

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/(1) NATURE AND OBJECTIVES OF CIVIL PROCEDURAL LAW/1. Nature of civil procedural law.

CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS

1. INTRODUCTION

(1) NATURE AND OBJECTIVES OF CIVIL PROCEDURAL LAW

1. Nature of civil procedural law.

Although civil procedure has been categorised as procedural rather than substantive law¹, it affects all other branches of the law except criminal law and criminal procedure², for rights under the law may need to be enforced, and a remedy requires procedure³. It is of great antiquity in its origins but has been periodically overhauled, sometimes radically, to meet current needs, most recently by the Civil Procedure Rules⁴. Civil procedural law governs the practice and procedure in the courts and regulates the administration of civil justice. It may be regarded as consisting of three parts, not to be viewed as self-contained compartments but as interrelated with, and overlapping and interacting upon, each other, namely the institutional part, the professional part and the procedural part⁵. Notwithstanding its apparent complexity and its occasional technicality, civil procedural law forms an indispensable part of the machinery of justice and operates as an essential tool for enforcing legal rights and claims, for redressing or preventing legal wrongs, for asserting legal defences, and for such other ancillary purposes as the recognition of personal status, the adjustment of proprietary interests in the case of insolvencies, the administration of estates and of trust property and the like, and for the supervision and control of inferior courts, tribunals and other judicial decision-making bodies. In short, civil procedural law is a necessary legal and social instrument for the attainment of what Lord Brougham called 'justice between man and man'⁶.

This title deals with the practice and procedure of the civil courts, except for those particular matters which are dealt with in other titles of this work⁷ but including the law relating to injunctions⁸, evidence and enforcement of judgments and orders⁹. It also covers the new European order for payment procedure¹⁰ and European small claims procedure¹¹. Detailed provisions about public funding¹², certain specialist proceedings¹³ and proceedings in the Family Division¹⁴ fall outside the scope of this title.

1 In his transcendent work, *De Legibus et Consuetudinibus Angliae*, Bracton devoted a special section to the subject of 'Actions': see 2 Bracton on the Laws and Customs of England 282 et seq, translated by Samuel E Thorne. Blackstone's Commentaries on the Laws of England vol 3 deals primarily with the law of civil procedure. In their *History of English Law*, Pollock and Maitland have a separate chapter IX in vol 2 on 'Procedure'. Volume I of Holdsworth's *History of the Laws of England* covers the history of English civil procedural law (see also vols 3 and 9). In his *Concise History of the Common Law*, Plucknett has a special chapter (Bk 2, Part I) on 'Procedure'. In the celebrated classification of the law in the Institutes of Justinian, following Gaius, equal place is given to the 'Law of Actions' (ie the system of civil procedural law) as is given to the two other branches of the law (ie 'the Law of Persons' and 'the Law of Things'): see RW Lee *The Elements of Roman Law* (1955) p 4, and the extended treatment of the subject at 421 et seq, under the heading 'Law of Actions'. See also H F Jolowicz *Historical Introduction to Roman Law*, chapters 12, 13, 23, 26. For a detailed history of the old forms of action see the previous (4th) edition of this title at PARA 82 et seq.

2 As to the distinction between civil and criminal procedural law see PARA 2.

3 See note 1.

4 As to the Civil Procedure Rules see PARA 30 et seq.

5 See Jacob's 'The Reform of Civil Procedural Law' (1980) 14 The Law Teacher 2.

6 See 2 Speeches of Henry, Lord Brougham (1838) 324. Henry Brougham used this seminal phrase in his celebrated speech in the House of Commons on 7 February 1828. It was no exaggeration for Sir Maurice Amos to claim that 'Procedure lies at the heart of the law': see Sir Maurice Amos's 'A Day in Court at Home and Abroad' (1926) Cambridge Law Journal 340. Cf the dictum of the Committee on Supreme Court Practice and Procedure ('the Evershed Committee') in its Final Report (1953) (Cmd 8878) para 1, 'the shape and development of the substantive law of England have always been, and, we think, always will be, strongly influenced by matters of procedure', citing the celebrated aphorism of Sir Henry Maine that 'substantive law has at first the look of being gradually secreted in the interstices of procedure'.

7 See eg **ARBITRATION; BANKRUPTCY AND INDIVIDUAL INSOLVENCY; CHILDREN AND YOUNG PERSONS; COMPANIES; COMPANY AND PARTNERSHIP INSOLVENCY; CONTEMPT OF COURT; COURTS; COPYRIGHT, DESIGN RIGHTS AND RELATED RIGHTS; CROWN PROCEEDINGS AND CROWN PRACTICE; DAMAGES; EXECUTORS AND ADMINISTRATORS; JURIES** vol 61 (2010) PARA 801 et seq; **LANDLORD AND TENANT; LEGAL PROFESSIONS; LIBEL AND SLANDER; LIMITATION PERIODS; MATRIMONIAL AND CIVIL PARTNERSHIP LAW; MENTAL HEALTH; PATENTS AND REGISTERED DESIGNS; RECEIVERS; SHIPPING AND MARITIME LAW; TRUSTS.**

8 See PARA 331 et seq.

9 See PARA 749 et seq.

10 See European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) creating a European order for payment procedure; CPR Pt 78, introduced by the Civil Procedure (Amendment) Rules 2008, SI 2008/2178, r 38, Sch 2; and PARAS 1647-1650.

11 See European Parliament and EC Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1), which establishes a European small claims procedure with effect from 1 January 2009. The member states were required to have communicated to the Commission which courts or tribunals have jurisdiction to give judgment in the procedure by 1 January 2008 (see art 25). See CPR Pt 78; and PARAS 1651-1656.

12 As to public funding see **LEGAL AID** vol 65 (2008) PARA 37 et seq.

13 As to specialist proceedings see CPR Pt 49; PARA 1536 et seq.

14 As to family proceedings see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 199 et seq; **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**. The Civil Procedure rules do not apply to such proceedings: see PARA 32 heads (5)-(6) in the text.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/(1) NATURE AND OBJECTIVES OF CIVIL PROCEDURAL LAW/2. Civil and criminal procedural law.

2. Civil and criminal procedural law.

In the context of 'civil procedural law', 'civil' is used in contradistinction to 'criminal'¹. In the English legal system the distinction between the civil and criminal judicial processes² is manifested in many ways: each has its own structure, organisation, administration and hierarchy of courts³, its own procedure and practices, its own rules of court⁴, its own modes and methods of processing its proceedings, its own rules regulating the place and mode of trial, especially the mode of trial by jury in criminal proceedings⁵ which is virtually obsolete in civil proceedings⁶, its own method of adjudicating on and disposing of its proceedings and, above all, its own system of appeals⁷.

The need for this division arises largely from the fact that, broadly speaking, the primary objective of civil procedure is remedial, to make good civil wrongs by compensation, restitution or satisfaction and, if necessary, by restraint by appropriate relief, whereas the primary objective of criminal procedure is penal or punitive. There is, however, an inevitable, though slight, overlap between the civil and criminal processes in, for example, the award in civil cases of aggravated or exemplary damages⁸, the entitlement to plead criminal convictions in civil cases⁹ and the entitlement to refuse to provide information in certain circumstances on the ground that to do so might tend to expose a person or his spouse to proceedings for an offence¹⁰. In addition the civil court has jurisdiction to make orders for the seizure and confiscation of money and other property under the control of defendants in criminal cases¹¹. Conversely, the criminal courts may make restitution orders¹² and compensation orders¹³ against convicted persons.

The jurisprudence of the European Court of Human Rights has identified three principal criteria which that court considers when deciding whether proceedings have a criminal character, namely the manner in which the domestic state classifies the proceedings, the nature of the offence and the character of the penalty to which the proceedings may give rise¹⁴. Both under that jurisprudence and as a matter of domestic law, proceedings for the imposition of anti-social behaviour orders¹⁵ are civil proceedings¹⁶. Applications for sex offender orders¹⁷ have also been held to be civil proceedings¹⁸. Note that proceedings for committal for contempt of court have been held to be criminal, even though they may concern enforcement of civil process obligations¹⁹.

1 As to criminal procedure generally see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 1050 et seq.

2 There was not always such a distinction, and in fact there is still some overlap. For example, the defendant's oral plea of 'guilty' or 'not guilty' in a criminal trial is a relic of the original system operating in all courts whereby pleadings were oral rather than written.

3 The Queen's Bench Division of the High Court, however, exercises jurisdiction in respect of certain criminal matters as well as civil matters; as to the civil jurisdiction of the Queen's Bench Division see PARAS 45, 1686 head (2) in the text, 1696-1699; and as to the criminal jurisdiction of that Division see PARAS 1688-1689; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2005 et seq.

4 In civil proceedings, rules of court are made by the Civil Procedure Rule Committee under the Civil Procedure Act 1997 s 2(1) (see PARA 25) and in criminal proceedings they are made by the Crown Court Rule Committee under the Supreme Court Act 1981 ss 84, 86 (see generally **COURTS**). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

5 As to jury trial in criminal cases see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1286 et seq.

6 As to jury trial in civil cases see PARA 1132.

7 As to civil appeals see PARA 1657 et seq; and as to criminal appeals see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 44 et seq.

8 See *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL; *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL; and **DAMAGES** vol 12(1) (Reissue) PARA 1111 et seq. A claim for aggravated or exemplary damages must be specifically pleaded: see CPR 16.4(1)(c); and PARA 587.

9 See the Civil Evidence Act 1968 ss 11, 13, negating *Hollington v F Hewthorn & Co Ltd* [1943] KB 587, [1943] 2 All ER 35, CA; *Practice Direction--Statements of Case* PD 16 para 8.1; and PARA 589. See also *Wauchope v Mordecai* [1970] 1 All ER 417, [1970] 1 WLR 317, CA; *Levene v Roxhan* [1970] 3 All ER 683, [1970] 1 WLR 1322, CA; *Stupple v Royal Insurance Co Ltd* [1971] 1 QB 50, [1970] 3 All ER 230, CA; PARAS 1208-1209; and **LIBEL AND SLANDER**.

10 See the Civil Procedure Act 1997 s 7(7); and PARA 319; but cf PARA 319 note 10. See also CPR 31.19 (disclosure of documents); and PARA 555; CPR 18.1 (provision of further information); and PARA 611.

11 See the Proceeds of Crime Act 2002 Pt 5 (ss 240-316); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2147 et seq. The emphasis of the Proceeds of Crime Act 2002 is on the criminal side of the recovery of the proceeds of crime process, and civil process is intended to be subsidiary to the criminal process: *Singh v Director of the Assets Recovery Agency* [2005] EWCA Civ 580, [2005] 1 WLR 3747, [2005] Crim LR 665.

12 See the Powers of Criminal Courts (Sentencing) Act 2000 s 148; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 388.

13 See the Powers of Criminal Courts (Sentencing) Act 2000 s 130; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 375 et seq. As to the Criminal Injuries Compensation Scheme see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2033 et seq.

14 See *R (on the application of McCann) v Crown Court at Manchester* [2001] EWCA Civ 281, [2001] 4 All ER 264; affd sub nom *R (McCann) v Crown Court at Manchester, Clingham v Kensington and Chelsea Royal London Borough Council* [2002] UKHL 39, [2003] 1 AC 787, [2002] 4 All ER 593.

15 See under the Crime and Disorder Act 1998 s 1: see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 496.

16 See *R (McCann) v Crown Court at Manchester, Clingham v Kensington and Chelsea Royal London Borough Council* [2002] UKHL 39, [2003] 1 AC 787, [2002] 4 All ER 593.

17 See under the Crime and Disorder Act 1998 s 2 (repealed). The equivalent now is a sexual offences prevention order under the Sexual Offences Act 2003 s 104: see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 360 et seq.

18 See *B v Chief Constable of the Avon and Somerset Constabulary* [2001] 1 All ER 562, [2001] 1 WLR 340, DC; approved in *R (McCann) v Crown Court at Manchester, Clingham v Kensington and Chelsea Royal London Borough Council* [2002] UKHL 39, [2003] 1 AC 787, [2002] 4 All ER 593.

19 As to contempt of court see **CONTEMPT OF COURT**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/(1) NATURE AND OBJECTIVES OF CIVIL PROCEDURAL LAW/3. Objectives of civil procedural law.

3. Objectives of civil procedural law.

Civil procedural law fulfils many legal and social functions, and its objectives have changed over time. In the present day, the function of the court is not only to decide individual cases but also to ensure that the civil justice system, which is a public service, delivers a satisfactory service which meets public expectations and needs. The civil process is no less a law enforcement process than the criminal process. The civil process is not only for the resolution of individual disputes but also for the protection of rights, for the enforcement of rights, and for remedying breaches.

Civil procedural law has been categorised according to the character which it assumes as the indispensable instrument for the attainment of justice, namely (1) its complementary character; (2) its protective character; and (3) its remedial or practical character.

In its complementary character, civil procedural law is ordinarily contrasted with substantive law. Substantive law creates rights and obligations and determines the ends of justice embodied in the law, whereas procedural law is an adjunct or an accessory to substantive law¹. But this does not mean that civil procedural law should be regarded as secondary. The two branches are complementary and interdependent, and the interplay between them often conceals what is substantive and what is procedural. It is by procedure that the law is put into motion, and it is procedural law which puts life into the substantive law, gives it its remedy and effectiveness and brings it into being².

In its protective character, civil procedural law represents the orderly, regular and public functioning of the legal machinery and the operation of the due process of law. In this sense, the protective character of procedural law has the effect of sustaining and safeguarding every person in his life, liberty, reputation, livelihood and property and ensuring that he does not suffer any deprivation of his rights except in accordance with the accepted rules of procedure.

In its remedial or practical character, civil procedural law deals with the means by which persons can obtain through the litigation process protection from future wrongs, remedies for wrongs suffered, and a resolution of disputes; in this sense it deals with the actual litigation process.

What the practitioners seek for their clients when they resort to the courts is to use the machinery of justice to obtain a just result, and what the clients seek in addition to justice is to avoid unnecessary expense and delay and excessive technicality in the process of attaining that just result.

The Civil Procedure Rules³ have entrusted the control of litigation to the court, giving the court a wider discretion than before to determine the best way of resolving disputes, under the overriding objective of enabling it to deal with cases justly⁴ and enabling it to save expense and time wherever possible.

¹ The classic expression of this view is stated by Collins MR in *Re Coles and Ravenshear's Arbitration* [1907] 1 KB 1 at 4, CA: 'Although I agree that a court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the court ought not to be so far bound and held by rules, which after all are only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case'. The Civil Procedure Rules which now apply were introduced by the Civil Procedure Act 1997; they are said to form 'a new procedural code with the overriding objective of enabling the court to deal with cases justly': see CPR 1.1; and PARA 33.

- 2 The maxim 'ubi jus, ibi remedium' reflects the complementary character of civil procedural law. As to the distinction between procedural and substantive law see further PARA 4.
- 3 As to the Civil Procedure Rules see PARA 30.
- 4 As to the overriding objective see PARA 33.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/(1) NATURE AND OBJECTIVES OF CIVIL PROCEDURAL LAW/4. Meaning of 'practice and procedure'.

4. Meaning of 'practice and procedure'.

The Civil Procedure Rule Committee¹ is empowered to make rules that govern the practice and procedure to be followed in the relevant courts², and they must not therefore extend into the area of substantive law³. There is thus a vital and essential distinction between substantive law and procedural law. The function of substantive law is to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties. Everyone is entitled to enjoy such legal rights or status but equally is liable to perform or comply with his legal duties. The function of practice and procedure is to provide the machinery or the manner in which legal rights or status and legal duties may be enforced or recognised by a court of law or other recognised or properly constituted tribunal⁴. Perhaps the term 'practice' is narrower than the term 'procedure', since practice may be limited to the habitual, repetitive or continuous use of practical methods or modes of proceeding, whereas 'procedure' refers to the mode or form of conducting judicial proceedings, whether they be to the whole or part of the suit. The distinction may rarely be invoked, since the terms are almost invariably used in conjunction⁵.

1 As to the Civil Procedure Rule Committee see PARA 25; as to the Civil Procedure Rules see PARAS 9, 30 et seq; and as to the power to make practice directions see PARA 27.

2 See the Civil Procedure Act 1997 s 1(1) which has replaced, in civil proceedings, the Supreme Court Act 1981 s 84(1), (2); and PARA 24. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

3 Under the old regime, it was comparatively rare for any of the Rules of the Supreme Court to be attacked or challenged as being ultra vires. For examples in which they were successfully so attacked see *Re Grosvenor Hotel, London (No 2)* [1965] Ch 1210, [1964] 3 All ER 354, CA (disclosure of documents injurious to the public interest); *Ward v James* [1966] 1 QB 273, [1965] 1 All ER 563, CA (discretion to order trial by jury). For instances where they were unsuccessfully so attacked see *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, CA (action for declaration of right); *Rodriguez v Parker* [1967] 1 QB 116, [1966] 2 All ER 349; and *Mitchell v Harris Engineering Co Ltd* [1967] 2 QB 703, [1967] 2 All ER 682, CA (power to amend after expiry of limitation period). Formerly, contests as to what were matters of 'practice and procedure' and what were not were much more frequent, since under the Supreme Court of Judicature (Procedure) Act 1894 s 1(4) (repealed) and the Rules of the Supreme Court 1883 Ord 54 r 23 (revoked), an appeal from the orders of a judge in chambers lay to a Divisional Court, except in matters of practice and procedure, when the appeal lay direct to the Court of Appeal.

Under the current civil procedure, it has been held that certain provisions of CPR Pt 6 (service of documents: see PARA 138 et seq) are not ultra vires: see *Sea Assets Ltd v PT Garuda Indonesia* [2000] 4 All ER 371, cited in PARA 139 note 10. However, it was held in *General Mediterranean Holdings SA v Patel* [1999] 3 All ER 673, [2000] 1 WLR 272 that CPR 48.7(3) (revoked as a result of the decision) was ultra vires in that it purported to abrogate the right to legal professional privilege.

4 As to matters of practice and procedure see *Re Oddy* [1895] 1 QB 392, CA (review of taxation of solicitor's bill of costs); *Black v Dawson* [1895] 1 QB 848, CA (application to issue writ for service out of the jurisdiction); *McHarg v Universal Stock Exchange Ltd* [1895] 2 QB 81, CA (summons for interim injunction); *Yonge v Toynbee* [1910] 1 KB 215, CA (no authority of solicitors to act for defendant who became of unsound mind without their knowledge); *Re Withers & Co* [1930] 2 KB 192, CA (order for delivery of bill of costs); *Lever Bros Ltd v Kneale and Bagnall* [1937] 2 KB 87, [1937] 2 All ER 477, CA (committal order for breach of injunction); *Re Shoemith* [1938] 2 KB 637, sub nom *Re Intended Action, Shoemith v Lancashire Mental Hospitals Board* [1938] 3 All ER 186, CA (permission to bring action under the Mental Treatment Act 1930 (repealed)).

As to matters held not to be matters of practice and procedure see *Re Marchant* [1908] 1 KB 998, CA (order to compel solicitor to pay sums in pursuance of his undertaking); *Haxby v Wood Advertising Agency Ltd* (1913) 109 LT 946 (attachment against solicitor); *Re Jackson* [1915] 1 KB 371, DC (retainer of solicitor in criminal proceedings).

The principle arrived at in those cases was that 'practice and procedure' was not confined to steps in the action itself (now known as a 'claim': see PARA 18) but extended also to matters in connection with the action: see *Black v Dawson* [1895] 1 QB 848, CA, per Lord Esher MR; *Yonge v Toynbee* [1910] 1 KB 215, CA, per Buckley LJ; *Re Shoesmith* [1938] 2 KB 637, sub nom *Re Intended Action, Shoesmith v Lancashire Mental Hospitals Board* [1938] 3 All ER 186, CA, per Slesser LJ. Thus the test for deciding whether a matter was one of practice and procedure was whether it was one in, or in connection with, a cause or matter: see *Watson v Petts* [1899] 1 QB 54, CA; *Re Marchant* [1908] 1 KB 998, CA; and *Re Jackson* [1915] 1 KB 371, DC. This test is still valid, and certainly a factor in determining what falls within the ambit of practice and procedure. Quite uncharacteristically Greer LJ fell into the error of adopting the test that matters of practice and procedure were interlocutory and referred to decisions given in the course of legal proceedings to get a final result, and were to be contrasted with matters that led to final decisions: see *Re Withers & Co* [1930] 2 KB 192, CA; *Re Shoesmith* [1938] 2 KB 637, sub nom *Re Intended Action, Shoesmith v Lancashire Mental Hospitals Board* [1938] 3 All ER 186, CA. As to the meaning of 'cause or matter' see PARA 44 note 1. However, the current civil procedure (see PARA 24 et seq) no longer employs this terminology: see PARA 18.

The Civil Procedure Act 1997 s 7 empowers the court to make orders for the purpose of securing the preservation of relevant evidence or of property which is or may be the subject matter of proceedings: see PARA 319. This section puts on a statutory footing the High Court's powers to grant search or 'Anton Piller' orders and implements in part the recommendations made by a committee of judges appointed by the Judges' Council in *Anton Piller Orders: A Consultation Paper* (LCD 1992).

5 The classic statement of this distinction is that expressed by Lush LJ, with the approval of Baggallay LJ, in *Poyser v Minors* (1881) 7 QBD 329 at 333-334, CA: "Practice' in its larger sense . . . , like 'procedure' . . . denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer the machinery as distinguished from its product. "Practice', and 'procedure', . . . I take to be convertible terms'. In *Mitchell v Harris Engineering Co Ltd* [1967] 2 QB 703 at 720, [1967] 2 All ER 682 at 687, CA, Russell LJ also described the terms as convertible. In *R v Sillim, The Alexandra* (1864) 10 HL Cas 704 at 723, Lord Westbury LC said that the common and ordinary sense of the word 'practice' denoted the rules that make or guide the *cursus curiae* and regulate the proceedings in a cause within the walls or limits of the court itself. In the court below Erle CJ had said 'I would premise that procedure in a suit includes the whole course of practice, from the issuing of the first process by which the suitors are brought before the court to the execution of the last process on the final judgment; and . . . "procedure' is used as equivalent to "process, practice, and mode of pleading": *A-G v Sillem* (1864) 2 H & C 431 at 627.

As to the distinction between substantive and procedural enactments see also **STATUTES** vol 44(1) (Reissue) PARA 1237.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/(1) NATURE AND OBJECTIVES OF CIVIL PROCEDURAL LAW/5. Right to a fair trial.

5. Right to a fair trial.

The right to a fair trial is a fundamental principle of the common law and is also guaranteed by the European Convention on Human Rights¹, which has been incorporated into domestic law². Thus, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law³. As specified in the Convention, this also means that judgment must be pronounced publicly although if necessary the press and public may be excluded from all or part of the trial⁴.

The right to a fair trial is an aspect of procedural fairness or 'natural justice'. The rules of natural justice must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, except where their application is excluded expressly or by necessary implication, or by reason of other special circumstances⁵, and bias, or apparent bias, on the part of a court or tribunal in a particular case will render its decision unlawful⁶. Another element of natural justice, the rule that no man is to be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard, is also a fundamental part of the rules of procedure⁷, in such respects as giving notice of a claim, of a hearing or adjournment and giving the other party an opportunity to reply to the claim and the opportunity to be heard⁸.

1 The Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969).

2 See the Human Rights Act 1998 s 1(3), Sch 1 art 6; and PARA 792. See generally **JUDICIAL REVIEW** vol 61 (2010) PARAS 652-654; **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 134 et seq.

3 See the Human Rights Act 1998 Sch 1 art 6(1).

4 See PARA 6; and **JUDICIAL REVIEW** vol 61 (2010) PARA 643.

5 See **JUDICIAL REVIEW** vol 61 (2010) PARAS 625, 629.

6 See **JUDICIAL REVIEW** vol 61 (2010) PARA 631 et seq. See also eg PARAS 95 note 8, 499.

7 See **JUDICIAL REVIEW** vol 61 (2010) PARA 639 et seq.

8 See **JUDICIAL REVIEW** vol 61 (2010) PARA 640.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/(1) NATURE AND OBJECTIVES OF CIVIL PROCEDURAL LAW/6. General rule that hearings are to be in public.

6. General rule that hearings are to be in public.

In accordance with the right to a fair trial¹, the general rule is that any hearing, including a trial², is to be in public³, but the court⁴ is not required to make special arrangements for accommodating members of the public⁵. A hearing, or any part of it, may be in private if:

- 1 (1) publicity would defeat the object of the hearing⁶;
- 2 (2) it involves matters relating to national security⁷;
- 3 (3) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality⁸;
- 4 (4) a private hearing is necessary to protect the interests of any child⁹ or protected party¹⁰;
- 5 (5) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing¹¹;
- 6 (6) it involves uncontested matters arising in the administration of trusts or in the administration of a deceased person's estate¹²; or
- 7 (7) the court considers this to be necessary, in the interests of justice¹³.

The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness¹⁴.

In furthering the overriding objective¹⁵ by actively managing cases the court may hold a hearing and receive evidence by telephone or by using any other method of direct oral communication¹⁶, particularly where it considers this to be necessary, in the interests of justice, or may deal with the case without the parties needing to attend at court¹⁷.

The procedural judge must keep, either by way of a note or a tape recording, brief details of all proceedings before him, including the dates of the proceedings and a short statement of the decision taken at each hearing¹⁸.

1 See PARA 5.

2 In CPR Pt 39 (see the text and notes 3-18; and PARA 1117 et seq), reference to a hearing includes a reference to the trial: CPR 39.1.

3 CPR 39.2(1). Under the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)), as incorporated into domestic law, everyone is entitled to a fair and public hearing in the determination of his civil rights and obligations. Judgment must be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice: see the Human Rights Act 1998 s 1(3), Sch 1, art 6(1). Article 6(1) will usually be relevant where a party applies for a hearing which would normally be held in public to be held in private as well as where a hearing would normally be held in private. The judge may need to consider whether the case is within any of the exceptions permitted by art 6(1): *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 1.4A.

An appeal to a county court against certain decisions under the Representation of the People Act 1983 in relation to anonymous entries in the electoral register is to be heard in private unless the court orders otherwise, and an appeal to the Court of Appeal against such a decision of a county court may be heard in private if the Court of Appeal so orders: see *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 1.7A; *Practice Direction--Appeals* PD 52 para 24.5(8), (9). See **ELECTIONS AND REFERENDUMS**.

4 As to the meaning of 'court' see PARA 22.

5 CPR 39.2(2).

6 CPR 39.2(3)(a).

7 CPR 39.2(3)(b).

8 CPR 39.2(3)(c). For examples of types of hearing which fall within this category see *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 1.5. Such examples include (1) a claim by a mortgagee against one or more individuals for an order for possession of land; (2) a claim by a landlord against one or more tenants or former tenants for the repossession of a dwelling house based on the non-payment of rent; (3) an application to suspend a warrant of execution or a warrant of possession or to stay execution where the court is being invited to consider the ability of a party to make payments to another party; (4) a re-determination under CPR 14.13 (see PARA 198) or an application to vary or suspend the payment of a judgment debt by instalments; (5) an application for a charging order (including an application to enforce a charging order), third party debt order, attachment of earnings order, administration order, or the appointment of a receiver; (6) an order to attend court for questioning; (7) the determination of the liability of a client funded by the Community Legal Service under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 9, reg 10, or of an assisted person's liability for costs under the predecessor provisions (the Civil Legal Aid (General) Regulations 1989, reg 127 (revoked)); (8) an application for security for costs under the Companies Act 1985 s 726(1) (see PARA 746 note 4; and **COMPANIES** vol 14 (2009) PARA 308); (9) proceedings brought under the Consumer Credit Act 1974, the Inheritance (Provision for Family and Dependents) Act 1975 or the Protection from Harassment Act 1997; and (10) an application by a trustee or personal representative for directions as to bringing or defending legal proceedings: see *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 1.5(1)-(10). Nothing in the relevant practice direction, however, prevents a judge ordering that a hearing taking place in public is to continue in private or vice versa: see para 1.8.

9 As to the meaning of 'child' see PARA 222 note 3.

10 CPR 39.2(3)(d). This includes applications under CPR 21.10 (see PARA 187; and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1422) for the approval of a settlement or compromise on behalf of a child or protected party, or an application for the payment of money out of court to such a person: see *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 1.6.

11 CPR 39.2(3)(e).

12 CPR 39.2(3)(f).

13 CPR 39.2(3)(g). The decision as to whether to hold a hearing in public or in private must be made by the judge conducting the hearing having regard to any representations which have been made to him: *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 1.4.

14 CPR 39.2(4).

15 As to the overriding objective see PARA 33.

16 See CPR 3.1(2)(d); and PARA 247. Detailed provisions for the arrangements to be made for the hearing of applications by telephone are set out in *Practice Direction--Applications* PD 23A para 6: see PARA 309. If the parties wish to use video conferencing facilities and they are available at the relevant court, they must apply for directions as to the arrangements to be made: para 7. As to the use of video conferencing in relation to interim proceedings see *Practice Direction--Written Evidence* PD 32 para 29.1, Annex 3; and PARAS 1033-1035.

17 See CPR 1.4(2)(j); and PARA 246. As to dealing with applications without a hearing see CPR 23.8; and PARA 308.

18 *Practice Direction--Applications* PD 23A para 8. This does not apply in the Commercial Court: see PARA 1541 note 3.

UPDATE

6 General rule that hearings are to be in public

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/ (2) SOURCES OF CIVIL PROCEDURAL LAW/7. Sources generally.

(2) SOURCES OF CIVIL PROCEDURAL LAW

7. Sources generally.

The sources of civil procedural law are several and disparate, although together they contribute to make up the general body of law and practice. They include:

- 8 (1) statute law¹;
- 9 (2) rules of court²;
- 10 (3) practice directions³;
- 11 (4) judicial precedent⁴;
- 12 (5) prescribed and practice forms⁵;
- 13 (6) the inherent jurisdiction of the court⁶;
- 14 (7) the practice of the court⁷; and
- 15 (8) books on practice and procedure⁸.

These sources differ in origin, authority and weight, but must nevertheless be taken and treated as an entire and integral whole, providing a complete and comprehensive account or description of the system for the administration of civil justice.

1 See PARA 8.

2 See PARAS 9, 10, 24 et seq.

3 See PARAS 12, 27.

4 See PARAS 11, 91 et seq.

5 See PARA 14.

6 See PARA 15.

7 See PARA 16.

8 See PARA 17.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/ (2) SOURCES OF CIVIL PROCEDURAL LAW/8. Statute law.

8. Statute law.

The primary source of civil procedural law is statute law, which deals with the structure, organisation, jurisdiction and hierarchy of the civil courts and the power to make rules of court to regulate the practice and procedure for the conduct of proceedings. The statute law relating to civil procedure is contained in an enormous number of statutes dealing with the multifarious, diverse, disparate and heterogeneous subjects comprised in civil procedural law¹. There is an obvious obligation on all legal practitioners, court administrators and officers, and the courts themselves, to search and research for the applicable statutory provisions arising in any particular case², for the relevant statute law is paramount in its operative effect on the civil judicial process³.

In construing a statute which affects only the practice and procedure of the courts, the presumption against retrospective interpretation has no application, and unless the statute otherwise provides, expressly or by necessary implication, any changes effected by such a statute will apply to pending proceedings and indeed will have retrospective effect⁴.

Where a statute confers a jurisdiction upon a court, then, unless the exercise of such jurisdiction is made conditional upon rules of court first being made, the fact that no rules have been made regulating the procedure does not prevent the jurisdiction from being exercised⁵.

1 It is difficult, if not impracticable, to list the entire range of statutes which deal wholly or in part with civil procedural law and practice. A very large number of them will be found mentioned in the Supreme Court Act 1981, which made substantial and consequential amendments to some of their provisions, partly repealed others and further made transitional provisions and savings: see s 152 (amended by the Statute Law (Repeals) Act 2004; and SI 1982/1188). The Supreme Court Act 1981 has itself been amended from time to time, eg by the Civil Procedure Act 1997: see PARA 24 et seq. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). Accordingly the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981 and for the words 'Supreme Court Act 1981' wherever they occur in any enactment there are to be substituted 'Senior Courts Act 1981': see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this title states the law, no day had been appointed for these purposes.

In addition, there are many other subjects which form an integral part of civil procedural law which are dealt with, in whole or in part, by other statutes. For convenience, therefore, and without in any way attempting to be exhaustive, reference may be made to the following statutes, many of which have, of course, been amended by later legislation: the Access to Justice Act 1999; the Administration of Justice (Miscellaneous Provisions) Act 1933; the Administration of Justice Act 1982; the Appellate Jurisdiction Act 1876; the Arbitration Acts 1950 and 1996; the Attachment of Earnings Act 1971; the Charging Orders Act 1979; the Children Act 1989; the Civil Evidence Acts 1968, 1972 and 1995; the Civil Liability (Contribution) Act 1978; the Companies Acts 1985 and 1989; the Contempt of Court Act 1981; the County Courts Act 1984; the Courts Act 1971; the Courts and Legal Services Act 1990; the Crown Proceedings Act 1947; the Evidence (Proceedings in Other Jurisdictions) Act 1975; the Fatal Accidents Act 1976; the Foreign Judgments (Reciprocal Enforcement) Act 1933; the Insolvency Act 1986; the Limitation Act 1980; the Magistrates' Courts Act 1980; the Matrimonial Causes Act 1973; the Matrimonial and Family Proceedings Act 1984; the Mental Health Act 1983; the Oaths Act 1978; the Patents Act 1977; the Solicitors Act 1974; the State Immunity Act 1978; the Town and Country Planning Act 1990; the Torts (Interference with Goods) Act 1977; the Tribunals and Inquiries Act 1992; the Courts Act 2003; and the Tribunals, Courts and Enforcement Act 2007.

2 Perhaps the case of *Wauchope v Mordecai* [1970] 1 All ER 417, [1970] 1 WLR 317, CA, may provide a cautionary tale, for in that case, at first instance, the judge was not referred to the Civil Evidence Act 1968 s 11, which had a decisive effect upon the case.

3 The primary statutes which provide the essential framework of civil procedural law are the Civil Procedure Act 1997; the Supreme Court Act 1981; and the County Courts Act 1984. These Acts deal with the structure, organisation, jurisdiction and the distribution of business of the Supreme Court (see note 1) (which consists of

the Court of Appeal, the High Court of Justice (dealing with civil proceedings) and the Crown Court (dealing with criminal proceedings): see the Supreme Court Act 1981 s 1(1)), and of the county courts.

4 See *Gardner v Lucas* (1878) 3 App Cas 582, HL; *Craxfords (Ramsgate) Ltd v Williams and Steer Manufacturing Co Ltd* [1954] 3 All ER 17, [1954] 1 WLR 1130; *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd, The Boucraa* [1994] 1 AC 486, [1993] 3 All ER 686, CA, revsd [1994] 1 AC 486, [1994] 1 All ER 20, HL. See also Maxwell's Interpretation of Statutes (12th Edn) p 222. No person has a vested interest in any course of procedure: *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369, PC.

5 See *A-G for Ontario v Daly* [1924] AC 1011, PC.

UPDATE

8 Statute law

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/ (2) SOURCES OF CIVIL PROCEDURAL LAW/9. Rules of court.

9. Rules of court.

The Civil Procedure Rules 1998 ('CPR')¹ are the rules of court that currently govern the practice and procedure to be followed in the Civil Division of the Court of Appeal, the High Court², and the county courts³. The Civil Procedure Rules are divided into Parts and most Parts are supplemented by practice directions⁴. For the first time, there are rules common to most civil proceedings in the courts exercising jurisdiction in England and Wales⁵. It has been held that, while the court continues to have an inherent jurisdiction to regulate the conduct of civil litigation, a claim is to be dealt with according to the Civil Procedure Rules where the subject matter of the claim is governed by those rules⁶.

There is authority under the old rules for the proposition that, where one rule of court is expressed in general terms and another on the same subject is specific, the specific rule will prevail⁷. The tendency of modern practice is to confer a wide discretion on the courts to apply the rules of court; this is achieved by conferring a power on the court and providing that the power 'may' be exercised⁸. This principle may survive the change of the rules⁹.

The Civil Procedure Rules are a form of delegated or subordinate legislation, and the Civil Procedure Rule Committee is empowered to make rules only within the strict limits defined by statute, whether contained in the Civil Procedure Act 1997 or any other Act¹⁰. Like the Rules of the Supreme Court and the County Court Rules before them, the rules are mere rules of practice and procedure, and their function is to regulate the machinery of litigation; they cannot confer or take away or alter or diminish any existing jurisdiction or any existing rights or duties¹¹. Since they are procedural in character and effect, they cannot enable a claim to be brought which could not otherwise have been brought¹².

1 The Civil Procedure Rules are the product of a wholesale review of the civil justice system in the 1990s led by Lord Woolf. In 1995 he presented a draft report *Access to Justice* to the Lord Chancellor. The Final Report and draft civil procedure rules were published in July 1996 and his recommendations were in large part adopted by the government. The Civil Procedure Act 1997 provided the necessary rule-making powers and the CPR themselves were contained in a statutory instrument and came into force on 24 April 1999: see the Civil Procedure Rules 1998, SI 1998/3132; and PARA 30 et seq.

The Civil Procedure Rules (comprising rules, practice directions, pre-action protocols and forms) are published by the Stationery Office. They are also available on the Ministry of Justice website: www.justice.gov.uk.

2 Ie subject to certain exceptions: see PARA 32.

3 See PARA 30 et seq.

4 See PARAS 27, 30.

5 See PARA 24.

6 See *Tombstone Ltd v Raja* [2008] EWCA Civ 1444 at [78], [2008] All ER (D) 180 (Dec) at [78]; and PARA 15. See also *Nelson v Clearsprings (Management) Ltd* [2006] EWCA Civ 1252, [2007] 2 All ER 407, [2007] 1 WLR 962.

7 See *Locke v White* (1886) 33 ChD 308, CA; *Cavendish v Strutt* [1904] 1 Ch 524. The principle is expressed in the rule *generalia specialibus non derogant*: see *Re West Devon Great Consols Mine* (1888) 38 ChD 51, CA.

8 See *A-G v Emerson* (1889) 24 QBD 56, CA; affd [1891] AC 649, HL. The use of the term 'may' as the basis of exercising a power necessarily involves 'may not', and this gives the court a discretion which no rule of practice can take away. Equally, where rules of court refer to the exercise of powers 'at any time' or 'at any

stage', in applying the rules the court should not diminish the full force of these words, unless by some necessary implication their force ought to be limited: see *Re Sadler, ex p Norris* (1886) 17 QBD 728 at 731, CA, per Esher MR.

9 As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

10 Rules of court must be confined to the purposes for which the power to make them is granted: see *Re C (legal aid: preparation of bill of costs)* [2001] 1 FLR 602, CA, per Hale LJ.

11 See in relation to previous rules of court *Britain v Rossiter* (1879) 11 QBD 123, CA; *North London Rly Co v Great Northern Rly Co* (1883) 11 QBD 30, CA; *Read v Brown* (1888) 22 QBD 128, CA; *British South Africa Co v Companhia de Moçambique* [1893] AC 602, HL; *The James Westoll* [1905] P 47, CA; and in relation to the new rules *General Mediterranean Holdings SA v Patel* [1999] 3 All ER 673, [2000] 1 WLR 272 cited in PARA 4 note 3.

12 *Everett v Griffiths* [1924] 1 KB 941.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/ (2) SOURCES OF CIVIL PROCEDURAL LAW/10. History of rule-making powers.

10. History of rule-making powers.

Before 1833 there was no statutory body which had power to make rules of court having statutory force and effect to regulate the practice and procedure of the superior courts of common law or of the Court of Chancery or other courts. Before that time, and perhaps for many centuries before then, it was the judges of each of the superior courts of common law at Westminster, and the Lord Chancellor in the case of the Court of Chancery, who exercised the power to issue orders or directions to regulate their own proceedings in their own several courts as occasion demanded from time to time. They did not do so under any statutory authority but under the inherent jurisdiction of the courts to regulate their own processes¹. In 1830 Parliament conferred power on the judges of the superior courts of common law to make general rules to regulate proceedings in their own courts respectively², but although these rules were not to have statutory force the judges did in fact make such rules³. In 1833 Parliament for the first time delegated to the judges of the superior common law courts, acting in concert, power to make rules of court relating mainly to the mode of pleading (but without power to dispense with the plea of the 'general issue') which were to have the force of law, and to be treated as if enacted by Parliament⁴, and, acting under this new power, the judges proceeded to make such rules⁵, which were the first rules of court to have the force of law⁶.

Nevertheless, during the middle period of the nineteenth century, from 1833 to 1875, the practice and procedure of the superior courts of common law, and of the Court of Chancery, were regulated by or by virtue of statute rather than rules of court⁷.

In the Court of Chancery, the power to make rules of court, within a limited scope, was introduced in 1850⁸ and was later extended to cover the whole procedure of the court⁹, and it was under this power that the great Consolidated Orders 1860 were issued.

In 1873 there was scheduled to the Supreme Court of Judicature Act 1873 a body of rules called the 'Rules of Court' which were to have the force of law¹⁰, but they were replaced by a revised and greatly improved body of rules, also called the 'Rules of Court', which were scheduled to the Supreme Court of Judicature Act 1875¹¹.

These rules of court were superseded by the Rules of the Supreme Court 1883, made by the Rule Committee to which greatly extended powers were delegated to make rules of court having the force of law. They came into operation on 24 October 1883. These rules were frequently amended, and remained in force until they were partially revised and superseded by the Rules of the Supreme Court (Revision) 1962¹² and soon thereafter wholly revised and superseded by the Rules of the Supreme Court 1965¹³, which came into operation on 1 October 1966. Thus it was that, for the first time since 1883, the entire Rules of the Supreme Court, revised and rewritten, reorganised and restructured, were made and issued as a complete, integrated body of rules of court. They revoked all the former rules and orders, some 144 made since 1883, and repealed the provisions of nine Acts of Parliament.

On 25 April 1999 the Rules of the Supreme Court and the County Court Rules were replaced by the Civil Procedure Rules¹⁴, the Schedules to which re-enacted various provisions of the former rules¹⁵. The Civil Procedure Rules themselves have been amended regularly since their commencement¹⁶.

1 See Tidd's New Practice (1837 Edn) 27. See also S Rosenbaum, *The Rule Making Authority in the English Supreme Court* (1917, Boston Book Co, Boston; reprinted 1993, Fred B Rothman & Co, Littleton Colorado).

- 2 See the Law Terms Act 1830 s 11 (repealed).
- 3 See the General Rules of Exchequer of Michaelmas Term 1830 (1 Cr & J 270); Regulae Generales of the Exchequer of Pleas of Trinity Term 1831 (1 Cr & J 468); Regulae Generales of Hilary Term 1832 (2 Cr & J 167).
- 4 See 3 & 4 Will 4 c 42 (Civil Procedure Act 1833), s 1 (repealed).
- 5 See the Regulae Generales of Hilary Term 1834 (2 Cr & M 10). The rules were consolidated in the Regulae Generales of Hilary Term 1853: see Day's Common Law Procedure Acts (4th Edn) 413 et seq.
- 6 See *Roffey v Smith* (1834) 6 Car & P 662, where counsel submitted and Lord Denman CJ agreed that these rules were 'the law of the land'.
- 7 The practice and procedure of the common law courts were largely governed by the Common Law Procedure Act 1852 (largely repealed), the Common Law Procedure Act 1854 (much of which has been repealed), the Common Law Procedure Act 1860 (repealed) and many other enactments and rules made under them, including Regulae Generales as to Pleading dated 10 May 1853 (revoked), the Summary Procedure on Bills of Exchange Act 1855 (repealed) (the precursor of the celebrated RSC Ord 14 (revoked) governing summary judgment), and 30 & 31 Vict c 68 (Common Law Chambers) (sometimes known as the Judges' Chambers (Dispatch of Business) Act 1867) (repealed) (which first virtually conferred original jurisdiction on the Masters of the Superior Courts of Common Law).
- 8 See 13 & 14 Vict c 35 (Court of Chancery) (1850) (repealed).
- 9 See the Chancery Amendment Act 1858 (repealed).
- 10 See the Supreme Court of Judicature Act 1873 ss 23, 69, 74, Schedule (repealed).
- 11 See the Supreme Court of Judicature Act 1875 ss 16, 17, 21, 24, Sch 1 (repealed).
- 12 The Rules of the Supreme Court (Revision) 1962, SI 1962/2145 (revoked), which came into operation on 1 January 1964, were made under the Supreme Court of Judicature (Consolidation) Act 1925 s 99 (repealed). They replaced in their entirety the parts of the rules relating to the commencement and progress of proceedings until and including the summons for directions, as well as many of the administrative rules and rules relating to particular proceedings. They represented the first stage of the complete revision of the existing rules recommended in 1951 by the Committee on Supreme Court Practice and Procedure (the 'Evershed Committee') in its Second Interim Report (Cmd 8176), and were supplemented by the Rules of the Supreme Court (Forms) 1962, SI 1962/2146 (revoked), which replaced a large number of the earlier prescribed forms so as to provide forms for the new procedure.
- 13 The Rules of the Supreme Court 1965, SI 1965/1776 (revoked), were made under the Supreme Court of Judicature (Consolidation) Act 1925 s 99 (repealed), but then had effect as if made under the Supreme Court Act 1981 s 84 (now amended by the Civil Procedure Act 1997 s 10, Sch 2 para 1(1), (4) and SI 2004/2035 so as to confine the rule-making power conferred thereby to rules for the purpose of regulating and prescribing the practice and procedure to be followed in the Crown Court except in relation to any criminal cause or matter). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. They completed the revision of the then existing rules recommended by the Evershed Committee (see note 12), and restated, with minor amendments, the rules revised in 1962 as well as replacing the remaining rules which had survived from the Rules of the Supreme Court 1883.
- 14 See PARA 30.
- 15 See PARA 30 text and note 19.
- 16 See PARA 30 note 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/ (2) SOURCES OF CIVIL PROCEDURAL LAW/11. Judicial precedent.

11. Judicial precedent.

As in other branches of the law, judicial precedent plays a crucial and significant part in civil procedural law¹. Some of the cases decided by the courts are of far-reaching importance and may be said to have a virtually legislative effect, so much have they changed the operation of procedural law². The decision of a court upon a procedural question, on what may be called 'procedural facts', may well have the effect of creating a substantive legal right or imposing a substantive legal duty, without deciding the substantive merits in the particular case.

1 As to judicial decisions as authorities see PARA 91 et seq; and as to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

2 Three illustrations will suffice to demonstrate the importance of judicial precedent in the field of civil procedural law.

Anton Piller KG v Manufacturing Processes Ltd [1976] Ch 55, [1976] 1 All ER 779, CA, enabled the court to require a defendant to permit the plaintiff (now known as the claimant) to enter his premises and to take into custody and detain and preserve illicit articles infringing the claimant's rights and related documents as to which there is a real fear that they might be destroyed or disposed of, and to require the defendant to make full disclosure of all such documents and to answer interrogatories (now to provide further information: see PARA 611). This power has now been given statutory force by the Civil Procedure Act 1997 s 7: see PARA 319. Such orders are one of the interim remedies listed in CPR Pt 25 and are now described as 'search orders': see CPR 25.1(1)(h); and PARAS 315 head (8), 319, 402 et seq.

The Mareva [1980] 1 All ER 213n, CA, distinguishing *Lister & Co v Stubbs* (1890) 45 ChD 1, CA, and applying *Nippon Yusen Kaisha v Karageorgis* [1975] 3 All ER 282, [1975] 1 WLR 1093, CA, empowered the court to grant an injunction, called a 'Mareva injunction', to prevent a defendant from removing or disposing of his assets out of the jurisdiction. This power has now been given statutory force by the Supreme Court Act 1981 s 37(3). Such orders are described in CPR Pt 25 as 'freezing injunctions': see CPR 25.1(1)(f); and PARAS 315 head (6), 318, 396 et seq. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

Arthur J S Hall & Co (a firm) v Simons, Barratt v Ansell (t/a Woolf Seddon (a firm)) [2002] 1 AC 615, [2000] 3 All ER 673, HL, established that advocates should no longer enjoy immunity against suits in negligence in respect of their conduct of civil or of criminal cases as it was no longer in the public interest to maintain the immunity in favour of advocates. In so doing, it overruled *Rondel v Worsley* [1969] 1 AC 191, [1967] 3 All ER 993, HL, as modified by *Saif Ali v Sydney Mitchell & Co (a firm)* [1980] AC 198, [1978] 3 All ER 1033, HL. See further **LEGAL PROFESSIONS** vol 66 (2009) PARA 822; **NEGLIGENCE** vol 78 (2010) PARA 20.

The important cases decided annually by the courts on what are called procedural points are at least as numerous as those decided on other branches of the law, and taken together the judicial decisions on matters of practice and procedure form a considerable corpus of civil procedural law. For guidance on public interest policy considerations see *Keating v Bromley London Borough Council* [2003] EWHC 1070 (QB), [2003] All ER (D) 204 (May).

Note that it has been held that the responsibility for monitoring and controlling developing practice as regards a field such as funding litigation under the Access to Justice Act 1999 lies with the Court of Appeal, which is best placed to respond with speed and sensitivity, and the House of Lords should be slow to intervene: see *Callery v Gray (Nos 1 and 2)* [2002] UKHL 28, [2002] 3 All ER 417. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

UPDATE

11 Judicial precedent

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/ (2) SOURCES OF CIVIL PROCEDURAL LAW/12. Practice directions.

12. Practice directions.

Practice directions provide a source of civil procedural law¹. They provide directions as to matters of practice and procedure for the assistance and guidance of litigants in the conduct of their proceedings, and in the administration of civil justice generally, and they are of enormous value to the courts, to practitioners and to all who are involved in the civil judicial process².

In the High Court, practice directions are issued from time to time by the Heads of Divisions³. The authority for such practice directions lies in the inherent jurisdiction which empowers the courts to regulate and control their own process⁴. In fact, these practice directions are made for the High Court under the inherent power of the Heads of Division, namely the Lord Chief Justice, the Master of the Rolls (so far as they affect civil appeals), the Chancellor of the High Court and the Head or Deputy Head of Civil Justice⁵.

Many of the Parts of the Civil Procedure Rules are supplemented by practice directions, within the scope of the rules, as provided for by the Civil Procedure Act 1997⁶. The practice directions supplementing the Civil Procedure Rules are made pursuant to statute and have the same authority as the rules themselves⁷.

Unlike the rules themselves, the practice directions are thus not made by statutory instrument. They are not laid before Parliament or subject to either the negative or positive resolution procedures in Parliament. They go through no democratic process. There was formerly no ministerial responsibility for practice directions made for the Supreme Court by the Heads of Division⁸. Now, however, directions which fall within the category of 'designated directions'⁹ may generally only be given or made with the agreement of the Lord Chancellor¹⁰.

Practice directions (including those which supplement the Civil Procedure Rules) do not take effect so as to amend or revoke any rules or regulations made by statutory instrument¹¹. Practice directions supplementing the Civil Procedure Rules may, however, modify or disapply any provision of the rules during the operation of pilot schemes¹².

1 It was formerly held that practice directions did not, strictly speaking, have the force of law: see eg *Hume v Somerton* (1890) 25 QBD 239; *Re Langton, Langton v Lloyds Bank Ltd* [1960] 1 All ER 657, [1960] 1 WLR 246, CA; *Barclays Bank International Ltd v Levin Bros (Bradford) Ltd* [1977] QB 270, [1976] 3 All ER 900. Perhaps the most important practice directions which were held not to have the force of law but indeed to be contrary to the law were those issued in 1936 by the judges of the Chancery Division in respect of applications for payment or for possession or other relief in mortgage actions under the Rules of the Supreme Court 1883 Ord 55 r 5A (revoked), which were amended by *Practice Directions* [1958] 2 All ER 384, [1958] 1 WLR 655: see *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883, [1962] 1 All ER 163; *London Permanent Benefit Building Society v de Baer* [1969] 1 Ch 321, [1968] 1 All ER 372. These directions had earlier been unsuccessfully challenged in *Hinckley and South Leicestershire Permanent Benefit Building Society v Freeman* [1941] Ch 32, [1940] 4 All ER 212; *Robertson v Cilia* [1956] 3 All ER 651, [1956] 1 WLR 1502; *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317, [1957] 2 All ER 35; *Braithwaite v Winwood* [1960] 3 All ER 642, [1960] 1 WLR 1257. Nevertheless, the directions were of such importance in mortgage actions that they have, as it were, been embodied in statute law: see the Administration of Justice Act 1970 s 36(2); and the Administration of Justice Act 1973 s 8, which negated *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883, [1962] 1 All ER 163 and *London Permanent Benefit Building Society v de Baer* [1969] 1 Ch 321, [1968] 1 All ER 372. See *Centrax Trustees Ltd v Ross* [1979] 2 All ER 952; and **MORTGAGE** vol 77 (2010) PARA 555.

2 Perhaps the most important practice direction was that issued by the House of Lords in which it announced that it would no longer be bound by its own decisions: see *Practice Note* [1966] 3 All ER 77, sub nom *Practice Statement* [1966] 1 WLR 1234, HL, negating *London Tramways Co v LCC* [1898] AC 375, HL. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the

United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

3 See PARA 27.

4 See PARA 27. Formerly, RSC Ord 63 r 11 (revoked) provided that there should be uniformity of practice both in the Central Office and in all the district registries. No such provision appears in the Civil Procedure Rules. As to the Central Office and the district registries see PARAS 51, 54.

5 See PARA 27 note 3; and see *Re C (legal aid: preparation of bill of costs)* [2001] 1 FLR 602, CA, per Hale LJ. As to the Head of Civil Justice see the Courts Act 2003 s 62 (substituted by the Constitutional Reform Act 2005 s 15, Sch 4 Pt 1 para 330). The Head of Civil Justice is normally the Master of the Rolls: see the Courts Act 2003 s 62(1) (as so substituted).

6 See the Civil Procedure Act 1997 ss 1(2), 5(1), Sch 1 paras 3, 6 (s 5(1) substituted by the Constitutional Reform Act 2005 s 13(2), Sch 2 Pt 2 para 6); and PARA 27. As to the meaning of 'within the scope of the rules' see PARA 24 note 2.

7 See PARA 27. In the case of any conflict between a rule and a practice direction, the rule prevails: see *The Queen's Bench Guide* (2007 Edn) para 1.3.2 in *The Civil Court Practice*.

8 See Professor Jolowicz 'Practice Directions and the Civil Procedure Rules' [2000] CLJ 53 p 61: 'It is right that the court should retain its power to regulate its own procedure within the limits set by statutory rules, and to fill in gaps left by those rules; it is wrong that it should have power actually to legislate'. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

9 'Designated directions' means directions under another Act which are, by virtue of provision in that Act, to be made or given in accordance with the Constitutional Reform Act 2005 Sch 2 Pt 1: Sch 2 Pt 1 para 1. Designated directions include those providing for the removal or transfer of proceedings within the High Court between divisions or district registries or between county courts: see PARA 27.

10 See the Constitutional Reform Act 2005 Sch 2 Pt 1 para 3. Designated directions are to be made by the Lord Chief Justice or by a judicial office holder nominated by the Lord Chief Justice with the agreement of the Lord Chancellor: Sch 2 Pt 1 para 2(1). The Lord Chief Justice may nominate a judicial office holder to make or give designated directions generally, or to make or give designated directions under a particular enactment: Sch 2 Pt 1 para 2(2). 'Judicial office holder' has the same meaning as in s 109(4): Sch 2 Pt 1 para 2(3)(a). References to the Lord Chief Justice's nominee, in relation to designated directions, mean a judicial office holder nominated by the Lord Chief Justice Sch 2 Pt 1 para 2(1) to make or give those directions: Sch 2 Pt 1 para 2(3) (b). The Lord Chief Justice has appointed the Master of the Rolls to make practice directions for the civil courts.

The Lord Chief Justice, or his nominee, may make or give designated directions only with the agreement of the Lord Chancellor: Sch 2 Pt 1 para 3(1). This does not apply, however, to designated directions to the extent that they consist of guidance about any of the following: (1) the application or interpretation of the law; (2) the making of judicial decisions: Sch 2 Pt 1 para 3(2). Nor does it apply to designated directions to the extent that they consist of criteria for determining which judges may be allocated to hear particular categories of case; but the directions may, to that extent, be made or given only after consulting the Lord Chancellor: Sch 2 Pt 1 para 3(3). If the agreement of the Lord Chancellor is required but he does not agree designated directions made or given by the Lord Chief Justice, or by his nominee, the Lord Chancellor must give that person written reasons why he does not agree the directions: Sch 2 Pt 1 para 3(4).

11 See *Re C (legal aid: preparation of bill of costs)* [2001] 1 FLR 602, CA.

12 See CPR 51.2; and PARA 30 text and note 8.

UPDATE

12 Practice directions

NOTES 2, 8--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/ (2) SOURCES OF CIVIL PROCEDURAL LAW/13. Pre-action protocols.

13. Pre-action protocols.

Pre-action protocols are statements of understanding between legal practitioners and others about pre-action practice and which are approved by a relevant practice direction¹. Pre-action protocols outline the steps parties² should take to seek information from and to provide information to each other about a prospective legal claim³. They derive their authority from the practice direction and are referred to in the Civil Procedure Rules themselves, which provide for consequences of non-compliance with them⁴.

1 See CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31. As to practice directions generally see PARA 27.

2 As to parties see PARA 207 et seq.

3 *Practice Direction--Protocols* para 1.3.

4 See further PARA 107 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/ (2) SOURCES OF CIVIL PROCEDURAL LAW/14. Forms.

14. Forms.

By its very nature, civil procedural law requires the use of forms for the written documents used in the application and operation of the judicial process. At almost every stage of civil proceedings, a form of document is required. This expresses what has to be done or what has been done, and contains the only authentic record of the step that is being or has been taken in the course of civil proceedings¹.

In this sense, therefore, forms play their part as a source of civil procedural law. The Civil Procedure Rules refer to three main classes² of such forms³, namely, new or N forms⁴, practice forms⁵, and county court forms⁶. N forms are the new forms to be used after 26 April 1999⁷ that are referred to in and required by the practice directions supporting the rules⁸; practice forms are those forms that were previously prescribed forms in the High Court or approved by the masters of the Queen's Bench and the Chancery Divisions and that may still be used⁹; and the county court forms are those forms that were prescribed or practice forms in the county courts before 26 April 1999 and that will continue in use on or after that date in amended form to ensure consistency with the new rules¹⁰.

The forms set out in a practice direction must be used in the cases to which they apply¹¹. A form may be varied by the court or a party if the variation is required by the circumstances of a particular case¹², but must not be varied so as to leave out any information or guidance which the form gives to the recipient¹³. Where the rules require a form to be sent by the court or by a party for another party to use, it must be sent without any variation except such as is required by the circumstances of the particular case¹⁴.

Where the court or a party produces a form shown in a practice direction with the words 'Royal Arms', the form must include a replica of the Royal Arms at the head of the first page¹⁵.

1 See the Preface to Chitty and Jacob's Queen's Bench Forms (19th Edn) at p x. It was there further stated that 'Forms provide the lubrication for the smooth working of the machinery of justice. The right form used at the proper time and place and for the proper purpose saves untold time, trouble and expense, whereas the use of the wrong form or the use of the right form but not at the proper time or place or for the proper reason causes delay, obstructs the work of the court and increases costs'.

2 Other forms may be authorised by practice directions supplementing CPR Pt 49 (specialist proceedings: see PARA 1536 et seq): see *Practice Direction--Forms* PD 4 para 2.1.

3 See generally *Practice Direction--Forms* PD 4.

4 See *Practice Direction--Forms* PD 4 para 1.3, Table 1.

5 See *Practice Direction--Forms* PD 4 para 1.3, Table 2. 'Practice form' means a form to be used for a particular purpose in proceedings, the form and purpose being specified by a practice direction: CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31.

6 See *Practice Direction--Forms* PD 4 para 1.3, Table 3.

7 See *Practice Direction--Forms* PD 4 para 1.1. 26 April 1999 is the date when the Civil Procedure Rules came into force: see PARA 30.

8 See *Practice Direction--Forms* PD 4 para 3.1, Table 1. The forms are available on the Ministry of Justice website, www.justice.gov.uk.

9 See *Practice Direction--Forms* PD 4 para 4.1, Table 2. These forms have been amended to ensure consistency with the new rules. *The Queen's Bench Guide* (2007 Edn) para 1.4.2 explains that these forms include forms that were previously prescribed forms (still listed under the numbers that previously identified them), former practice forms common to both Queen's Bench and Chancery Divisions (now prefaced PF), former practice forms used mainly in the Queen's Bench Division (now prefaced QB) and former practice forms used mainly in the Chancery Division (now prefaced CH). These forms are set out in *Practice Forms for use in Proceedings in the High Court* and in the Forms Supplement to *The Civil Court Practice*. These forms are also reproduced in an Appendix to *The Chancery Guide* (2005 Edn) and *The Queen's Bench Guide* (2007 Edn) and on the Courts Service website, www.hmcourts-service.gov.uk: see *Practice Direction--Forms* PD 4 para 4.3. As to the online forms service on that website see PARA 84.

10 See *Practice Direction--Forms* PD 4 para 5.1, Table 3.

11 CPR 4(1).

12 CPR 4(2). See eg *Practice Direction--Forms* PD 4 para 5.2 (where a rule permits, a party intending to use a witness statement as an alternative to an affidavit must amend any form in Table 3 to be used in connection with that rule so that 'witness statement' replaces 'affidavit' wherever it appears in the form). As to the meaning of 'court' for these purposes see PARA 22. As to the meaning of 'witness statement' see PARA 751 note 1; and as to the meaning of 'affidavit' see PARA 540 note 5.

13 CPR 4(3).

14 CPR 4(4).

15 CPR 4(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/ (2) SOURCES OF CIVIL PROCEDURAL LAW/15. Inherent jurisdiction of the court.

15. Inherent jurisdiction of the court.

Unlike all other branches of law, except perhaps criminal procedure, there is a source of law which is peculiar and special to civil procedural law and is commonly called the 'inherent jurisdiction of the court'¹. In the ordinary way the Supreme Court², as a superior court of record, exercises the full plenitude of judicial power in all matters concerning the general administration of justice within its territorial limits, and enjoys unrestricted and unlimited powers in all matters of substantive law, both civil and criminal, except in so far as that has been taken away in unequivocal terms by statutory enactment³. The term 'inherent jurisdiction' is not used in contradistinction to the jurisdiction of the court exercisable at common law or conferred on it by statute or rules of court⁴. The jurisdiction of the court which is comprised within the term 'inherent' is that which enables it to fulfil, properly and effectively, its role as a court of law⁵. It has been said that the overriding feature of the inherent jurisdiction of the court is that it is a part of procedural law, both civil and criminal, and not a part of substantive law; it is exercisable by summary process, without a plenary trial; it may be invoked not only in relation to parties in pending proceedings, but in relation to any one, whether a party or not, and in relation to matters not raised in the litigation between the parties; it must be distinguished from the exercise of judicial discretion; and it may be exercised even in circumstances governed by rules of court⁶. Note, however, that a recent decision has held that, while the court continues to have the inherent jurisdiction to regulate the conduct of civil litigation, a claim should be dealt with in accordance with the rules of court and not by exercising the court's inherent jurisdiction where the subject matter of the claim is governed by those rules⁷.

In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them⁸.

1 For a full analysis of the subject see Jacob's 'The Inherent Jurisdiction of the Court' (1970) 23 Current Legal Problems 23 et seq.

2 As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

The county courts also have an inherent jurisdiction to regulate their own procedures provided that the exercise of this power is not inconsistent with statute or statutory rules: *Langley v North West Water Authority* [1991] 3 All ER 610, [1991] 1 WLR 697, CA. Further, the County Courts Act 1984 s 76 provides that, in any case not expressly provided for by or in pursuance of the 1984 Act, the general principles of practice in the High Court may be adopted and applied to proceedings in the county court; and see also s 38 (substituted by the Courts and Legal Services Act 1990 s 3; and amended by the Constitutional Reform Act 2005 ss 12(2), 15(1), 146, Sch 1 Pt 2 para 17, Sch 4 Pt 1 paras 160, 167, Sch 18 Pt 1), which provides that subject to the County Courts Act 1984 s 38(2)-(7), in any proceedings in a county court the court may make any order which could be made by the High Court if the proceedings were in the High Court: s 38(1) (as so substituted). Section 76 has been held to allow a county court judge to exercise the same inherent power as the High Court in restraining a litigant from making applications without permission: *Wayte v Slocombe and Rose* (15 June 1994, unreported), CA; *Ebert v Birch* [2000] Ch 484, [1999] 3 WLR 670, CA, per Lord Woolf; and see also *Grepe v Loam* (1887) 37 ChD 168, CA. Such a remedy does not appear in the list of interim remedies listed in CPR 25.1 (see PARA 315) but the list is not exhaustive: CPR 25.1(3).

3 See *Peacock v Bell and Kendal* (1667) 1 Saund 69; *Board v Board* [1919] AC 956, PC; *Langley v North West Water Authority* [1991] 3 All ER 610, [1991] 1 WLR 697, CA.

4 See *Willis v Earl Beauchamp* (1886) 11 PD 59, CA; *Davey v Bentinck* [1893] 1 QB 185, CA.

5 See *Connelly v DPP* [1964] AC 1254, [1964] 2 All ER 401, HL. In *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn* [1981] AC 909 at 977, [1981] 1 All ER 289 at 295, HL, Lord Diplock opined that it would be conducive to clarity if the use of the expressions 'inherent power' and 'inherent jurisdiction' of the High Court were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice. See also Jacob 'The Inherent Jurisdiction of the Court' (1970) 23 Current Legal Problems pp 27, 28.

6 See Jacob 'The Inherent Jurisdiction of the Court' (1970) 23 Current Legal Problems pp 24, 25.

7 See *Tombstone Ltd v Raja* [2008] EWCA Civ 1444 at [78], [2008] All ER (D) 180 (Dec) at [78]; and PARA 9.

8 See Jacob 'The Inherent Jurisdiction of the Court' (1970) 23 Current Legal Problems p 51. This definition was approved and applied by the Court of Appeal of Manitoba in *Montreal Trust Co v Churchill Forest Industries (Manitoba) Ltd* [1971] 4 WWR 542 at 548, 21 DLR (3d) 75 at 81, Man CA, per Freedman CJM. This paper was also approved and applied in the Court of Appeal of New Zealand in *Taylor v A-G* [1975] 2 NZLR 675, NZ CA. See also *The Venus Destiny* [1980] 1 All ER 718, [1980] 1 WLR 460.

The inherent jurisdiction was used to create Mareva injunctions and Anton Piller orders, both now incorporated into the Civil Procedure Rules: see PARAS 396 et seq, 402 et seq; and see also PARAS 315, 318-319.

UPDATE

15 Inherent jurisdiction of the court

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/ (2) SOURCES OF CIVIL PROCEDURAL LAW/16. Court guides and other court practice sources.

16. Court guides and other court practice sources.

A rather undefined source of civil procedural law is the practice of the court, not expressed in practice directions nor in any particular case, but a course of proceedings which has been followed over a period of time by successive judges¹. To some extent, 'the practice of the court' has been recognised by statute as a source of civil procedural law². It is, however, not easy to define what is the practice of the court or how it is to be ascertained, and, in any event, it is thought that it would be open to a judge to come to a conclusion which may differ from what he may be told or knows to be the practice of the court³.

Certain civil courts publish guidance as to the conduct of cases therein⁴. Such guidance does not have the force of law but it is expected that parties will comply with it and failure to do so may have adverse costs consequences and it is important in practice⁵.

1 See *Salm Kyrburg v Posnanski* (1884) 13 QBD 218, DC, where both Huddleston B and Grove J supported their judgments on appeal from an order of the judge in chambers giving leave to issue a writ of attachment by saying that they were informed by the masters that that was a general practice that had been followed since the Supreme Court of Judicature Act 1873, and Grove J added, at 224, 'This, of course, is not conclusive on us, but it seems to me to afford an argument to the extent that it is a reason for not interfering with the actually existing practice unless the arguments against it strongly preponderate'. See also *Stumm v Dixon & Co and Knight* (1889) 22 QBD 529, CA; *Davies & Co v André & Co* (1890) 24 QBD 598, CA; *Hume v Somerton* (1890) 25 QBD 239; *Harbottle v Roberts* [1905] 1 KB 572, CA; *Re Mercantile Lighterage Co Ltd* [1906] 1 Ch 491; *Morison v Telfer* [1906] WN 31. The old maxim was that 'the practice of the court is the law of the court', and it reflected the principle that the court is always slow to depart from an established practice.

2 See the Supreme Court Act 1981 s 67, which provides that business in the High Court is to be heard and disposed of in court (ie in open court or in public) except in so far as it may under that or any other Act, under rules of court or in accordance with the practice of the court, be dealt with in chambers or in private. Although it is placed on the same footing as rules of court, the phrase 'the practice of the court' is not defined, or even described, and it remains a somewhat vague and obscure, if not ambiguous, term; but as to hearings in public or private since 26 April 1999 see CPR 39.2; and PARAS 6, 1117. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

3 See *Adlington v Conyngham* [1898] 2 QB 492, CA.

4 See eg *The Chancery Guide* (2005 Edn) incorporating previous Chancery practice directions; *The Queen's Bench Guide* (2007 Edn); and see generally *The Civil Court Practice*. The Guides will also be found on the Publications section of the Courts Service website: www.hmcourts-service.gov.uk.

5 See *The Chancery Guide* (2005 Edn) general note; *The Queen's Bench Guide* (2007 Edn) para 1.1.3. Cf the status of *The Admiralty and Commercial Courts Guide* (7th Edn, 2006), the predecessor to which was brought into force by a practice direction supplementary to CPR Pt 49 and therefore had legal status: see PARA 1536 note 2.

UPDATE

16 Court guides and other court practice sources

NOTE 5--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/ (2) SOURCES OF CIVIL PROCEDURAL LAW/17. Practice books.

17. Practice books.

From very early times, books on practice and procedure have provided both the courts and practitioners with a convenient and valuable source of civil procedural law. Such books are in constant, even everyday, use¹, and are relied on as giving guidance, assistance and even authority to matters of practice and procedure. Books of a more academic nature have also increasingly been relied upon².

1 It would be idle to refer to the ancient books which dealt with practice and procedure of bygone days, although, of course, they are of great historical interest and value. The book of outstanding authority in this sphere is Bullen and Leake's *Precedents of Pleading in Actions in the Queen's Bench Division* (3rd Edn) published in 1868, which encapsulated the practice of the superior common law courts before the Supreme Court of Judicature Acts 1873 and 1875. Modern works include: *The Civil Court Practice* (otherwise known as the 'Green Book'); *Civil Procedure* (otherwise known as the 'White Book'); Atkin's Court Forms; Bullen, Leake and Jacob's *Precedents of Pleadings* (16th Edn, 2007); Butterworths County Court Precedents; and *Blackstone's Civil Practice* (annual edition).

2 See eg Zuckerman *Civil Procedure: Principles of Practice* (2nd Edn, 2006).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/(3) GENERAL DEFINITIONS/18. Claim.

(3) GENERAL DEFINITIONS

18. Claim.

The Civil Procedure Rules do not use the titles 'actions', 'matters', or 'causes', which were, previously, used in their technical senses and had important distinctions between them¹. Whereas previously a writ, summons, or other originating process was issued in order to commence proceedings² now they are started by the court issuing, at the request of a claimant, a 'claim'³ in the prescribed form. A 'claimant' is a person who makes a claim, and a 'defendant' is a person against whom a claim is made⁴. Any person who, pursuant to, or by virtue of, rules of court or any other statutory provision, has been served with notice of proceedings or has intervened in them is a 'party'⁵.

1 See, eg, the definitions contained in the Supreme Court Act 1981 s 151(1); and PARA 44 note 1. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to the current civil procedure see PARA 24 et seq.

2 'Proceedings' is not defined in the Civil Procedure Rules, but is referred to: see eg CPR Pt 7 (how to start proceedings); and PARA 116 et seq. It is the term used to refer to the entirety of the steps taken between commencement (by the court issuing a claim form at the request of the claimant) and conclusion (usually by judgment being satisfied).

3 In the Civil Procedure Rules, although undefined as a general term, 'claim' is the word used to refer to either the whole of any case, or a separate cause of action in that case (see eg CPR 7.3; and PARA 119), or a petition or application (see eg CPR 6.2(c); and PARA 138 note 6).

4 CPR 2.3(1). Any number of claimants or defendants may be joined as parties to a claim: see CPR 19.1; and PARA 210. The rules governing the bringing and defending of claims by children and protected parties are to be found in CPR Pt 21: see PARA 222; and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1409 et seq.

5 See the Supreme Court Act 1981 s 151(1). 'Party' may mean 'person' (see *Long v Crossley* (1879) 13 Ch D 388) or it may mean claimants or defendants collectively (see *Joyce v Beall* [1891] 1 QB 459, DC). As to the addition and substitution of parties, representative parties, and group litigation see CPR Pt 19; and PARA 210 et seq; and as to litigation friends of parties who are children and protected parties see CPR Pt 21; PARA 222; and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARAS 1411-1417.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/(3) GENERAL DEFINITIONS/19. Claim for personal injuries.

19. Claim for personal injuries.

A 'claim for personal injuries' means proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person's death, and 'personal injuries' includes any disease and any impairment of a person's physical or mental condition¹.

¹ CPR 2.3(1). This definition follows that which was given in RSC Ord 1 r 4(1) (revoked). See also the Supreme Court Act 1981 s 35(5), which defines 'personal injuries' in identical terms for the purposes of ss 32A-35. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to the limitation period for such claims see the Limitation Act 1980 s 11; and **LIMITATION PERIODS** vol 68 (2008) PARA 998.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/(3) GENERAL DEFINITIONS/20. Claims founded on contract or tort.

20. Claims founded on contract or tort.

The distinction between claims founded on contract and those founded on tort is important in connection with service out of the jurisdiction¹, limitation periods² and the measure of damages³.

So far as service out of the jurisdiction is concerned where the permission of the court is required, proceedings in contract may be entertained by the court in a variety of circumstances⁴ whereas the court may entertain proceedings in tort only if damage is sustained within the jurisdiction or the damage sustained resulted from an act committed within the jurisdiction⁵.

The limitation period⁶ in respect of claims founded on tort runs (1) where the tort is actionable per se, from the date of its commission⁷; (2) where the tort is a continuing one or is repeated, from the date of each repetition⁸; (3) where the tort is actionable only on proof of special damage, from the date when the damage occurs and not the date of the act giving rise to the damage⁹; and (4) in other torts, from the date when the injury was committed, whether or not it was then apparent¹⁰; a cause of action accrues from the date the damage occurs, not the date of discovery¹¹. In respect of wrongs causing personal injury or death, special time-limits are provided¹². The limitation period in respect of claims founded on simple contract runs from the date of the breach¹³.

The measure of damages in contract differs from that in tort¹⁴. Exemplary damages are not awarded for breach of contract¹⁵, nor nominal damages for delictual negligence¹⁶.

In deciding whether a claim is founded on contract or on tort the substance of the claim must be looked at; the form of it as stated in the statement of case is not determinative¹⁷. Where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, the claim may be said to be founded on tort¹⁸, and it may still be founded on tort, even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract; a claim may be said to be founded on contract where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract¹⁹.

1 As to provisions under domestic law for service out of the jurisdiction see PARA 168 et seq.

2 As to limitation periods see generally **LIMITATION PERIODS**.

3 As to the measure of damages see generally **DAMAGES**.

4 See PARA 170 heads (6)-(8) in the text.

5 See PARA 170 head (9) in the text.

6 As to limitation periods in contract and tort see the Limitation Act 1980 ss 2-8; and **LIMITATION PERIODS** vol 68 (2008) PARA 955 et seq.

7 *R B Policies at Lloyds v Butler* [1950] 1 KB 76, [1949] 2 All ER 226.

8 *Duke of Brunswick and Luneberg v Harmer* (1849) 14 QB 185.

9 *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127, HL.

10 *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, [1963] 1 All ER 341, HL.

11 See *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL; *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1, [1983] 1 All ER 65, HL; and **LIMITATION PERIODS** vol 68 (2008) PARA 980.

12 See the Limitation Act 1980 ss 11-14B, 33 (discretionary power to exclude such time-limits); and **LIMITATION PERIODS** vol 68 (2008) PARA 998 et seq.

13 *Gould v Johnson* (1702) 2 Salk 422; *Battley v Faulkner* (1820) 3 B & Ald 288. See also *Gibbs v Guild* (1881) 8 QBD 296; affd (1882) 9 QBD 59, CA. If the claimant's claim is equally poised in contract and in tort, he may rely upon that aspect which puts him in the more favourable position under the relevant limitation enactment: *Chesworth v Farrar* [1967] 1 QB 407, [1966] 2 All ER 107.

14 *Groom v Crocker* [1939] 1 KB 194, [1938] 2 All ER 394, CA. See generally **DAMAGES** vol 12(1) (Reissue) PARAS 851 et seq (tort), 941 et seq (contract).

15 *Perera v Vandiyar* [1953] 1 All ER 1109, [1953] 1 WLR 672, CA; *Kenny v Preen* [1963] 1 QB 499, [1962] 3 All ER 814, CA.

16 This is because nominal damages are awarded only where a person's rights have been infringed but he has not in fact suffered actual damage: see *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] QB 864, [1982] 1 All ER 28, CA (nominal damages for wrongful detention of goods); and **DAMAGES** vol 12(1) (Reissue) PARA 813.

17 *Sachs v Henderson* [1902] 1 KB 612; *Jarvis v Moy, Davies, Smith, Vandervell & Co* [1936] 1 KB 399, CA. As to statements of case see PARA 584 et seq.

18 Examples are the wrongful detention of goods (*Bryant v Herbert* (1878) 3 CPD 389, CA; *Du Pasquier v Cadbury, Jones & Co Ltd* [1903] 1 KB 104, CA; *Trotter v Windham & Co* (1907) 23 TLR 676, CA); negligence of railway employees (*Taylor v Manchester, Sheffield and Lincolnshire Rly Co* [1895] 1 QB 134, CA; *Kelly v Metropolitan Rly Co* [1895] 1 QB 944, CA). See also *Bretherton v Wood* (1821) 3 Brod & Bing 54, Ex Ch; *Pontifex v Midland Rly Co* (1877) 3 QBD 23, DC; *Lyles v Southend on Sea Corp* [1905] 2 KB 1, CA (carriers for delivery of goods to original consignees after receipt of notice to stop the goods in transit); *Cohen v Foster* (1892) 61 LJQB 643, DC (auctioneer reselling goods already sold to plaintiff); *Turner v Stallibrass* [1898] 1 QB 56, CA (injuries received by a horse entrusted to the defendant for agistment); *Sachs v Henderson* [1902] 1 KB 612, CA (house owner removing fixtures before the commencement of a lease by which fixtures were to remain on the premises); *Edwards v Mallan* [1908] 1 KB 1002, CA (unskilful extraction of teeth); *Jackson v Mayfair Window Cleaning Co Ltd* [1952] 1 All ER 215 (unskilful cleaning of chandelier); *Chesworth v Farrar* [1967] 1 QB 407, [1966] 2 All ER 107 (bailees' failure to take proper care).

19 See eg *Legge v Tucker* (1856) 1 H & N 500 (negligence of stable keeper; but cf *Turner v Stallibrass* [1898] 1 QB 56, CA); *Morgan v Ravey* (1861) 6 H & N 265 (innkeeper); *Bayliss v Lintott* (1873) LR 8 CP 345 (carriage proprietor's negligence with hirer's luggage); *Tattan v Great Western Rly Co* (1860) 2 E & E 844 and *Fleming v Manchester, Sheffield and Lincolnshire Rly Co* (1878) 4 QBD 81, CA (railway company as common carrier); *Steljes v Ingram* (1903) 19 TLR 534 and *Bagot v Stevens Scanlon & Co Ltd* [1966] 1 QB 197, [1964] 3 All ER 577 (architect); *Jarvis v Moy, Davies, Smith, Vandervell & Co* [1936] 1 KB 399, CA, not following *Boorman v Brown* (1842) 3 QB 511 (affd sub nom *Brown v Boorman* (1844) 11 Cl & Fin 1, HL) (stockbroker); and the following cases concerning solicitors: *Groom v Crocker* [1939] 1 KB 194, [1938] 2 All ER 394, CA; *Clark v Kirby-Smith* [1964] Ch 506, [1964] 2 All ER 835; *Cook v S* [1967] 1 All ER 299 at 302, [1967] 1 WLR 457 at 461, CA; *Treloar v Henderson* [1968] NZLR 1085; *Sykes v Midland Bank Executor and Trustee Co Ltd* [1969] 2 QB 518, [1969] 2 All ER 1238 (revsd [1971] 1 QB 113, [1970] 2 All ER 471, CA).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/(3) GENERAL DEFINITIONS/21. Cause of action.

21. Cause of action.

'Cause of action' has been defined as meaning simply the facts the existence of which entitles one person to obtain from the court a remedy against another person¹. The phrase has been held from the earliest time to include every fact which is necessary to be proved to entitle the claimant to succeed, and every fact which the defendant would have a right to dispute². 'Cause of action' has also been taken to mean that particular act on the part of the defendant which gives the claimant his cause of complaint³, or the subject matter or grievance founding the claim, not merely the technical cause of action⁴.

The same facts or the same transaction or event may give rise to more than one effective cause of action⁵.

A cause of action arises wholly or in part within a certain local area where all or some of the material facts which the claimant has to prove in order to succeed arise within that area⁶.

A reasonable cause of action means a cause of action with some chance of success, when only the allegations in the statement of case are considered⁷.

1 *Letang v Cooper* [1965] 1 QB 232 at 242, [1964] 2 All ER 929 at 934, CA, per Diplock LJ.

2 *Cooke v Gill* (1873) LR 8 CP 107 at 116, per Brett J. As Lord Esher MR, he later defined the words as comprising every fact, though not every piece of evidence, which it would be necessary for the plaintiff (now referred to as the claimant: see PARA 18) to prove, if disputed, to support his right to the judgment of the court: *Read v Brown* (1888) 22 QBD 128 at 131, CA. See also *Dipple v Dipple* [1942] P 65, [1942] 1 All ER 234; *Trower & Sons Ltd v Ripstein* [1944] AC 254, [1944] 2 All ER 274, PC; *Delahunty v Delahunty* [1961] 1 All ER 923, [1961] 1 WLR 515; *Robinson v Unicos Property Corp Ltd* [1962] 2 All ER 24, [1962] 1 WLR 520, CA; *Chatsworth Investments Ltd v Cussins (Contractors) Ltd* [1969] 1 All ER 143, [1969] 1 WLR 1, CA.

3 *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458, [1971] 1 All ER 694, PC, applying *Jackson v Spittal* (1870) LR 5 CP 542.

4 *O'Keefe v Walsh* [1903] 2 IR 681.

5 *Brunsdon v Humphrey* (1884) 14 QBD 141, CA; *Payana Reena Saminathan v Pana Lana Palaniappa* [1914] AC 618, PC; *Goldrei, Foucard & Son v Sinclair and Russian Chamber of Commerce in London* [1918] 1 KB 180, CA; *The Koursk* [1924] P 140, CA; *Greenhalgh v Mallard* [1943] 2 All ER 234 at 255, CA; *The Oropesa* [1943] P 32, [1943] 1 All ER 211, CA. See also (1968) 31 MLR 458.

6 *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458, [1971] 1 All ER 694, PC, where Lord Pearson fully examined the historical and juridical background. See also *Cooke v Gill* (1873) LR 8 CP 107; *Gold v Turner* (1874) LR 10 CP 149; *Read v Brown* (1888) 22 QBD 128, CA; *Bowler v Barberton Development Syndicate* [1897] 1 QB 164, CA.

The place where the cause of action arises may be important for the purposes of service out of the jurisdiction: see CPR Pt 6 Section IV (CPR 6.30-6.47); and PARA 168 et seq. As to the accrual of causes of action see **LIMITATION PERIODS** vol 68 (2008) PARA 920.

7 *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094 at 1101, [1970] 1 WLR 688 at 696, CA, per Lord Pearson. See also *Republic of Peru v Peruvian Guano Co* (1887) 36 ChD 489; *Hubbuck & Sons Ltd v Wilkinson, Heywood and Clark Ltd* [1899] 1 QB 86, CA; *Hanratty v Lord Butler of Saffron Walden* (1971) 115 Sol Jo 386, CA. As to statements of case see PARA 584 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/(3) GENERAL DEFINITIONS/22. The court.

22. The court.

The Civil Procedure Rules contain rules of court applicable to proceedings in both the High Court and the county courts¹. Under the rules, reference to the 'court', where the context requires, means a reference to a particular county court, a district registry, or the Royal Courts of Justice².

The use of the term the 'High Court' or the 'court' or the 'court or a judge' in any enactment requires the court's jurisdiction under the statute to be exercised only by a single judge of the High Court³ unless (1) by or by virtue of rules of court or any other statutory provision that jurisdiction is required to be exercised by a Divisional Court⁴; or (2) by rules of court that jurisdiction is made exercisable by a master, district judge or other officer of the court, or by any other person⁵.

1 See PARAS 9, 24 et seq.

2 CPR 2.3(3). With regard to CPR Schs 1, 2, however (Scheduled rules: see PARA 30 text and note 20), a provision previously contained in the Rules of the Supreme Court 1965 applies only to proceedings in the High Court and a provision previously contained in the County Court Rules 1981 applies only to proceedings in a county court, unless otherwise stated in CPR Schs 1, 2 or the relevant practice direction: see CPR 50(3)(c), (4) (c).

3 See the Supreme Court Act 1981 s 19(3). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

4 Supreme Court Act 1981 s 19(3)(a).

5 See the Supreme Court Act 1981 s 19(3)(b). This is the classic way in which the statutory jurisdiction of the High Court or a judge of the High Court is made exercisable by a master or district judge. In the absence of a rule of court conferring such power on a master or district judge the jurisdiction may be exercised only by a High Court judge: see *Barclays Bank Ltd v Moore* [1967] 3 All ER 34, [1967] 1 WLR 1201, CA, where it was held that a master has no power to appoint a receiver; and *Firman v Ellis* [1978] QB 886 at 909, [1978] 2 All ER 851 at 863, CA, per Lord Denning MR, where it was held that only a judge had discretionary power to exclude time-limits in personal injury actions. As to the power of judges, masters and district judges to perform the functions of the court see CPR 2.4; and PARA 49; and as to the allocation of cases between different levels of the judiciary see *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B; and PARA 50. For the like provisions relating to county courts see PARAS 61-62.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/1. INTRODUCTION/(4) FUNDING/23. Funding arrangements.

(4) FUNDING

23. Funding arrangements.

The cost of litigation can be very high, and the availability of funding for costs liability, which is unpredictable and potentially unlimited in amount, can be a crucial factor in the decision whether or not to litigate. An unsuccessful litigant will generally have to pay the winning party's costs as well as his own. Formerly, legal aid had been available to litigants who met the income criteria, but the cost of legal aid escalated as the costs of litigation did¹. The legal aid system has been replaced by funding arrangements², which have shifted the burden of legal costs from the government to those who have to meet the cost of litigation: normally, defendants' insurance companies³. Under the new system, lawyers are allowed to represent clients on the basis of a conditional fee agreement⁴ and the client normally takes out after-the-event insurance to cover the risk of having to pay the opponent's costs if the client is unsuccessful, and of liability for costs and expenses of the client's lawyers to the extent that they are not recoverable from the opponent if the client is successful⁵. This, however, has tended to cause a further escalation in costs⁶.

A detailed system is now in place⁷. Where a party has entered into a funding arrangement, it is important that the other parties are notified about the arrangement⁸.

1 For the history of the litigation funding legislation see *Hollins v Russell* [2003] EWCA Civ 718, [2003] 4 All ER 590 per Brooke LJ. See also **LEGAL AID**. As to costs generally see PARA 1729 et seq.

2 As to the meaning of 'funding arrangement' see PARA 1830. See further PARAS 1826-1836.

3 See *Callery v Gray* [2001] EWCA Civ 1117, [2001] 3 All ER 833, [2001] 1 WLR 2112; affd [2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000.

4 As to the meaning of 'conditional fee agreement' see PARA 1830 note 2. Formerly it was considered contrary to public policy that a solicitor's remuneration should depend on the outcome of the case: see *Awwad v Geraghty & Co (a firm)* [2001] QB 570, [2000] 1 All ER 608, CA; *Thai Trading Co (a firm) v Taylor* [1998] QB 781, [1998] 3 All ER 65, CA.

5 See PARA 1830 text and note 5.

6 See eg J Peysner 'What's Wrong with Contingency Fees?' (2001) 10(1) Nottingham LJ 22; and Zuckerman *Civil Procedure: Principles of Practice* (2nd Edn, 2006) para 26.147 et seq.

7 See PARA 1826 et seq.

8 See PARA 1832.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(1) THE CIVIL PROCEDURE ACT 1997/24. Civil Procedure Rules.

2. FRAMEWORK OF CIVIL PROCEDURE

(1) THE

24. Civil Procedure Rules.

Rules of Court, called the Civil Procedure Rules, govern the practice and procedure to be followed in the Civil Division of the Court of Appeal, in the High Court (other than in most proceedings in the Family Division¹) and in the county courts². For the first time, there are rules common to most civil proceedings in the courts exercising civil jurisdiction in England and Wales. Civil Procedure Rules may be made about any matters which were governed by the former Rules of the Supreme Court³ or the former County Court Rules⁴. They may provide for the exercise of the jurisdiction of any court whose practice and procedure is within the scope of the rules by court officers or staff⁵. Civil Procedure Rules may also provide for the removal of proceedings⁶ at any stage within the High Court⁷ or between county courts⁸, may modify the rules of evidence as they apply to proceedings in any court within the scope of the rules⁹ and apply any rules of court¹⁰ which relate to a court which is outside the scope of the rules¹¹. Any rules of court, not made by the Civil Procedure Rule Committee¹², which apply to proceedings of a particular kind in a court within the scope of Civil Procedure Rules may be applied by those rules to other proceedings in such a court¹³.

1 As to proceedings in the Family Division see PARAS 32 text and notes 13-14, 46; and **CHILDREN AND YOUNG PERSONS; MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

2 See the Civil Procedure Act 1997 s 1(1). A court the practice and procedure of which is governed by the Civil Procedure Rules is referred to in the 1997 Act as being 'within the scope' of the rules and references to a court 'outside the scope' are to be read accordingly: s 9(1). As to the application of the Civil Procedure Rules see further PARA 32. As to the making of the Civil Procedure Rules see PARAS 25-26.

3 Ie the Rules of the Supreme Court 1965, SI 1965/1776 (revoked subject to transitional provisions).

4 See the Civil Procedure Act 1997 s 1(2), Sch 1 para 1. The former County Court Rules referred to are the County Court Rules 1981, SI 1981/1687 (revoked subject to transitional provisions). The power to make Civil Procedure Rules includes power to make different provision for different cases or different areas, including different provision (1) for a specific court or specific division of a court; or (2) for specific proceedings, or a specific jurisdiction, specified in the rules: Civil Procedure Act 1997 Sch 1 para 7.

5 Civil Procedure Act 1997 Sch 1 para 2.

6 For these purposes, 'provide for the removal of proceedings' means (1) provide for transfer of proceedings; or (2) provide for any jurisdiction in any proceedings to be exercised (whether concurrently or not) elsewhere within the High Court or, as the case may be, by another county court without the proceedings being transferred (Civil Procedure Act 1997 Sch 1 para 3(2)(a)); and 'proceedings' includes any part of proceedings (Sch 1 para 3(2)(b)).

7 Eg between different Divisions or different district registries: see PARA 67.

8 Civil Procedure Act 1997 Sch 1 para 3(1); and see PARA 68.

9 Civil Procedure Act 1997 Sch 1 para 4.

10 For these purposes, 'rules of court' includes any provision governing the practice and procedure of a court which is made by or under an enactment: Civil Procedure Act 1997 Sch 1 para 5(3). 'Enactment' includes

an enactment contained in subordinate legislation (within the meaning of the Interpretation Act 1978): Civil Procedure Act 1997 s 9(2). As to the meaning of 'subordinate legislation' see the Interpretation Act 1978 s 21(1); and **STATUTES** vol 44(1) (Reissue) PARA 1232 note 2.

11 Civil Procedure Act 1997 Sch 1 para 5(1).

12 As to the Civil Procedure Rule Committee see PARA 25.

13 Civil Procedure Act 1997 Sch 1 para 5(2). Where Civil Procedure Rules may be made by applying other rules, the other rules may be applied to any extent, with or without modification, and as amended from time to time: Sch 1 para 5(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(1) THE CIVIL PROCEDURE ACT 1997/25. The Civil Procedure Rule Committee.

25. The Civil Procedure Rule Committee.

The Civil Procedure Rules are made by the Civil Procedure Rule Committee¹, which must exercise its power to make the rules with a view to securing that the civil justice system is accessible, fair and efficient². The membership of the Committee consists of the Head of Civil Justice³, the Deputy Head of Civil Justice (if there is one) and the persons currently appointed by the Lord Chief Justice and the Lord Chancellor⁴. In appointing the members of the Committee, the Lord Chief Justice must consult the Lord Chancellor⁵ and the Lord Chancellor must consult the Lord Chief Justice and, in certain cases, certain bodies⁶.

The Lord Chancellor may reimburse the members of the Civil Procedure Rule Committee their travelling and out-of-pocket expenses⁷.

1 Civil Procedure Act 1997 s 2(1) (substituted by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 261, 263(1), (2)). The Civil Procedure Act 1997 s 10, Sch 2 amends, inter alia, the Supreme Court Act 1981 and the County Courts Act 1984, effectively abolishing the Supreme Court Rule Committee and the County Court Rule Committee, established under those Acts: see the Civil Procedure Act 1997 Sch 2 paras 1, 2 (Sch 2 para 1 amended by the Access to Justice Act 1999 s 106, Sch 15 Pt III). It is not within the power of a judge to vary the Civil Procedure Rules: see *Bovale Ltd v Secretary of State for Communities and Local Government* [2009] EWCA Civ 171, [2009] All ER (D) 115 (Mar). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 Civil Procedure Act 1997 s 1(3). As to the overriding objective of the Civil Procedure Rules see CPR 1.1, 1.2; and PARA 33. As from a day to be appointed, any power to make Civil Procedure Rules is to be exercised with a view to securing that (1) the system of civil justice is accessible, fair and efficient; and (2) the rules are both simple and simply expressed: Civil Procedure Act 1997 s 1(3) (substituted, as from a day to be appointed, by the Courts Act 2003 s 82(1); and amended by the Constitutional Reform Act 2005 ss 15(1), 146, Sch 4 Pt 1 paras 261, 262, Sch 18 Pt 2). At the date at which this title states the law, no day had been appointed for the purposes of the substitution.

3 As to the Head of Civil Justice see PARA 12 note 5.

4 See the Civil Procedure Act 1997 s 2(1) (as substituted: see note 1). The Lord Chief Justice must appoint the persons falling within s 2(2)(a)-(d) (heads (1)-(4)), and the Lord Chancellor must appoint the persons falling within s 2(2)(e)-(g) (heads (5)-(7)): s 2(1A), (1B) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 263(2)). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the Civil Procedure Act 1997 s 2: s 2(9) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 263(6)).

The persons to be appointed in accordance with the Civil Procedure Act 1997 s 2(1A), (1B) are as follows (s 2(2) (amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 263(3)):

- 1 (1) either two or three judges of the Supreme Court (Civil Procedure Act 1997 s 2(2)(a) (substituted by the Courts Act 2003 s 83(2); and amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 2 para 4(1), (3), to substitute a reference to the Senior Courts for the reference to the Supreme Court; at the date at which this title states the law, no such day had been appointed));
- 2 (2) one circuit judge (Civil Procedure Act 1997 s 2(2)(b));
- 3 (3) either one or two district judges (Civil Procedure Act 1997 s 2(2)(c) (amended by SI 2006/1847));
- 4 (4) one person who is a master referred to in the Supreme Court Act 1981 Sch 2 Pt II (Civil Procedure Act 1997 s 2(2)(d) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 Sch 11 Pt 1 para 1(2), to substitute a reference to the Senior Courts Act 1981

for the reference to the Supreme Court Act 1981; at the date at which this title states the law, no such day had been appointed));

- 5 (5) three persons who have a Supreme Court qualification (within the meaning of the Courts and Legal Services Act 1990 s 71: see **LEGAL PROFESSIONS** vol 65 (2008) PARA 742), including at least one with particular experience of practice in county courts (Civil Procedure Act 1997 s 2(2)(e) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 Sch 11 Pt 2 para 43, to substitute a reference to the Senior Courts for the reference to the Supreme Court; at the date at which this title states the law, no such day had been appointed));
- 6 (6) three persons who have been granted by an authorised body, under the Courts and Legal Services Act 1990 Pt II (ss 17-70) (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 329 et seq), the right to conduct litigation in relation to all proceedings in the Supreme Court, including at least one with particular experience of practice in county courts (Civil Procedure Act 1997 s 2(2)(f) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 Sch 11 Pt 2 para 43, to substitute a reference to the Senior Courts for the reference to the Supreme Court; further amended, as from a day to be appointed, by the Legal Services Act 2007 s 208(1), Sch 21 para 122(a), to substitute 'authorised by a relevant approved regulator' for 'granted by an authorised body, under the Courts and Legal Services Act 1990 Pt II (ss 17-70)'; at the date at which this title states the law, no such day had been appointed for either purpose)); and
- 7 (7) two person with experience in and knowledge of the lay advice sector or consumer affairs (Civil Procedure Act 1997 s 2(2)(g) (substituted by the Courts Act 2003 s 83(3)).

In head (6), 'relevant approved regulator' is to be construed in accordance with the Legal Services Act 2007 s 20(3): Civil Procedure Act 1997 s 2(2A) (added, as from a day to be appointed, by the Legal Services Act 2007 Sch 21 para 122(b)). At the date at which this title states the law, no such day had been appointed.

5 Civil Procedure Act 1997 s 2(3) (substituted by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 263(4)).

6 Civil Procedure Act 1997 s 2(4) (amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 263(5)). If the person falls within the Civil Procedure Act 1997 s 2(2)(e) or (f) (head (5) or (6)), the Lord Chancellor must also consult any body which has members who are eligible for appointment under that provision and which is an authorised body for the purposes of the Courts and Legal Services Act 1990 s 27 or s 28: Civil Procedure Act 1997 s 2(4).

The Lord Chancellor may by order amend s 2(2), (3) or (4), and make consequential amendments in any other provision of s 2: s 2A(1) (s 2A added by the Courts Act 2003 s 84; Civil Procedure Act 1997 s 2A(1) amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 264(1), (2)). The Lord Chancellor may make such an order only with the concurrence of the Lord Chief Justice: Civil Procedure Act 1997 s 2A(2) (as so added; substituted by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 264(3)). The power to make an order under these provisions is exercisable by statutory instrument, which is subject to annulment in pursuance of a resolution of either House of Parliament: Civil Procedure Act 1997 s 2A(3), (4) (as so added). Before making an order the Lord Chancellor must consult the Head of Civil Justice and the Deputy Head of Civil Justice (if there is one): Civil Procedure Act 1997 s 2A(2A) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 264(3)). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the Civil Procedure Act 1997 s 2A: s 2A(2B) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 264(3)).

7 Civil Procedure Act 1997 s 2(5).

UPDATE

25 The Civil Procedure Rule Committee

NOTE 4--Day appointed in relation to Constitutional Reform Act 2005 Sch 11 is 1 October 2009: SI 2009/1604. Day appointed in relation to Legal Services Act 2007 Sch 21 para 122 is 1 January 2010: SI 2009/3250.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(1) THE CIVIL PROCEDURE ACT 1997/26. Making Civil Procedure Rules.

26. Making Civil Procedure Rules.

Before making or amending Civil Procedure Rules the Civil Procedure Rule Committee must consult such persons as the committee considers appropriate and must meet, unless it is inexpedient to do so¹. The Committee must try to make rules which are both simple and simply expressed². The rules must be signed by at least eight members of the Committee and be submitted to the Lord Chancellor, who may allow or disallow them³. The rules must be contained in a statutory instrument⁴ and are subject to annulment by resolution of either House of Parliament⁵.

If the Lord Chancellor gives the Civil Procedure Rules Committee written notice that he thinks it is expedient for Civil Procedure Rules to include provision that would achieve a purpose specified in the notice, the Committee must make such rules as it considers necessary to achieve the specified purpose⁶. Those rules must be made within a reasonable period after the Lord Chancellor gives notice to the Committee and made in accordance with the above provisions⁷.

1 Civil Procedure Act 1997 s 2(6) (s 2(6)-(8) repealed, as from a day to be appointed, by the Courts Act 2003 ss 85(1), 109(3), Sch 10). As to the Civil Procedure Rule Committee see PARA 25. It is not within the power of a judge to vary the Civil Procedure Rules: see *Bovale Ltd v Secretary of State for Communities and Local Government* [2009] EWCA Civ 171, [2009] All ER (D) 115 (Mar).

2 Civil Procedure Act 1997 s 2(7) (prospectively repealed: see note 1).

3 Civil Procedure Act 1997 s 2(8) (prospectively repealed: see note 1). If the Lord Chancellor disallows rules, he must give the Civil Procedure Rule Committee written reasons for doing so: s 2(9) (sic) (added by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 2 para 385(1), (2)). Rules so made and allowed come into force on such day as the Lord Chancellor may direct: Civil Procedure Act 1997 s 3(1)(a). See also the Constitutional Reform Act 2005 s 19, Sch 7 para 4 (protected functions of the Lord Chancellor); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

4 The Statutory Instruments Act 1946 applies to such a statutory instrument as if it contained rules made by a Minister of the Crown: Civil Procedure Act 1997 s 3(1)(b). As to statutory instruments see further **STATUTES** vol 44(1) (Reissue) PARA 1501 et seq.

5 Civil Procedure Act 1997 s 3(1)(b), (2).

As from a day to be appointed, s 3 is substituted by the Courts Act 2003 s 85(2), as follows. The Civil Procedure Rule Committee must, before making Civil Procedure Rules (1) consult such persons as they consider appropriate; and (2) meet (unless it is inexpedient to do so): Civil Procedure Act 1997 s 3(1) (as so substituted). Rules made by the Civil Procedure Rule Committee must be signed by a majority of the members of the Committee and submitted to the Lord Chancellor: s 3(2) (as so substituted). The Lord Chancellor may allow or disallow rules so made: s 3(3) (as so substituted; further substituted by the Constitutional Reform Act 2005 Sch 4 Pt 1 paras 261, 265(1), (2)). If the Lord Chancellor disallows rules, he must give the Committee written reasons for doing so: Civil Procedure Act 1997 s 3(4) (as so substituted and further substituted). Rules so made and allowed by the Lord Chancellor (a) come into force on such day as the Lord Chancellor directs; and (b) are to be contained in a statutory instrument to which the Statutory Instruments Act 1946 applies (see **STATUTES** vol 44(1) (Reissue) PARA 1501 et seq) as if the instrument contained rules made by a Minister of the Crown: s 3(5) (as so substituted; amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 265(3)). A statutory instrument containing Civil Procedure Rules is subject to annulment in pursuance of a resolution of either House of Parliament: Civil Procedure Act 1997 s 3(6) (as so substituted; amended by the Constitutional Reform Act 2005 ss 15(1), 146, Sch 4 Pt 1 para 265(3), Sch 18 Pt 2).

6 Civil Procedure Act 1997 s 3A(1), (2) (s 3A added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 266).

- 7 Civil Procedure Act 1997 s 3A(3) (as added: see note 6).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(1) THE CIVIL PROCEDURE ACT 1997/27. Practice directions.

27. Practice directions.

Instead of providing for any matter of practice and procedure, Civil Procedure Rules may refer to provision about that matter made or to be made by practice directions¹, which are defined as directions as to the practice and procedure of any court within the scope of the rules². Practice directions applicable to the Supreme Court have been made, in the exercise of their inherent jurisdiction, in respect of the practice and procedure in their respective divisions by the Lord Chief Justice as President of the Queen's Bench Division, by the Master of the Rolls as President of the Civil Division of the Court of Appeal and by the Vice-Chancellor as vice-president of the Chancery Division³. Practice directions for the civil courts must now be made by the Lord Chief Justice with the approval of the Lord Chancellor or, if not made by the Lord Chief Justice, must be approved by him⁴. Practice directions may also provide for the removal or transfer of proceedings within the High Court between divisions or district registries or between county courts⁵.

1 Civil Procedure Act 1997 s 1, Sch 1 para 6.

2 See the Civil Procedure Act 1997 s 9(2). As to the meaning of 'within the scope of the rules' see PARA 24 note 2.

3 See *Practice Direction* [1999] 3 All ER 380, sub nom *Practice Direction (Civil Litigation: Procedure)* [1999] 1 WLR 1124, signed on 23 April 1999 by the Heads of Division and published in *Civil Procedure Rules, Practice Directions, Pre-action Protocols and Forms* vol 1 (HMSO, May 2001). Note that the Vice-Chancellor is now the Chancellor of the High Court: see PARA 43 note 1. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

4 See the Civil Procedure Act 1997 s 5(1), (2) (s 5 substituted by the Constitutional Reform Act 2005 s 13(2), Sch 2 Pt 2 para 6); the Constitutional Reform Act 2005 Sch 2 Pt 1; and PARA 12 note 10. Such practice directions may be given in accordance with the Constitutional Reform Act 2005 Sch 2 Pt 1 or otherwise: Civil Procedure Act 1997 s 5(1) (as so substituted); see PARA 12 note 10. Practice directions given otherwise than under that process may not be given without the approval of the Lord Chancellor and the Lord Chief Justice: Civil Procedure Act 1997 s 5(2) (as so substituted). The power to give practice directions under s 5(1) includes power (1) to vary or revoke directions given by any person; (2) to give directions containing different provision for different cases (including different areas); (3) to give directions containing provision for a specific court, for specific proceedings or for a specific jurisdiction: s 5(4) (as so substituted). The requirement for the approval of the Lord Chancellor does not apply to directions to the extent that they consist of guidance about any of (a) the application or interpretation of the law; (b) the making of judicial decisions: s 5(5) (as so substituted). Nor does it apply to directions to the extent that they consist of criteria for determining which judges may be allocated to hear particular categories of case; but the directions may, to that extent, be given only after consulting the Lord Chancellor, and with the approval of the Lord Chief Justice: s 5(6) (as so substituted). It is not within the power of a judge to vary practice directions: see *Bovale Ltd v Secretary of State for Communities and Local Government* [2009] EWCA Civ 171, [2009] All ER (D) 115 (Mar).

5 See the Civil Procedure Act 1997 s 5(1), (3), Sch 1 para 3(1) (s 5 as substituted: see note 4). As to the meaning of 'provide for the removal of proceedings' and 'proceedings' see PARA 24 note 6. As to the transfer of proceedings see PARA 66 et seq.

UPDATE

27 Practice directions

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(1) THE CIVIL PROCEDURE ACT 1997/28. The Civil Justice Council.

28. The Civil Justice Council.

The Lord Chancellor must establish and maintain an advisory body, to be known as the Civil Justice Council¹. The council must include:

- 16 (1) members of the judiciary²;
- 17 (2) members of the legal professions³;
- 18 (3) civil servants concerned with the administration of the courts⁴;
- 19 (4) persons with experience in and knowledge of consumer affairs⁵;
- 20 (5) persons with experience in and knowledge of the lay advice sector⁶; and
- 21 (6) persons able to represent the interests of particular kinds of litigants (for example, businesses or employees)⁷.

The functions of the council include:

- 22 (a) keeping the civil justice system under review⁸;
- 23 (b) considering how to make the civil justice system more accessible, fair and efficient⁹;
- 24 (c) advising the Lord Chancellor and the judiciary on the development of the civil justice system¹⁰;
- 25 (d) referring proposals for changes in the civil justice system to the Lord Chancellor and the Civil Procedure Rule Committee¹¹; and
- 26 (e) making proposals for research¹².

The Lord Chancellor may reimburse the members of the council their travelling and out-of-pocket expenses¹³.

1 Civil Procedure Act 1997 s 6(1). See also the Constitutional Reform Act 2005 s 19, Sch 7 para 4 (protected functions of the Lord Chancellor); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

2 Civil Procedure Act 1997 s 6(2)(a).

3 Civil Procedure Act 1997 s 6(2)(b).

4 Civil Procedure Act 1997 s 6(2)(c).

5 Civil Procedure Act 1997 s 6(2)(d).

6 Civil Procedure Act 1997 s 6(2)(e).

7 Civil Procedure Act 1997 s 6(2)(f). The Lord Chancellor must decide the following questions, after consulting the Lord Chief Justice: (1) how many members of the Council are to be drawn from each of the groups mentioned in the text; (2) how many other members the Council is to have: s 6(2A) (s 6(2A), (2B) added by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 261, 268(1), (2)). It is for the Lord Chief Justice to appoint members of the judiciary to the Council, after consulting the Lord Chancellor; and for the Lord Chancellor to appoint other persons to the Council: Civil Procedure Act 1997 s 6(2B) (as so added). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under s 6: s 6(5) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 268(3)).

8 Civil Procedure Act 1997 s 6(3)(a).

- 9 Civil Procedure Act 1997 s 6(3)(b). As to the overriding objective of the Civil Procedure Rules see CPR 1.1, 1.2; and PARA 33.
- 10 Civil Procedure Act 1997 s 6(3)(c).
- 11 Civil Procedure Act 1997 s 6(3)(d). As to the Civil Procedure Rule Committee see PARA 25.
- 12 Civil Procedure Act 1997 s 6(3)(e).
- 13 Civil Procedure Act 1997 s 6(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(1) THE CIVIL PROCEDURE ACT 1997/29. Changes to enactments.

29. Changes to enactments.

The Lord Chancellor may, after consulting the Lord Chief Justice, by order¹ amend, repeal or revoke any enactment² to the extent he considers necessary or desirable in consequence of the establishment of the Civil Procedure Rule Committee³ or of the making of the Civil Procedure Rules⁴ or of the rules themselves⁵. The Lord Chancellor may also, after consulting the Lord Chief Justice, by order⁶ amend, repeal or revoke any enactment passed or made before 27 April 1997⁷ to the extent he considers necessary or desirable in order to facilitate the making of Civil Procedure Rules⁸. Further, the Lord Chancellor may by order⁹ amend certain specified provisions of the Supreme Court Act 1981¹⁰ or of the County Courts Act 1984¹¹ which give the court power to order disclosure of documents where a claim may be made in respect of personal injury or death, so as to extend those provisions to circumstances where other claims may be made, or generally¹².

1 Any power to make an order under the Civil Procedure Act 1997 s 4 (see the text and notes 2-8) is exercisable by statutory instrument: s 4(3).

2 As to the meaning of 'enactment' see PARA 24 note 10.

3 Ie in consequence of the Civil Procedure Act 1997 s 2: see PARA 25.

4 Ie in consequence of the Civil Procedure Act 1997 s 1: see PARA 24.

5 Civil Procedure Act 1997 s 4(1) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 261, 267(1), (2)). A statutory instrument containing an order under the Civil Procedure Act 1997 s 4(1) is subject to annulment in pursuance of a resolution of either House of Parliament: s 4(4). In the exercise of this power the Lord Chancellor has made the following Orders.

8 (1) The Civil Procedure (Modification of Enactments) Order 2000, SI 2000/941, which came into force on 2 May 2000 (see art 1) and which amends the Lands Tribunal Act 1949 s 3(4) proviso, to provide that appeals from the Lands Tribunal in England and Wales to the Court of Appeal are no longer by way of case stated, following the making of a new rule for appeals in the Civil Procedure (Amendment) Rules 2000, SI 2000/221, r 19, Sch 5 (see the Civil Procedure (Modification of Enactments) Order 2000, SI 2000/941, art 2).

9 (2) The Civil Procedure (Modification of Enactments) Order 2001, SI 2001/2717, which came into force on 15 October 2001 (see art 1) and which amends the interpretation of 'prescribed' in the Landlord and Tenant Act 1927 s 25(1) so as to permit rules of court or a practice direction to prescribe the manner in which a claim is made under s 1(1) or 8(1) and an application is made or a certification given under s 3(1) (see the Civil Procedure (Modification of Enactments) Order 2001, SI 2001/2717, arts 2, 3).

10 (3) The Civil Procedure (Modification of Enactments) Order 2002, SI 2002/439, which came into force on 25 March 2002 (see art 1) and which makes a number of amendments: (a) consequential on the Civil Procedure (Amendment No 5) Rules 2001, SI 2001/4015, r 39, which made amendments to CCR Order 38 (judgment summonses), it amends the Debtors Act 1869 s 5 to remove the provision enabling a debtor to be cross-examined on oath as to his means following the issue of a judgment summons, makes consequential amendments to the County Courts Act 1984 s 110 removing the power of the court to commit a judgment debtor for refusing to be sworn or give evidence, and amends the definition of 'judgment summons' in the County Courts Act 1984 s 147; (b) it amends the definition of 'prescribed' in the Debtors Act 1869 s 10 to revoke obsolete references to rules under the Common Law Procedure Act 1852, the Court of Chancery Act 1852 and the County Courts Act 1856, and to substitute a reference to rules of court; (c) it amends the Charging Orders Act 1979 s 5 to set out the extent to which rules of court made under the Civil Procedure Act 1997 s 1 and Sch 1 may make provision for the making of stop orders and the service of stop notices and to revoke obsolete references to powers to

make rules of court under the Supreme Court Act 1981 s 84 and the County Courts Act 1984 s 75, which had been superseded by the power to make rules of court under the Civil Procedure Act 1997; (d) it amends the Supreme Court Act 1981 s 40A and the County Courts Act 1984 s 109 in consequence of changes to terminology made by new rules of court contained in the Civil Procedure (Amendment No 4) Rules 2001, SI 2001/2792, relating to attachment of debts; (e) it amends the County Court Remedies Regulations 1991, SI 1991/1222, and the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, in consequence of new rules of court enacted by the Civil Procedure (Amendment No 5) Rules 2001, SI 2001/4015, relating to mercantile courts, which, among other things, designated the Central London County Court Business List as a mercantile court and renamed it the Central London County Court Mercantile List; and (f) it amends the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, in consequence of amendments enacted by the Civil Procedure (Amendment No 2) Rules 2001, SI 2001/1388, and the Civil Procedure (Amendment No 5) Rules 2001, SI 2001/4015, to the rules of court relating to certain types of specialist proceedings (see the Civil Procedure (Modification of Enactments) Order 2002, SI 2002/439, arts 2-12).

- 11 (4) The Civil Procedure (Modification of Enactments) Order 2003, SI 2003/490, which came into force on 1 April 2003 (see art 1) and which amends the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 4 to provide that an appeal will lie to the Court of Appeal where a claim is allocated to the multi-track under any provision of the CPR or is made in proceedings under the Companies Act 1985 or the Companies Act 1989 or to which CPR Part 57 Section I, II or III or any of CPR Parts 58-63 apply (see the Civil Procedure (Modification of Enactments) Order 2003, SI 2003/490, art 2).
- 12 (5) The Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, which came into force on 1 May 2004 (see art 1) and which amends the Supreme Court Act 1981, in particular ss 29, 31, to provide that the orders of mandamus, prohibition and certiorari are to be known instead as mandatory, prohibiting and quashing orders, not just in that Act but in any primary or secondary legislation extending to England and Wales (see the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, arts 2-5), and amends the Supreme Court Act 1981 s 31(4) to give the High Court, on an application for judicial review, the power to award restitution or the recovery of a sum due, in addition to the existing power to award damages (see the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, art 4).

6 No such order may be made unless a draft of it has been laid before and approved by resolution of each House of Parliament: Civil Procedure Act 1997 s 4(5).

7 The day on which the Civil Procedure Act 1997 s 4 came into force by virtue of the Civil Procedure Act 1997 (Commencement No 1) Order 1997, SI 1997/841, arts 1, 3: see the Civil Procedure Act 1997 s 4(2).

8 Civil Procedure Act 1997 s 4(2) (amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 267(2)). In the exercise of this power the Lord Chancellor has made the following orders which modify certain enactments in order to facilitate the making of Civil Procedure Rules:

- 13 (1) The Civil Procedure (Modification of Enactments) Order 1998, SI 1998/2940, which came into force on 26 April 1999: see art 1. The changes made by the 1998 Order are: (a) to amend the Judgments Act 1838 s 17 (judgment debts to carry interest: see PARA 1149) to allow rules of court to prescribe the date from which interest on judgment debts should start to run and to allow the court, in accordance with rules of court, to disallow interest that would otherwise be payable on a judgment debt; (b) to amend the Law Reform (Husband and Wife) Act 1962 s 1 (actions in tort between husband and wife: see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 211) to remove the requirement for rules of court to oblige the court to consider the stay of proceedings between husband and wife in an action in tort; (c) to amend the Supreme Court Act 1981 s 34 and the County Courts Act 1984 s 53 to extend to all proceedings the power of the court to order disclosure of documents against a non-party (see PARA 550); (d) to repeal the County Courts Act 1984 s 47 (specific right of a child to bring proceedings in the county court without a next friend in an action for wages due to him); (e) to amend s 63 (assessors) to bring the county court power to appoint assessors in line with that in the High Court (see PARAS 863, 1133); (f) to amend s 133 to remove the requirement that a certificate of service in the county court was to be signed by the individual officer responsible for service; and (g) to repeal s 134 (requirement to seal documents issuing out of the county court and provisions relating to the evidential status of such documents): see the Civil Procedure (Modification of Enactments) Order 1998, SI 1998/2940, arts 2-4, 5(b), 6(a), (c)-(f); and see further note 12.
- 14 (2) The Civil Procedure (Modification of Enactments) Order 1999, SI 1999/1217, which came into force on 26 April 1999: see art 1. The changes made by the 1999 Order are: (a) to change

the reference to county court arbitration in the Courts and Legal Services Act 1990 s 11 (lay representation) to a reference to the small claims procedure; and (b) to modify the Civil Evidence Act 1995 s 16 (commencement provisions) so as to enable that Act (which made new provision for the admissibility of hearsay evidence and the proof of documentary evidence) and the provisions of the Civil Procedure Rules to apply to cases begun before 31 January 1997 (the original commencement date of the 1995 Act): see the Civil Procedure (Modification of Enactments) Order 1999, SI 1999/1217, arts 2-4.

- 15 (3) The Civil Procedure (Modification of Crown Proceedings Act 1947) Order 2005, SI 2005/2712, which came into force on 1 October 2005: see art 1(1). The Order (a) amends the Crown Proceedings Act 1947 to enable the special procedural privileges of the Crown as to the venue of civil proceedings (s 19), as to the transfer of civil proceedings from the county courts to the High Court (s 20) and as to rules of court to be made about the content of claim forms in civil proceedings against the Crown, and about default judgments, summary judgments and interrogatories (s 35) to be revoked on the addition of Part 66 to the CPR replacing CPR Sch 1 RSC Ord 77 and CPR Sch 2 CCR Ord 42 (see the Civil Procedure (Modification of Crown Proceedings Act 1947) Order 2005, SI 2005/2712, art 2, Sch 1); and (b) makes consequential amendments to the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995 (see the Civil Procedure (Modification of Crown Proceedings Act 1947) Order 2005, SI 2005/2712, art 3, Sch 2).

9 The power to make such an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Civil Procedure Act 1997 s 8(2).

10 Ie the Supreme Court Act 1981 s 33(2): see PARA 111. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

11 Ie the County Courts Act 1984 s 52(2): see PARA 111.

12 Civil Procedure Act 1997 s 8(1) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2) to refer to the Senior Courts Act 1981 instead of the Supreme Court Act 1981; at the date at which this title states the law, no such day had been appointed). The Civil Procedure (Modification of Enactments) Order 1998, SI 1998/2940, which came into force on 26 April 1999 (see note 8 head (1)) is expressed to be made by the Lord Chancellor in exercise of his powers under the Civil Procedure Act 1997 s 4(2), but modifies the Supreme Court Act 1981 s 33(2) and the County Courts Act 1984 s 52(2) so as to extend to all proceedings the power of the court to order disclosure of documents against a potential party before proceedings have started (see PARA 111): see the Civil Procedure (Modification of Enactments) Order 1998, SI 1998/2940, arts 5(a), 6(b). It is apprehended that the 1998 Order was partly made in exercise of the power under the Civil Procedure Act 1997 s 8(1).

UPDATE

29 Changes to enactments

NOTE 5--Head (1) Lands Tribunal Act 1949 s 3(4) repealed; SI 2000/941 revoked: SI 2009/1307.

NOTE 12--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(2) THE CIVIL PROCEDURE RULES; GENERAL INTRODUCTION/30. General scheme and structure of the Civil Procedure Rules.

(2) THE CIVIL PROCEDURE RULES; GENERAL INTRODUCTION

30. General scheme and structure of the Civil Procedure Rules.

The Civil Procedure Rules 1998 came into force on 26 April 1999¹, replacing the Rules of the Supreme Court 1965 and the County Court Rules 1981². The rules are divided into Parts, each dealing with particular matters of practice and procedure and containing the individual rules. Most Parts are supplemented by practice directions, issued in the exercise of inherent powers and of powers under the Civil Procedure Act 1997³. The core practice and procedure for the majority of civil proceedings is governed by Parts 1 to 42 of the Civil Procedure Rules⁴. Parts 43 to 48 provide for costs⁵, Part 49 governs specialist proceedings⁶ and Part 51 makes transitional provisions⁷ and, with effect from 15 October 2001, provision that practice directions may modify or disapply any provision of the rules for specified periods, and in relation to proceedings in specified courts, during the operation of pilot schemes for assessing the use of new practices and procedures in connection with proceedings⁸. Part 52 governing appeals⁹ and Part 53 governing defamation claims¹⁰ came into force on 2 May 2000¹¹. Part 54 governing judicial review¹² came into force on 2 October 2000¹³. Part 55 governing possession proceedings¹⁴ and Part 56 governing landlord and tenant proceedings¹⁵ came into force on 15 October 2001¹⁶, as did Part 57 governing probate claims (other than non-contentious probate claims)¹⁷ and related matters¹⁸. For a time Part numbers 58 to 69 were left unused, but these Part numbers have now been allocated to other new rules governing specific types of procedure¹⁹.

Part 50 applies the Schedules to the rules, which reproduce and re-enact, in modified form, some of the Rules of the Supreme Court and the County Court Rules governing certain peripheral matters of practice and procedure which were not included in the original Civil Procedure Rules and subsequent amendments²⁰. Many of these matters are now governed by Civil Procedure Rules and the Scheduled rules have largely been superseded. Parts 70 to 73 of the rules, which came into force on 25 March 2002²¹, began this process by replacing some of the provisions of the Scheduled rules relating to the enforcement of judgments and orders. Part 70 contains general rules about enforcement. Parts 71 to 73 provide new procedures governing, respectively, orders to obtain information from judgment debtors (known as oral examinations under the earlier rules), third party debt orders (known as garnishee orders under the earlier rules), and charging orders, stop orders and stop notices. The previous rules are revoked and there are many consequential amendments²². A new Part 74, on the enforcement of judgments in different jurisdictions, was added as from 2 December 2002, and Part 75 on Traffic Enforcement as from 1 October 2002²³. Part 76, dealing with proceedings under the Prevention of Terrorism Act 2005, was introduced as from 11 March 2005²⁴; Part 77 making provision in support of criminal justice, came into force on 6 April 2008²⁵. The latest addition is Part 78, giving effect to the European order for payment and European small claims procedures with effect from 1 October 2008²⁶.

1 See the Civil Procedure Rules 1998, SI 1998/3132. The rules have been amended by the following statutory instruments: the Civil Procedure (Amendment) Rules 1999, SI 1999/1008; the Civil Procedure (Amendment) Rules 2000, SI 2000/221; the Civil Procedure (Amendment No 2) Rules 2000, SI 2000/940; the Civil Procedure (Amendment No 3) Rules 2000, SI 2000/1317; the Civil Procedure (Amendment No 4) Rules, SI 2000/2092; the Civil Procedure (Amendment) Rules 2001, SI 2001/256; the Civil Procedure (Amendment No 2) Rules 2001, SI 2001/1388; the Civil Procedure (Amendment No 3) Rules 2001, SI 2001/1769; the Civil Procedure (Amendment

No 4) Rules 2001, SI 2001/2792; the Civil Procedure (Amendment No 5) Rules 2001, SI 2001/4015; the Civil Procedure (Amendment No 6) Rules 2001, SI 2001/4016; the Civil Procedure (Amendment) Rules 2002, SI 2002/2058; the Civil Procedure (Amendment No 2) Rules 2002, SI 2002/3219; the Civil Procedure (Amendment) Rules 2003, SI 2003/364; the Civil Procedure (Amendment No 2) Rules 2003, SI 2003/1242; the Civil Procedure (Amendment No 4) Rules 2003, SI 2003/2113; the Civil Procedure (Amendment No 5) Rules 2003, SI 2003/3361; the Civil Procedure (Amendment) Rules 2004, SI 2004/1306; the Civil Procedure (Amendment No 2) Rules 2004, SI 2004/2072; the Civil Procedure (Amendment No 3) Rules 2004, SI 2004/3129; the Civil Procedure (Amendment No 4) Rules 2004, SI 2004/3419; the Civil Procedure (Amendment) Rules 2005, SI 2005/352; the Civil Procedure (Amendment No 2) Rules 2005, SI 2005/656; the Civil Procedure (Amendment No 3) Rules 2005, SI 2005/2292; the Civil Procedure (Amendment No 4) Rules 2005, SI 2005/3515; the Civil Procedure (Amendment) Rules 2006, SI 2006/1689; the Civil Procedure (Amendment No 2) Rules 2006, SI 2006/3132; the Civil Procedure (Amendment No 3) Rules 2006, SI 2006/3435; the Civil Procedure (Amendment) Rules 2007, SI 2007/2204; the Civil Procedure (Amendment No 2) Rules 2007, SI 2007/3543; and the Civil Procedure (Amendment) Rules 2008, SI 2008/2178.

2 The Civil Procedure Rules are a new procedural code: CPR 1.1(1); and see PARA 33. As to the disapplication of the rules to certain types of proceedings see CPR 2.1; and PARA 32. As to the saving, in modified form, of certain provisions of the Rules of the Supreme Court and the County Court Rules see the text and note 20.

3 See PARA 27. See also PARA 12.

4 See PARAS 14, 31 et seq.

5 See *The Civil Court Practice*. As to costs generally see also PARA 1729 et seq.

6 See PARA 1536 et seq.

7 See CPR 51.1; and *Practice Direction--Transitional Arrangements* PD 51. The general scheme of these transitional arrangements, as set out in therein, is to apply the previous rules to undefended cases, allowing them to progress to their disposal, but to apply the new rules to defended cases so far as is practicable: PARA 9.

8 CPR 51.2; and see the Civil Procedure (Amendment No 4) Rules 2001, SI 2001/2792, r 1(a).

9 See PARA 1657 et seq.

10 See **LIBEL AND SLANDER**.

11 See the Civil Procedure (Amendment) Rules 2000, SI 2000/221, rr 19, 20.

12 See PARA 1530.

13 See the Civil Procedure (Amendment No 4) Rules, SI 2000/2092, rr 1, 22.

14 See **LANDLORD AND TENANT**.

15 See note 14.

16 See the Civil Procedure (Amendment) Rules 2001, SI 2001/256, rr 1(d), 17, 18.

17 As to the rules governing non-contentious probate claims see PARA 32 head (2) in the text.

18 See the Civil Procedure (Amendment No 2) Rules 2001, SI 2001/1388, rr 1(b), 14.

19 Ie Part 58 on the Commercial Court; Part 59 on mercantile courts; Part 60 on Technology and Construction Court claims; Part 61 on Admiralty claims; Part 62 on arbitration claims; Part 63 on patents and other intellectual property claims; Part 64 on estates, trusts and charities; Part 65 on proceedings relating to anti-social behaviour and harassment; Part 66 on Crown proceedings; Part 67 on proceedings relating to solicitors; Part 68 on references to the European Court; and Part 69 on the court's power to appoint a receiver.

20 CPR Schs 1, 2 set out, with modifications, certain provisions previously contained in the Rules of the Supreme Court 1965 and the County Court Rules 1981 (both revoked subject to transitional provisions): CPR 50(1). The Civil Procedure Rules apply in relation to the proceedings to which the Schedules apply subject to the provisions in the Schedules and the relevant practice directions: CPR 50(2). A provision previously contained in the Rules of the Supreme Court 1965 is headed 'RSC'; is numbered with the Order and rule numbers it bore as part of the RSC; and unless otherwise stated in the Schedules or the relevant practice direction, applies only to proceedings in the High Court: CPR 50(3). A provision previously contained in the County Court Rules 1981 is headed 'CCR'; is numbered with the Order and rule numbers it bore as part of the CCR; and unless otherwise stated in the Schedules or the relevant practice direction, applies only to proceedings in the county court: CPR

50(4). A reference in a Schedule to a rule by number alone is a reference to the rule so numbered in the Order in which the reference occurs: CPR 50(5). A reference in a Schedule to a rule by number prefixed by 'CPR' is a reference to the rule with that number in the Civil Procedure Rules: CPR 50(6). In the Schedules, unless otherwise stated, the 'Act' means (1) in a provision headed 'RSC', the Supreme Court Act 1981; and (2) in a provision headed 'CCR', the County Courts Act 1984: CPR 50(7). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

- 21 See the Civil Procedure (Amendment No 4) Rules 2001, SI 2001/2792, r 1(c).
- 22 See the Civil Procedure (Amendment No 4) Rules 2001, SI 2001/2792, rr 6, 9-12, 16-22, 24-25, Schs 1-5. See further PARA 1224.
- 23 See the Civil Procedure (Amendment) Rules 2002, SI 2002/2058, rr 1, 29, Schs 8, 9.
- 24 See the Civil Procedure (Amendment No 2) Rules 2005, SI 2005/656, rr 1, 4, Schedule.
- 25 See the Civil Procedure (Amendment No 2) Rules 2007, SI 2007/3543, rr 1(b), 11, Schedule.
- 26 See the Civil Procedure (Amendment) Rules 2008, SI 2008/2178, rr 1(2), 38, Sch 2 and PARAS 1647-1656.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(2) THE CIVIL PROCEDURE RULES; GENERAL INTRODUCTION/31. Interpretation and Glossary.

31. Interpretation and Glossary.

Provision is made for the interpretation of certain terms in the Civil Procedure Rules¹. In addition, the Glossary at the end of the rules is a guide to the meaning of certain legal expressions used in the rules, but is not to be taken as giving those expressions any meaning in the rules which they do not have in the law generally².

Although the rules do not expressly so provide, the Interpretation Act 1978 applies for their interpretation³.

1 See CPR 2.3.

2 CPR 2.2(1). Words in the rules which are included in the Glossary are followed by '(GL)', with the exception of the words 'counterclaim', 'damages', 'practice form' and 'service', which appear frequently in the rules and are included in the Glossary but are not followed by '(GL)': see CPR 2.2(2), (3).

3 See the Interpretation Act 1978 s 23; and **STATUTES** vol 44(1) (Reissue) PARA 1522.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(2) THE CIVIL PROCEDURE RULES; GENERAL INTRODUCTION/32. Application of the Civil Procedure Rules.

32. Application of the Civil Procedure Rules.

Subject to the exceptions set out below¹, the Civil Procedure Rules apply to all proceedings in county courts², the High Court³ and the Civil Division of the Court of Appeal⁴. They do not, however, apply to proceedings of the following kinds⁵, for which rules may be made under the specified enactments⁶, except to the extent that they are applied to those proceedings by another enactment⁷:

- 27 (1) insolvency proceedings, for which rules may be made under certain provisions of the Insolvency Act 1986⁸;
- 28 (2) non-contentious or common form probate proceedings, for which rules may be made under the Supreme Court Act 1981⁹;
- 29 (3) proceedings in the High Court when acting as a prize court, for which rules may be made under the Prize Courts Act 1894¹⁰;
- 30 (4) proceedings before the Court of Protection¹¹, for which rules may be made under the Mental Capacity Act 2005¹²;
- 31 (5) family proceedings, for which rules may be made under the Matrimonial and Family Proceedings Act 1984¹³;
- 32 (6) adoption proceedings, for which rules may be made under the Adoption Act 1976 or the Adoption and Children Act 2002¹⁴;
- 33 (7) election petitions in the High Court, for which rules may be made under the Representation of the People Act 1983¹⁵.

1 See heads (1)-(6) in the text.

2 CPR 2.1(1)(a).

3 CPR 2.1(1)(b).

4 CPR 2.1(1)(c).

5 I.e. proceedings of the kinds specified in CPR 2.1(2), Table, col 1: see the text and notes 8-14.

6 I.e. the enactments specified in CPR 2.1(2), Table col 2: see the text and notes 8-14.

7 CPR 2.1(2).

8 I.e. under the Insolvency Act 1986 s 411 (company insolvency rules: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1041) or s 412 (individual insolvency rules: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 753): CPR 2.1(2), Table item 1.

9 I.e. under the Supreme Court Act 1981 s 127 (probate rules: see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 81): CPR 2.1(2), Table item 2. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

10 I.e. under the Prize Courts Act 1894 s 3 (rules of court for and fees in prize courts: see **PRIZE** vol 36(2) (Reissue) PARA 852): CPR 2.1(2), Table item 3.

11 As to the Court of Protection see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 750 et seq.

12 I.e. under the Mental Capacity Act 2005 s 51 (rules of procedure: see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 752): CPR 2.1(2), Table item 4.

13 le under the Matrimonial and Family Proceedings Act 1984 s 40 (repealed by the Courts Act 2003 s 109(1), (3), Sch 8 para 278(a), Sch 10, as from a day to be appointed) (family proceedings rules: see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 1005): CPR 2.1(2), Table item 5.

14 le under the Adoption Act 1976 s 66 (repealed) (rules of procedure) or the Adoption and Children Act 2002 s 141 (rules of procedure: see **CHILDREN AND YOUNG PERSONS**): CPR 2.1(2), Table item 6.

15 le under the Representation of the People Act 1983 s 182 (rules of procedure: see **ELECTIONS AND REFERENDUMS** vol 15(4) (2007 Reissue) PARA 765): CPR 2.1(2), Table item 7.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(3) THE OVERRIDING OBJECTIVE/33. The overriding objective.

(3) THE OVERRIDING OBJECTIVE

33. The overriding objective.

The Civil Procedure Rules state that they are a new procedural code¹. The effect of this provision is that previous case law, authorities and other legal material will not usually be applied but are, at most, only persuasive in interpreting and giving effect to the new provisions². This new code has the overriding objective of enabling the court³ to deal with cases justly⁴. Dealing with a case justly includes, so far as is practicable:

- 34 (1) ensuring that the parties are on an equal footing⁵;
- 35 (2) saving expense⁶;
- 36 (3) dealing with the case in ways which are proportionate:¹
 - 1. (a) to the amount of money involved⁷;
 - 2. (b) to the importance of the case⁸;
 - 3. (c) to the complexity of the issues⁹; and
 - 4. (d) to the financial position of each party¹⁰;
- 37 (4) ensuring that it is dealt with expeditiously and fairly¹¹; and
- 38 (5) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases¹².

As the terminology implies, the overriding objective governs every application of the rules¹³. It is, in part, in accordance with the requirement that the rules secure that the civil justice system is accessible, fair and efficient¹⁴. The parties are required to help the court to further the overriding objective¹⁵.

1 CPR 1.1(1).

2 *Bank of England v Vagliano Bros* [1891] AC 107, HL; *Biguzzi v Rank Leisure plc* [1999] 4 All ER 934, [1999] 1 WLR 1926, CA. The underlying thought processes of previous decisions should not be completely thrown overboard; rather it is necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective of the rules: *Purdy v Cambran* [1999] All ER (D) 1518, [1999] CPLR 843, CA; and see *Amgulf Polymers & Chemicals Ltd v Owners and/or Demise Charterers of MV Athinoula* [2001] 2 All ER (Comm) 821; *Walsh v Misseldine* [2000] All ER (D) 261, [2000] CPLR 201, CA. See also *Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd* [2007] EWHC 2613 (Ch), [2008] 2 All ER (Comm) 280.

3 As to the meaning of 'court' see PARA 22.

4 CPR 1.1(1). See also CPR 1.2; and PARA 34. The overriding objective demands that relatively minor procedural errors should not be regarded as incurable: see *Law v St Margarets Insurances Ltd* [2001] EWCA Civ 30, [2001] All ER (D) 97 (Jan).

5 CPR 1.1(2)(a). Cf the principle of equality of arms between the parties before the court for the purposes of the right to a fair trial under the Human Rights Act 1998 s 1(3), Sch 1 art 6; and see PARA 5 and generally **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 135 et seq. The right of a litigant to be represented by solicitors or advocate of choice is fundamental and well-established; that right is not removed by the 'level playing field' envisaged in CPR 1.1(2)(a) and the concept of proportionality in CPR 1.1(2)(c) (see head (3) in the text): *Maltez v Lewis* [1999] 21 LS Gaz R 39, [1999] All ER (D) 425.

6 CPR 1.1(2)(b).

7 CPR 1.1(2)(c)(i).

8 CPR 1.1(2)(c)(ii).

9 CPR 1.1(2)(c)(iii).

10 CPR 1.1(2)(c)(iv). The need for proportionality, particularly in defamation proceedings, had not gone unnoticed prior to the new rules, but CPR1.1 gives a new emphasis to that need: *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 793, CA, per Lord Woolf MR. On an application for permission to appeal, the disparity between the sum in issue and the costs involved in litigating that issue may be so great as to oblige the court, having regard to the overriding objective, to refuse a party the opportunity to litigate the matter further: see eg *Naish v Bhardwaj* [2001] All ER (D) 421 (Mar). As to appeals see PARA 1657 et seq.

11 CPR 1.1(2)(d). In furtherance of this objective the Court of Appeal may refuse to consider new points on appeal: see *Australia New Zealand Banking Group Ltd v Société Générale* [2000] 1 All ER (Comm) 682, CA; *Yukong Line Ltd (SK Shipping Ltd) v Rendsburg Investments Corp* [2001] 2 Lloyd's Rep 113, [2000] All ER (D) 2437, CA. Cf *Gillingham v Gillingham* [2001] EWCA Civ 906, [2001] 4 CPLR 355, where new evidence was admitted, in the light of the overriding objective, which would probably not have been admitted under the old rules. To allow parties to re-open arguments after draft judgments have been supplied, other than in exceptional circumstances, would be contrary to the overriding objective: *Royal Brompton Hospital National Health Service Trust v Hammond* [2001] EWCA Civ 778, 76 Con LR 62, [2001] All ER (D) 308 (May). See *Bates v Microstar Ltd* [2003] EWHC 661 (Ch), [2003] 22 LS Gaz R 30, [2003] All ER (D) 425 (Mar) (release of applicant from undertaking was appropriate and in furtherance of overriding objective to deal with all cases justly).

12 CPR 1.1(2)(e).

13 See CPR 1.2; and PARA 34.

14 See the Civil Procedure Act 1997 s 1(3); and PARA 25.

15 CPR 1.3. 'If a party, because of his or her circumstances, wishes the court to restrain the activities of another party [in the conduct of its litigation] with the object of achieving greater equality, then that party must behave in a way which makes it clear that he or she is conducting the proceedings in a manner which demonstrates a desire to limit the expense as far as practical': *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 793, CA, per Lord Woolf MR. As to the duty to assist the court see also *Matthews v Tarmac Bricks and Tiles Ltd* (1999) 54 BMLR 139, (1999) Times, 1 July, CA; *Chilton v Surrey County Council and Foakes (t/a RF Mechanical Services)* [1999] CPLR 525, CA (the duty to assist the court includes the parties co-operating with each other in the conduct of proceedings); *HFC Bank plc v HSBC Bank plc* [2000] All ER (D) 159, CA (the duty applies not only in the Court of Appeal, but also at first instance). Disputes over procedural irregularities do not assist the court in furthering the overriding objective: *Hannigan v Hannigan* [2000] 2 FCR 650, CA. The parties' legal representatives have a duty to keep up to date with reported decisions of the Court of Appeal and to bring them to the attention of the court whenever they are in point: *Copeland v Smith* [2000] 1 All ER 457, [2000] 1 WLR 1371, CA. See also *Tasyurdu v Secretary of State for the Home Department* (2003) Times, 16 April, CA (duty to assist court required solicitors and counsel to inform court as soon as it was known that listed matter would not proceed); *Yell Ltd v Garton* [2004] EWCA Civ 87, (2004) Independent, 11 February (counsel and solicitors had duty to notify court if likelihood that judicial time would be wasted in preparing for an appeal which had been settled or was subject to negotiations which might well lead to settlement). The duty under CPR 1.3 does not extend so far as to impose on counsel a duty in conflict with his proper duty to his client: *Khudados v Hayden* [2007] EWCA Civ 1316, [2007] All ER (D) 203 (Dec).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(3) THE OVERRIDING OBJECTIVE/34. Application by the court of the overriding objective.

34. Application by the court of the overriding objective.

The court¹ must seek to give effect to the overriding objective² when it exercises any power given to it by the Civil Procedure Rules³ or interprets any rule⁴.

1 As to the meaning of 'court' see PARA 22.

2 As to the overriding objective see PARA 33.

3 CPR 1.2(a).

4 CPR 1.2(b). This is, however, subject to CPR 76.2 (modification to the overriding objective in proceedings under the Prevention of Terrorism Act 2005: see PARA 1533; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 506 et seq) and CPR 79.2 (modification to the overriding objective in proceedings under the Counter-Terrorism Act 2008: see PARA 1534; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 506 et seq).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(3) THE OVERRIDING OBJECTIVE/35. Active case management.

35. Active case management.

In order to further the overriding objective the court must actively manage cases¹. In exercising its duty to manage cases actively, the most important powers given to the court are those of:

- 39 (1) encouraging the parties to co-operate with each other in the conduct of the proceedings² and, in an appropriate case, to use an alternative dispute resolution procedure³;
- 40 (2) identifying the issues at an early stage⁴;
- 41 (3) deciding promptly which issues need full investigation and trial and which may be disposed of summarily⁵;
- 42 (4) deciding the order in which issues are to be resolved⁶;
- 43 (5) fixing timetables and otherwise controlling the progress of the case⁷.

Furthermore, the court may make orders on its own initiative⁸, as well as on the application of a party⁹.

1 CPR 1.4(1); and see PARA 246. As to the overriding objective see PARA 33; and as to the meaning of 'court' see PARA 22. The overriding objective may be more likely to be furthered by actively managing a case with appropriate directions than by simply striking it out in circumstances where the claimant could then bring fresh proceedings: see *Re Hoicrest Ltd, Keene v Martin* [2000] 1 WLR 414, [2000] 1 BCLC 194, CA.

2 CPR 1.4(2)(a). As to the duty of the parties to help the court in furthering the overriding objective see PARA 33 text and note 15.

3 CPR 1.4(2)(e). 'Alternative dispute resolution' (ADR) is a 'collective description of methods of resolving disputes otherwise than through the normal trial process': CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31. As to alternative dispute resolution generally see **ARBITRATION** vol 2 (2008) PARA 1201 et seq.

4 CPR 1.4(2)(b). In furtherance of this power the Court of Appeal may refuse to consider new points on appeal: see *Australia New Zealand Banking Group Ltd v Société Générale* [2000] 1 All ER (Comm) 682, CA; and PARA 33 note 11. As to appeals see PARA 1657 et seq.

5 CPR 1.4(2)(c).

6 CPR 1.4(2)(d).

7 CPR 1.4(2)(g). As to case management see further PARA 246 et seq.

8 CPR 3.3(1). See further PARA 251.

9 CPR 3.3(1); and see CPR Pt 23; and PARA 303 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(4) CASE MANAGEMENT TRACKS/36. Case management tracks.

(4) CASE MANAGEMENT TRACKS

36. Case management tracks.

For the purposes of management of cases by the court, defended cases will be allocated to management tracks¹. These are:

- 44 (1) the small claims track²;
- 45 (2) the fast track³; and
- 46 (3) the multi-track⁴.

1 See CPR 26.1; CPR 26.5; and PARA 260 et seq.

2 See PARAS 37, 267, 274 et seq.

3 See PARAS 38, 268, 286 et seq.

4 See PARAS 39, 269, 293 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(4) CASE MANAGEMENT TRACKS/37. Scope of small claims track.

37. Scope of small claims track.

The small claims track is the normal track for:

- 47 (1) any claim for personal injuries¹ where:
 - 3 5. (a) the value of the claim is not more than £5,000²; and
 6. (b) the value of any claim for damages for personal injuries³ is not more than £1,000⁴;
- 4 48 (2) any claim which includes a claim by a tenant of residential premises against a landlord where:
 - 5 7. (a) the tenant is seeking an order requiring the landlord to carry out repairs or other work to the premises (whether or not the tenant is also seeking some other remedy)⁵;
 8. (b) the cost of the repairs or other work to the premises is estimated to be not more than £1,000⁶; and
 9. (c) the value of any other claim for damages is not more than £1,000⁷.
- 6

Subject to the above provision, the small claims track is the normal track for any claim which has a value of not more than £5,000⁸.

1 As to the meaning of 'claim for personal injuries' see PARA 19. 'Damages' means a sum of money awarded by the court as compensation to the claimant: CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31. As to the meaning of 'court' see PARA 22; and as to the meaning of 'claimant' see PARA 18.

2 CPR 26.6(1)(a)(i).

3 For the purposes of CPR 26.6(1) 'damages for personal injuries' means damages claimed as compensation for pain, suffering and loss of amenity and does not include any other damages which are claimed: CPR 26.6(2).

4 CPR 26.6(1)(a)(ii).

5 CPR 26.6(1)(b)(i).

6 CPR 26.6(1)(b)(ii).

7 CPR 26.6(1)(b)(iii).

8 CPR 26.6(3). However, CPR 26.7(4) (see PARA 270) provides that the court will not allocate to the small claims track certain claims in respect of harassment or unlawful eviction: see CPR 26.3(3). As to the small claims track see further PARAS 267, 274 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(4) CASE MANAGEMENT TRACKS/38. Scope of the fast track.

38. Scope of the fast track.

The fast track is the normal track for any claim for which the small claims track is not the normal track¹ and which has a value for proceedings issued on or after 6 April 2009 of not more than £25,000 and for proceedings issued before 6 April 2009 of not more than £15,000², but only if the court considers that the trial is likely to last for no longer than one day³ and oral expert evidence at trial will be limited to (1) one expert per party in relation to any expert field⁴; and (2) expert evidence in two expert fields⁵.

1 CPR 26.6(4)(a). As to claims for which the small claims track is the normal track see PARA 37.

2 CPR 26.6(4)(b).

3 CPR 26.6(5)(a).

4 CPR 26.6(5)(b)(i). As to expert evidence see PARA 838 et seq.

5 CPR 26.6(5)(b)(ii). As to the fast track see further PARAS 268, 286 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(4) CASE MANAGEMENT TRACKS/39. Scope of the multi-track.

39. Scope of the multi-track.

The multi-track is the normal track for any claim for which the small claims track or the fast track is not the normal track¹.

¹ CPR 26.6(6). As to claims for which the small claims track is the normal track see PARA 37; and as to claims for which the fast track is the normal track see PARA 38. As to the multi-track see further PARAS 269, 293 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(5) CONSEQUENCES OF NON-COMPLIANCE/40. Consequences of non-compliance.

(5) CONSEQUENCES OF NON-COMPLIANCE

40. Consequences of non-compliance.

In order to ensure that parties comply with the Civil Procedure Rules, practice directions and orders of the court, the court has power to specify a number of different consequences¹. The court may:

- 49 (1) stay the whole or part of the proceedings or judgment, either generally or until a specified date²;
- 50 (2) make an order subject to conditions, including a condition to pay a sum of money into court, and specify the consequence of failure to comply with the order or condition³;
- 51 (3) order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, a practice direction or a relevant pre-action protocol⁴;
- 52 (4) order that a party's statement of case be struck out unless that party complies with an order giving directions for the conduct of the case⁵;
- 53 (5) strike out a party's statement of case, where there has been a failure to comply with a rule, practice direction or court order⁶;
- 54 (6) order a party to pay costs⁷.

1 See heads (1)-(7) in the text. As to the meaning of 'court' see PARA 22.

2 See CPR 3.1(2)(f); and PARA 247.

3 See CPR 3.1(3); and PARA 247.

4 See CPR 3.1(5); and PARA 247. In exercising this power, the court must have regard to the amount in dispute and the costs incurred or which may be incurred: CPR 3.1(6). As to pre-action protocols see PARA 107 et seq.

5 See CPR 3.1(3)(b), 3.5(1)(a); and PARA 521. As to statements of case see PARA 584.

6 See CPR 3.4(2)(c); and PARA 520.

7 See CPR 44.3; and *The Civil Court Practice*. As to costs generally see also PARA 1729 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(5) CONSEQUENCES OF NON-COMPLIANCE/41. Peremptory or 'unless' order; order subject to conditions.

41. Peremptory or 'unless' order; order subject to conditions.

The court¹ may make an order (a peremptory or an 'unless' order) that a specified act is required to be done within a specified time, making it a condition of the order that, unless it is complied with within the time specified, a specified consequence will follow², such as that the action will be dismissed or a statement of case will be struck out, following which a judgment may be entered for the other party. Even before the introduction of the Civil Procedure Rules ('CPR'), the court had jurisdiction to make an order by which the court could specify in advance the consequences of non-compliance with procedural requirements³, and this jurisdiction is recognised in the new procedure⁴. The consequences of failure to comply with an 'unless' order take effect automatically⁵.

The court may also make an order subject to conditions, including a condition to pay a sum of money into court⁶.

1 As to the meaning of 'court' see PARA 22.

2 See CPR 3.1(3).

3 See eg *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630, [1992] 1 WLR 1196, CA.

4 See CPR 3.1(3)(b). See PARA 247.

5 This is because CPR 3.8(1) (see PARA 255) provides that where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction: *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463, [2007] 3 All ER 365. As to relief see PARA 42.

6 See CPR 3.1(3)(a).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/2. FRAMEWORK OF CIVIL PROCEDURE/(5) CONSEQUENCES OF NON-COMPLIANCE/42. Relief from consequences of non-compliance.

42. Relief from consequences of non-compliance.

A party may seek relief from any sanction imposed by a rule, practice direction or court order but, once a party has failed to comply with a rule, practice direction or court order, the sanction takes effect and remains in place until relief is obtained¹. A party may obtain relief from an order for costs applied as a sanction only by appealing against the order for costs and not by applying for relief to the court which made the order². In deciding whether to grant relief, the court will consider all the circumstances of the case, including certain specific matters, for example whether the failure to comply was caused by the party or by his legal representative³.

1 See CPR 3.8(1); and PARA 255. See also *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463, [2007] 3 All ER 365.

2 See CPR 3.8(2); and PARA 255.

3 See CPR 3.9; and PARA 256.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(1) JURISDICTION AND ASSIGNMENT OF PROCEEDINGS IN THE HIGH COURT/43. Distribution of business among Divisions of the High Court.

3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS

(1) JURISDICTION AND ASSIGNMENT OF PROCEEDINGS IN THE HIGH COURT

43. Distribution of business among Divisions of the High Court.

The distribution of business in the High Court among the Divisions¹ is designed with a view to promoting the more convenient and speedy dispatch of business, and recognises that certain disputes demand specialist knowledge or experience and should be dealt with by judges who are specialists in the particular field or branch of law². Nevertheless, the unitary character of the High Court is underscored by the provision that without prejudice to the provisions of the Supreme Court Act 1981 relating to the distribution of business in the High Court, all the jurisdiction vested in the High Court under that Act may be exercised by all the Divisions alike³. Moreover, subject to rules of court, the fact that a cause or matter commenced in the High Court falls within a class of business assigned by or under that Act to a particular Division does not make it obligatory for it to be allocated or transferred to that Division⁴.

Subject to the provisions made by or under the 1981 Act or any other Act⁵, the business of the High Court is distributed among the Divisions in accordance with the statutory provisions in force regulating such distribution⁶. This provision is subject also to rules of court made to provide for the distribution of business in the High Court among the Divisions⁷, and to orders made by the Lord Chief Justice with the concurrence of the Lord Chancellor directing (1) that any non-assigned business of the High Court be assigned to a specified Division⁸; (2) that any business assigned to one Division be assigned to another specified Division⁹; and (3) that the statutory assignment of the business of the High Court¹⁰ be amended so far as necessary in consequence of provision made under head (1) or head (2) above¹¹. Rules of court and orders made by the Lord Chief Justice may assign business of any description to two or more Divisions concurrently¹²; and rules of court may provide for the distribution of business in any Division among the judges of that Division other than business required to be heard by a Divisional Court¹³.

1 There are three Divisions of the High Court, namely (1) the Chancery Division, consisting of the Chancellor of the High Court, who is its president, and such of the puisne judges as are for the time being attached to it (Supreme Court Act 1981 s 5(1)(a) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 114, 118(1), (2))); (2) the Queen's Bench Division, consisting of the Lord Chief Justice, the President of the Queen's Bench Division, the vice-president of the Queen's Bench Division and such of the puisne judges as are for the time being attached to it (Supreme Court Act 1981 s 5(1)(b) (amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 118(3))); and (3) the Family Division, consisting of the President of the Family Division and such of the puisne judges as are for the time being attached to it (Supreme Court Act 1981 s 5(1)(c)). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

The Chancery Division includes (a) the Patents Court (see s 6(1)(a); and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 637 et seq); (b) the Bankruptcy Court (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 764 et seq); and (c) the Companies Court (see generally **COMPANIES**). Patents and other intellectual property claims are dealt with under CPR Pt 63: see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS; PATENTS AND REGISTERED DESIGNS**. Proceedings in the Companies Court are designated 'specialist proceedings' by the Civil Procedure Rules: see CPR 49(1), (2); *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49; and PARA 1547. Insolvency proceedings in the Bankruptcy Court are not specialist proceedings for the purposes of CPR Pt 49 and are governed by the Insolvency Rules 1986, SI 1986/1925: see

The Chancery Guide (2005 Edn) para 19.1; and *Practice Direction--Insolvency Proceedings in The Civil Court Practice*.

The Queen's Bench Division includes (i) the Admiralty Court (see the Supreme Court Act 1981 s 6(1)(b); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 85 et seq); (ii) the Commercial Court (see s 6(1)(b); and PARA 1536 et seq); and (iii) the Technology and Construction Court (see PARA 1546). Proceedings in these are governed by CPR Pt 61, CPR Pt 58 and CPR Pt 60 respectively. Mercantile courts have been introduced and procedure in them is governed by CPR Pt 59: see PARA 1545. There is also an Administrative Court which hears claims for judicial review falling within CPR Pt 54: see PARA 1530; and **JUDICIAL REVIEW** vol 61 (2010) PARA 659 et seq. As to the establishment of the Administrative Court see PARA 219 text and note 8.

2 The puisne judges of the High Court are attached to the various Divisions by direction given by the Lord Chief Justice after consulting the Lord Chancellor: see the Supreme Court Act 1981 s 5(2) (amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 118(4)). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under this provision: Supreme Court Act 1981 s 5(6) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 118(6)). However, any judge attached to any Division may act as an additional judge of any other Division at the request of the Lord Chief Justice made with the concurrence of both the senior judge of the Division to which the judge is attached and the senior judge of the Division of which the judge is to act as an additional judge (Supreme Court Act 1981 s 5(3) (amended by the Court and Legal Services Act 1990 s 125(2), Sch 17 para 12; and the Constitutional Reform Act 2005 Sch 4 Pt 1 para 118(5))); and a judge of any Division may sit, whenever required, in a Divisional Court of another Division or for any judge of another Division (Supreme Court Act 1981 s 5(4)). Vacation judges sit regardless of Divisions: see PARA 65. Any High Court judge has jurisdiction to try any action (now known as a 'claim': see PARA 18) which has been wrongly assigned to the Division in which he sits: *Pinney v Hunt*(1877) 6 ChD 98; *The Recepta*[1893] P 255, CA; *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd*[1921] 2 AC 438, HL; *Midland Bank Ltd v Stamps*[1978] 3 All ER 1, [1978] 1 WLR 635.

3 Supreme Court Act 1981 s 5(5), re-enacting the Supreme Court of Judicature (Consolidation) Act 1925 s 4(4) (repealed) (added by the Administration of Justice Act 1928 s 6 (repealed)), which was intended to override the decision in *The Sheaf Brook*[1926] P 61, CA. The Lord Chief Justice may, with the concurrence of the Lord Chancellor by order reassign business from one Division to another under the Supreme Court Act 1981 s 61(3) (b): see the text and note 9. An order of any Division or court of the High Court is the order of the High Court and not an order of a particular Division or court: see *Re Hastings (No 3)* [1959] Ch 368, [1959] 1 All ER 698, DC.

4 Supreme Court Act 1981 s 61(6). As to the choice of Division by the claimant see s 64; and PARA 48; and as to the power of transfer see s 65; and PARA 66. As to the procedure for transfer see CPR 30.5; and PARA 67.

5 This refers in particular to rules of court made under the Supreme Court Act 1981 s 61(2) and orders of the Lord Chief Justice made under s 61(3): see the text and notes 7-8.

6 Supreme Court Act 1981 s 61(1). The provisions referred to are those of s 61(1), (3), Sch 1: see PARAS 44-46 (Chancery, Queen's Bench and Family Divisions). As to Admiralty jurisdiction see ss 20-24, 62(2); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 85 et seq. As to prize jurisdiction see s 27; and **PRIZE** vol 36(2) (Reissue) PARA 847. As to probate jurisdiction see s 25; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 73. As to matrimonial jurisdiction see s 26; and **COURTS** vol 10 (Reissue) PARA 608. As to the business of the Patents Court see s 62(1); and as to the business of the Commercial Court see s 62(3).

7 Rules of court may provide for the distribution of High Court business among Divisions, but subject to any orders in force under the Supreme Court Act 1981 s 61(3): s 61(2).

Among rules of court which expressly or by necessary implication assign classes of business to the Chancery Division see CPR 57.2(2) and *Practice Direction--Probate* PD 57 para 2; CPR Pt 63 (patents and other intellectual property claims); CPR Pt 64 (estates, trusts and charities); CPR 67.4 (claims under the Solicitors Act 1974 Sch 1); and CPR Sch 1 RSC Ord 93 (various statutory applications and appeals). See further PARAS 1694-1695. See also *Practice Direction--Appeals* PD 52 para 23; and PARA 1686 head (3) in the text.

Among rules of court which expressly or by necessary implication assign classes of business to the Queen's Bench Division see CPR Pt 54 (judicial review and statutory review: see PARA 1530); CPR Pt 58 (proceedings in the Commercial Court); CPR Pt 59 and *Practice Direction--Mercantile Courts* PD 59 (mercantile courts); CPR Pt 60 and *Practice Direction--Technology and Construction Court Claims* PD 60 (Technology and Construction Court claims); CPR Pt 61 and *Practice Direction--Admiralty Claims* PD 61 (Admiralty claims); CPR Pt 62 and *Practice Direction--Arbitration* PD 62 (arbitration); CPR Pt 65 (proceedings relating to anti-social behaviour and harassment); CPR Pt 77 (provisions in support of criminal justice); CPR Sch 1 RSC Ord 54 (habeas corpus: see PARA 1531); CPR Sch 1 RSC Ord 79 (criminal proceedings); CPR Sch 1 RSC Ord 94 (various statutory applications and appeals); CPR Sch 1 RSC Ord 95 (bills of sale and industrial and provident societies). See further PARAS 1696-1699. See also *Practice Direction--Appeals* PD 52 para 22; and PARA 1686 head (2) in the text.

8 Supreme Court Act 1981 s 61(3)(a) (s 61(3) amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 129(1), (2)). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the Supreme Court Act 1981 s 61(3): s 61(9) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 129(3)). Any order under the Supreme Court Act 1981 s 61(3) must be made by statutory instrument, which must be laid before Parliament after being made: s 61(8). For examples of such orders see the High Court (Distribution of Business) Order 1991, SI 1991/1210 (assigning certain proceedings to the Family Division); the High Court (Distribution of Business) Order 1993, SI 1993/622 (assigning proceedings under the Child Support Act 1991 to the Family Division); and the High Court (Distribution of Business) Order 2004, SI 2004/3418 (assigning all proceedings in the High Court under the Gender Recognition Act 2004 ss 6, 8 to the Family Division).

9 Supreme Court Act 1981 s 61(3)(b) (as amended: see note 8). See also note 8. No such order may be made without the concurrence of the senior judge of the Division or each Division to which the business is assigned (s 61(5)(a)) and of the Division or each Division to which the business is to be assigned (s 61(5)(b)). Section 61(3)(b) in substance re-enacts the Supreme Court of Judicature (Consolidation) Act 1925 s 57(1) (repealed), under which the Lord Chancellor has directed that any Division to which a cause or matter is assigned is to have jurisdiction to grant in that cause or matter any remedy or relief arising out of or related to or connected with any claim made in the cause or matter notwithstanding that proceedings for that remedy or relief are assigned to another Division: *Practice Direction*[1973] 2 All ER 233, [1973] 1 WLR 627. In *Midland Bank Ltd v Stamps*[1978] 3 All ER 1, [1978] 1 WLR 635, an action by the bank for repayment of a loan secured by a charge on real property was retained in the Commercial Court as a commercial action notwithstanding the assignment of mortgage actions to the Chancery Division. Actions are now known as 'claims': see PARA 18.

10 le under the Supreme Court Act 1981 Sch 1.

11 Supreme Court Act 1981 s 61(3)(c). See also note 8.

12 Supreme Court Act 1981 s 61(4).

13 Supreme Court Act 1981 s 61(7).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(1) JURISDICTION AND ASSIGNMENT OF PROCEEDINGS IN THE HIGH COURT/44. Assignment of proceedings to the Chancery Division.

44. Assignment of proceedings to the Chancery Division.

To the Chancery Division are assigned by the Supreme Court Act 1981 all causes and matters¹ relating to:

- 55 (1) the sale², exchange or partition of land³, or the raising of charges on land⁴;
- 56 (2) the redemption or foreclosure of mortgages⁵;
- 57 (3) the execution of trusts⁶;
- 58 (4) the administration of the estates of deceased persons⁷;
- 59 (5) bankruptcy⁸;
- 60 (6) the dissolution of partnerships or the taking of partnership or other accounts⁹;
- 61 (7) the rectification, setting aside or cancellation of deeds or other instruments in writing¹⁰;
- 62 (8) probate business¹¹, other than non-contentious or common form business¹²;
- 63 (9) patents¹³, trade marks, registered designs,¹⁴ copyright¹⁵ or design right¹⁶;
- 64 (10) the appointment of a guardian of a minor's estate¹⁷.

Also assigned to the Chancery Division are all causes and matters involving the exercise of the jurisdiction of the High Court under the enactments relating to companies¹⁸.

The assignment of statutory appeals and other miscellaneous appeals and applications to the Chancery Division under the Civil Procedure Rules is discussed elsewhere in this title¹⁹.

1 For the purposes of the Supreme Court Act 1981, 'cause' means any action or any criminal proceedings and 'matter' means any proceedings in court not a cause: see s 151(1). However, the new civil procedure (see PARA 24 et seq) no longer employs this terminology: see PARA 18. The causes and matters here assigned by the Supreme Court Act 1981 s 61(1), Sch 1 para 1 (as amended: see note 16) are by no means coincident or coextensive with the former equity jurisdiction, but are much less: see *Rogers v Jones* (1877) 7 ChD 345, CA. Moreover, subject to the power of transfer under the Supreme Court Act 1981 s 65 and rules of court (see CPR 30.5; and PARA 67), any common law action (now known as a 'claim') may be brought in the Chancery Division: see *Warner v Murdoch, Murdoch v Warner* (1877) 4 ChD 750, CA (a jury trial cannot be held in the Chancery Division). See also *Stafford Winfield Cook & Partners Ltd v Winfield* [1980] 3 All ER 759, [1981] 1 WLR 458. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 As to the sale of land see **SALE OF LAND**.

3 As to the partition or exchange of land see **REAL PROPERTY** vol 39(2) (Reissue) PARAS 198 et seq, 240 et seq.

4 Supreme Court Act 1981 Sch 1 para 1(a). As to charges on land see **LAND CHARGES** vol 26 (2004 Reissue) para 622 et seq.

5 Supreme Court Act 1981 Sch 1 para 1(b). As to redemption and foreclosure see **MORTGAGE** vol 77 (2010) PARA 584 et seq.

6 Supreme Court Act 1981 Sch 1 para 1(c): see **TRUSTS** vol 48 (2007 Reissue) PARA 632.

7 Supreme Court Act 1981 Sch 1 para 1(d): see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 705 et seq.

8 Supreme Court Act 1981 Sch 1 para 1(e): see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 124 et seq.

9 Supreme Court Act 1981 Sch 1 para 1(f). As to dissolution see **PARTNERSHIP** vol 79 (2008) PARA 174 et seq; and as to accounts see **PARTNERSHIP** vol 79 (2008) PARA 135 et seq.

10 Supreme Court Act 1981 Sch 1 para 1(g): see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 67 et seq.

11 As to contentious probate business see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 269 et seq.

12 Supreme Court Act 1981 Sch 1 para 1(h). As to non-contentious probate business see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 81 et seq. As to the distinction between contentious and non-contentious probate business see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 80.

13 As to patents see **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 301 et seq.

14 As to trade marks see **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 2 et seq; and as to registered designs see **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 681 et seq.

15 As to copyright see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 54 et seq. See also *Apac Rowena Ltd v Norpol Packaging Ltd* [1991] 4 All ER 516 (writ (now known as a claim form) issued out of Queen's Bench Division).

16 Supreme Court Act 1981 Sch 1(i) (amended by the Copyright, Designs and Patents Act 1988 s 303(1), Sch 7 para 28(1), (3)). As to design right see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 501 et seq.

17 Supreme Court Act 1981 Sch 1 para 1(j); and see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 147. This must be distinguished from jurisdiction in guardianship generally, which belongs to the Family Division: see Sch 1 para 3(b)(ii); and PARA 46.

18 Supreme Court Act 1981 Sch 1 para 1; and see generally **COMPANIES**.

19 See PARAS 1686, 1694-1695.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(1) JURISDICTION AND ASSIGNMENT OF PROCEEDINGS IN THE HIGH COURT/45. Assignment of proceedings to the Queen's Bench Division.

45. Assignment of proceedings to the Queen's Bench Division.

To the Queen's Bench Division are assigned by the Supreme Court Act 1981¹:

- 65 (1) applications for writs of habeas corpus², except applications made by a parent or guardian of a minor for such a writ concerning the custody of the minor³;
- 66 (2) applications for judicial review⁴;
- 67 (3) all control order proceedings (within the meaning of the Prevention of Terrorism Act 2005)⁵;
- 68 (4) all causes and matters involving the exercise of the Admiralty jurisdiction of the High Court⁶ or its jurisdiction as a prize court⁷; and
- 69 (5) all causes and matters entered in the commercial list⁸.

The assignment of statutory appeals and other miscellaneous appeals and applications to the Queen's Bench Division under the Civil Procedure Rules is discussed elsewhere in this title⁹.

1 The list in the Supreme Court Act 1981 s 61(1), Sch 1 para 2 is far from being exhaustive, and does not accurately reflect the actual business conducted in the Queen's Bench Division, which is the lineal successor of the original superior courts of common law, namely the Court of Queen's Bench, the Court of Common Pleas at Westminster and the Court of Exchequer, both as a Court of Revenue and as a common law court: see the Supreme Court of Judicature (Consolidation) Act 1925 s 18(2) (repealed). It thus exercises the entire range of common law jurisdiction, embracing all the branches of the common law except that which was exercised by the High Court of Chancery. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 As to habeas corpus see CPR Sch 1 RSC Ord 54 rr 1-10; PARA 1531; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 207 et seq.

3 Supreme Court Act 1981 Sch 1 para 2(a): see CPR Sch 1 RSC Ord 54 r 11. Such an application is made in the Family Division.

4 Supreme Court Act 1981 Sch 1 para 2(b): see CPR Pt 54; PARA 1530; and **JUDICIAL REVIEW**.

5 Supreme Court Act 1981 Sch 1 para 2(ba) (added by the Prevention of Terrorism Act 2005 s 11(5), Schedule para 10): see CPR Pt 76; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 477.

6 See CPR Pt 61; *Practice Direction--Admiralty Claims* PD 61; and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 91 et seq. As to the meaning of 'cause' and 'matter' see PARA 44 note 1; but note that the new civil procedure (see PARA 24 et seq) no longer employs this terminology: see PARA 18.

7 Supreme Court Act 1981 Sch 1 para 2(c). As to prize jurisdiction see **PRIZE** vol 36(2) (Reissue) PARA 847.

8 Supreme Court Act 1981 Sch 1 para 2(d): see CPR Pt 58; *Practice Direction--Commercial Court* PD 58; and PARA 1536 et seq.

9 See PARAS 1686, 1696-1699.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(1) JURISDICTION AND ASSIGNMENT OF PROCEEDINGS IN THE HIGH COURT/46. Assignment of proceedings to the Family Division.

46. Assignment of proceedings to the Family Division.

To the Family Division are assigned by the Supreme Court Act 1981¹:

- 70 (1) all matrimonial causes and matters (whether at first instance or on appeal)²;
- 71 (2) all causes and matters (whether at first instance or on appeal) relating to:
- 7
 10. (a) legitimacy³;
 11. (b) the exercise of the inherent jurisdiction of the High Court with respect to minors, the maintenance of minors and any proceedings under the Children Act 1989, except proceedings solely for the appointment of a guardian of a minor's estate⁴;
 12. (c) adoption⁵;
 13. (d) non-contentious or common form probate business⁶;
- 8
 - 72 (3) applications for consent to the marriage of a minor or for a declaration under the provisions of the Marriage Act 1949 relating to marriages in respect of which there would otherwise be an impediment of affinity⁷;
 - 73 (4) proceedings on appeal under the Administration of Justice Act 1960⁸ from an order or decision made under the Magistrates' Courts Act 1980⁹ to enforce an order of a magistrates' court made in matrimonial proceedings or proceedings under Part IV of the Family Law Act 1996¹⁰ or with respect to the guardianship of a minor¹¹;
 - 74 (5) applications for declarations of status under Part III of the Family Law Act 1986¹²;
 - 75 (6) proceedings under the Children Act 1989¹³;
 - 76 (7) proceedings under the Childcare Act 2006 for a warrant for a constable to assist in the exercise of powers of entry¹⁴;
 - 77 (8) all proceedings under:
 - 78 (a) Part IV or Part IVA of the Family Law Act 1996¹⁵;
 - 79 (b) the Child Abduction and Custody Act 1985¹⁶;
 - 80 (c) the Family Law Act 1986¹⁷;
 - 81 (d) the provision of the Human Fertilisation and Embryology Act 1990 relating to parental orders for gamete donors¹⁸;
 - 82 (e) EC Council Regulation 2201/2003, so far as that Regulation relates to jurisdiction, recognition and enforcement in parental responsibility matters¹⁹;
 - 83 (9) all proceedings relating to a debit or credit under the Welfare Reform and Pensions Act 1999²⁰;
 - 84 (10) all proceedings for the purpose of enforcing an order made in any proceedings of a type described in this paragraph²¹;
 - 85 (11) all proceedings under the Child Support Act 1991²²;
 - 86 (12) all proceedings relating to errors in gender recognition certificates and appeals under the Gender Recognition Act 2004²³;
 - 87 (13) all civil partnership causes and matters (whether at first instance or on appeal)²⁴;
 - 88 (14) applications for consent to the formation of a civil partnership by a minor or for a declaration²⁵ that there is no impediment of affinity to the formation of the civil partnership²⁶;

89 (15) applications for declarations relating to civil partnerships²⁷.

The practice and procedure in the Family Division falls outside the scope of this title²⁸.

1 See the Supreme Court Act 1981 s 61(1), Sch 1 para 3; and the text and notes 2-27. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 Supreme Court Act 1981 Sch 1 para 3(a). See generally **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**. As to the meaning of 'cause' and 'matter' see PARA 44 note 1. Note that civil procedure under the CPR (see PARA 24 et seq) no longer employs this terminology: see PARA 18. Family proceedings, however, are not governed by the Civil Procedure Rules: see PARA 32 text and note 13.

3 Supreme Court Act 1981 Sch 1 para 3(b)(i).

4 Supreme Court Act 1981 Sch 1 para 3(b)(ii) (substituted by the Children Act 1989 108(5), Sch 13 para 45(3)). Proceedings relating to the appointment of guardians of minors' estates are assigned to the Chancery Division: see PARA 44.

5 Supreme Court Act 1981 Sch 1 para 3(b)(iii) (amended by the Family Law Reform Act 1987 s 33(4), Sch 4).

6 Supreme Court Act 1981 Sch 1 para 3(b)(iv). Contentious probate proceedings are assigned to the Chancery Division: see PARA 44.

7 Supreme Court Act 1981 Sch 1 para 3(c) (amended by the Marriage (Prohibited Degrees of Relationship) Act 1986 s 5). The declaration referred to is a declaration under the Marriage Act 1949 s 27B: see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 93.

8 Ie under the Administration of Justice Act 1960 s 13: see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 512 et seq.

9 Ie under the Magistrates' Courts Act 1980 s 63(3): see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 478.

10 Ie under the Family Law Act 1996 Pt IV (ss 30-63) (family homes and domestic violence): see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 285 et seq.

11 Supreme Court Act 1981 Sch 1 para 3(d) (amended by the Family Law Act 1996 s 66(1), Sch 8 para 51).

12 Ie under the Family Law Act 1986 Pt III (ss 55-62): Supreme Court Act 1981 Sch 1 para 3(e) (added by the Family Law Act 1986 s 68(1), Sch 1 para 26).

13 Supreme Court Act 1981 Sch 1 para 3(e) (sic) (added by the Children Act 1989 s 92(11), Sch 11 para 9).

14 Ie under the Childcare Act 2006 s 79: Supreme Court Act 1981 Sch 1 para 3(ea) (added by the Childcare Act 2006 s 103(1), Sch 2 para 3).

15 Ie under the Family Law 1996 Pt IV (see note 10) or Pt IVA (ss 63A-63J) (forced marriage protection orders): Supreme Court Act 1981 Sch 1 para 3(f)(i) (Sch 1 para 3(f) added by SI 1991/1210; the Supreme Court Act 1981 Sch 1 para 3(f)(i) substituted by the Family Law Act 1996 Sch 8 para 51; and amended by the Forced Marriage (Civil Protection) Act 2007 s 3(1), Sch 2 Pt 1 para 1). See also note 10, the text to which appears to duplicate this provision.

16 Supreme Court Act 1981 Sch 1 para 3(f)(ii) (as added: see note 15).

17 Supreme Court Act 1981 Sch 1 para 3(f)(iii) (as added: see note 15).

18 Ie under the Human Fertilisation and Embryology Act 1990 s 30: Supreme Court Act 1981 Sch 1 para 3(f)(iv) (as added (see note 15); amended by SI 2005/265).

19 Ie EC Council Regulation 2201/2003 (OJ L338, 23.12.2003, p 1) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility: Supreme Court Act 1981 Sch 1 para 3(f)(v) (added by SI 2005/265).

20 Ie under the Welfare Reform and Pensions Act 1999 s 29(1) or s 49(1): Supreme Court Act 1981 Sch 1 para 3(fa) (added by the Welfare Reform and Pensions Act 1999 s 84(1), Sch 12 Pt I para 1).

21 Supreme Court Act 1981 Sch 1 para 3(g) (added by SI 1991/1210).

22 Supreme Court Act 1981 Sch 1 para 3(h) (added by the High Court (Distribution of Business) Order 1993, SI 1993/622).

23 Ie under the Gender Recognition Act 2004 ss 6, 8: Supreme Court Act 1981 Sch 1 para 3(i) (added by SI 2004/3418).

24 Supreme Court Act 1981 Sch 1 para 3(i) (sic) (added by the Civil Partnership Act 2004 s 261(1), Sch 27 para 70).

25 Ie under the Civil Partnership Act 2004 Sch 1 para 7.

26 Supreme Court Act 1981 Sch 1 para 3(j) (added by the Civil Partnership Act 2004 Sch 27 para 70).

27 Ie under s 58: Supreme Court Act 1981 Sch 1 para 3(k) (added by the Civil Partnership Act 2004 Sch 27 para 70).

28 Family proceedings are not governed by the new civil procedure: see note 2. As to such proceedings see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 199 et seq; **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

UPDATE

46 Assignment of proceedings to the Family Division

NOTE 18--Supreme Court Act 1981 Sch 1 para 3(f)(iv) (now Senior Courts Act 1981 Sch 1 para 3(f)(iv)) substituted: Human Fertilisation and Embryology Act 2008 Sch 6 para 21.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(1) JURISDICTION AND ASSIGNMENT OF PROCEEDINGS IN THE HIGH COURT/47. Divisional Courts.

47. Divisional Courts.

Divisional Courts, constituted of at least two judges, may be held for the transaction of certain High Court business which is required by or by virtue of rules of court or any other statutory provision to be heard by a Divisional Court¹.

¹ See the Supreme Court Act 1981 s 66; and **COURTS** vol 10 (Reissue) PARA 605. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

As to proceedings specifically assigned to a Divisional Court of the Queen's Bench Division see eg PARA 1697; and as to proceedings assigned to a Divisional Court of the Chancery Division see eg PARA 1695.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(1) JURISDICTION AND ASSIGNMENT OF PROCEEDINGS IN THE HIGH COURT/48. Choice of Division by claimant.

48. Choice of Division by claimant.

Subject to the court's power to transfer a cause or matter¹, the person by whom any cause or matter is commenced in the High Court must allocate it to whichever Division he thinks fit², and all subsequent interlocutory or other steps or proceedings in the cause or matter must be taken in the Division to which it is for the time being allocated, whether by the choice of the claimant or in consequence of its subsequent transfer³.

1 See the Supreme Court Act 1981 s 65; and PARA 67 note 7. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to the meaning of 'cause or matter' see PARA 44 note 1. However, the current civil procedure (see PARA 24 et seq) no longer employs this terminology: see PARA 18.

2 Supreme Court Act 1981 s 64(1). As to the court in which proceedings must be commenced see further PARA 116; and as to allocation and case management by the court see PARA 260 et seq.

3 Supreme Court Act 1981 s 64(2). See also s 61(1), which does not make it obligatory to allocate or transfer proceedings to the assigned Division for that class of business; and PARA 43.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(1) JURISDICTION AND ASSIGNMENT OF PROCEEDINGS IN THE HIGH COURT/49. Powers of judge, master, district judge or court officer to perform court functions and acts.

49. Powers of judge, master, district judge or court officer to perform court functions and acts.

Where the Civil Procedure Rules provide for the court to perform any act then, except where an enactment, rule or practice direction provides otherwise, that act may be performed in relation to proceedings in the High Court, by any judge, master or district judge of that court¹. Accordingly, in those rules, 'judge', unless the context otherwise requires, means a judge, master or district judge or a person authorised to act as such².

Where those rules require or permit the court to perform an act of a formal or administrative character, that act may be performed by a court officer³. However, a requirement that a court officer carry out any act at the request of a party is subject to the payment of any fee required by a fees order for the carrying out of that act⁴.

1 CPR 2.4(a). As to the Civil Procedure Rules see PARAS 9, 30 et seq.

2 CPR 2.3(1). As to district judges see PARA 55. As to the appointment of masters see the Supreme Court Act 1981 s 89; and **COURTS**. As to the allocation of cases between judges, masters and district judges see PARA 50. As to district judges in county courts see PARA 60. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

3 CPR 2.5(1). 'Court officer' means a member of the court staff: CPR 2.3(1). A court officer may refer to a judge before taking any step: see CPR 3.2(a); and PARA 250.

4 CPR 2.5(2). As to fees orders see PARA 87.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(1) JURISDICTION AND ASSIGNMENT OF PROCEEDINGS IN THE HIGH COURT/50. Allocation of cases between levels of judiciary and to particular masters.

50. Allocation of cases between levels of judiciary and to particular masters.

The Civil Procedure Rules set out, by supplementary practice direction, the matters over which masters and district judges (including deputies) in the Queen's Bench and Chancery Divisions do not have jurisdiction or which they may deal with only on certain conditions¹.

The practice direction provides that, in relation to injunctions²:

- 90 (1) search orders³, freezing orders⁴ and any ancillary information orders⁵ and orders authorising a person to enter land to recover, inspect or sample property⁶ may only be made by a judge⁷;
- 91 (2) injunctions and orders relating to specific performance where these involve an injunction must be made by a judge unless:
- 9 (a) the terms of the injunction are agreed by the parties⁸;
- 14. (b) the injunction is made in connection with or ancillary to a charging order⁹;
- 15. (c) the injunction is made in connection with or ancillary to an order appointing a receiver by way of equitable execution¹⁰; or
- 16. (d) the injunction is made in proceedings for an order restraining a person from receiving a sum due from the Crown¹¹.
- 10

A master or district judge may, however, make an order varying or discharging an injunction or undertaking given to the court if all parties to the proceedings have consented to the variation or discharge¹².

In relation to other pre-trial orders and interim remedies, the practice direction provides that a master or district judge may not make orders or grant interim remedies:

- 92 (i) relating to the liberty of the subject¹³;
- 93 (ii) relating to criminal proceedings or matters except procedural applications in appeals to the High Court (including appeals by case stated) under any enactment¹⁴;
- 94 (iii) relating to a claim for judicial review (though interim applications in claims for judicial review may be made to masters of the Queen's Bench Division)¹⁵;
- 95 (iv) relating to appeals from masters or district judges¹⁶;
- 96 (v) in appeals against costs assessments¹⁷, except on an appeal¹⁸ against the decision of an authorised court officer in detailed assessment proceedings¹⁹;
- 97 (vi) in applications by a person subject to a civil or criminal or an all proceedings order (vexatious litigant) for permission to start or continue proceedings²⁰;
- 98 (vii) in applications under the Mental Health Act 1983 for permission to bring proceedings against a person²¹.

A master or district judge may, subject to any practice direction, try a case which is treated as allocated to the multi-track because it is proceeding under Part 8 of the Civil Procedure Rules (the alternative procedure for claims)²² but may try a case which has been allocated to the multi-track under Part 26 only with the consent of the parties²³.

Any such restrictions on the trial jurisdiction of masters and district judges do not prevent them from hearing applications for summary judgment or, if the parties consent, for the determination of a preliminary issue²⁴. They may also assess the damages or sum due to a party under a judgment without limit as to the amount²⁵.

In proceedings in the Chancery Division, a master or district judge may not deal with a number of specified matters without the consent of the Chancellor²⁶ and may only give directions for early trial after consulting the judge in charge of the relevant list²⁷. Where, however, a winding-up order has been made against a company, any proceedings against the company by or on behalf of debenture holders may be dealt with, at the Royal Courts of Justice, by a registrar and, in a district registry with insolvency jurisdiction, by a district judge²⁸.

A deputy High Court judge, a master or a district judge may not try a case in a claim made in respect of a judicial act under the Human Rights Act 1998 or a claim for a declaration of incompatibility in accordance with the relevant provision²⁹ of that Act³⁰.

The Senior Master and the Chief Master will make arrangements for proceedings to be assigned to individual masters. They may vary such arrangements generally or in particular cases, for example, by transferring a case from a master to whom it had been assigned to another master³¹. The fact that a case has been assigned to a particular master does not prevent another master from dealing with that case if circumstances require, whether at the request of the assigned master or otherwise³².

Wherever a master or district judge has jurisdiction, he may refer the matter to a judge instead of dealing with it himself³³.

1 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B, which does not deal with proceedings in the Family Division except in relation to those matters where the Family Division has joint jurisdiction with the Chancery Division: see para 3.2. In such cases district judges (including district judges of the Principal Registry) have jurisdiction, subject to any direction given by the President of the Family Division: para 3.2. Examples of such proceedings are proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 or under the Trusts of Land and Appointment of Trustees Act 1996 s 14.

For these purposes, references to masters and district judges include deputies: *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 1.1.

2 As to the meaning of 'injunction' see PARA 315 note 2.

3 Ie under CPR 25.1(1)(h): see PARA 315 head (8) in the text.

4 Ie under CPR 25.1(1)(f): see PARAS 315 head (6) in the text, 318, 396 et seq. Where the court has made a freezing order under CPR 25.1(f) and has ordered a person to make a witness statement or affidavit about his assets and to be cross-examined on its contents, unless the judge directs otherwise, the cross-examination will take place before a master or a district judge, or if the master or district judge directs, before an examiner of the court: *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 7. As to the meaning of 'witness statement' see PARA 751 note 1; and as to the meaning of 'affidavit' see PARA 540 note 5. 'Cross-examination' means questioning of a witness by a party other than the party who called the witness: see CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31. As to examiners of the court see PARA 993.

5 Ie under CPR 25.1(1)(g): see PARA 315 head (7) in the text.

6 Ie under CPR 25.1(1)(d): see PARA 315 head (4) in the text.

7 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 2.1.

8 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B paras 2.2, 2.3(a). See also the text to note 12.

9 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B paras 2.2, 2.3(b).

10 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B paras 2.2, 2.3(c).

11 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B paras 2.2, 2.3(d). The order referred to is an order under CPR 66.7: see PARA 1429.

12 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 2.4. See *Richmond v Burch* [2006] EWHC 921 (Ch), [2007] 1 All ER 658.

13 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 3.1(a).

14 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 3.1(b).

15 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 3.1(c).

16 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 3.1(d).

17 *le* under CPR Pts 43-48: see *The Civil Court Practice*. As to costs generally see also PARA 1729 *et seq*.

18 *le* under CPR 47.20: see *The Civil Court Practice*.

19 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 3.1(e).

20 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 3.1(f). The applications referred to are applications under the Supreme Court Act 1981 s 42: see PARA 258. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

21 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 3.1(g). The applications referred to are applications under the Mental Health Act 1983 s 139: see **MENTAL HEALTH**.

22 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 4.1. As to the Part 8 procedure see PARA 127 *et seq*. As to the treatment of such cases as if allocated to the multi-track see CPR 8.9(c); and PARA 136.

23 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 4.1. As to allocation to the multi-track see PARA 269.

24 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 4.1. As to summary judgment see PARA 524 *et seq*.

25 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 4.2; but see *Sandry v Jones* (2000) Times, 3 August, CA.

26 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 5.1. The specified matters are: (1) approving compromises (other than applications under the Inheritance (Provision for Family and Dependents) Act 1975) (a) on behalf of a person under disability where that person's interest in a fund, or if there is no fund, the maximum amount of the claim, exceeds £100,000; and (b) on behalf of absent, unborn and unascertained persons; (2) making declarations, except in plain cases; (3) making final orders under the Variation of Trusts Act 1958 s 1(1), except for the removal of protective trusts where the interest of the principal beneficiary has not failed or determined; (4) where the proceedings are brought by a Part 8 claim form seeking determination of any question of law or as to the construction of a document which is raised by the claim form; (5) giving permission to executors, administrators and trustees to bring or defend proceedings or to continue the prosecution or defence of proceedings, and granting an indemnity for costs out of the trust estate, except in plain cases; (6) granting an indemnity for costs out of the assets of a company on the application of minority shareholders bringing a derivative action, except in plain cases; (7) making an order for rectification, except for rectification of the register under the Land Registration Act 1925, or alteration or rectification of the register under the Land Registration Act 2002, in plain cases; (8) making orders to vacate entries in the register under the Land Charges Act 1972, except in plain cases; (9) making final orders on applications under the Leasehold Reform Act 1967 s 19, the Administration of Justice Act 1985 s 48 and the Law of Property Act 1969 ss 21, 25; (10) making final orders under the Landlord and Tenant Acts 1927 and 1954, except (a) by consent; and (b) orders for interim rents under the Landlord and Tenant Act 1954 s 24A-24D; (11) making orders in proceedings in the Patents Court except (a) by consent; (b) to extend time; (c) on applications for permission to serve out of the jurisdiction; and (d) on applications for security for costs: *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 5.1.

27 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 5.2.

28 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 5.3.

29 *le* under the Human Rights Act 1998 s 4: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

- 30 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 7A.
- 31 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 6.1.
- 32 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 6.2.
- 33 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 1.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(2) THE CENTRAL OFFICE OF THE SUPREME COURT/51. The Central Office of the Supreme Court.

(2) THE CENTRAL OFFICE OF THE SUPREME COURT

51. The Central Office of the Supreme Court.

In 1879, as part of an extensive reorganisation of the Supreme Court, the Central Office was established¹. The Central Office performs such business as the Lord Chief Justice may, with the concurrence of the Lord Chancellor, direct². The relevant practice direction provides for the division of the Central Office into departments and for the distribution of Central Office business among such departments in such manner as is set out in *The Queen's Bench Division Guide*³.

1 Supreme Court of Judicature (Officers) Act 1879 s 4 (repealed). Many offices were amalgamated with, and many court officers were transferred to, the Central Office by ss 5, 6 (repealed). These provisions were repealed and replaced by the Supreme Court of Judicature (Consolidation) Act 1925 s 104, Sch 6, which in turn has been repealed by the Supreme Court Act 1981 s 152(4), Sch 7. The present position is governed by s 96 (see the text and note 2), which assumes the continued existence of the Central Office. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

The Supreme Court of Judicature (Officers) Act 1879 placed the control and superintendence of the Central Office substantially under the masters of the Superior Common Law Courts, and this power was continued under the Supreme Court of Judicature (Consolidation) Act 1925 s 104(2), but this provision was repealed by the Courts Act 1971 s 56(4), Sch 11 Pt IV.

2 Supreme Court Act 1981 s 96(1) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 114, 141(1), (2); and amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 4 para 26(1), (2) to substitute 'Senior Courts' for 'Supreme Court'; at the date at which this title states the law, no such day had been appointed). Subject to any direction under the Supreme Court Act 1981 s 96(1), the Central Office is to perform such business as it performed immediately before 1 January 1982 (ie the commencement date of the Supreme Court Act 1981: see s 153(2)): s 96(2) (amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 141(3)). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the Supreme Court Act 1981 s 96: s 96(3) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 141(4)).

3 See *Practice Direction--Court Offices* PD 2A para 1. The Central Office comprises the following departments: (1) the Action Department, which deals with the issue of claims, responses to claims, admissions, undefended and summary judgments, enforcement, drawing up of certain orders, public searches, provision of copies of court documents, enrolment of deeds, submission of references to the European Court of Justice and registration of foreign judgments; (2) the Masters' Secretary's Department, which covers three discrete areas of work: (a) the Masters' Support Unit which provides support (i) to the masters, including assisting with case-management, and (ii) to the Senior Master; (b) foreign process; and (c) investment of children's funds; (3) the Queen's Bench Associates' Department; (4) the Clerk of the Lists, who lists all trials and matters before the judges; (5) the Registry of the Technology and Construction Court; (6) the Admiralty and Commercial Registry: see *The Queen's Bench Guide* (2007 Edn) paras 1.6.3-1.6.5, 1.6.7. The Queen's Bench Associates sit in court with the judges during trials and certain interim hearings. The chief associate manages the Queen's Bench Associates and also provides support to the Senior Master as the Queen's Remembrancer. The associates draw up the orders made in court at trial and those interim orders that the parties do not wish to draw up themselves or which are directed by a master to be drawn by the court: para 1.6.6. One of the staff of the Masters' Secretary's Department acts as the chief clerk to the prescribed officer for election petitions (the Senior Master): see para 1.6.5.

UPDATE

51 The Central Office of the [Senior Courts]

NOTES 1, 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(2) THE CENTRAL OFFICE OF THE SUPREME COURT/52. The practice master.

52. The practice master.

One of the masters of the Queen's Bench Division is required to be present on duty as the practice master of the day each day of the week throughout the year (including the vacations) that the Central Office is open¹. The function of the practice master is to superintend the business performed in the Central Office and to give any directions which may be required on questions of practice and procedure².

¹ See *Practice Direction--Court Offices* PD 2A para 2.2. The offices of the Supreme Court must be open on every day of the year except: (1) Saturdays and Sundays; (2) Good Friday and the day after Easter Monday; (3) Christmas Day and, if that day is a Friday or Saturday, then 28 December; (4) bank holidays in England and Wales under the Banking and Financial Dealings Act 1971 (see **TIME** vol 97 (2010) PARA 321); and (5) such other days as the Lord Chancellor, with the concurrence of the Lord Chief Justice, the Master of the Rolls, the President of the Family Division and the Chancellor (the 'Heads of Division') may direct: *Practice Direction--Court Offices* PD 2A para 2.1(1). The hours during which the offices of the Supreme Court and the Principal Probate Registry at First Avenue House, 42-49 High Holborn, London WC1V 6HA must be open to the public are as follows: (a) from 10 am to 4.30 pm; (b) at such other hours as the Lord Chancellor, with the concurrence of the Heads of Division, may from time to time direct: para 2.1(2). As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

² *Practice Direction--Court Offices* PD 2A para 2.2.

UPDATE

52 The practice master

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(2) THE CENTRAL OFFICE OF THE SUPREME COURT/53. Chancery business.

53. Chancery business.

Administrative business of the Chancery Division is conducted by Chancery Chambers¹. Details of the various administrative arrangements are set out in *The Chancery Guide*².

¹ This arrangement was introduced by the Rules of the Supreme Court (Amendment No 2) 1982, SI 1982/1111 (revoked), the relevant provisions of which came into force on 1 October 1982. See also *Practice Direction* [1982] 3 All ER 124, [1982] 1 WLR 1189, in particular para 4.

² See *The Chancery Guide* (2005 Edn) Appendix 8 in *The Civil Court Practice*.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(3) DISTRICT REGISTRIES/54. District registries.

(3) DISTRICT REGISTRIES

54. District registries.

The Lord Chancellor may, after consulting the Lord Chief Justice, by order, made by statutory instrument¹, direct that there are to be district registries of the High Court at such places and for such districts as are specified in the order².

There is a district registry for every part of England and Wales except in the London area³.

¹ Supreme Court Act 1981 s 99(2). The statutory instrument must be laid before Parliament after being made: s 99(2). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

² Supreme Court Act 1981 s 99(1) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 114, 143(1), (2)), which repeats in substance the Supreme Court of Judicature (Consolidation) Act 1925 s 84(1) (repealed), which in turn replaced the Supreme Court of Judicature Act 1873 s 60 (repealed), under which district registries were first established on 1 November 1875, the date on which the Supreme Court of Judicature Act 1875 came into force (s 2 (repealed)). The function of district registries was expressed to be to facilitate the prosecution in country districts of such proceedings as may be more speedily, cheaply and conveniently carried on there. The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the Supreme Court Act 1981 s 99: s 99(3) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 143(3)).

³ See the Civil Courts Order 1983, SI 1983/713, art 4, Sch 1 (amended by SI 1984/297; SI 1984/1075; SI 1985/511; SI 1986/754; SI 1986/1361; SI 1986/2001; SI 1986/2207; SI 1988/2165; SI 1989/106; SI 1989/107; SI 1989/914; SI 1991/1809; SI 1991/2211; SI 1992/593; SI 1992/1345; SI 1992/1810; SI 1992/3071; SI 1993/1809; SI 1993/3120; SI 1994/706; SI 1994/1536; SI 1994/2626; SI 1994/2893; SI 1995/1897; SI 1995/3173; SI 1996/68; SI 1996/588; SI 1996/2579; SI 1997/361; SI 1997/1085; SI 1997/2310; SI 1997/2762; SI 1998/1880; SI 1998/2910; SI 1999/216; SI 1999/1011; SI 1999/3187; SI 2000/1482; SI 2000/2738; SI 2001/4025; and SI 2007/786) which provides for district registries (the districts of which are generally defined by reference to county court districts) at Aberystwyth, Barnsley, Barnstaple, Barrow in Furness, Basingstoke, Bath, Bedford, Birkenhead, Birmingham, Blackburn, Blackpool, Blackwood, Bolton, Boston, Bournemouth, Bradford, Brecon ('Brecknock District Registry'), Bridgend, Brighton, Bristol, Burnley, Bury, Bury St Edmunds, Caernarfon, Cambridge, Canterbury, Cardiff, Carlisle, Carmarthen, Chatham ('Medway District Registry'), Chelmsford, Cheltenham, Chester, Chesterfield, Chichester, Colchester, Coventry, Crewe, Croydon, Darlington, Derby, Dewsbury, Doncaster, Dudley, Durham, Eastbourne, Exeter, Gloucester, Great Grimsby, Guildford, Halifax, Harlow, Harrogate, Hartlepool, Hastings, Haverfordwest, Hereford, Huddersfield, Ipswich, Keighley, Kendal, King's Lynn, Kingston upon Hull, Lancaster, Leeds, Leicester, Lincoln, Liverpool, Llangefni, Lowestoft, Luton, Macclesfield, Maidstone, Manchester, Mansfield, Margate ('Thanet District Registry'), Merthyr Tydfil, Middlesbrough, Milton Keynes, Mold, Newcastle upon Tyne, Newport (Gwent), Newport (IOW), Northampton, Norwich, Nottingham, Oldham, Oxford, Peterborough, Plymouth, Pontefract, Pontypridd, Portsmouth, Preston, Reading, Rhyl, Romford, St Helens, Salford, Salisbury, Scarborough, Scunthorpe, Sheffield, Shrewsbury, Southampton, Southend on Sea, Southport, South Shields, Stafford, Stockport, Stoke on Trent, Sunderland, Swansea, Swindon, Taunton, Torquay ('Torquay and Newton Abbot District Registry'), Truro, Tunbridge Wells, Wakefield, Walsall, Warrington, Welshpool, Weymouth, Whitehaven, Wigan, Winchester, Wolverhampton, Worcester, Worthing, Wrexham, Yeovil and York.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(3) DISTRICT REGISTRIES/55. District judges.

55. District judges.

The Lord Chief Justice, after consulting the Lord Chancellor, may assign a district judge¹ to one or more district registries² and may change an assignment so as to assign the district judge to a different district registry or registries (or to no district registry)³. While a district judge is assigned to one or more district registries he is a district judge of the High Court⁴.

Every district judge is, by virtue of his office, capable of acting in any district registry whether or not assigned to it, but may do so only in accordance with arrangements made by or on behalf of the Lord Chief Justice⁵.

1 Formerly called a 'district registrar': see the Courts and Legal Services Act 1990 s 74(1). The district judges perform the work carried out by the masters in the Royal Courts of Justice.

2 As to district registries see PARA 54.

3 Supreme Court Act 1981 s 100 (1) (s 100 substituted by the Constitutional Reform Act 2005 s 14, Sch 3 para 2(1)). As to county court district judges see PARA 60. A reference in any enactment or other instrument to the district judge of a district registry is a reference to any district judge assigned to the registry concerned: Supreme Court Act 1981 s 100 (2) (as so substituted). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the Supreme Court Act 1981 s 100(1): s 100(5) (added by the Tribunals, Courts and Enforcement Act 2007 s 56, Sch 11 paras 1, 2). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

4 Supreme Court Act 1981 s 100 (4) (as substituted: see note 3). Section 100 applies to a district judge holding office by virtue of an appointment made before the commencement of the Constitutional Reform Act 2005 Sch 3 para 2(1) (ie before 3 April 2006: see the Constitutional Reform Act 2005 (Commencement No 5) Order 2006, SI 2006/1014) as if he had been assigned to the district registry or registries for which he was appointed: Constitutional Reform Act 2005 Sch 3 para 2(2).

5 Supreme Court Act 1981 s 100 (3) (as substituted: see note 3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(3) DISTRICT REGISTRIES/56. Deputy district judges.

56. Deputy district judges.

If it appears to the Lord Chancellor expedient in order to facilitate the disposal of business in the High Court, he may appoint a person¹ to be a deputy district judge². The Lord Chief Justice, after consulting the Lord Chancellor, may assign a deputy district judge to one or more district registries³ and may change an assignment so as to assign the deputy district judge to a different district registry or registries (or to no district registry)⁴; and a deputy district judge assigned to a district registry has, while acting under his assignment, the same jurisdiction as a district judge assigned to that registry⁵.

1 A person is qualified for appointment as a deputy district judge only if the person (1) is qualified for appointment as a district judge; or (2) holds, or has held, the office of district judge: Supreme Court Act 1981 s 102(1A) (s 102(1A)-(1C) added by the Tribunals, Courts and Enforcement Act 2007 s 56, Sch 11 paras 1, 3(1), (2)). The Lord Chancellor may not appoint a person as a deputy district judge without the concurrence of the Lord Chief Justice if the person (a) holds the office of district judge; or (b) ceased to hold the office of district judge within two years ending with the date when the appointment takes effect: Supreme Court Act 1981 s 102(1B) (as so added). The Constitutional Reform Act 2005 s 85 (selection of certain office holders) does not apply to an appointment to which the Supreme Court Act 1981 s 102(1B) applies: s 102(1C) (as so added). No appointment to which s 102(1B) applies may be such as to extend beyond the day on which the person in question attains the age of 75: see s 102(3) (amended by the Tribunals, Courts and Enforcement Act 2007 Sch 11 para 3(3)). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the Supreme Court Act 1981 s 102(1B) or (4A): s 102(5A) (added by the Tribunals, Courts and Enforcement Act 2007 Sch 11 para 3(5)). As to county court district judges see PARA 60. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 Supreme Court Act 1981 s 102(1) (substituted by the Tribunals, Courts and Enforcement Act 2007 Sch 11 para 3(2)). A deputy district judge was formerly called a 'deputy district registrar': see the Courts and Legal Services Act 1990 s 74(1). Any appointment to the office of deputy district judge in exercise of the function under the Supreme Court Act 1981 s 102(1) must be made, by virtue of the Constitutional Reform Act 2005 s 85, Sch 14 Pt 2 (amended by the Tribunals, Courts and Enforcement Act 2007 ss 56, 146, Sch 11 para 15, Sch 23 Pt 1), in accordance with the Constitutional Reform Act 2005 ss 85-93, 96: see **COURTS**. The Lord Chancellor's function under the Supreme Court Act 1981 s 102(1) is a protected function for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

3 As to district registries see PARA 54.

4 Supreme Court Act 1981 s 102(4A) (s 102(4A)-(4C) added by the Tribunals, Courts and Enforcement Act 2007 Sch 11 para 3(4)). Every deputy district judge so appointed is, by virtue of his office, capable of acting as a district judge in any district registry to which he is not assigned, but may act in a district registry to which he is not assigned only in accordance with arrangements made by or on behalf of the Lord Chief Justice: Supreme Court Act 1981 s 102(4C) (as so added). As to the effect of this amendment see the Tribunals, Courts and Enforcement Act 2007 Sch 11 para 4. The Lord Chancellor may pay a deputy district judge such remuneration and allowances out of money provided by Parliament as, with the concurrence of the Minister for the Civil Service, the Lord Chancellor determines: see the Supreme Court Act 1981 s 91(6), applied by s 102(5) (substituted by the Judicial Pensions and Retirement Act 1993 s 31(3), Sch 8 para 15(3)). Notwithstanding the expiry of the period of his appointment, a deputy district judge may validly continue to deal with, give judgment in or deal with any ancillary matter relating to any case with which he was concerned during that period: see the Judicial Pensions and Retirement Act 1993 s 27(1).

5 Supreme Court Act 1981 s 102(4B) (added by the Tribunals, Courts and Enforcement Act 2007 Sch 11 para 3(4)).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(3) DISTRICT REGISTRIES/57. Procedure in the district registries.

57. Procedure in the district registries.

Under the old rules¹ it was expressly provided that the procedure of the Central Office² was to apply in the district registries. The Civil Procedure Rules make no such express provision; however it is to be assumed that the procedure set out in the practice guides of the Queen's Bench and Chancery Divisions³ and in the Family Proceedings Rules 1991⁴ and practice directions applies as appropriate in the district registries.

Every district registry must be open on the days and during the hours that the Lord Chancellor from time to time directs and, in the absence of any such directions, must be open on the same days and during the same hours as the county court offices of which it forms part are open⁵.

1 See RSC Ord 63 (revoked).

2 As to the Central Office see PARA 51.

3 As to *The Queen's Bench Guide* (2007 Edn) and *The Chancery Guide* (2005 Edn) see PARA 16 text and notes 4-5; and as to their contents see further *The Civil Court Practice*. The district registries at Birmingham, Bristol, Caernarfon, Cardiff, Leeds, Liverpool, Manchester, Mold, Newcastle upon Tyne and Preston are specifically designated as Chancery courts: see the Civil Courts Order 1983, SI 1983/713, art 4, Sch 1 (amended by SI 2007/786).

4 As to the Family Proceedings Rules 1991, SI 1991/1247, see **CHILDREN AND YOUNG PERSONS; MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

5 *Practice Direction--Court Offices* PD 2A para 2.1(3). As to the opening hours of county court offices see PARA 58 note 5.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(4) COUNTY COURTS/58. In general.

(4) COUNTY COURTS

58. In general.

County courts are creatures of statute¹. As such, the jurisdiction exercised by county court judges and officers derives from the County Courts Act 1984 and the Civil Procedure Rules. It is, however, now established that county courts have inherent jurisdiction².

England and Wales is divided into districts and a county court is held for each district at one or more places in it, each court having such jurisdiction and powers as are conferred by the County Courts Act 1984 and any other enactment for the time being in force³. A county court is a court of record and has a seal⁴. The Lord Chancellor may, after consulting the Lord Chief Justice, by order specify places at which county courts are to be held and the name by which the court held at any place so specified is to be known⁵. The City of London is a county court district⁶ and the county court for that district is known as the Mayor's and City of London Court⁷.

Provision is made for public buildings, other than buildings erected before 1 January 1889 for the purpose of holding and carrying on the business of a county court, to be used for the purpose of holding the court, provided that the court sittings are arranged so as not to interfere with the business of the local or any other public authority usually transacted in such a building⁸.

For many types of proceedings, the High Court and county courts have concurrent jurisdiction and there are now rules common to most civil proceedings in these courts⁹. County courts do not, however, have the power to grant search orders¹⁰ and have the power to grant freezing injunctions only in limited circumstances¹¹. These orders can, however, generally be granted in the patents county court and in the Central London County Court business list. Where the county court has no jurisdiction to make the order, proceedings are transferred to the High Court for the purposes of the application and then transferred back to the county court¹².

A county court cannot make a declaration of incompatibility in accordance with the Human Rights Act 1998¹³.

The decision as to whether a claim should be commenced in the High Court or a county court depends on such factors as the complexity of the case, whether it is likely to raise difficult questions of law or fact, the monetary value of the claim and the importance of its outcome to the general public¹⁴. Additionally, there are a number of statutory and other restrictions on where proceedings may be started. Provisions relating to where proceedings may be commenced are discussed elsewhere in this title¹⁵.

A claimant who brings proceedings in the High Court which should have been commenced in a county court is likely to be penalised in costs¹⁶.

The location of the court used is generally determined by convenience, that of the parties and their solicitors. However, if the case is defended, the court will give first consideration to the convenience of the defendant¹⁷. In the case of proceedings seeking possession of property, these must be commenced in the county court serving the district in which the property is situated¹⁸.

1 As to the history and origins of county courts see **COURTS**.

2 See *Langley v North West Water Authority* [1991] 3 All ER 610, [1991] 1 WLR 697, CA.

3 County Courts Act 1984 s 1(1) (amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(1), (4)). Nothing in this provision affects the operation of the Courts Act 1971 s 42 (City of London: see the text and notes 6-7): County Courts Act 1984 s 1(3).

4 County Courts Act 1984 s 1(2). As to courts of record see generally **COURTS**.

5 County Courts Act 1984 s 2(1) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 160, 161(1), (2)). Such order must be made by statutory instrument which must be laid before Parliament after being made: County Courts Act 1984 s 2(2). Subject to any alterations made by virtue of s 2, county courts continue to be held for the districts and at the places and by the names appointed on 1 August 1984 (the commencement date of the County Courts Act 1984: see s 150): s 2(4). The districts for which county courts are to be held are to be determined in accordance with directions given, after consulting the Lord Chief Justice, by or on behalf of the Lord Chancellor: s 2(3) (amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 161(3)). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the County Courts Act 1984 s 2(1) or (3): s 2(5) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 161(4)).

By virtue of the County Courts Act 1984 s 2(4) and the Interpretation Act 1978 s 17(2)(b), the Civil Courts Order 1983, SI 1983/713 (as amended: see PARA 54 note 3) has effect as if made under these provisions. Article 6(1), Sch 3 col 1 lists the places at which there is a county court. The name of every place so specified is the name of the county court at that place except where the contrary is specified in art 6(2), Sch 4: art 6(2). Where the word 'Divorce' appears in Sch 3 col 2 opposite a place name in Sch 3 col 1, the county court at that place is designated as a divorce county court and that county court is also designated as a court of trial: see art 7. Where the words 'Civil Partnership' appear in Sch 3 col 2 opposite a place name in Sch 3 col 1, the county court at that place is designated for the purpose of the Matrimonial and Family Proceedings Act 1984 s 36A as a civil partnership proceedings county court and that county court is also designated as a court of trial: Civil Courts Order 1983, SI 1983/713, art 8 (added by SI 2005/2923). The county court at a place named in the Civil Courts Order 1983, SI 1983/713, Sch 3 col 1 is excluded from having jurisdiction under the Insolvency Act 1986 Pts I-XI (ss 1-385) if the word 'Bankruptcy' does not appear in the Civil Courts Order 1983, SI 1983/713, Sch 3 col 2 opposite the name of the place and the district of a county court excluded from having such jurisdiction is attached for the purposes of that jurisdiction to the bankruptcy county court named in Sch 3 col 4 opposite the name of the place at which the court is situated: see art 9 (amended by SI 2007/786). Where the words 'Race Relations' appear in the Civil Courts Order 1983, SI 1983/713, Sch 3 col 2 opposite a place named in Sch 3 col 1, the county court at that place is designated for the purposes of the Race Relations Act 1976 and the district of a county court not so designated for those purposes is assigned for race relations purposes to the race relations county court named in the Civil Courts Order 1983, SI 1983/713, Sch 3 col 5 opposite the name of the place at which the court is situated: see art 10. There are some 240 county courts in total.

Certain county courts are authorised to hear mercantile claims (see PARA 1545), Technology and Construction Court claims (subject to certain restrictions: see PARA 1546) and patents and other specialist proceedings (see PARA 1547).

Each county court has at least one office for the conduct of court business, which must generally be open to the public from 10 am to 4 pm or such other hours as the Lord Chancellor may from time to time direct: see *Practice Direction--Court Offices* PD 2A paras 3.1, 3.3. Every county court office, or if a court has two or more offices at least one of those offices, must be open on every day of the year except (1) Saturdays and Sundays; (2) the day before Good Friday from noon onwards and Good Friday; (3) the Tuesday after the Spring bank holiday; (4) Christmas Day and, if that day is a Friday or Saturday, then 28 December; (5) bank holidays; and (6) such other days as the Lord Chancellor may direct: para 3.2(1). For these purposes, 'bank holiday' means a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971 and 'spring bank holiday' means the bank holiday on the last Monday in May or any day appointed instead of that day under s 1(2): *Practice Direction--Court Offices* PD 2A para 3.2(2). As to bank holidays see further **TIME** vol 97 (2010) PARA 321.

The districts of district registries are generally defined by reference to county court districts: see PARA 54 note 3.

6 See the Courts Act 1971 s 42(2).

7 See the Courts Act 1971 s 42(3).

8 See the County Courts Act 1984 s 4.

9 As to the new civil procedure see PARA 24 et seq. The Civil Procedure Rules do not apply to most family proceedings: see PARA 32.

Subject to the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 4A (see PARA 116 note 4); to art 5 (see PARA 116 note 5); to art 6 (which provides that applications and appeals under the Audit Commission Act 1998 ss 17, 18 (prospectively repealed) (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 772) must be commenced in the High Court); and to the High Court and County Courts Jurisdiction Order 1991, SI

1991/724, art 6A (see PARA 116 text and note 26), proceedings in which both the county courts and the High Court have jurisdiction may be commenced either in a county court or in the High Court: art 4 (amended by the Access to Neighbouring Land Act 1992 s 7(2); and by SI 1999/1014). Except for a judgment or order of a county court for the payment of a sum of money in proceedings arising out of an agreement regulated by the Consumer Credit Act 1974, which may be enforced only in a county court, a judgment or order of a county court for the payment of a sum of money which it is sought to enforce wholly or partially by execution against goods may be enforced only in the High Court where the sum which it is sought to enforce is £5,000 or more, may be enforced only in a county court where the sum which it is sought to enforce is less than £600, and in any other case may be enforced in either the High Court or a county court: High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 8(1) (amended by SI 1993/1407; SI 1999/1014; SI 1995/205); High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 8(1A) (added by SI 1995/205). Where an enactment provides that a sum of money is to be or may be recoverable as if it were payable under a county court order and the recovery of the sum is sought wholly or partially by execution against goods, payment of that sum is to be enforced in accordance with the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 8(1) (a)-(c); however, art 8(1)(b) does not apply to the enforcement of money recoverable under the Employment Tribunals Act 1996 s 15(1) or a compromise sum which is recoverable under s 19A(3) (see **EMPLOYMENT** vol 41 (2009) PARA 1383); High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 8(2), (3) (added by SI 2009/577). Proceedings for the recovery of certain road traffic penalties may be taken only in Northampton County Court: see the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 8A (added by SI 1993/1407; and amended by SI 1996/3141; SI 2001/1387; SI 2009/577); and **COURTS** vol 10 (Reissue) PARA 713. A judgment or order of a county court for possession of land made in a possession claim against trespassers may be enforced in the High Court or a county court: see art 8B (added by SI 2001/2685). The High Court and County Courts Jurisdiction Order 1991, SI 1991/724, does not apply to family proceedings within the meaning of the Matrimonial and Family Proceedings Act 1984 Pt V (ss 32-42) (see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 744); High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 12(a).

A county court has jurisdiction under:

- 16 (1) the following provisions, whatever the amount involved in the proceedings and whatever the value of any fund or asset connected with the proceedings: (a) the Law of Property Act 1925 ss 146, 147; (b) the Landlord and Tenant Act 1954 s 63(2); (c) the Mines and Quarries (Tips) Act 1969 s 28; (d) the Taxes Management Act 1970 s 66; (e) the Administration of Justice Act 1970 s 41; (f) the Consumer Credit Act 1974 s 139(5)(b); (g) the Torts (Interference with Goods) Act 1977 s 13; (h) the Magistrates' Courts Act 1980 s 87; (i) the Audit Commission Act 1998 ss 17, 18; (j) the County Courts Act 1984 s 15 (contract and tort claims: but see s 15(2); and PARA 116 text and note 26); s 16 (money recoverable by statute); s 21 (claims for the recovery of land); s 25 (applications for orders under the Inheritance (Provision for Family and Dependants) Act 1975 s 2); and the County Courts Act 1984 s 138 (forfeiture for non-payment of rent); (k) the Legal Aid Act 1988 s 39(4), Sch 3 para 3(1) (all repealed); (l) the Copyright, Designs and Patents Act 1988 ss 99, 102(5), 114, 195, 204, 230, 231 and 235(5); (m) the Housing Act 1988 s 40; and (n) the Trusts of Land and Appointment of Trustees Act 1996 ss 13, 14 (see the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(1) (amended by SI 1996/3141; SI 2005/587; and by virtue of the Audit Commission Act 1998 s 54(2), Sch 4, para 4(1));
- 17 (2) the Local Land Charges Act 1975 s 10 and the Rentcharges Act 1977 s 10(4) where the sum concerned or amount claimed does not exceed £5,000 (see the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(2));
- 18 (3) the following provisions of the Law of Property Act 1925 where the capital value of the land or interest in land which is to be dealt with does not exceed £30,000: (a) ss 3, 49, 66, 181 and 188; (b) Sch 1 Pt III para 3 proviso (iii); (c) Sch 1 Pt IV para 1(3) proviso (v); (d) Sch 1 Pt IV para 1(4) provisos (iii), (iv) (see the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(3));
- 19 (4) the Law of Property Act 1925 ss 89-92 where the amount owing in respect of the mortgage or charge at the commencement of the proceedings does not exceed £30,000 (see the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(4));
- 20 (5) the Law of Property Act 1925 s 136(1), proviso where the amount or value of the debt or thing in action does not exceed £30,000 (see the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(5));
- 21 (6) the Land Charges Act 1972 s 1(6): (a) in the case of a land charge of Class C(i), C(ii) or D(i), if the amount does not exceed £30,000; (b) in the case of a land charge of Class C(iii), if it is for a specified capital sum of money not exceeding £30,000 or, where it is not for a specified capital sum, if the capital value of the land affected does not exceed £30,000; (c) in the case of a land charge of Class A, Class B, Class C(iv), Class D(ii), Class D(iii) or Class E, if the capital value of the land affected does not exceed £30,000; (d) in the case of a land charge of Class F, if the land affected by it is the subject of an order made by the court under the Matrimonial Homes Act

1983 s 1 (repealed) or the Family Law Act 1996 s 33 or an application for such an order relating to that land has been made to the court; (e) in a case where an application under the Deeds of Arrangement Act 1914 s 23 could be entertained by the court (see the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(6));

- 22 (7) the Solicitors Act 1974 ss 69-71 where a bill of costs relates wholly or partly to contentious business done in a county court and the amount of the bill does not exceed £5,000 (see the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(7));
- 23 (8) the Trade Marks Act 1994 ss 15, 16, 19, 23(5), 25(4)(b), 30, 31, 46, 47, 64, 73, 74, Sch 1 para 12, Sch 2 para 14, to include jurisdiction to hear and determine any claims or matters ancillary to, or arising from proceedings brought under such provisions (this applies to the county courts at Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester and Newcastle upon Tyne only) (see the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(7A), (7B) (added by SI 2005/587)).

In relation to equity jurisdiction, a county court has all the jurisdiction of the High Court to hear and determine: (i) proceedings for the administration of the estate of a deceased person, where the estate does not exceed in amount or value the county court limit; (ii) proceedings for the execution of any trust, or for a declaration that a trust subsists, or under the Variation of Trusts Act 1958 s 1, where the estate or fund subject, or alleged to be subject, to the trust does not exceed in amount or value the county court limit; (iii) proceedings for foreclosure or redemption of any mortgage or for enforcing any charge or lien, where the amount owing in respect of the mortgage, charge or lien does not exceed the county court limit; (iv) proceedings for the specific performance, or for the rectification, delivery up or cancellation, of any agreement for the sale, purchase or lease of any property, where, in the case of a sale or purchase, the purchase money, or in the case of a lease, the value of the property, does not exceed the county court limit; (v) proceedings relating to the maintenance or advancement of a minor, where the property of the minor does not exceed in amount or value the county court limit; (vi) proceedings for the dissolution or winding-up of any partnership (whether or not the existence of the partnership is in dispute), where the whole assets of the partnership do not exceed in amount or value the county court limit; and (vii) proceedings for relief against fraud or mistake, where the damage sustained or the estate or fund in respect of which relief is sought does not exceed in amount or value the county court limit: County Courts Act 1984 s 23. Additionally, a county court may hear and determine certain other equity proceedings by agreement: see s 24; and **COURTS**.

In relation to equity jurisdiction, where the High Court has transferred proceedings to a county court pursuant to s 40(2), notwithstanding s 23, the county court has jurisdiction to hear and determine the proceedings even where the amount exceeds the county court limit: *National Westminster Bank plc v King* [2008] EWHC 280 (Ch), [2008] Ch 385, [2008] All ER (D) 292 (Feb).

Subject to certain exceptions, in any proceedings in a county court the court may make any order which could be made by the High Court if proceedings were in the High Court: County Courts Act 1984 s 38(1) (s 38 substituted by the Courts and Legal Services Act 1990 s 3). A county court may not, however, make a mandatory, quashing or prohibiting order, or make an order of a kind prescribed by regulations made by the Lord Chancellor under the County Courts Act 1984 s 38 (as so substituted): see s 38(3), (5) (as so substituted); s 38(5) amended by the Constitutional Reform Act 2005 s 15(1) Sch 4 Pt 1 paras 160, 167). As to such regulations see the County Courts Act 1984 s 38(4), (4A) (s 38(4) as so substituted, and amended by the Constitutional Reform Act 2005 ss 12(2), 146, Sch 1 Pt 2 para 17(1), (2), Sch 18 Pt 1; County Courts Act 1984 s 38(4A) added by the Constitutional Reform Act 2005 Sch 1 Pt 2 para 17(3)).

10 See PARA 319.

11 See PARAS 315 head (6) in the text, 318, 396 et seq.

12 See the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 3. As to the transfer of proceedings between the High Court and a county court see PARA 69.

13 See the Human Rights Act 1998 s 4(5) (amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 43; and, as from a day to be appointed, by the Constitutional Reform Act 2005 s 40(4), Sch 9 Pt 1 para 66(1), (2) and the Armed Forces Act 2006 s 378(1), Sch 16 para 156). At the date at which this title states the law, no day had been appointed bringing the latter two amendments into force. As to other limitations on the jurisdiction of a county court under that Act see CPR 7.11; and PARA 116.

14 As to the court where a claim should be commenced see PARA 116.

15 See PARA 116.

16 As to sanctions in the form of payment of costs see generally PARA 255.

17 In certain circumstances where a claim is not started in the defendant's home court, proceedings may be automatically transferred there: see eg CPR 14.12(2) (determination of rate of payment by a judge); and PARA 197. 'Defendant's home court' means (1) if the claim is proceeding in a county court, the county court for the district in which the defendant resides or carries on business; and (2) if the claim is proceeding in the High Court, the district registry for the district in which the defendant resides or carries on business or, where there is no such district registry, the Royal Courts of Justice: CPR 2.3(1). As to the meaning of 'defendant' see PARA 18.

18 See PARA 116 text and note 24.

UPDATE

58 In general

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

NOTE 9--The rule that proceedings in which both the county courts and the High Court have jurisdiction may be commenced either in a county court or in the High Court is further subject to art 6B (see PARA 116): SI 1991/724 art 4 (amended by SI 2008/2934). Head (1)(f) omitted: SI 1991/724 art 2(1) (amended by SI 2008/2934).

NOTE 5--As to the exclusion of certain county courts from having jurisdiction under the Companies Act 2006 and the assignment of the district of each excluded court to another county court, see SI 1983/713 art 10A (added by SI 2009/2455).

NOTE 13--Constitutional Reform Act 2005 Sch 9 para 66 in force 1 October 2009: SI 2009/1604. Armed Forces Act 2006 Sch 16 para 156 in force on 31 October 2009: SI 2009/1167.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(4) COUNTY COURTS/59. Judges of county courts.

59. Judges of county courts.

Every circuit judge is, by virtue of his office, capable of sitting as a judge for any county court district in England and Wales¹. The Lord Chief Justice, after consulting the Lord Chancellor, must assign one or more circuit judges to each district and may from time to time vary the assignment of circuit judges among the districts².

Subject to any directions given by the Lord Chief Justice after consulting the Lord Chancellor, in any case where more than one circuit judge is so assigned to a district, any function conferred by or under the County Courts Act 1984 on the judge for a district may be exercised by any of the circuit judges for the time being assigned to that district³. Notwithstanding that he is not for the time being assigned to a particular district, a circuit judge must sit as a judge of that district at such times and on such occasions as the Lord Chief Justice may, after consulting the Lord Chancellor, direct and may sit as a judge of that district in any case where it appears to him that the judge of that district is not, or none of the judges of that district is, available to deal with the case⁴.

Every judge of the Court of Appeal, every judge of the High Court and every recorder is, by virtue of his office, capable of sitting as a judge for any county court district in England and Wales and, if he consents to do so, must sit as such a judge at such times and on such occasions as the Lord Chief Justice considers desirable after consulting the Lord Chancellor⁵.

1 County Courts Act 1984 s 5(1). As to county court districts see PARA 58. As to the appointment of circuit judges see the Courts Act 1971 s 16; and **COURTS**. The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the County Courts Act 1984 s 5: s 5(5) (added by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 160, 163(1), (6)).

2 County Courts Act 1984 s 5(1) (amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 163(2)).

3 County Courts Act 1984 s 5(2) (amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 163(3)).

4 County Courts Act 1984 s 5(4) (amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 163(5)).

5 County Courts Act 1984 s 5(3) (amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 163(4)). As to the appointment of recorders to act as part-time judges of the Crown Court and to carry out such other judicial functions as may be conferred on them under any enactment see the Courts Act 1971 s 21; and **COURTS**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(4) COUNTY COURTS/60. District judges and deputy district judges.

60. District judges and deputy district judges.

The Lord Chief Justice, after consulting the Lord Chancellor, must assign each district judge to one or more districts and may change an assignment so as to assign the district judge to a different district or districts¹. Every district judge is, by virtue of his office, capable of acting in any district whether or not assigned to it, but may do so only in accordance with arrangements made by or on behalf of the Lord Chief Justice².

If it appears to the Lord Chancellor that it is expedient to do so in order to facilitate the disposal of business in the county courts, he may appoint a person to be a deputy district judge³. A deputy district judge, while acting under his appointment and assigned to a district, has the same powers and is subject to the same liabilities as if he were a district judge assigned to the district⁴. The Lord Chief Justice, after consulting the Lord Chancellor, may assign a deputy district judge to one or more districts and may change an assignment so as to assign the deputy district judge to a different district or districts (or to no district)⁵.

The district judge for every district must keep or cause to be kept such records of and in relation to proceedings in the court for that district as the Lord Chancellor may by regulations made by statutory instrument prescribe⁶. Any entry in a book or other document required by those regulations to be kept for these purposes, or a copy of any such entry or document purporting to be signed and certified as a true copy by the district judge, is at all times without further proof to be admitted in any court or place whatsoever as evidence of the entry and of the proceeding referred to by it and of the regularity of that proceeding⁷.

1 County Courts Act 1984 s 6(2) (s 6 substituted by the Constitutional Reform Act 2005 s 14, Sch 3 para 1(1)). A reference in any enactment or other instrument to the district judge for a district or of a county court is a reference to any district judge assigned to the district concerned: County Courts Act 1984 s 6(3) (as so substituted). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the County Courts Act 1984 s 6(2): s 6(7) (added by the Tribunals, Courts and Enforcement Act 2007 s 56, Sch 11 paras 5, 6).

2 County Courts Act 1984 s 6(4) (as substituted: see note 1).

3 See the County Courts Act 1984 s 8; and **COURTS** vol 10 (Reissue) para 728.

4 County Courts Act 1984 s 8(1C) (added by the Tribunals, Courts and Enforcement Act 2007 Sch 11 para 7(4)).

5 County Courts Act 1984 s 8(1B) (added by the Tribunals, Courts and Enforcement Act 2007 Sch 11 para 7(4)). Every deputy district judge is, by virtue of his office, capable of acting as a district judge in any district to which he is not assigned, but may act in a district to which he is not assigned only in accordance with arrangements made by or on behalf of the Lord Chief Justice: County Courts Act 1984 s 8(1D) (added by the Tribunals, Courts and Enforcement Act 2007 Sch 11 para 7(4)).

6 County Courts Act 1984 s 12(1) (s 12 amended by the Courts and Legal Services Act 1990 Sch 18 para 42). By virtue of the Interpretation Act 1978 s 17(2)(b), the County Courts (Records of Proceedings) Regulations 1967, SI 1967/1194 (as amended and modified) have effect as if so made: see further **COURTS**. The Lord Chancellor must consult the Lord Chief Justice before making regulations under the County Courts Act 1984 s 12, and the Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise these functions: County Courts Act 1984 s 12(3), (4) (added by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 160, 165). The Lord Chancellor's functions under the County Courts Act 1984 ss 8(1), (3), 12(1) are protected functions for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

7 County Courts Act 1984 s 12(2) (as amended: see note 6). As to the register of county court judgments see the Courts Act 2003 s 98; and PARA 1147.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(4) COUNTY COURTS/61. Powers of judge, district judge and court officers to perform court functions and acts.

61. Powers of judge, district judge and court officers to perform court functions and acts.

Where the Civil Procedure Rules provide for the court to perform any act then, except where an enactment, rule or practice direction provides otherwise, that act may be performed in relation to proceedings in a county court by any judge or district judge¹.

Where those rules require or permit the court to perform an act of a formal or administrative character, that act may be performed by a court officer². However, a requirement that a court officer carry out any act at the request of a party is subject to the payment of any fee required by a fees order for the carrying out of that act³.

1 CPR 2.4(b). As to the Civil Procedure Rules see PARAS 9, 30 et seq. As to county court judges see PARA 59; and as to district judges and deputy district judges see PARA 60. As to the allocation of cases between levels of the judiciary in county courts see PARA 62. As to the meaning of 'judge' see PARA 49.

2 CPR 2.5(1). As to the meaning of 'court officer' for these purposes see PARA 49 note 3.

3 CPR 2.5(2). As to county court fees orders see PARA 87.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(4) COUNTY COURTS/62. Allocation of cases between levels of judiciary and to particular judges.

62. Allocation of cases between levels of judiciary and to particular judges.

The Civil Procedure Rules set out, by supplementary practice direction, the matters over which district judges and deputy district judges in the county courts do not have jurisdiction or which they may deal with only on certain conditions¹.

In relation to injunctions which a county court has jurisdiction to make, the practice direction provides that such injunctions may only be made by a circuit judge, except:

- 99 (1) where the injunction is to be made in proceedings which a district judge otherwise has jurisdiction to hear²;
- 100 (2) where the injunction is sought in a money claim which has not yet been allocated to a track and the amount claimed does not exceed the fast track financial limit³;
- 101 (3) in specified circumstances⁴ in which a district judge or a master could make an injunction in the High Court⁵;
- 102 (4) where the injunction is to be made under specified provisions⁶ of the Housing Act 1996 or the Protection from Harassment Act 1997⁷.

A district judge may, however, make orders varying or discharging injunctions if all parties to the proceedings have consented to the variation or discharge⁸; and has jurisdiction to make anti-social behaviour orders and parenting orders⁹.

In relation to other pre-trial orders and interim remedies, the practice direction provides that a district judge may not make orders or grant interim remedies relating to appeals from district judges or deputy district judges¹⁰ or in appeals against costs assessments¹¹, except on an appeal¹² against the decision of an authorised court officer in detailed assessment proceedings¹³. To the extent that a county court has power to make a freezing order¹⁴, any cross-examination on the contents of a witness statement or affidavit which the court has ordered a person to make about his assets will take place before a district judge or, if he directs, before an examiner of the court, unless the circuit judge directs otherwise¹⁵.

A district judge may not make an order committing a person to prison except where an enactment authorises this¹⁶. Nor may he hear appeals on a point of law¹⁷ where a person is dissatisfied with a review of a local authority's decision under the homelessness provisions of the Housing Act 1996¹⁸.

A district judge may not try a case in a claim made in respect of a judicial act under the Human Rights Act 1998 or a claim for a declaration of incompatibility under that Act¹⁹; nor may a district judge try a case in which an allegation of indirect discrimination is made against a public authority that would, if the court finds that it occurred, be unlawful as constituting discrimination²⁰ under the Race Relations Act 1976²¹.

The practice direction provides that a district judge has jurisdiction to hear the following:

- 103 (a) subject to certain exceptions²², any claim which has been allocated to the small claims track or fast track²³ or which is treated as being allocated to the multi-track²⁴ under the provisions relating to Part 8 proceedings²⁵;

- 104 (b) proceedings for the recovery of land, demotion claims under the Housing Act 1985²⁶ or the Housing Act 1988²⁷ and proceedings in a county court²⁸ relating to demoted tenancies²⁹;
- 105 (c) the assessment of damages or other sum due to a party under a judgment without any financial limit³⁰; and
- 106 (d) with the permission of the designated civil judge in respect of that case, any other proceedings³¹.

Furthermore, a case allocated to the small claims track may only be assigned to a circuit judge to hear with his consent³².

Where both the circuit judge and the district judge have jurisdiction in respect of any proceedings, the exercise of jurisdiction by the district judge is subject to any arrangements made by the designated civil judge for the proper distribution of business between circuit judges and district judges³³. The designated civil judge may make arrangements for proceedings to be assigned to individual district judges and may vary such arrangements either generally or in particular cases³⁴. The fact that a case has been assigned to a particular district judge does not, however, prevent another district judge from dealing with the case if the circumstances require³⁵.

Wherever a district judge has jurisdiction, he may refer the matter to a circuit judge instead of dealing with it himself³⁶.

1 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B, which does not affect jurisdiction conferred by other enactments: see para 1.1. References therein to circuit judges include recorders and assistant recorders and references to district judges include deputies: para 1.1. As to the appointment of recorders to act as part-time judges of the Crown Court and to carry out such other judicial functions as may be conferred on them under any enactment see the Courts Act 1971 s 21; and **COURTS**.

2 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 8.1(a). As to such proceedings see heads (a)-(d) in the text. As to the meaning of 'injunction' see PARA 315 note 2.

3 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 8.1(b). As to allocation to track see PARA 262 et seq; and as to the fast track financial limit see PARA 268.

4 Ie in the circumstances provided by *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 2.3: see PARA 50 head (2)(a)-(d) in the text.

5 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 8.1(c).

6 Ie under the Housing Act 1996 s 153A, 153B or 153D (see **HOUSING** vol 22 (2006 Reissue) PARAS 268-269) or the Protection from Harassment Act 1997 s 3 (see **TORT** vol 45(2) (Reissue) PARA 457).

7 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 8.1(d).

8 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 8.2, applying para 2.4, which is set out in PARA 50 text to note 12.

9 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 8.1A. Anti-social behaviour orders are made under the Crime and Disorder Act 1998 s 1B or 1D (see **DISPOSITION OF OFFENDERS** vol 92 (2010) PARAS 497, 498); and parenting orders are made under the Anti-social Behaviour Act 2003 s 26A, 26B or 26C (see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARAS 1329-1333).

10 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 10.1, applying para 3.1(d), which is set out in PARA 50 head (iv) in the text.

11 Ie under CPR Pts 43-48: see *The Civil Court Practice*. As to costs generally see also PARA 1729 et seq.

12 Ie under CPR 47.20: see *The Civil Court Practice*.

13 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 10.1, applying para 3.1(e), which is set out in PARA 50 head (v) in the text.

- 14 As to freezing orders see PARAS 315 head (6) in the text, 318, 396 et seq.
- 15 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 12, applying para 7 as appropriate, which is set out in PARA 50 note 4.
- 16 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 8.3. As to such enactments see (1) the Attachment of Earnings Act 1971 s 23; and PARAS 1465-1466; (2) the County Courts Act 1984 s 14; and PARA 63; s 118; and **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 454; (3) the Housing Act 1996 ss 152-157 (breach of anti-social behaviour injunction); and **HOUSING** vol 22 (2006 Reissue) PARA 268 et seq; (4) the Protection from Harassment Act 1997 s 3; and **TORT** vol 45(2) (Reissue) PARA 457; and (5) the relevant rules: see *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 8.3.
- 17 Ie under the Housing Act 1996 s 204 or 204A: see **HOUSING** vol 22 (2006 Reissue) PARA 295.
- 18 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 9.
- 19 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 7A. See the Human Rights Act 1988 s 4, PARA 5; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.
- 20 Ie under the Race Relations Act 1976 s 19B: see **DISCRIMINATION** vol 13 (2007 Reissue) PARA 470.
- 21 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 15.
- 22 The exceptions relate to certain applications under the Landlord and Tenant Acts 1927 and 1954 and to proceedings under the Landlord and Tenant Act 1987, the Agricultural Holdings Act 1986, the Legitimacy Act 1976, the Fair Trading Act 1973 and the Mental Health Act 1983: see *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 11.1(a)(i)-(vii).
- 23 As to claims normally allocated to the small claims track or the fast track see PARAS 267-268.
- 24 Ie treated as allocated to the multi-track under CPR 8.9(c) (see PARA 136) and *Practice Direction--Part 8* PD 8B, para B.1, Table 2 (see PARA 127): *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 11.1(a).
- 25 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 11.1(a). As to Part 8 proceedings see PARA 127 et seq.
- 26 Ie under the Housing Act 1985 s 82A: see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1351.
- 27 Ie under the Housing Act 1988 s 6A(2): see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1066.
- 28 Ie under the Housing Act 1996 Pt V Ch 1A (ss 143A-143P): see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARAS 1382-1384.
- 29 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 11.1(b).
- 30 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 11.1(c); but see *Sandry v Jones* (2000) Times, 3 August, CA.
- 31 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 11.1(d).
- 32 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 11.2.
- 33 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 13.
- 34 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 14.1.
- 35 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 14.2.
- 36 *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 1.2.

UPDATE

62 Allocation of cases between levels of judiciary and to particular judges

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(4) COUNTY COURTS/63. Miscellaneous provisions about officers.

63. Miscellaneous provisions about officers.

Subject to what follows, no officer¹ of a county court may, either by himself or his partner, be directly or indirectly engaged as legal representative or agent for any party in any proceedings in that court². Every person who contravenes this prohibition is liable for each offence on summary conviction to a fine of an amount not exceeding level 3 on the standard scale³.

This prohibition does not, however, apply to a person acting as district judge in another district⁴ nor to a deputy district judge⁵; but a deputy district judge must not act as such in relation to any proceedings in which he is, either by himself or his partner, directly or indirectly engaged as legal representative or agent for any party⁶.

Any person assaulting an officer of the court in the execution of his duty is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 5 on the standard scale, or to both, or, alternatively, may be committed to prison by the judge for contempt of court or fined by the judge, or both⁷.

1 'Officer' in relation to a court means any district judge or deputy district judge assigned to that court, and any clerk, bailiff, usher or messenger in the service of the court: County Courts Act 1984 s 147(1) (amended by the Tribunals, Courts and Enforcement Act 2007 s 56, Sch 11 paras 5, 9).

2 County Courts Act 1984 s 13(1) (amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 49). 'Legal representative' means an authorised advocate or authorised litigator, as defined by the Courts and Legal Services Act 1990 s 119(1) (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 498): County Courts Act 1984 s 147(1) (definition added by the Courts and Legal Services Act 1990 Sch 18 para 49). As from a day to be appointed, 'legal representative' means a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation (within the meaning of that Act): County Courts Act 1984 s 147(1) (definition amended, as from a day to be appointed, by the Legal Services Act 2007 s 208(1), Sch 21 para 61). At the date at which this title states the law, no such day had been appointed.

3 County Courts Act 1984 s 13(2). 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37: see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58(a)); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 142. At the date at which this title states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 2003 s 164; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 144.

4 He acting as district judge by virtue of the County Courts Act 1984 s 6(5): see PARA 60.

5 See the County Courts Act 1984 s 13(3), (4) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3)).

6 County Courts Act 1984 s 13(4) (as amended (see note 5); and amended by the Courts and Legal Services Act 1990 Sch 18 para 49).

7 See the County Courts Act 1984 s 14(1) (amended by the Statute Law (Repeals) Act 1986). The maximum term of imprisonment is prospectively increased to 51 weeks: see the County Courts Act 1984 s 14(1) (amended, as from a day to be appointed, by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 33(1), (2)). At the date at which this title states the law, no such day had been appointed. The judge may at any time revoke an order committing a person to prison under this provision and, if he is already in custody, order his discharge: County Courts Act 1984 s 14(2). A district judge or deputy district judge has the same powers under s 14 as a judge: s 14(3) (added by the Courts and Legal Services Act 1990 s 74(4)).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(5) SITTINGS AND VACATIONS/64. Court sittings.

(5) SITTINGS AND VACATIONS

64. Court sittings.

Sittings of the High Court may be held, and any other business of the High Court may be conducted, at any place in England and Wales¹, but, subject to rules of court, the Lord Chancellor, after consulting the Lord Chief Justice, may give directions² which will determine the places at which the High Court sits outside the Royal Courts of Justice³, and the days and times when the High Court sits at any such place⁴.

There are four sittings of the Court of Appeal and of the High Court in every year, namely:

- 107 (1) the Michaelmas sittings which begin on 1 October and end on 21 December;
- 108 (2) the Hilary sittings which begin on 11 January and end on the Wednesday before Easter Sunday;
- 109 (3) the Easter sittings which begin on the second Tuesday after Easter Sunday and end on the Friday before the spring holiday⁵; and
- 110 (4) the Trinity sittings which begin on the second Tuesday after the spring holiday and end on 31 July⁶.

These provisions have been modified in relation to the year 2002 only⁷.

In any county court district⁸ the places at which the court sits, and the days and times when the court sits at any place, are to be determined in accordance with directions given, after consulting the Lord Chief Justice, by or on behalf of the Lord Chancellor⁹. A judge may from time to time adjourn any court held by him, and a district judge may from time to time adjourn any court held by him, or, in the absence of the judge, any court to be held by the judge¹⁰.

1 Supreme Court Act 1981 s 71(1). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 Supreme Court Act 1981 s 71(2) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 114, 132(1), (2)). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the Supreme Court Act 1981 s 71: s 71(6) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 132(3)).

3 Supreme Court Act 1981 s 71(2)(a).

4 Supreme Court Act 1981 s 71(2)(b).

5 For these purposes, 'spring holiday' means the bank holiday falling on the last Monday in May or any day appointed instead of that day under the Banking and Financial Dealings Act 1971 s 1(2): *Practice Direction--Court Sittings* PD 39B para 1.1(2). As to bank holidays see further **TIME** vol 97 (2010) PARA 321.

6 *Practice Direction--Court Sittings* PD 39B para 1.1.

7 In 2002 only, the Easter sittings of the Court of Appeal and the High Court ended on Friday 31 May 2002 (the Friday before the spring holiday which was appointed to be on Tuesday 4 June 2002 in place of the last Monday in May); and the Trinity sittings began on Tuesday 11 June 2002 (the first Tuesday after the spring holiday). These changes were made following the appointment of Monday 3 June 2002 to be a Bank Holiday to mark Her Majesty's Golden Jubilee, by Royal Proclamation pursuant to the Banking and Financial Dealings Act 1971 s 1(2), (3): see *Practice Direction--Court Sittings in 2002* PD 39B.

8 As to county court districts see PARA 58.

9 County Courts Act 1984 s 3(1) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 160, 162(1), (2)). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the County Courts Act 1984 s 3(1): s 3(5) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 162(3)). References in the County Courts Act 1984 to sittings of the court include references to sittings by any district judge in pursuance of any provision contained in, or made under, that Act: see s 3(4).

10 See the County Courts Act 1984 s 3(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(5) SITTINGS AND VACATIONS/65. Vacations and vacation business.

65. Vacations and vacation business.

Rules of court may make provision for regulating the vacations to be observed by the High Court and in the offices of that court¹. Rules of court may provide for securing such sittings of any Division of the High Court during vacation as the senior judge of that Division may with the concurrence of the Lord Chancellor determine and they must provide for the transaction during vacation by judges of the High Court of all such business in the High Court as may require to be immediately or promptly transacted².

In the High Court, the senior judge of each Division has the power to direct that one or more judges of each Division of the High Court should sit in vacation on such days as may be directed, to hear such cases, claims, matters or applications requiring immediately or promptly to be heard and to hear other cases, claims, matters or applications if the senior judge of that Division determines that sittings are necessary for that purpose³.

Any party to a claim or matter may at any time apply to the court for an order that such claim or matter be heard in vacation and, if the court is satisfied that the claim or matter requires to be immediately or promptly heard, it may make an order accordingly and fix a date for the hearing⁴.

Any judge of the High Court may hear such other cases, claims, matters or applications in vacation as the court may direct⁵.

The above does not apply outside the Royal Courts of Justice. The senior presiding judge of each circuit, with the concurrence of the senior presiding judge, and the Vice-Chancellor of the County Palatine of Lancaster and the Chancery supervising judge for Birmingham, Bristol and Cardiff, with the concurrence of the Chancellor, may make such arrangements for vacation sittings in the courts for which they are respectively responsible as they think desirable⁶.

Subject to the discretion of the judge, any appeal and any application normally made to a judge may be made in the month of September⁷. In the month of August, save with the permission of a judge or under arrangements for vacation sittings in courts outside the Royal Courts of Justice, appeals to a judge will be limited⁸, and only applications of real urgency will be dealt with⁹. It is desirable, where this is practical, to submit applications or appeals to a master, district judge or judge prior to the hearing of the application or appeal so that they can be marked 'fit for August' or 'fit for vacation'. If they are so marked, then normally the judge will be prepared to hear the application or appeal in August, if marked 'fit for August', or in September if marked 'fit for vacation'. A request to have the papers so marked should normally be made in writing, shortly setting out the nature of the application or appeal and the reasons why it should be dealt with in August or in September, as the case may be¹⁰.

An application notice may, without permission, be issued returnable before a Queen's Bench master in the month of August for any of the following purposes:

- 111 (1) to set aside a claim form or particulars of claim, or service of a claim form or particulars of claim;
- 112 (2) to set aside judgment; for stay of execution;
- 113 (3) for any order by consent;
- 114 (4) for judgment or permission to enter judgment;
- 115 (5) for approval of settlements or for interim payment;

- 116 (6) for relief from forfeiture; for charging order; for third party debt order;
- 117 (7) for appointment or discharge of a receiver;
- 118 (8) for relief by way of interpleader by a sheriff or High Court enforcement officer;
- 119 (9) for transfer to a county court or for trial by master; and
- 120 (10) for time where time is running in the month of August¹¹.

In any case of urgency any other type of application notice may, with the permission of a master, be issued returnable before a master during the month of August¹².

There is no distinction between term time and vacation so far as business before the Chancery masters is concerned. The masters will deal with all types of business throughout the year, and when a master is on holiday his list will normally be taken by a deputy master¹³.

1 Supreme Court Act 1981 s 71(3). Different provision may be made in pursuance of s 71(3) for different parts of the country: s 71(4). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to term times see PARA 64; and as to office hours in the Central Office of the Supreme Court see PARA 52.

2 Supreme Court Act 1981 s 71(4)(a), (b).

3 See *Practice Direction--Court Sittings* PD 39B para 2.1(1). As to the Divisions of the High Court see PARAS 43-46. As to vacation business in the Family Division see *Practice Direction (Family Division: Guide to Vacation Business)* [2006] 2 FCR 840.

4 *Practice Direction--Court Sittings* PD 39B para 2.1(2).

5 *Practice Direction--Court Sittings* PD 39B para 2.1(3).

6 *Practice Direction--Court Sittings* PD 39B para 2.2.

7 *Practice Direction--Court Sittings* PD 39B para 2.3(1).

8 Such appeals will be limited to appeals from the decisions of the masters under *Practice Direction--Court Sittings* PD 39B para 2.5 (see the text and notes 11-12): see para 2.3(2), which states that such appeals will be limited 'to the matters set out in paragraph 3.5 below'; it is apprehended that this is a misprint for 'para 2.5' since there is no para 3.5.

9 See *Practice Direction--Court Sittings* PD 39B para 2.3(2).

10 *Practice Direction--Court Sittings* PD 39B para 2.3(3).

11 *Practice Direction--Court Sittings* PD 39B para 2.5(1). As to time generally see PARA 88 et seq.

12 *Practice Direction--Court Sittings* PD 39B para 2.5(2).

13 *Practice Direction--Court Sittings* PD 39B para 2.4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(6) TRANSFER OF PROCEEDINGS/66. General power of transfer.

(6) TRANSFER OF PROCEEDINGS

66. General power of transfer.

The court's power to transfer proceedings from one court to another is a useful corrective to ensure that proceedings, wherever begun¹ or whatever forum the claimant has initially chosen², are dealt with or heard or determined by the court most appropriate or suitable for those proceedings.

When making or refusing an order for transfer, the court³ will have regard to the overriding objective⁴ and its duty actively to manage cases⁵. The matters to which it must have regard also include:

- 121 (1) the financial value of the claim⁶ and the amount in dispute, if different⁷;
- 122 (2) whether it would be more convenient or fair for hearings (including the trial) to be held in some other court⁸;
- 123 (3) the availability of a judge specialising in the type of claim in question⁹;
- 124 (4) whether the facts, legal issues, remedies or procedures involved are simple or complex¹⁰;
- 125 (5) the importance of the outcome of the claim to the public in general¹¹;
- 126 (6) the facilities available at the court where the claim is being dealt with and whether they may be inadequate because of any disabilities of a party or potential witness¹²;
- 127 (7) whether the making of a declaration of incompatibility under the relevant provision of the Human Rights Act 1998¹³ has arisen or may arise¹⁴;
- 128 (8) in the case of civil proceedings by or against the Crown¹⁵, the location of the relevant government department or officers of the Crown and, where appropriate, any relevant public interest that the matter should be tried in London¹⁶.

In general, the power to transfer is discretionary¹⁷ and the court has power to make transfer orders of its own initiative¹⁸ as well as on application being made¹⁹. In certain circumstances, however, transfer is automatic²⁰. Additionally, there are prescribed restrictions on the power of transfer²¹.

1 As to the court in which proceedings are to be started see PARA 116.

2 As to the choice of a Division of the High Court by the claimant see PARA 48.

3 As to the meaning of 'court' see PARA 22.

4 As to the overriding objective see PARA 33.

5 See CPR 1.4; and PARA 246. CPR Pt 30 deals with the transfer of proceedings between county courts, between the High Court and the county courts and within the High Court: CPR 30.1(1). The practice direction may make provision about the transfer of proceedings between the court and a tribunal: CPR 30.1(2). See *Practice Direction--Transfer* PD 30 para 8 (transfer from the High Court or a county court to the Competition Appeal Tribunal and vice versa under the Enterprise Act 2002 s 16(4), (5)).

6 As to calculating the financial value of a claim see CPR 16.3(6); and PARA 116 note 5. The financial value is significant because of the financial limits set out in the High Court and County Courts Jurisdiction Order 1991, SI 1991/724: see PARA 116.

7 CPR 30.3(2)(a).

8 CPR 30.3(2)(b). This is particularly significant in the light of the right to a fair trial under the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)) now incorporated into domestic law: see the Human Rights Act 1998 s 1(3), Sch 1 art 6 (see PARA 5).

9 CPR 30.3(2)(c). As to specialist proceedings see CPR Pt 49; and PARA 1536 et seq.

10 CPR 30.3(2)(d).

11 CPR 30.3(2)(e).

12 CPR 30.3(2)(f).

13 Ie under the Human Rights Act 1998 s 4: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

14 CPR 30.3(2)(g). A transfer must only be made on the basis of the criterion in CPR 30.3(2)(g) where there is a real prospect that a declaration of incompatibility will be made: *Practice Direction--Transfer* PD 30 para 7. The court must have regard to the matters set out in heads (1)-(7) in the text when considering whether to make a transfer order: (1) between the High Court and a county court, under the County Courts Act 1984 s 40(2), s 41(1) or s 42(2) (see PARA 69); (2) between county courts under CPR 30.2(1) (see PARA 68); or (3) between the Royal Courts of Justice and the district registries under CPR 30.2(4) (see PARA 67); CPR 30.3(1).

15 Ie as defined in CPR 66.1(2): see PARA 1239 note 8.

16 CPR 30.3(2)(h).

17 See eg *Midland Bank Ltd v Stamps* [1978] 3 All ER 1, [1978] 1 WLR 635 (where the court refused to transfer a mortgage action from the Commercial Court to the Chancery Division); *Stafford Winfield Cook & Partners Ltd v Winfield* [1980] 3 All ER 759, [1981] 1 WLR 458 (where the court refused to transfer an action in the Chancery Division in which the defendant claimed the right to trial by jury); *CIBA Vision (UK) Ltd v Coopervision Ltd* [2001] All ER (D) 20 (Jul), sub nom *Wesley Jessen Corpn v Coopervision Ltd* (2001) Times, 31 July (where the High Court refused an application by defendants in patent infringement litigation to have the proceedings transferred to the Patents Court in the High Court of Justice from the Patents County Court, the application being resisted by the claimant). As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

18 See CPR 3.3; and PARA 251.

19 As to applications for transfer see eg CPR 30.2(3); and PARA 68; CPR 30.2(6); and PARA 67.

20 Examples of claims that will be automatically transferred include claims in the High Court where a jury trial is directed (where transfer will be to the Queen's Bench Division: see *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 2.8; and PARA 116 note 9); or where CPR 26.2 applies (automatic transfer to the defendant's home court: see PARA 261).

21 See eg CPR 30.2(8) (restrictions on courts to which probate proceedings may be transferred); and PARA 67 note 4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(6) TRANSFER OF PROCEEDINGS/67. Transfer within the High Court.

67. Transfer within the High Court.

The High Court may, having regard to the prescribed criteria¹, order proceedings in the Royal Courts of Justice or a district registry², or any part of such proceedings³, to be transferred from the Royal Courts of Justice to a district registry or from a district registry to the Royal Courts of Justice or to another district registry⁴. A district registry may order proceedings before it for the detailed assessment of costs to be transferred to another district registry if it is satisfied that the proceedings could be more conveniently or fairly taken in that other district registry⁵. Orders for the transfer of proceedings may be made either with or without application⁶.

The High Court may also order proceedings in any Division of the High Court to be transferred to another Division⁷ and a judge dealing with claims in a specialist list may order proceedings to be transferred to or from that list⁸.

1 le the criteria in CPR 30.3: see PARA 66.

2 As to district registries see PARA 54.

3 le such as a counterclaim or an application made in the proceedings: see CPR 30.2(4). As to the meaning of 'counterclaim' see PARA 618 note 3; and as to applications see generally PARA 315 et seq.

4 CPR 30.2(4). Probate proceedings may only be transferred under this provision to the Chancery Division at the Royal Courts of Justice or to one of the Chancery district registries: CPR 30.2(8). As to the Chancery district registries see PARA 57 note 3.

5 CPR 30.2(5).

6 See PARA 66 text and notes 17-20. An application for an order under CPR 30.2(4) or (5) must, if the claim is proceeding in a district registry, be made to that registry: CPR 30.2(6).

7 CPR 30.5(1); and see the Supreme Court Act 1981 s 65(1). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. The power of transfer from one Division or judge of the High Court to another Division or judge may be exercised either on the application of a party or by the court of its own initiative. It is within the discretion of the court whether or not to order transfer, even if the proceedings involve a claim assigned by statute to a particular Division. As to such assignment see s 61; and PARA 43. Thus a claim will not necessarily be transferred from the Queen's Bench Division to the Chancery Division merely because it involves a claim for the execution of a trust, the rectification or cancellation of a deed or the specific performance of a contract to buy land: see *Holloway v York* (1877) 2 Ex D 333, CA; *Storey v Waddle* (1879) 4 QBD 289, CA; *London Land Co Ltd v Harris* (1884) 13 QBD 540. A claim arising out of a collision between ships will not necessarily be transferred to the Admiralty Court (*Waddle v Wallsend Shipping Co Ltd* [1952] 2 Lloyd's Rep 105), especially if the collision occurred on an inland river, although proceedings within the original jurisdiction of the Admiralty Court will usually be so transferred (see *Hawkins v Morgan* (1880) 49 LJQB 618; *Ocean Steamship Co v Anderson, Tritton & Co* (1885) 33 WR 536, CA; *The Gertrude, The Baron Aberdare* (1888) 13 PD 105, CA; but see *Roche v London and South Western Rly Co* [1899] 2 QB 502, CA). In *DBS Management plc v Excess Insurance Co Ltd* (25 April 1994, unreported) it was said that the test for transfer from one Division to another was whether it was inappropriate for the case to be tried in the Division in which it was begun because that Division lacked a special expertise needed for the just and expeditious disposal of the case. See *Fawdry & Co (a firm) v Murfitt* [2002] EWCA Civ 643, [2003] QB 104, [2003] 4 All ER 60 (presiding judge had power to transfer case on his own initiative from Queen's Bench Division to Technology and Construction Court). If proceedings are transferred to another Division, all further steps or proceedings must be taken in that Division: see the Supreme Court Act 1981 s 64(2). The transfer will not affect the validity of any steps or proceedings taken or order made in the proceedings before the transfer: s 65(2). As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

8 CPR 30.5(2). Any application for such a transfer must be made to a judge dealing with claims in that list: CPR 30.5(3). A reference to a 'specialist list' is a reference to a list that has been designated as such by a rule or practice direction (CPR 2.3(2)) such as, eg, the list of a mercantile court by CPR 59.1(3). As to specialist proceedings see PARA 1536 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(6) TRANSFER OF PROCEEDINGS/68. Transfer between county courts.

68. Transfer between county courts.

A county court may order proceedings before that court, or any part of them¹, to be transferred to another county court if it is satisfied that an order should be made having regard to the prescribed criteria² or that proceedings for the detailed assessment of costs or the enforcement of a judgment or order could be more conveniently or fairly taken in that other county court³.

If proceedings have been started in the wrong county court, a judge of the county court may order that the proceedings be transferred to the county court in which they ought to have been started, continue in the county court in which they have been started or be struck out⁴.

An application for an order under these provisions must be made to the county court where the claim is proceeding⁵.

Cases allocated to the multi-track⁶ are normally transferred to the nearest civil trial centre⁷.

1 le such as a counterclaim or an application made in the proceedings: see CPR 30.2(1). As to the meaning of 'counterclaim' see PARA 618 note 3; and as to applications see PARA 315 et seq.

2 le the criteria set out in CPR 30.3: see PARA 66.

3 CPR 30.2(1). Where, however, some enactment, other than the Civil Procedure Rules, requires proceedings to be started in a particular county court, neither CPR 30.2(1) nor CPR 30.2(2) (see the text and note 4) gives the court power to order proceedings to be transferred to a county court which is not the court in which they should have been started or to order them to continue in the wrong court: CPR 30.2(7). As to the court in which proceedings are to be started see further PARA 116.

4 CPR 30.2(2); and see note 3. As to the meaning of 'strike out' see PARA 218 note 2. However the power to strike out is unlikely to be exercised unless the case is extreme as the overriding objective to deal with cases justly and proportionately would not normally warrant such a draconian order. As to the overriding objective see PARA 33.

5 CPR 30.2(3).

6 As to cases normally allocated to the multi-track see PARA 269.

7 See PARA 269.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(6) TRANSFER OF PROCEEDINGS/69. Transfer between High Court and county court.

69. Transfer between High Court and county court.

Where the High Court is satisfied that any proceedings before it are required by any provision made under the Courts and Legal Services Act 1990¹ or by or under any other enactment to be in a county court it must order the transfer of the proceedings to a county court or, if the court is satisfied that the person bringing the proceedings knew, or ought to have known, of that requirement, order that they be struck out². Subject to any such provision, the High Court may order the transfer of any proceedings before it to a county court³. Such an order may be made either on the motion of the High Court itself or on the application of any party to the proceedings⁴. Proceedings so transferred must be transferred to such county court as the High Court considers appropriate, having taken into account the convenience of the parties and that of any other persons likely to be affected and the state of business in the courts concerned⁵.

Similarly, where a county court is satisfied that any proceedings before it are required by any provision of a kind mentioned above⁶ to be in the High Court, it must order the transfer of the proceedings to the High Court or, if the court is satisfied that the person bringing the proceedings knew, or ought to have known, of that requirement, order that they be struck out⁷. Subject to any such provision, a county court may order the transfer of any proceedings before it to the High Court⁸. Such an order may be made either on the motion of the court itself or on the application of any party to the proceedings⁹.

These transfer provisions do not apply to family proceedings¹⁰.

Finally, if at any stage in proceedings commenced in a county court or transferred to a county court under the above provisions, the High Court thinks it desirable that the proceedings, or any part of them, should be heard and determined in the High Court, it may order the transfer to the High Court of the proceedings or, as the case may be, of that part of them¹¹.

Transfer from the High Court to the county court and vice versa is a power exercisable by any judge, master or district judge¹². Claims of insufficiently high value are normally transferred from the High Court to the county court¹³.

Where proceedings for the enforcement of any judgment or order of the High Court are transferred under the above provisions to the county court, the judgment or order may be enforced as if it were a judgment or order of a county court and it must be treated¹⁴ as a judgment or order of that court for all purposes¹⁵. However, the powers of any court to set aside, correct, vary or quash a judgment or order of the High Court, and the enactments relating to appeals from such a judgment or order, continue to apply and the powers of any court to set aside, correct, vary or quash a judgment or order of a county court, and the enactments relating to appeals from such a judgment or order, do not apply¹⁶. Similarly, where proceedings for the enforcement of any judgment or order of a county court are transferred under these provisions to the High Court by order of the county court¹⁷, the judgment or order may be enforced as if it were a judgment or order of the High Court and it must be treated¹⁸ as a judgment or order of that court for all purposes¹⁹. However, the powers of any court to set aside, correct, vary or quash a judgment or order of a county court, and the enactments relating to appeals from such a judgment or order, continue to apply and the powers of any court to set aside, correct, vary or quash a judgment or order of the High Court, and the enactments relating to appeals from such a judgment or order, do not apply²⁰.

- 1 le under the Courts and Legal Services Act 1990 s 1 (allocation of business between High Court and county courts).
- 2 County Courts Act 1984 s 40(1), (8) (ss 40, 42 substituted by the Courts and Legal Services Act 1990 s 2).
- 3 County Courts Act 1984 s 40(2) (as substituted: see note 2). In exercising this power the court must have regard to the criteria set out in CPR 30.3(2) (see PARA 66): CPR 30.3(1)(a). The High Court's power to transfer proceedings under the County Courts Act 1984 s 40(2), and therefore the county court's jurisdiction to hear and determine proceedings, is not constrained by the limits which otherwise exist on a county court's jurisdiction: *National Westminster Bank plc v King* [2008] EWHC 280 (Ch), [2008] Ch 385, [2008] All ER (D) 292 (Feb).
- 4 County Courts Act 1984 s 40(3) (as substituted: see note 2).
- 5 County Courts Act 1984 s 40(4) (as substituted: see note 2). The transfer of any proceedings under these provisions does not affect any right of appeal from the order directing the transfer: s 40(5) (as so substituted).
- 6 See the text to notes 1-2.
- 7 County Courts Act 1984 s 42(1), (7) (as substituted: see note 2). A county court has no power to transfer to the High Court an application erroneously made to the county court for a freezing order in connection with a claim which is not required to be in the High Court: *Schmidt v Wong* [2005] EWCA Civ 1506, [2006] 1 All ER 677, [2006] 1 WLR 561. As to freezing orders see PARAS 315 head (6) in the text, 318, 396 et seq.
- 8 County Courts Act 1984 s 42(2) (as substituted: see note 2). In exercising this power the court must have regard to the criteria set out in CPR 30.3(2) (see PARA 66): CPR 30.3(1)(a). As to the transfer of proceedings to the High Court for enforcement see the text and notes 17-20; CPR Sch 2 CCR Ord 25 r 13; and PARA 1233 note 11.
- 9 County Courts Act 1984 s 42(3) (as substituted: see note 2). The transfer of any proceedings under these provisions does not affect any right of appeal from the order directing the transfer: s 42(4) (as so substituted).
- 10 County Courts Act 1984 ss 40(9), 42(8) (as substituted: see note 2).
- 11 County Courts Act 1984 s 41(1). This power is without prejudice to the Supreme Court Act 1981 s 29 (power of High Court to issue prerogative orders: see **JUDICIAL REVIEW** vol 61 (2010) PARAS 602, 709) but must be exercised in relation to family proceedings in accordance with directions given under the Matrimonial and Family Proceedings Act 1984 s 37: County Courts Act 1984 s 41(2) (amended by the Matrimonial and Family Proceedings Act 1984 s 46(1), Sch 1 para 30; and, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2), to substitute a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981; at the date at which this title states the law, no such day had been appointed). The power so conferred must also be exercised subject to any provision made under the Courts and Legal Services Act 1990 s 1 or by or under any other enactment: County Courts Act 1984 s 41(3) (added by the Courts and Legal Services Act 1990 s 2(2)). In exercising the power to transfer cases conferred by the County Courts Act 1984 s 41(1), the court must have regard to the criteria set out in CPR 30.3(2) (see PARA 66): see CPR 30.3(1)(a). For an example of a case where the High Court refused an application by defendants in patent infringement litigation to have the proceedings transferred to the Patents Court in the High Court of Justice from the Patents County Court, the application being resisted by the claimant, see *CIBA Vision (UK) Ltd v Coopervision Ltd* [2001] All ER (D) 20 (Jul), sub nom *Wesley Jessen Corpn v Coopervision Ltd* (2001) Times, 31 July.
- 12 See CPR 2.4; and PARA 49.
- 13 Claims with an estimated value of less than £50,000 will generally, but not necessarily, be so transferred: see *Practice Direction--The Multi-track* PD 29 paras 2.2, 2.3; and PARA 294. The transfer order must be made as soon as possible and in any event not later than the date for the filing of pre-trial check lists: *Practice Direction--The Multi-track* PD 29 para 2.4.
- 14 le subject to the County Courts Act 1984 s 40(7): see the text to note 16.
- 15 County Courts Act 1984 s 40(6) (as substituted: see note 2).
- 16 County Courts Act 1984 s 40(7) (as substituted: see note 2).
- 17 le under the County Courts Act 1984 s 42: see the text and notes 6-9.
- 18 le subject to the County Courts Act 1984 s 42(6): see the text to note 20.
- 19 County Courts Act 1984 s 42(5) (as substituted: see note 2).

20 County Courts Act 1984 s 42(6) (as substituted: see note 2). As to the enforcement of judgments and orders see further PARA 1223 et seq. As to costs in transferred cases see s 45(1) (amended by the Courts and Legal Services Act 1990 s 125(7), Sch 20). As to costs generally see also PARA 1729 et seq.

UPDATE

69 Transfer between High Court and county court

NOTE 11--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(6) TRANSFER OF PROCEEDINGS/70. Procedure on transfer.

70. Procedure on transfer.

Where the court¹ orders proceedings to be transferred, the court from which they are to be transferred must give notice of the transfer to all the parties². The transferring court must immediately send notice to the receiving court of the name and number of the case, at the same time as it notifies the parties³. The transfer order takes effect from the date when it is made by the court⁴ but any order made before the transfer of the proceedings is not affected by the order to transfer⁵.

The appropriate court in which to appeal⁶ or apply to set aside⁷ a transfer order depends on when and where the order was made.

1 As to the meaning of 'court' see PARA 22.

2 CPR 30.4(1).

3 *Practice Direction--Transfer* PD 30 paras 4.1, 4.2.

4 *Practice Direction--Transfer* PD 30 para 3.

5 CPR 30.4(2).

6 For example, an order made by a district judge transferring proceedings between county courts must be appealed in the receiving court (see *Practice Direction--Transfer* PD 30 para 5.1); although the receiving court may remit the appeal to the transferring court for the sake of the parties' convenience (see para 5.2). For the rules on where to make applications and appeals see CPR 23.2; CPR Pt 52; and PARAS 304, 1693 et seq.

7 Where a party may apply to set aside an order for transfer (eg under CPR 23.10: see PARA 312), the application must be made to the court that made the order and is made in accordance with CPR Pt 23 (see PARA 303 et seq): *Practice Direction--Transfer* PD 30 paras 6.1, 6.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(6) TRANSFER OF PROCEEDINGS/71. Power to specify place to hold hearings without transfer.

71. Power to specify place to hold hearings without transfer.

The court¹ may specify the place (for instance, a particular county court) where the trial or some other hearing in any proceedings is to be held and may do so without ordering the proceedings to be transferred².

1 As to the meaning of 'court' see PARA 22.

2 CPR 30.6. Note that *Practice Direction--Administrative Court (Venue)* PD 54D contains provisions about where hearings may be held in proceedings in the Administrative Court: CPR 30.6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(6) TRANSFER OF PROCEEDINGS/72. Court's discretion as to where it deals with cases.

72. Court's discretion as to where it deals with cases.

The Civil Procedure Rules¹ provide that the court² may deal with a case at any place that it considers appropriate³.

1 As to the Civil Procedure Rules see PARAS 9, 30 et seq.

2 As to the meaning of 'court' see PARA 22.

3 CPR 2.7.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(6) TRANSFER OF PROCEEDINGS/73. Transfer of control of money in court.

73. Transfer of control of money in court.

The court¹ may order that control of any money recovered by or on behalf of a child² or protected party³ which is held by it⁴ is to be transferred to another court if that court would be more convenient⁵.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'child' see PARA 222 note 3.

3 As to the meaning of 'protected party' see PARA 222 note 1.

4 I.e. under CPR 21.11 (control of money recovered by or on behalf of a child or protected party): see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1424; **MENTAL HEALTH** vol 30(2) (Reissue) PARA 639.

5 CPR 30.7. As to funds in court see further PARA 1548 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(6) TRANSFER OF PROCEEDINGS/74. Transfer of competition law claims.

74. Transfer of competition law claims.

If, in any proceedings in the Queen's Bench Division (other than proceedings in the Commercial or Admiralty Courts), a district registry of the High Court or a county court, a party's statement of case raises an issue relating to the application of competition law¹, then the normal rules as to transfer² do not apply and the court³ must transfer the proceedings to the Chancery Division of the High Court at the Royal Courts of Justice⁴. If any such proceedings which have been commenced in the Queen's Bench Division or a mercantile court fall within the definition of 'commercial claim'⁵, any party to those proceedings may apply for the transfer of the proceedings to the Commercial Court⁶. If the application is refused, the proceedings must be transferred to the Chancery Division of the High Court at the Royal Courts of Justice⁷.

1 Ie under the EC Treaty (Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) art 81 or 82 or the Competition Act 1998 Pt I Ch I (ss 1-11): see **COMPETITION** vol 18 (2009) PARAS 115-124.

2 Ie CPR 30.2 and CPR 30.3: see PARAS 66-68.

3 As to the meaning of 'court' see PARA 22.

4 CPR 30.8(1)-(3).

5 Ie fall within the scope of CPR 58.1(2): see PARA 1536.

6 CPR 30.8(4). Ie in accordance with CPR 58.4(2) and CPR 30.5(3): see PARA 1537.

7 CPR 30.8(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(7) CONSOLIDATION OF PROCEEDINGS/75. Consolidation of proceedings; in general.

(7) CONSOLIDATION OF PROCEEDINGS

75. Consolidation of proceedings; in general.

Prior to the advent of the Civil Procedure Rules, rules of court governed whether or not two or more causes or matters could by order of the court be combined and united and treated as one cause or matter¹.

Now the power either to consolidate proceedings² or to try two or more claims on the same occasion³ is specifically provided for as being amongst the court's general powers of case management⁴. Either power may be exercised by the court of its own initiative or on application being made to it⁵. The court has a duty to further the overriding objective⁶ by actively managing cases⁷. A court considering whether or not to consolidate proceedings is most likely to be concerned with whether costs and time could be thereby saved.

1 See RSC Ord 4 r 9 (revoked). The power to make an order of consolidation was discretionary, and the court had to consider whether it was desirable in all the circumstances that the common questions of law or fact arising or the rights to relief claimed in the several causes or matters should all be disposed of at the same time: see *Payne v British Time Recorder Co Ltd and WW Curtis Ltd*[1921] 2 KB 1, CA; *Harwood v Statesman Publishing Co Ltd* (1929) 98 LJB 450, CA; *Daws v Daily Sketch and Sunday Graphic Ltd*[1960] 1 All ER 397, [1960] 1 WLR 126, CA. As to the meaning of 'cause or matter' see PARA 44 note 1. However, the new civil procedure (see PARA 24 et seq) no longer employs this terminology: see PARA 18.

2 See CPR 3.1(2)(g); and PARA 247 head (7) in the text.

3 See CPR 3.1(2)(h); and PARA 247 head (8) in the text.

4 As to case management see PARA 246 et seq.

5 Application must be made in accordance with CPR Pt 23: see PARA 303 et seq.

6 As to the overriding objective see PARA 33.

7 See CPR 1.4(1); and PARA 246. Active management includes dealing with as many aspects of a case as possible on the same occasion: see CPR 1.4(2)(i); and PARA 246 head (9) in the text.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(8) COURT DOCUMENTS/76. Introduction.

(8) COURT DOCUMENTS

76. Introduction.

Part 5 of the Civil Procedure Rules¹ contains general provisions about documents used in court proceedings² and the obligations of a court officer³ in relation to those documents⁴.

- 1 See CPR Pt 5; and PARA 77 et seq.
- 2 See CPR 5.1(a). As to the meaning of 'court' see PARA 22.
- 3 As to the meaning of 'court officer' see PARA 49 note 3.
- 4 See CPR 5.1(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(8) COURT DOCUMENTS/77. Preparation of documents.

77. Preparation of documents.

Where, under the Civil Procedure Rules, a document is to be prepared by the court¹, the document may be prepared by the party whose document it is, unless a court officer² otherwise directs³ or it is a document relating to the reissue of a warrant in a county court where the condition upon which the warrant was suspended has not been complied with⁴ or the issue of a warrant of committal in the county court⁵, to which particular county court rules apply⁶.

Nothing in these provisions requires a court officer to accept a document which is illegible, has not been duly authorised, or is unsatisfactory for some other similar reason⁷.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'court officer' see PARA 49 note 3.

3 See CPR 5.2(1)(a).

4 Ie a document to which CPR Sch 2 CCR Ord 25 r 8(9) applies.

5 Ie a document to which CPR Sch 2 CCR Ord 28 r 11(1) applies.

6 See CPR 5.2(1)(b).

7 CPR 5.2(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(8) COURT DOCUMENTS/78. Form of documents.

78. Form of documents.

Statements of case¹ and other documents drafted by a legal representative² must bear his or her signature and if they are drafted by a legal representative as a member or employee of a firm they must be signed in the name of the firm³.

Every document prepared by a party for filing⁴ or use at the court⁵ must:

- 129 (1) unless the nature of the document renders it impracticable, be on A4 paper of durable quality having a margin not less than 3.5 centimetres wide⁶;
- 130 (2) be fully legible and, normally, typed⁷;
- 131 (3) where possible be bound securely in a manner which would not hamper filing or otherwise each page must be indorsed with the case number⁸;
- 132 (4) have the pages numbered consecutively⁹;
- 133 (5) be divided into numbered paragraphs¹⁰;
- 134 (6) have all numbers, including dates, expressed as figures¹¹; and
- 135 (7) give in the margin the reference of every document mentioned that has already been filed¹².

A document which is a copy produced by a colour photostat machine or other similar device may be filed at the court office provided that the coloured date seal of the court is not reproduced on the copy¹³.

1 As to statements of case see PARA 584 et seq.

2 As to the meaning of 'legal representative' see PARA 1833 note 13.

3 *Practice Direction--Court Documents* PD 5A para 2.1.

4 As to the meaning of 'filing' see PARA 1832 note 8.

5 As to the meaning of 'court' see PARA 22.

6 *Practice Direction--Court Documents* PD 5A para 2.2(1).

7 See *Practice Direction--Court Documents* PD 5A para 2.2(2).

8 *Practice Direction--Court Documents* PD 5A para 2.2(3).

9 *Practice Direction--Court Documents* PD 5A para 2.2(4).

10 *Practice Direction--Court Documents* PD 5A para 2.2(5).

11 *Practice Direction--Court Documents* PD 5A para 2.2(6).

12 *Practice Direction--Court Documents* PD 5A para 2.2(7).

13 *Practice Direction--Court Documents* PD 5A para 2.3. As to the sealing of documents by the court see PARA 81.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(8) COURT DOCUMENTS/79. Signature of documents by mechanical means.

79. Signature of documents by mechanical means.

Where any of the Civil Procedure Rules or any practice direction requires a document to be signed, that requirement is satisfied if the signature is printed by computer or other mechanical means¹. Where, under this rule, a replica signature is printed electronically or by other mechanical means on any document, the name of the person whose signature is printed must also be printed so that the person may be identified; but this requirement does not apply to claim forms issued through the claims production centre².

1 CPR 5.3.

2 *Practice Direction--Court Documents* PD 5A para 1. As to the production centre for claims see PARA 126.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(8) COURT DOCUMENTS/80. Supply of documents to new parties.

80. Supply of documents to new parties.

Provision is made by the relevant practice direction for the supply of documents to a new party who is joined¹ to existing proceedings². These provisions are discussed elsewhere in this title³.

1 As to the joinder of parties see PARA 210 et seq.

2 See *Practice Direction--Court Documents* PD 5A paras 3.1-3.3A.

3 See PARA 214 text and notes 17-18.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(8) COURT DOCUMENTS/81. Court documents must be sealed.

81. Court documents must be sealed.

The court¹ must seal² the claim form³ on issue and must also seal any other document which a rule or practice direction requires it to seal⁴. The court may place the seal on the document either by hand or by printing a facsimile of the seal on the document whether electronically or otherwise⁵.

A document purporting to bear the court's seal is admissible in evidence without further proof⁶.

1 As to the meaning of 'court' see PARA 22.

2 A 'seal' is a mark which the court puts on a document to indicate that the document has been issued by the court: CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31.

3 As to the claim form see PARA 117.

4 CPR 2.6(1). See eg CPR 40.2(2)(b) (every judgment or order to be sealed); and PARA 1137.

5 CPR 2.6(2).

6 CPR 2.6(3); and see also the Supreme Court Act 1981 s 132, which provides that every document purporting to be sealed or stamped with the seal or stamp of the Supreme Court or of any office of the Supreme Court is to be received in evidence in all parts of the United Kingdom without further proof. As from a day to be appointed, s 132 is amended by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 4 para 26(1), (2) to substitute references to the 'Senior Courts' for the 'Supreme Court'. At the date at which this title states the law, no such day had been appointed. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

UPDATE

81 Court documents must be sealed

NOTE 6--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(8) COURT DOCUMENTS/82. Supply of documents from court records.

82. Supply of documents from court records.

A court or court office may keep a publicly accessible register of claims which have been issued out of that court or court office¹. Any person who pays the prescribed fee² may, during office hours³, search any available register of claims⁴.

A party to proceedings may, unless the court⁵ orders otherwise, obtain from the records of the court a copy of any document of a specified⁶ type⁷ and may, if the court gives permission, obtain from the records of the court a copy of any other document filed⁸ by a party or communication between the court and a party or another person⁹.

The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of (1) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it; (2) a judgment or order given or made in public (whether made at a hearing or without a hearing)¹⁰. A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person¹¹. A non-party may obtain a copy of a statement of case or judgment or order only if (a) where there is one defendant, the defendant has filed an acknowledgment of service or a defence; (b) where there is more than one defendant, either (i) all the defendants have filed an acknowledgment of service or a defence; or (ii) at least one defendant has filed an acknowledgment of service or a defence and the court gives permission; (c) the claim has been listed for a hearing; or (d) judgment has been entered in the claim¹². The court may, on the application of a party or of any person identified in a statement of case, (A) order that a non-party may not obtain a copy of that statement of case; (B) restrict the persons or classes of persons who may obtain a copy of a statement of case; (C) order that persons or classes of persons may only obtain a copy of a statement of case if it is edited in accordance with the directions of the court; or (D) make such other order as it thinks fit¹³. Where the court makes an order under the above provisions, a non-party who wishes to obtain a copy of the statement of case, or to obtain an unedited copy of the statement of case, may apply on notice to the party or person identified in the statement of case who requested the order, for permission¹⁴.

A person wishing to obtain a copy of a document under the above provisions must pay any prescribed fee and, if the court's permission is required, file an application notice¹⁵ or, if permission is not required, file a written request for the document¹⁶. An application for an order by a party or a person identified in a statement of case¹⁷ or for permission to obtain a copy of a document¹⁸ may be made without notice, but the court may direct notice to be given to any person who would be affected by its decision¹⁹. The above provisions do not apply in relation to any proceedings in respect of which a rule or practice direction makes different provision²⁰.

1 CPR 5.4(1). Details of the available registers are given in *Practice Direction--Court Documents* PD 5A paras 4.1-4.2.

2 As to prescribed fees see PARA 87.

3 As to office hours see PARA 52 note 1 (Supreme Court Office), PARA 58 note 5 (county court offices). As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

4 CPR 5.4(2).

5 As to the meaning of 'court' see PARA 22.

6 I.e a document listed in *Practice Direction--Court Documents* PD 5A para 4.2A.

7 CPR 5.4B(1).

8 As to the meaning of 'filing' see PARA 1832 note 8.

9 CPR 5.4B(2). An application under CPR 5.4B(2), 5.4C(2) (see text to note 11) or 5.4C(3)(b)(ii) (see head (b) (ii) in the text) for permission to obtain a copy of a document, even if made without notice, must be made under CPR Pt 23 (see PARA 303 et seq) and the application notice must identify the document or class of document in respect of which permission is sought and the grounds relied upon: see *Practice Direction--Court Documents* PD 5A para 4.3.

10 CPR 5.4C(1). Where a non-party seeks to obtain a copy of a statement of case filed before 2 October 2006, CPR 5.4C(1) does not apply and the rules of court relating to access by a non-party to statements of case in force immediately before 2 October 2006 apply as if they had not been revoked: CPR 5.4C(1A). The former rules are set out in *Practice Direction--Court Documents* PD 5A para 4A.

11 CPR 5.4C(2). See note 9. See *Re Guardian Newspapers Ltd* [2004] EWHC 3092 (Ch), [2005] 3 All ER 155, sub nom *Chan U Seek v Alvis Vehicles Ltd (Guardian Newspapers Ltd intervening)* [2005] 1 WLR 2965 (permission given to newspaper to obtain evidence which was not disputed and was therefore not read out in open court); *DIAN AO v Davis Frankel & Mead (a firm)* [2005] EWHC 2662 (Comm), [2005] 1 All ER 1074, [2005] 1 WLR 2951 (applicant required to identify with reasonable precision documents in respect of which he sought permission; he could not seek permission to search the whole of the court file). A non-party may apply for access to records of the court of a case which is settled after the hearing begins: *Re Guardian Newspapers Ltd* [2004] EWHC 3092 (Ch), [2005] 3 All ER 155, sub nom *Chan U Seek v Alvis Vehicles Ltd (Guardian Newspapers Ltd intervening)* [2005] 1 WLR 2965.

12 CPR 5.4C(3).

13 CPR 5.4C(4). A person wishing to apply for an order under CPR 5.4C(4) must file an application notice in accordance with CPR Pt 23: CPR 5.4C(5). An application under CPR 5.4C(4) by a party or a person identified in a claim form must be made (1) under CPR Pt 23; and (2) to a master or district judge, unless the court directs otherwise: see *Practice Direction--Court Documents* PD 5A para 4.4.

14 CPR 5.4C(6).

15 I.e in accordance with CPR Pt 23.

16 CPR 5.4D(1).

17 I.e under CPR 5.4C(4).

18 I.e under CPR 5.4B or CPR 5.4C. This does not apply to an application for permission under CPR 5.4C(6) (see the text to note 13): CPR 5.4D(2).

19 CPR 5.4D(2).

20 CPR 5.4D(3).

UPDATE

82 Supply of documents from court records

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(8) COURT DOCUMENTS/83. Supply of documents to Attorney General.

83. Supply of documents to Attorney General.

The Attorney General may search for, inspect and take a copy of any documents within a court file for the purpose of preparing an application or considering whether to make an application¹ to restrict vexatious proceedings². The Attorney General must, when exercising the right, pay any prescribed fee³ and file a written request, which must (1) confirm that the request is for the purpose of preparing an application or considering whether to make an application to restrict vexatious proceedings; and (2) name the person who would be the subject of the application⁴.

1 le under the Supreme Court Act 1981 s 42 (see PARA 258) or the Employment Tribunals Act 1996 s 33 (see **EMPLOYMENT** vol 41 (2009) PARA 1392). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 CPR 5.4A(1) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2) to substitute a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981; at the date at which this title states the law, no such day had been appointed).

3 As to prescribed fees see PARA 87.

4 CPR 5.4A(2).

UPDATE

83 Supply of documents to Attorney General

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(8) COURT DOCUMENTS/84. Filing and sending documents by electronic means.

84. Filing and sending documents by electronic means.

A practice direction may make provision for documents to be filed or sent to the court¹ by facsimile or other electronic means². Any such practice direction may (1) provide that only particular categories of documents may be filed or sent to the court by such means; (2) provide that particular provisions only apply in specific courts; and (3) specify the requirements that must be fulfilled for any document filed or sent to the court by such means³. Such provision has been made⁴, and the relevant practice direction provides that a party to a claim in a specified court⁵ may send a specified document⁶ to the court by e-mail⁷ and that a party to a claim in a specified court⁸ may send a specified document⁹ to the court using the online forms service¹⁰.

However, a party must not use e-mail to take any step in a claim for which a fee is payable¹¹. A party may make an application using e-mail in the Preston Combined Court, where permitted to do so by PREMA (Preston E-mail Application Service) User Guide and Protocols¹², and a party may file an application notice by e-mail in the Civil Appeals Office or in the Preston Combined Court where permitted to do so by PREMA (Preston E-mail Application Service) User Guide and Protocols¹³.

A party may use the online forms service to take a step in a claim for which a fee is payable¹⁴. The fee must be paid, using the facilities available at the online forms service, before the application, or other document attracting a fee, is forwarded to the specified court¹⁵. The online forms service will assist the user in completing a document accurately but the user is responsible for ensuring that the rules and practice directions relating to the document have been complied with¹⁶. Transmission by the service does not guarantee that the document will be accepted by the specified court¹⁷.

Where a party files a document electronically¹⁸, he must not send a hard copy of that document to the court¹⁹. A document is not filed until the transmission²⁰ is received by the court, whatever time it is shown to have been sent²¹. The time of receipt of a transmission will be recorded electronically on the transmission as it is received²². If a transmission is received after 4 pm, the transmission will be treated as received, and any document attached to the transmission will be treated as filed, on the next day the court office is open²³. A party sending an e-mail or using the online forms service in accordance with the relevant requirements is responsible for ensuring that the transmission or any document attached to it is filed within any relevant time limits²⁴. The court will normally reply by e-mail where the response is to a message transmitted electronically and the sender has provided an e-mail address²⁵. Parties are advised not to transmit electronically any correspondence or documents of a confidential or sensitive nature, as security cannot be guaranteed²⁶. If a document transmitted electronically requires urgent attention, the sender should contact the court by telephone²⁷. A document that is required by a rule or practice direction to be filed at court is not filed when it is sent to the judge by e-mail²⁸.

Where a party wishes to file a document containing a statement of truth²⁹ electronically, that party should retain the document containing the original signature and file with the court a version of the document satisfying one of the following requirements: (a) the name of the person who has signed the statement of truth is typed underneath the statement; (b) the person who has signed the statement of truth has applied a facsimile of his signature to the statement in the document by mechanical means; or (c) the document that is filed is a scanned version of the document containing the original signature to the statement of truth³⁰.

1 As to the meaning of 'court' see PARA 22.

2 CPR 5.5(1).

3 CPR 5.5(2).

4 See *Practice Direction--Electronic Communication and Filing of Documents* PD 5B, which provides for parties to claims in specified courts to communicate with the court by e-mail and file specified documents by e-mail (Section I: see para 1.1), and provides for parties to claims in specified courts to file specified documents electronically via an online forms service (Section II: see para 1.2). The practice direction does not allow communication with the court or the filing of documents by e-mail, or use of the online forms service, in proceedings to which the Civil Procedure Rules do not apply: *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 1.4. As to proceedings to which the CPR do not apply see PARA 32.

5 For these purposes, a specified court is a court or court office which has published an e-mail address for the filing of documents on the Courts Service website www.hmcourts-service.gov.uk (the 'Court Service website'): *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 2.1(1).

6 For these purposes, a specified document is a document listed on the Court Service website as a document that may be sent to or filed in that court by e-mail: *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 2.1(2).

7 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 3.1. CPR 6.3(1)(d) and 6.20(1)(d) permit service by e-mail in accordance with the relevant practice direction: see PARA 139. As to the circumstances in which a party may serve a document by e-mail see CPR 6.23(6); *Practice Direction--Service* PD 6A para 4; and PARA 144. The technical specifications of e-mail are set out in *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 4.

8 For these purposes, a specified court is a court or court office listed on the Court Service website as able to receive documents filed electronically via the online forms service: *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 5.2(1).

9 For these purposes, a specified document is a document which is available for completion on the forms website: *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 5.2(2).

10 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 6.1. Reference to an online forms service is reference to a service available at www.hmcourts-service.gov.uk (the 'forms website'). The forms website contains certain documents which a user may complete online and then submit electronically to a specified court: *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 5.1. Certain notices may be filed electronically at the Court of Appeal, Civil Division using the online forms service on the Court of Appeal, Civil Division website: see *Practice Direction--Appeals* PD 52 para 15.1B; and PARA 1710.

11 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 3.2. If a fee is payable on the filing of a particular document and a party purports to file that document by e-mail, the court must treat the document as not having been filed: para 3.3.

12 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 3.2A.

13 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 3.3A.

14 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 6.2.

15 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 6.2.

16 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 6.3.

17 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 6.3.

18 Filing or sending a document 'electronically', means filing or sending it in accordance with Section I or Section II of *Practice Direction--Electronic Communication and Filing of Documents* PD 5B: para 7(1).

19 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 8.1.

20 A reference to 'transmission' means, unless the context otherwise requires, in relation to *Practice Direction--Electronic Communication and Filing of Documents* PD 5B Section I, the e-mail sent by the party to the court and, in relation to Section II, the electronic transmission of the form by the online forms service to the court: para 7(2).

- 21 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 8.2.
- 22 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 8.3.
- 23 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 8.4. As to office hours see PARA 52 note 1 (Supreme Court Office), PARA 58 note 5 (county court offices). As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.
- 24 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 8.5.
- 25 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 8.6.
- 26 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 8.7.
- 27 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 8.8.
- 28 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 8.9.
- 29 As to the requirement for a statement of truth see CPR 22.1(1); and PARA 613.
- 30 *Practice Direction--Electronic Communication and Filing of Documents* PD 5B para 9.

UPDATE

84 Filing and sending documents by electronic means

NOTE 23--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(8) COURT DOCUMENTS/85. Documents for filing at court.

85. Documents for filing at court.

The date on which a document was filed¹ at court² must be recorded on the document³. This may be done by a seal⁴ or a receipt stamp⁵.

Particulars of the date of delivery at a court office of any document for filing and the title of the proceedings in which the document is filed must be entered in court records, on the court file or on a computer kept in the court office for the purpose. Except where a document has been delivered at the court office through the post, the time of delivery must also be recorded⁶.

Subject to the rules about producing a document filed, lodged or held in a court office to another court, tribunal or arbitrator⁷, a party may file a document at court by sending it by facsimile ('fax')⁸. Where a document is filed by fax, the party filing it must not send the court a hard copy in addition⁹. A party filing a document by fax should, however, be aware that the document is not filed at court until it is delivered by the court's fax machine, whatever time it is shown to have been transmitted from the party's machine¹⁰; it remains the responsibility of the party to ensure that the document is delivered to the court in time¹¹. If a fax is delivered after 4 pm it will be treated as filed on the next day the court office is open¹². If a fax relates to a hearing, the date and time of the hearing must be prominently displayed¹³.

Fax should not be used to send letters or documents of a routine or non-urgent nature¹⁴. Nor should it be used, except in an unavoidable emergency, to deliver a document which attracts a fee¹⁵, a document relating to a hearing less than two hours ahead, or trial bundles or skeleton arguments¹⁶.

Where courts have several fax machines, each allocated to an individual section, fax messages must only be sent to the machine of the section for which the message is intended¹⁷.

Where the court orders any document to be lodged in court, the document must, unless otherwise directed, be deposited in the office of that court¹⁸. A document filed, lodged or held in any court office may not be taken out of that office without the permission of the court unless the document is to be sent to the office of another court¹⁹, except in accordance with the rule relating to impounded documents²⁰ or in accordance with the following provisions²¹.

Where a document filed, lodged or held in a court office is required to be produced to any court, tribunal or arbitrator, the document may be produced by sending it by registered post²² to the court, tribunal or arbitrator in accordance with the following provisions²³. Any court, tribunal or arbitrator or any party requiring any document filed, lodged or held in any court office to be produced must apply to that court office by sending a completed request²⁴, stamped with the prescribed fee²⁵. On receipt of the request the court officer will submit it to a master in the Royal Courts of Justice or to a district judge elsewhere, who may direct that the request be complied with. Before giving a direction the master or district judge may require to be satisfied that the request is made in good faith and that the document is required to be produced for the reasons stated. The master or district judge giving the direction may also direct that, before the document is sent, an official copy of it is made and filed in the court office at the expense of the party requiring the document to be produced²⁶.

On the direction of the master or district judge the court officer must send the document by registered post addressed to the court, tribunal or arbitrator, with an envelope stamped and addressed for use in returning the document to the court office from which it was sent, a certificate in the prescribed form²⁷ and a covering letter describing the document, stating at

whose request and for what purpose it is sent, referring to these provisions and containing a request that the document be returned to the court office from which it was sent in the enclosed envelope as soon as the court or tribunal no longer requires it²⁸.

It is the duty of the court, tribunal or arbitrator to whom the document was sent to keep it in safe custody, and to return it by registered post to the court office from which it was sent, as soon as the court, tribunal or arbitrator no longer requires it²⁹.

In each court office a record must be kept of each document sent and the date on which it was sent and the court, tribunal or arbitrator to whom it was sent and the date of its return. It is the duty of the court officer who has signed the certificate accompanying the document³⁰ to ensure that the document is returned within a reasonable time and to make inquiries and report to the master or district judge who has given the direction to comply with the request for the document if the document is not returned, so that steps may be taken to secure its return³¹.

Notwithstanding the above provisions, the master or district judge may direct a court officer to attend the court, tribunal or arbitrator for the purpose of producing the document³².

1 As to the meaning of 'filing' see PARA 1832 note 8.

2 As to the meaning of 'court' see PARA 22.

3 *Practice Direction--Court Documents* PD 5A para 5.1.

4 As to the meaning of 'seal' see PARA 81 note 2.

5 *Practice Direction--Court Documents* PD 5A para 5.1.

6 *Practice Direction--Court Documents* PD 5A para 5.2.

7 le subject to *Practice Direction--Court Documents* PD 5A para 5.6: see the text and notes 23-33.

8 *Practice Direction--Court Documents* PD 5A para 5.3(1).

9 *Practice Direction--Court Documents* PD 5A para 5.3(2).

10 *Practice Direction--Court Documents* PD 5A para 5.3(3). The time of delivery of the faxed document will be recorded on it in accordance with para 5.2 (see the text to note 6): para 5.3(4).

11 *Practice Direction--Court Documents* PD 5A para 5.3(5).

12 *Practice Direction--Court Documents* PD 5A para 5.3(6). As to office hours see PARA 52 note 1 (Supreme Court Office), PARA 58 note 5 (county court offices). As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

13 *Practice Direction--Court Documents* PD 5A para 5.3(7).

14 *Practice Direction--Court Documents* PD 5A para 5.3(8).

15 In such a case the fax must give an explanation for the emergency and include an undertaking that the fee has been dispatched that day by or will be paid at the court office counter the following business day: *Practice Direction--Court Documents* PD 5A para 5.3(10). As to court fees see PARA 87.

16 *Practice Direction--Court Documents* PD 5A para 5.3(9).

17 *Practice Direction--Court Documents* PD 5A para 5.3(11).

18 *Practice Direction--Court Documents* PD 5A para 5.4.

19 Eg under CPR Pt 30 (transfer of proceedings): see PARA 66 et seq.

20 le in accordance with CPR 39.7: see PARA 1131.

21 *Practice Direction--Court Documents* PD 5A para 5.5.

22 The document must be accompanied by a certificate in the form set out in *Practice Direction--Court Documents* PD 5A para 5.6(8)(b) (see *The Civil Court Practice*): *Practice Direction--Court Documents* PD 5A para 5.6(1).

23 *Practice Direction--Court Documents* PD 5A para 5.6(1).

24 The request must be in the form set out in *Practice Direction--Court Documents* PD 5A para 5.6(8)(a) (see *The Civil Court Practice*): *Practice Direction--Court Documents* PD 5A para 5.6(2).

25 *Practice Direction--Court Documents* PD 5A para 5.6(2).

26 *Practice Direction--Court Documents* PD 5A para 5.6(3).

27 See note 22.

28 *Practice Direction--Court Documents* PD 5A para 5.6(4).

29 *Practice Direction--Court Documents* PD 5A para 5.6(5).

30 Ie the certificate referred to in note 22.

31 *Practice Direction--Court Documents* PD 5A para 5.6(6).

32 *Practice Direction--Court Documents* PD 5A para 5.6(7).

UPDATE

85 Documents for filing at court

NOTE 12--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(8) COURT DOCUMENTS/86. Enrolment of deeds and other documents.

86. Enrolment of deeds and other documents.

The Master of the Rolls may make regulations for authorising and regulating the enrolment or filing of instruments in the Supreme Court, and for prescribing the form in which certificates of enrolment or filing are to be issued¹. Such regulations do not affect the operation of any enactment requiring or authorising the enrolment of any instrument in the Supreme Court or prescribing the manner in which any instrument is to be enrolled there².

Any deed or document which by virtue of any enactment is required or authorised to be enrolled in the Supreme Court may be enrolled in the Central Office of the High Court³.

The following practice must be followed in any case in which a child's name is to be changed⁴ and to which the Enrolment of Deeds (Change of Name) Regulations 1994⁵ apply⁶. Where a person has by any order of the High Court, a county court or a family proceedings court been given parental responsibility⁷ for a child and applies to the Central Office, Filing Department, for the enrolment of a deed poll to change the surname (family name) of a child who is under the age of 18 years (unless the child is or has been married or has formed a civil partnership), the application must be supported by the production of the consent in writing of every other person having parental responsibility⁸. In the absence of that consent, the application will be adjourned generally unless and until permission is given in the proceedings in which the above-mentioned order was made to change the surname of the child and the permission is produced to the Central Office⁹. Where an application is made to the Central Office by a person who has not been given parental responsibility for a child by any order of the High Court, a county court or a family proceedings court for the enrolment of a deed poll to change the surname of the child who is under the age of 18 years (unless the child is or has been married or has formed a civil partnership), the court's permission to enrol the deed will be granted if the consent in writing of every person having parental responsibility is produced or if the person (or, if more than one, persons) having parental responsibility is dead or overseas or despite the exercise of reasonable diligence it has not been possible to find him or her for other good reason¹⁰. In cases of doubt the Senior Master or, in his absence, the practice master will refer the matter to the Master of the Rolls¹¹. In the absence of any of the conditions specified above the Senior Master or the Master of the Rolls, as the case may be, may refer the matter to the Official Solicitor for investigation and report¹².

1 Supreme Court Act 1981 s 133(1). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. Any such regulations must be made by statutory instrument, which must be laid before Parliament after being made; and the Statutory Instruments Act 1946 (see **STATUTES** vol 44(1) (Reissue) PARA 1501 et seq) applies to a statutory instrument containing such regulations in like manner as if the regulations had been made by a Minister of the Crown: Supreme Court Act 1981 s 133(5). Any instrument which is required or authorised by or under the 1981 Act or any other Act to be enrolled or engrossed in the Supreme Court is deemed to have been duly enrolled or engrossed if it is written on material authorised or required by regulations so made and has been filed or otherwise preserved in accordance with such regulations: s 133(3). In exercise of the power so conferred, the Master of the Rolls has made the Enrolment of Deeds (Change of Name) Regulations 1994, SI 1994/604 (amended by SI 2005/2056), which are reproduced in *Practice Direction--Court Documents* PD 5A, Appendix. See further **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1279.

The Supreme Court Act 1981 s 133(1)-(4) is amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 4 para 26 to substitute references to the 'Senior Courts' for references to the 'Supreme Court'. At the date at which this title states the law, no such day had been appointed.

2 Supreme Court Act 1981 s 133(2) (prospectively amended: see note 1). The Lord Chancellor may also, with the concurrence of the Master of the Rolls and of the Treasury, make regulations by statutory instrument prescribing the fees to be paid on the enrolment or filing of any instrument in the Supreme Court: see s 133(4), (5) (s 133(4) prospectively amended: see note 1); the Enrolment of Deeds (Fees) Regulations 1994, SI 1994/601; and **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1279. The Lord Chancellor's function under the Supreme Court Act 1981 s 133 is a protected function for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

3 *Practice Direction--Court Documents* PD 5A para 6.1(1).

4 As to changing a child's name see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 134, 141 note 5; and **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1279.

5 See note 1.

6 *Practice Direction--Court Documents* PD 5A para 6.2.

7 As to parental responsibility orders see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 139.

8 *Practice Direction--Court Documents* PD 5A para 6.3(1).

9 *Practice Direction--Court Documents* PD 5A para 6.3(2).

10 *Practice Direction--Court Documents* PD 5A para 6.3(3).

11 *Practice Direction--Court Documents* PD 5A para 6.3(4).

12 *Practice Direction--Court Documents* PD 5A para 6.3(5).

UPDATE

86 Enrolment of deeds and other documents

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(9) FEES/87. Supreme Court and county court fees.

(9) FEES

87. Supreme Court and county court fees.

The Lord Chancellor may with the consent of the Treasury by order prescribe fees payable in respect of anything dealt with by the Supreme Court or county courts¹, other than fees which he or some other authority otherwise has power to prescribe². When including any provision in such an order, the Lord Chancellor must have regard to the principle that access to the courts must not be denied³. The Lord Chancellor must take such steps as are reasonably practicable to bring information about fees to the attention of persons likely to have to pay them⁴. Fees payable under an order made under these provisions are recoverable summarily as a civil debt⁵.

The Civil Proceedings Fees Order 2008⁶ provides for fees⁷ in most proceedings in the Supreme Court and county courts. The provisions of the Order do not, however, apply to the following⁸:

- 136 (1) non-contentious probate business⁹;
- 137 (2) the enrolment of documents¹⁰;
- 138 (3) criminal proceedings (except proceedings on the Crown side of the Queen's Bench Division (now known as the Administrative Court)¹¹ to which the fees prescribed in those provisions are applicable)¹²;
- 139 (4) proceedings by sheriffs, under-sheriffs, deputy-sheriffs or other officers of the sheriff¹³; and
- 140 (5) family proceedings in the High Court or a county court¹⁴.

Detailed provision is made for the purpose of ascertaining whether a party is entitled to a remission or part remission of a prescribed fee¹⁵. No fee is payable under the 2008 Order if, at the time when a fee would otherwise be payable, the party is in receipt of a qualifying benefit¹⁶ or the party has a specified number of children¹⁷ and a gross annual income below a specified amount¹⁸, or a disposable monthly income of less than £50¹⁹. Part remission of fees is granted if the party's disposable monthly income is greater than £50²⁰. The maximum amount of fee payable is (a) if the disposable monthly income of the party is more than £50 but does not exceed £210, an amount equal to one-quarter of every £10 of the party's disposable monthly income up to a maximum of £50; and (b) if the disposable monthly income is more than £210, an amount equal to £50 plus one-half of every £10 over £200 of the party's disposable monthly income²¹. Where the fee that would otherwise be payable under the 2008 Order is greater than the maximum fee which a party is required to pay as calculated in heads (a) and (b), the fee will be remitted to the amount payable as so calculated²². An application for remission or part remission of a fee must be made to the court officer at the time when the fee would otherwise be payable²³.

Where it appears to the Lord Chancellor that the payment of any fee prescribed by the 2008 Order would, owing to the exceptional circumstances of the particular case, involve undue financial hardship, the Lord Chancellor may reduce or remit the fee in that case²⁴.

Where a party has not provided the documentary evidence required in support of his application for remission or part remission of a fee²⁵ and a fee has been paid at a time when it was not payable²⁶, the fee will be refunded if documentary evidence relating to the time when the fee became payable is provided at a later date²⁷. Where a fee has been paid at a time

where the Lord Chancellor, if all the circumstances had been known, would have reduced or remitted the fee²⁸, the fee or the amount by which the fee would have been reduced, as the case may be, will be refunded²⁹. In either case, no refund will be made unless the party who paid the fee applies within six months of paying the fee³⁰, although the Lord Chancellor may extend the period of six months mentioned if the Lord Chancellor considers that there is a good reason for an application being made after the end of the period of six months³¹.

Where a restraint order is in force against a party³² and the party makes an application for permission to (i) issue proceedings or take a step in proceedings as required by the restraint order; (ii) apply for amendment or discharge of the order; or (iii) appeal the order, the fee prescribed for the application is payable in full³³. If the court grants the permission requested, the applicant will be refunded the difference between the fee paid and the fee that would have been payable if the provisions as to remission had been applied without reference to the above requirement to pay the full fee³⁴.

Where by any convention entered into by Her Majesty with any foreign power it is provided that no fee is required to be paid in respect of any proceedings, the fees specified in the 2008 Order are not payable in respect of those proceedings³⁵.

1 Courts Act 2003 s 92(1) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 2 para 4(1), (3), to substitute a reference to the Senior Courts for the reference to the Supreme Court; at the date at which this title states the law, no such day had been appointed). Before making such an order, the Lord Chancellor must consult (1) the Lord Chief Justice; (2) the Master of the Rolls; (3) the President of the Queen's Bench Division; (4) the President of the Family Division; (5) the Chancellor of the High Court; (6) the Head of Civil Justice; (7) the Deputy Head of Civil Justice (if there is one) (Courts Act 2003 s 92(5) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 308, 345)); and before making a fees order in relation to civil proceedings, the Lord Chancellor must consult the Civil Justice Council (Courts Act 2003 s 92(6)). As to the Head of Civil Justice see PARA 12 note 5. As to the Civil Justice Council see PARA 28.

A fees order made by the Lord Chancellor may, in particular, contain provision as to (a) scales or rates of fees; (b) exemptions from or reductions in fees; (c) remission of fees in whole or in part: s 92(2).

2 Courts Act 2003 s 92(4). Nothing in s 92 prevents an authority which has power to prescribe fees payable in any of the courts referred to in s 92(1) from applying to any extent provisions contained in an order made under s 92; and an instrument made in exercise of the power is to be read (unless the contrary intention appears) as applying those provisions as amended from time to time: s 92(9), (10).

3 Courts Act 2003 s 92(3).

4 Courts Act 2003 s 92(7).

5 Courts Act 2003 s 92(8).

6 The Civil Proceedings Fees Order 2008, SI 2008/1053, which came into force on 1 May 2008 (see art 1(1)), and has been amended by SI 2008/2853.

7 The fees set out in the Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 1 col 2 are payable in the Supreme Court and in county courts in respect of the items described in Sch 1 col 1 in accordance with and subject to the directions specified in Sch 1 col 1: see art 2.

8 Civil Proceedings Fees Order 2008, SI 2008/1053, art 3.

9 Civil Proceedings Fees Order 2008, SI 2008/1053, art 3(a). For the fees to be taken in non-contentious probate business see the Non-Contentious Probate Fees Order 2004, SI 2004/3120, art 2, Schs 1, 1A (Sch 1A added by SI 2007/2174); and see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 82.

10 Civil Proceedings Fees Order 2008, SI 2008/1053, art 3(b). For the fees to be taken for the enrolment of documents see the Enrolment of Deeds (Fees) Regulations 1994, SI 1994/601; and see **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1279.

11 As to the establishment of the Administrative Court see PARA 219 text and note 8.

12 Civil Proceedings Fees Order 2008, SI 2008/1053, art 3(c).

13 Civil Proceedings Fees Order 2008, SI 2008/1053, art 3(d). As to a sheriff's statutory right to fees and as to the types of fees to which he is entitled in connection with the execution of process see **SHERIFFS** vol 42 (Reissue) PARAS 1123, 1138 et seq.

14 Civil Proceedings Fees Order 2008, SI 2008/1053, art 3(e). For the fees to be taken in family proceedings see the Family Proceedings Fees Order 2008, SI 2008/1054; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 139; **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 1036.

15 See the Civil Proceedings Fees Order 2008, SI 2008/1053, art 5, Sch 2. Schedule 2 does not apply to fee 8.8 (fee payable on a consolidated attachment of earnings order or an administration order): Sch 2 para 11. 'Party' means the individual who would, but for Sch 2, be liable to pay the fee required under the Civil Proceedings Fees Order 2008, SI 2008/1053: Sch 2 para 1(1) (amended by SI 2008/2853).

16 Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 2(1). The following are qualifying benefits for these purposes: (1) income support under the Security Contributions and Benefits Act 1992; (2) working tax credit, provided that no child tax credit is being paid to the party; (3) income-based jobseeker's allowance under the Jobseekers Act 1995; (4) guarantee credit under the State Pension Credit Act 2002; and (5) income-related employment and support allowance under the Welfare Reform Act 2007: Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 2(2) (amended by SI 2008/2853). See further **SOCIAL SECURITY AND PENSIONS**. The receipt by a partner of a qualifying benefit does not entitle a party to remission of a fee: Sch 2 para 6(2). 'Partner' means a person with whom the party lives as a couple and includes a person with whom the party is not currently living but from whom the party is not living separate and apart: Sch 2 para 1(1). 'Couple' has the meaning given in the Tax Credits Act 2002 s 3(5A): Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 1(1).

17 'Child' means a child or young person in respect of whom a party is entitled to receive child benefit in accordance with the Social Security Contributions and Benefits Act 1992 s 141 and regulations made under s 142: Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 1(1).

18 See the Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 3. For the purpose of determining whether a party is entitled to the remission or part remission of a fee in accordance with Sch 2, the income of a partner, if any, is to be included as income of the party: Sch 2 para 6(1). 'Gross annual income' means total annual income, for the 12 months preceding the application for remission or part remission, from all sources other than receipt of any of the excluded benefits; and 'excluded benefits' means (1) any of the following benefits payable under the Social Security Contributions and Benefits Act 1992: (a) attendance allowance paid under s 64; (b) severe disablement allowance; (c) carer's allowance; (d) disability living allowance; (e) constant attendance allowance paid under s 104 or Sch 8 para 4 or 7(2) as an increase to a disablement pension; (f) council tax benefit; (g) any payment made out of the social fund; (h) housing benefit; (2) any direct payment made under the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2003, SI 2003/762, or the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004, SI 2004/1748; (3) a back to work bonus payable under the Jobseekers Act 1995 s 626; (4) any exceptionally severe disablement allowance paid under the Personal Injuries (Civilian) Scheme 1983, SI 1983/686; (5) any pension paid under the Naval, Military and Air Forces etc (Disablement and Death) Service Pension Order 2006, SI 2006/606; (6) any payment made from the Independent Living Funds; and (7) any financial support paid under an agreement for the care of a foster child: Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 1(1).

19 See the Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 4(1). As to the calculation of disposable income see Sch 2 para 5.

20 See the Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 4(2).

21 Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 4(2)(a), (b).

22 Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 4(3).

23 Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 7(1). Where a claim for full remission of fees is made, the party must provide documentary evidence of, as the case may be (1) entitlement to a qualifying benefit or gross annual income; and (2) if applicable, the children included for the purposes determining the entitlement to remission: Sch 2 para 7(2). Where a claim for full or part remission of fees under Sch 2 para 4 is made, the party must provide documentary evidence of (a) such of the party's gross monthly income as is derived from (i) employment; (ii) rental or other income received from persons living with the party by reason of their residence in the party's home; (iii) a pension; or (iv) a state benefit, not being an excluded benefit; and (b) any expenditure being deducted from the gross monthly income in accordance with Sch 2 para 5(2): Sch 2 para 7(3).

24 Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 8.

- 25 le under the Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 7: see note 23.
- 26 le under the Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 2, 3 or 4.
- 27 Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 9(1).
- 28 le under the Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 8.
- 29 Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 9(2).
- 30 Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 9(3).
- 31 Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 9(4).
- 32 As to restraint orders see PARA 258.
- 33 Civil Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 10(1), (2).
- 34 Proceedings Fees Order 2008, SI 2008/1053, Sch 2 para 10(3).
- 35 Civil Proceedings Fees Order 2008, SI 2008/1053, art 4.

UPDATE

87 [Senior Courts] and county court fees

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 7--SI 2008/1053 Sch 1 amended: SI 2009/1498.

NOTE 9--SI 2004/3120 Sch 1A substituted: SI 2009/1497.

NOTE 14--SI 2008/1054 amended: SI 2008/2856 (amended by SI 2008/3106).

NOTE 18--SI 2008/1053 Sch 2 paras 1(1), 3 amended: SI 2009/1498.

NOTE 19--SI 2008/1053 Sch 2 para 5 amended: SI 2009/1498.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(10) TIME/88. Calculation of time.

(10) TIME

88. Calculation of time.

Part 2 of the Civil Procedure Rules contains the rule¹ that shows how to calculate any period of time for doing any act which is specified by those rules, by a practice direction or by a judgment or order of the court². A period of time expressed as a number of days must be computed as clear days³. Where the specified period is five days or less and includes a Saturday or Sunday or a bank holiday, Christmas Day or Good Friday, that day does not count⁴.

When the period specified by the rules or a practice direction, or by any judgment or court order, for doing any act at the court office ends on a day on which the office is closed⁵, that act is in time if done on the next day on which the court office is open⁶.

1 Ie CPR 2.8: see the text and notes 2-6.

2 See CPR 2.8(1). As to the meaning of 'court' see PARA 22.

3 CPR 2.8(2). For these purposes, 'clear days' means that in computing the number of days the day on which the period begins and, if the end of the period is defined by reference to an event, the day on which that event occurs, are not included: CPR 2.8(3). The following examples are given in CPR 2.8(3):

- 24 (1) Notice of an application must be served at least three days before the hearing. An application is to be heard on Friday 20 October. The last date for service is Monday 16 October.
- 25 (2) The court is to fix a date for a hearing. The hearing must be at least 28 days after the date of notice. If the court gives notice of the date of the hearing on 1 October, the earliest date for the hearing is 30 October.
- 26 (3) Particulars of claim must be served within 14 days of service of the claim form. The claim form is served on 2 October. The last day for service of the particulars of claim is 16 October.

As to the meaning of 'service' see PARA 138 note 2; as to the claim form see PARA 117; and as to particulars of claim see PARA 587 et seq.

4 See CPR 2.8(4). The following example is given in CPR 2.8(4): Notice of an application must be served at least three days before the hearing. An application is to be heard on Monday 20 October. The last date for service is Tuesday 14 October.

As to bank holidays see **TIME** vol 97 (2010) PARA 321.

5 As to office hours see PARA 52 note 1 (Supreme Court Office), PARA 58 note 5 (county court offices). As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

6 CPR 2.8(5).

UPDATE

88 Calculation of time

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(10) TIME/89. Expression of dates.

89. Expression of dates.

Where the court¹ gives a judgment, order or direction which imposes a time limit for doing any act, the last date for compliance must, wherever practicable, be expressed as a calendar date² and include the time of day by which the act must be done³. Where the date by which an act must be done is inserted in any document, the date must, wherever practicable, be expressed as a calendar date⁴.

1 As to the meaning of 'court' see PARA 22.

2 See CPR 2.9(1)(a).

3 See CPR 2.9(1)(b).

4 See CPR 2.9(2). See further **TIME** vol 97 (2010) PARA 337.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(10) TIME/90. Meaning of 'month'.

90. Meaning of 'month'.

Where 'month' occurs in any judgment, order, direction or other document, it means a calendar month¹.

1 CPR 2.10. See further **TIME** vol 97 (2010) PARA 307 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(11) JUDICIAL DECISIONS AS AUTHORITIES/91. Ratio decidendi.

(11) JUDICIAL DECISIONS AS AUTHORITIES

91. Ratio decidendi.

The use of precedent is an indispensable foundation upon which to decide what is the law and its application to individual cases; it provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules¹. The enunciation of the reason or principle upon which a question before a court has been decided is alone binding as a precedent². This underlying principle is called the ratio decidendi, namely the general reasons given for the decision or the general grounds upon which it is based, detached or abstracted from the specific peculiarities of the particular case which gives rise to the decision³. What constitutes binding precedent is the ratio decidendi, and this is almost always to be ascertained by an analysis of the material facts of the case, for a judicial decision is often reached by a process of reasoning involving a major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration⁴.

The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision⁵, which alone has the force of law and which, when it is clear what it was, is binding; but, if it is not clear, it is not part of a tribunal's duty to spell out with difficulty a ratio decidendi in order to be bound by it⁶, and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case⁷. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi⁸.

The House of Lords is entitled to question or limit a previous ratio decidendi of the House (1) where it is obscure; (2) where it is out of line with other authorities or established principles; and (3) where it is much wider than was necessary for the decision⁹. Where there is no discernible ratio decidendi common to the majority of the House of Lords the reasoning accepted in a long line of cases before that decision will be adopted by the House¹⁰. Where too rigid an adherence to precedent may lead to injustice in a particular case and an undue restriction of the proper development of the law, the House of Lords may depart from its previous decisions when it appears right to do so¹¹.

When construing a statute the court must not rely on judicial statements as to the construction, but must construe the words of the Act itself¹². However, where there is ambiguity or obscurity the court may refer to reports of Parliamentary debates as an aid to construction¹³. Particularly in extempore judgments, wide expressions must be read according to the subject matter; an isolated phrase must not be taken as if it were intended to expound the whole law on the subject¹⁴. The court's authoritative opinion must be distinguished from propositions assumed by the court to be correct for the purpose of disposing of the particular case¹⁵.

With effect from 9 April 2001, advocates are required to state, in respect of each authority that they wish to cite, the proposition of law that the authority demonstrates, and the parts of the judgment that support that proposition. If it is sought to cite more than one authority in support of a given proposition, advocates must state the reason for taking that course¹⁶. This demonstration is required to be contained in any skeleton argument and in any appellant's or respondent's notice in respect of each authority referred to in that skeleton or notice¹⁷. Any

bundle or list of authorities prepared for the use of any court must bear a certification by the advocate responsible for arguing the case that these requirements have been complied with in respect of each authority included¹⁸.

1 *Practice Note (Judicial Precedent)*[1966] 3 All ER 77, sub nom *Practice Statement* [1966] 1 WLR 1234, HL. The principle by which a court is bound to follow decisions in former cases is known as 'stare decisis'.

2 The only thing in a judge's decision binding as an authority is the principle upon which the case was decided: *Osborne to Rowlett*(1880) 13 ChD 774 at 785. Judicial authority belongs not to the exact words used nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision: Sir Frederick Pollock, quoted by Lord Denning in *Close v Steel Co of Wales Ltd*[1962] AC 367, [1961] 2 All ER 953, HL. The only use of authorities or decided cases is the establishment of some principle which the judge can follow out in deciding the case before him: *Re Hallett's Estate, Knatchbull v Hallett*(1880) 13 ChD 696, CA; *Smith v Harris*[1939] 3 All ER 960, CA; *Jolley v London Borough of Sutton* [2000] 3 All ER 409, [2000] 1 WLR 1082, HL. A subsequent court is not bound by a proposition of law which has been assumed by the previous court and not decided by it: *R (on the application of Kadhim) v Brent London Borough Council Housing Benefit Review Board*[2001] QB 955, [2000] All ER (D) 2408, CA.

3 See 2 Austin's Lectures on Jurisprudence (5th Edn) 627, 628, and 63 LQR 461.

4 *FA and AB Ltd v Lupton*[1972] AC 634 at 658, [1971] 3 All ER 948 at 964, HL, per Lord Simon of Glaisdale, who added that where the decision constitutes new law, this may not be expressly stated as a proposition of law: frequently the new law appears only from subsequent comparison of the material facts inherent in the major premises with the material facts which constitute the minor premise.

5 Every judgment must be read as applicable to the particular facts proved, since the generality of expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the particular case: *Quinn v Leatham*[1901] AC 495 at 506, HL, per Lord Halsbury; *Miller-Mead v Minister of Housing and Local Government*[1963] 2 QB 196 at 236, [1963] 1 All ER 459 at 476, CA, per Diplock LJ.

6 *The Mostyn*[1928] AC 57, HL.

7 *Monk v Warbey*[1935] 1 KB 75, CA.

8 *Jacobs v LCC*[1950] AC 361, [1950] 1 All ER 737, HL; *Cheater v Cater*[1918] 1 KB 247, CA; *London Jewellers Ltd v Attenborough, London Jewellers Ltd v Robertsons (London) Ltd*[1934] 2 KB 206, CA; *Behrens v Bertram Mills Circus Ltd*[1957] 2 QB 1, [1957] 1 All ER 583; *Cane v Royal College of Music*[1961] 2 QB 89, [1961] 1 All ER 12, CA; *Miliangos v George Frank (Textiles) Ltd*[1975] QB 487, [1975] 1 All ER 1076, CA; affd [1976] AC 443, [1975] 3 All ER 801, HL. If the House of Lords gives two reasons for its decision and afterwards finds one to be wrong, it is entitled to accept the right reason and reject the wrong: *Re Holmden's Settlement Trusts, Holmden v IRC*[1966] Ch 511, [1966] 2 All ER 661, CA; affd sub nom *IRC v Holmden*[1968] AC 685, [1968] 1 All ER 148, HL. Where a point is presented for consideration to a court with other points, and the court bases its decision entirely on the other points and says nothing about the first, no inference can be drawn that the court approved the point any more than it disapproved it: *Guaranty Trust Co of New York v Hannay & Co*[1918] 2 KB 623, CA. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

9 *Scruttons Ltd v Midland Silicones Ltd*[1962] AC 446, [1962] 1 All ER 1, HL; *Penn-Texas Corp v Murat Anstalt (No 2)*[1964] 2 QB 647, [1964] 2 All ER 594, CA.

10 *Harper v National Coal Board*[1974] QB 614, [1974] 2 All ER 441, CA.

11 *Practice Note (Judicial Precedent)*[1966] 3 All ER 77, sub nom *Practice Statement* [1966] 1 WLR 1234, HL; *R v Shivpur*[1987] AC 1, [1986] 2 All ER 334, HL.

12 *Ogden Industries Pty Ltd v Lucas*[1970] AC 113, [1969] 1 All ER 121, PC.

13 *Pepper (Inspector of Taxes) v Hart*[1993] AC 593, [1993] 1 All ER 42, HL; *Chief Adjudication Officer v Foster*[1993] AC 754, [1993] 1 All ER 705, HL.

14 *Miller-Mead v Minister of Housing and Local Government*[1963] 2 QB 196, [1963] 1 All ER 459, CA. See also *Moss v Gallimore* (1779) 1 Doug KB 279; *Hood v Newby*(1882) 21 ChD 605, CA. It is never wise to take a passage out of a judgment and to treat it as though it were a statutory enactment: *Metropolitan Police District Receiver v Croydon Corp*[1957] 2 QB 154 at 167, [1957] 1 All ER 78 at 85, CA, per Morris LJ. For a suggestion

that an extempore judgment after inadequate argument may not be as authoritative as a judgment given after full argument and mature consideration see *Haley v London Electricity Board*[1965] AC 778 at 792, [1964] 3 All ER 185 at 188, HL, per Lord Reid.

15 *Baker v R*[1975] AC 774, [1975] 3 All ER 55, PC; *National Enterprises Ltd v Racal Communications Ltd*[1975] Ch 397, [1974] 3 All ER 1010, CA.

16 See *Practice Note*[2001] 2 All ER 510, sub nom *Practice Direction (citation of authorities)* [2001] 1 WLR 1001, CA, para 8.1. The statements referred to in para 8.1 must not materially add to the length of submissions or of skeleton arguments, but should be sufficient to demonstrate, in the context of the advocate's argument, the relevance of the authority or authorities to that argument and that the citation is necessary for a proper presentation of that argument: para 8.4. See *A v B plc*[2002] EWCA Civ 337 at [8], [2003] QB 195 at [8], [2002] 2 All ER 545 at [8] per Lord Woolf CJ.

17 *Practice Note*[2001] 2 All ER 510, sub nom *Practice Direction (citation of authorities)* [2001] 1 WLR 1001, CA, para 8.2.

18 *Practice Note*[2001] 2 All ER 510, sub nom *Practice Direction (citation of authorities)* [2001] 1 WLR 1001, CA, para 8.3.

UPDATE

91 Ratio decidendi

NOTE 8--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(11) JUDICIAL DECISIONS AS AUTHORITIES/92. Dicta.

92. Dicta.

Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand are generally termed 'dicta'¹. They have no binding authority on another court, although they may have some persuasive efficacy². Mere passing remarks of a judge are known as 'obiter dicta', whilst considered enunciations of the judge's opinion on a point not arising for decision, and so not part of the ratio decidendi, have been termed 'judicial dicta'³. A third type of dictum may consist in a statement by a judge as to what has been done in other cases which have not been reported⁴.

Rights of property should not be upset merely because, when historically traced through the reports of centuries, they rest upon a dictum⁵, nor is it right to distrust a practice that follows on dicta when it is the practice and not the dicta that forms the binding authority⁶. Even dicta of individual members of the House of Lords, although of great weight, are not of binding authority⁷, but, when dicta have been expressed unanimously by all the judges of a Divisional Court, it would not be seemly for the judges of another Divisional Court not to follow them⁸. Interlocutory observations by members of a court during the argument, while of persuasive weight, are not judicial pronouncements and do not decide anything⁹.

It is dangerous in the exercise of discretion to take a reported case as a guide for that exercise in another case¹⁰. The Court of Appeal may lay down maxims to guide judges in exercising discretion, but will not compel them to follow them¹¹, although an exercise of discretion is always subject to review¹².

1 There is no justification for regarding as obiter dictum a reason given by a judge for his decision because he has given another reason also: *Jacobs v LCC* [1950] AC 361 at 369, [1950] 1 All ER 737 at 741, HL, per Lord Simonds. See also *R v Hatton* [2005] EWCA Crim 2951, [2006] 1 Cr App Rep 247, [2005] All ER (D) 308 (Oct).

2 *A-G v Dean and Canons of Windsor* (1860) 8 HL Cas 369; *G and C Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, HL; *Cornelius v Phillips* [1918] AC 199, HL; *Tindall v Wright* (1922) 127 LT 149, where the court refused to give a decision which, in the circumstances of the case, would have been essentially in the nature of an obiter dictum and not binding on any other court; *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, HL; *Cassidy v Daily Mirror Newspapers* [1929] 2 KB 331, CA; *Re Burradon and Coxlodge Coal Co Ltd*, *Martin's Bank Ltd v Burradon and Coxlodge Coal Co Ltd* (1930) 23 BWCC 7, CA; *Flower v Ebbw Vale Steel, Iron and Coal Co Ltd* [1934] 2 KB 132, CA; but cf *Tees Conservancy Comrs v James* [1935] Ch 544, where the court considered that it would be wrong to disregard dicta of two judges whose experience in matters of the kind in question was very great and of high authority.

3 *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424 at 431, [1969] 1 All ER 289 at 292, per Megarry J; affd [1969] 2 Ch 424 at 435, [1969] 1 All ER 943, CA. See also *Slack v Leeds Industrial Co-operative Society Ltd* [1923] 1 Ch 431, CA; on appeal sub nom *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, HL.

4 *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424 at 431, [1969] 1 All ER 289 at 292, per Megarry J, who said that such a statement of the settled law or accustomed practice carries the highest authority that any dictum can bear; affd [1969] 2 Ch 424 at 435, [1969] 1 All ER 943, CA.

5 *A-G v Reynolds* [1911] 2 KB 888.

6 *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, HL.

7 *Latham v R Johnson & Nephew Ltd* [1913] 1 KB 398, CA; *East London Rly Joint Committee v Greenwich Union Assessment Committee*, *East London Rly Joint Committee v Bermondsey Assessment Committee*, *East London Rly Joint Committee v Stepney Assessment Committee* [1913] 1 KB 612, CA; *Charles R Davidson & Co v*

M'Robb (or Officer) [1918] AC 304, HL; *Harries v Crawford* [1919] AC 717, HL. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

8 *Mills v LCC* [1925] 1 KB 213, DC. As to decisions of co-ordinate courts see PARA 98.

9 *Practice Note* [1942] WN 89, PC, per Viscount Simon C.

10 *Bragg v Crosville Motor Services Ltd* [1959] 1 All ER 613, [1959] 1 WLR 324, CA.

11 *Watts v Manning* [1964] 2 All ER 267, [1964] 1 WLR 623, CA.

12 *Sims v William Howard & Son Ltd* [1964] 2 QB 409, [1964] 1 All ER 918, CA.

UPDATE

92 Dicta

NOTE 7--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(11) JUDICIAL DECISIONS AS AUTHORITIES/93. Decisions on matters of fact.

93. Decisions on matters of fact.

Except as between the parties or their privies, decisions upon matters of fact are not binding on any other court¹, even when given by the House of Lords². When a previous case has not laid down any new principle, but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to erect a previous decision into a governing precedent merely because it contains what is simply resemblance of circumstances³; but a case may be of use to show the way in which judges regard facts⁴, and a decision that certain legal consequences follow from certain facts is binding in another case raising substantially similar facts⁵.

A decision on a question of foreign law is not binding, for such a question is a question of fact to be decided in each case on the actual evidence in that case⁶.

1 *Carnell v Harrison* [1916] 1 Ch 328; affd on another point [1916] 1 Ch 328 at 336, CA; *Lancashire and Yorkshire Rly Co v Highley* [1917] AC 352, HL; *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356, CA; *Williams-Ellis v Cobb* [1935] 1 KB 310, CA. See also *Beith's Trustees v Beith* 1950 SC 66; *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743, [1959] 2 All ER 38, HL. As to privies see eg PARAS 1155 note 5, 1196-1198.

2 *The Mostyn* [1928] AC 57, HL; *Wilkinson v Sibley and Donovan* [1932] 1 KB 194, CA. One may, however, look at decisions in other cases to see how a basic rule can properly be applied in a special class of situation: *Hazell v British Transport Commission* [1958] 1 All ER 116, [1958] 1 WLR 169. But one must distinguish between a statement of a proposition of law and a statement of the factual framework within which the law would fall to be applied: *Brown v Rolls Royce Ltd* [1960] 1 All ER 577, [1960] 1 WLR 210, HL. See also *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145, [1959] 2 All ER 745, HL. As to the right of the House of Lords to act as judges of facts where the trial was originally without a jury see *Flower v Ebbw Vale Steel, Iron and Coal Co Ltd* [1936] AC 206 at 220, HL, per Lord Wright. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

3 *G and C Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, HL. See also *Worsfold v Howe* [1980] 1 All ER 1028, [1980] 1 WLR 1175, CA.

4 *The Swansea Vale (Owners) v Rice* [1912] AC 238, HL.

5 *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356, CA. For the extent to which a decision on one charterparty will govern another in similar form see *General Gordon Akt v Cape Copper Co* (1921) 91 LKB 112, CA.

6 *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, HL. As to the decisions of overseas courts see PARA 105.

UPDATE

93 Decisions on matters of fact

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(11) JUDICIAL DECISIONS AS AUTHORITIES/94. Quantum of damages.

94. Quantum of damages.

It is an important function of the Court of Appeal to set guidelines as to the quantum of damages appropriate for compensation in respect of various types of commonly occurring injuries, in order to assist both judges at first instance and the parties in assessing the likely level of award¹. Thus, decisions as to the quantum of damages in similar circumstances (particularly those of the Court of Appeal) may be cited to a judge of first instance if, in his discretion, he permits them to be cited². The choice of the right figure for damages, particularly in personal injuries cases, is empirical and in practice results from a general consensus of opinion of among those tribunals which award damages; when all proper allowance has been made for differing circumstances the sum awarded to one person should not be out of all proportion to the sum awarded to another in respect of similar injuries³.

In cases where the quantum of compensatory damages is assessed by a jury (particularly in cases of defamation), they may be told of the conventional compensatory scales awarded for particular types of personal injury, in order to provide them with guidance and as a check on the reasonableness of the award which they are contemplating⁴. Moreover, in cases of malicious prosecution and false imprisonment, the judge should give the jury an indication and guidance as to the appropriate brackets for the quantum of compensatory, aggravated and exemplary damages⁵.

1 *Wright v British Railways Board* [1983] 2 AC 773, [1983] 2 All ER 698, HL. For an example see *Heil v Rankin* [2001] QB 272, [2000] 3 All ER 138, CA. As to the setting of similar guidelines for cases where the quantum of damage is assessed by a jury see text and notes 4-5.

2 *Waldon v War Office* [1956] 1 All ER 108, [1956] 1 WLR 51, CA.

3 *Bastow v Bagley & Co Ltd* [1961] 3 All ER 1101, [1961] 1 WLR 1494, CA; and see **DAMAGES**. As to the caution which must be exercised in paying heed to awards in other cases, particularly where they are not fully reported see *Singh (an infant) v Toong Fong Omnibus Co Ltd* [1964] 3 All ER 925, sub nom *Jag Singh v Toong Fong Omnibus Co* [1964] 1 WLR 1382, PC.

4 *John v MGN Ltd* [1997] QB 586, [1996] 2 All ER 35, CA.

5 *Thompson v Metropolitan Police Comr* [1998] QB 498, [1997] 2 All ER 762, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(11) JUDICIAL DECISIONS AS AUTHORITIES/95. House of Lords decisions.

95. House of Lords decisions.

The decisions of the House of Lords¹ upon questions of law are normally considered by the House to be binding upon itself², but because too rigid adherence to precedent may lead to injustice in a particular case and unduly restrict the proper development of the law the House will depart from a previous decision when it appears right to do so³, although it bears in mind the danger of disturbing retrospectively the basis upon which contracts, property settlements and fiscal arrangements have been entered into and the especial need for certainty⁴ as to the criminal law⁵. When a broad principle has been clearly decided by the House, the decision should not be weakened or frittered away by fine distinctions⁶, and an erroneous decision of the House upon a question of law can be set right only by Act of Parliament⁷. However, a decision of the House of Lords may be set aside on the ground that there is a real danger or reasonable apprehension or suspicion of bias⁸.

A decision of the House of Lords occasioned by members of the House being equally divided is as binding on the House and on all inferior tribunals as if it had been unanimous⁹. Decisions of the House of Lords are binding on every court inferior to it¹⁰. It is not open to the Court of Appeal to advise judges to ignore House of Lords decisions on the ground that they were decided per incuriam or are unworkable¹¹; but if there is no discernible ratio decidendi the Court of Appeal may adopt any reasoning which appears to it correct provided it supports the actual decision of the House¹².

1 The decisions of the Committee for Privileges are not judgments, and are not binding in another claim, even though the circumstances attending the claim and the point of law arising upon it may be precisely the same: *Re Wiltes' Peerage Claim* (1869) LR 4 HL 126; *Viscountess Rhondda's Claim* [1922] 2 AC 339, HL; and see **COURTS; PEERAGES AND DIGNITIES**. Dicta of individual members of the House are not, however, of binding authority: see PARA 92 the text to note 7. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

2 *Radcliffe v Ribble Motor Services Ltd* [1939] AC 215, [1939] 1 All ER 637, HL; *Nash (Inspector of Taxes) v Tamplin & Sons Brewery Brighton Ltd* [1952] AC 231, [1951] 2 All ER 869, HL; *Practice Note (Judicial Precedent)* [1966] 3 All ER 77, sub nom *Practice Statement* [1966] 1 WLR 1234, HL. See also eg *R (on the application of Purdy) v DPP* [2009] EWCA Civ 92, [2009] All ER (D) 197 (Feb) (following an earlier House of Lords decision rather than a conflicting decision of the European Court of Human Rights). The reasons were (1) that a House of Lords decision establishes the law so as to bind all subjects of the Crown, including the law lords, and can be altered only by Parliament (*Beamish v Beamish* (1861) 9 HL Cas 274); and (2) that the rule was needed to provide the law with desirable certainty (*London Tramways Co v LCC* [1898] AC 375, HL). See generally *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, [1972] 2 All ER 898, HL. However, the fact that an earlier case is indistinguishable on its facts does not require the House to follow the result in an earlier case whilst ignoring its reasoning: *Chancery Lane Safe Deposit and Offices Co Ltd v IRC* [1966] AC 85, [1966] 1 All ER 1, HL.

3 A previous decision should not be departed from merely because the House considers that it was wrongly decided (*Fitzleet Estates Ltd v Cherry (Inspector of Taxes)* [1977] 3 All ER 996, [1977] 1 WLR 1345, HL) or that it was illogical (*The Johanna Oldendorff* [1974] AC 479, [1973] 3 All ER 148, HL) or, generally, where questions of construction are involved (*Jones v Secretary of State for Social Services* [1972] AC 944, [1972] 1 All ER 145, HL). A previous decision may, however, be departed from where it has proved unduly restrictive of proper legal development and in changed circumstances is no longer adequate (*British Railways Board v Herrington* [1972] AC 877, [1972] 1 All ER 749, HL), or where it causes uncertainty or inconvenience in practice (*The Johanna Oldendorff* [1974] AC 479, [1973] 3 All ER 148, HL; cf *Public Trustee v IRC* [1960] AC 398, [1960] 1 All ER 1, HL), or where fresh considerations of real substance have since emerged (*Miliangos v George Frank (Textiles) Ltd*

[1976] AC 443, [1975] 3 All ER 801, HL). In *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL (decided before the House determined that in proper cases it might depart from previous decisions), Lord Reid suggested that it could properly question or limit a previous decision which was obscure, or out of line with other authorities or established principles, or wider than was necessary for the decision. See also *Saif Ali v Sydney Mitchell & Co (a firm)* [1980] AC 198, [1978] 3 All ER 1033, HL, where the House by a majority narrowed the immunity for barristers laid down in *Rondel v Worsley* [1969] 1 AC 191, [1973] 3 All ER 993, HL, remarking that since 1967 the extension of liability for negligence had gone on apace; and *Arthur J S Hall & Co (a firm) v Simmons, Barratt v Ansell (t/a Woolf Seddon (a firm))* [2002] 1 AC 615, [2000] 3 All ER 673, HL, where the House decided that advocates should no longer enjoy immunity against suits in negligence in respect of their conduct of civil or of criminal cases as it was no longer in the public interest to maintain such immunity in favour of advocates. See also *Vestey v IRC (No 2)* [1980] AC 1148, [1979] 3 All ER 976, HL.

4 See *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, [1972] 2 All ER 898, HL.

5 *Practice Note (Judicial Precedent)* [1966] 3 All ER 77, sub nom *Practice Statement* [1966] 1 WLR 1234, HL. See also *R v Cunningham* [1982] AC 566, [1981] 2 All ER 863, HL; *R v Shivpuri* [1987] AC 1, [1986] 2 All ER 334, HL. This power has always been possessed by the High Court of Australia (see *Perpetual Executors and Trustees Association of Australia Ltd v Australian Commonwealth Taxes Comr* [1954] AC 114, [1954] 1 All ER 339, PC; *Geelong Harbour Trust Comrs v Gibbs Bright & Co* [1974] AC 810, PC), and the Supreme Court of South Africa (*Harris v Dönges* (1952) 1 TLR 1245, S Africa SC).

6 *Newton v Guest, Keen and Nettelfolds Ltd* (1926) 135 LT 386, HL; *Jones v South-West Lancashire Coal Owners' Association* [1927] AC 827, HL. For a consideration of the extent to which an analogous decision of the House of Lords, although distinguishable, should be followed see the observation of Roxburgh J in *Re House Property and Investment Co Ltd* [1954] Ch 576 at 600-601, [1953] 2 All ER 1525 at 1538-1539.

7 *London Tramways Co v LCC* [1898] AC 375, HL; *The Mostyn* [1928] AC 57, HL; *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, [1972] 2 All ER 898, HL.

8 *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, [1999] 1 All ER 577, HL (setting aside *R v Bow Street Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International intervening)* [2000] 1 AC 61, [1998] 4 All ER 897, HL), where it was held that the House of Lords, as the ultimate court of appeal, will only re-open an earlier appeal where the party has been subjected to an unfair procedure. In this case the connection between the appeal judge and the intervening party was of such a nature that he could not be seen to be impartial and therefore had to be disqualified; the decision had to be set aside, and the matter remitted to a differently constituted committee. For the subsequent decision see *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3) (Amnesty International intervening)* [2000] 1 AC 147, [1999] 2 All ER 97, HL. As to the rule against bias see **JUDICIAL REVIEW** vol 61 (2010) PARA 631 et seq.

9 *A-G v Dean and Canons of Windsor* (1860) 8 HL Cas 369; *Beamish v Beamish* (1861) 9 HL Cas 274; *Usher's Wiltshire Brewery Ltd v Bruce* [1915] AC 433, HL; *IRC v Walker* [1915] AC 509, HL. Where the House of Lords is equally divided, the decision of the tribunal below is affirmed.

10 *French v Macale* (1842) 2 Dr & War 269; *A-G v Dean and Canons of Windsor* (1860) 8 HL Cas 369; *Topham v Duke of Portland* (1869) 38 LJCh 513; affd 5 Ch App 40, CA; *The Mostyn* [1928] AC 57, HL; *Wilkinson v Sibley and Donovan* [1932] 1 KB 194, CA; *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1951] 1 KB 711, [1951] 1 All ER 268, DC. An appellate court in a dominion, dependency or colony regulated by English law is bound to follow a decision of the House of Lords (*Robins v National Trust Co* [1927] AC 515, PC) unless the law there has properly developed in such a way that to follow the House of Lords decision would compel a change in what had become a well-settled judicial approach (*Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590, [1967] 3 All ER 523, PC). A House of Lords decision construing the words of a modern British statute is binding on the Privy Council and on colonial courts, where the same wording is used in the local statute or ordinance: *de Lasala v de Lasala* [1980] AC 546, [1979] 2 All ER 1146, PC.

11 *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL.

12 *Harper v National Coal Board* [1974] QB 614, [1974] 2 All ER 441, CA.

UPDATE

95 House of Lords decisions

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(11) JUDICIAL DECISIONS AS AUTHORITIES/96. Court of Appeal decisions.

96. Court of Appeal decisions.

The decisions of the Court of Appeal¹ upon questions of law must be followed by Divisional Courts² and courts of first instance³, and, as a general rule, are binding on the Court of Appeal⁴ until a contrary determination has been arrived at by the House of Lords⁵. There are, however, three exceptions to this rule⁶; thus (1) the Court of Appeal is entitled and bound to decide which of two conflicting decisions of its own it will follow⁷; (2) it is bound to refuse to follow a decision of its own which, although not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords⁸; and further is not bound by one of its decisions if the House of Lords has decided the case on different grounds, ruling that the issue decided by the Court of Appeal did not arise for decision⁹; and (3) the Court of Appeal is not bound to follow a decision of its own if given per incuriam¹⁰. Unlike the House of Lords, the Court of Appeal does not have liberty to review its own earlier decisions¹¹.

A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow¹²; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision¹³; or when the decision is given in ignorance of the terms of a statute or rule having statutory force¹⁴, or when, in rare and exceptional cases, it is satisfied that the earlier decision involved a manifest slip or error¹⁵ and there is no real prospect of a further appeal to the House of Lords¹⁶. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties¹⁷, or because the court had not the benefit of the best argument¹⁸, and, as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority¹⁹. Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake²⁰.

A decision of the Court of Appeal occasioned by the members of the court being equally divided is not binding on the Court of Appeal²¹, as there is no common law or statutory rule to oblige a court to bow to its own decisions, and a court only does so on grounds of judicial comity, which does not exist where a court is equally divided²². It is undesirable that different divisions of the Court of Appeal should say different things in relation to the same matter²³.

A full Court of Appeal has no greater powers than a division of the court and, except in the cases mentioned above, has no power to overrule a previous decision of a division of the court²⁴. Where, however, there is an apparent conflict between two previous decisions of the court, it is not uncommon for the matter to be argued before a full court as the decision of such a court carries greater weight²⁵.

In its criminal jurisdiction the Court of Appeal applies the same principles as on the civil side, but recognises that there are exceptions²⁶ (a) where the applicant is in prison and in the full court's opinion wrongly so²⁷; (b) where the court thinks that the law was misunderstood or misapplied²⁸; and (c) where the full court is carrying out its duty to lay down principles and guidelines in relation to sentencing²⁹. The full Court of Appeal is not precluded by its own rule of stare decisis in respect of final orders from overriding an interlocutory order of two lords justices which the court considers to be wrong³⁰, but decisions of a two judge court now have the same authority as a three judge court³¹.

As a general rule the Court of Appeal in Northern Ireland follows decisions of the Court of Appeal in England on the construction of a statute³².

Where an asylum applicant's counsel conceded, on the basis of a Court of Appeal decision in an unconnected case, that the applicant could not show that she had suffered persecution for a Convention reason, and the House of Lords subsequently reversed the Court of Appeal decision on which counsel had based the concession, the Court of Appeal subsequently held that she should not be bound by counsel's concession³³.

1 For present purposes the Court of Appeal may be considered as co-ordinate with the former Court of Appeal in Chancery (*Re South Durham Iron Co, Smith's Case* (1879) 11 ChD 579, CA; *Mills v Jennings* (1880) 13 ChD 639, CA), the Lords Justices (*Pledge v Carr* [1895] 1 Ch 51, CA), and the Court of Exchequer (where its decision is treated as good law by the Court of Appeal in Chancery) (*Hanau v Ehrlich* [1911] 2 KB 1056, CA; on appeal [1912] AC 39, HL: see note 17). A decision of the Exchequer Chamber binds the Court of Appeal: *Maine and New Brunswick Electrical Power Co v Hart* [1929] AC 631, PC. It seems that a decision of the Lord Chancellor sitting alone did not bind the Court of Appeal: see *Wheeldon v Burrows* (1879) 12 ChD 31, CA; *Ashworth v Munn* (1880) 15 ChD 363, CA; *Re Watts, Cornford v Elliott* (1885) 29 ChD 947, CA; but see *Gard v City of London Sewers Comrs* (1885) 28 ChD 486, CA; *Gibson v Fisher* (1867) LR 5 Eq 51; *Re Lloyd, Lloyd v Lloyd* [1903] 1 Ch 385, CA. The former Court of Criminal Appeal and Court for Crown Cases Reserved are also co-ordinate: cf note 2.

2 *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1951] 1 KB 711, [1951] 1 All ER 268, DC, where, however, the court did not apply a Court of Appeal decision which was inconsistent with earlier House of Lords decisions which had not been cited to the Court of Appeal; *Read v Joannon* (1890) 25 QBD 300. In a criminal matter a Divisional Court is bound by a decision of the former Court of Criminal Appeal (*Russell v Smith* [1958] 1 QB 27, [1957] 2 All ER 796, DC, per Lord Goddard CJ) or of the former Court for Crown Cases Reserved (*Ruse v Read* [1949] 1 KB 377, [1949] 1 All ER 398, DC). The Court for Crown Cases Reserved was succeeded by the Court of Criminal Appeal, which was in turn succeeded by the Court of Appeal (Criminal Division). As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

3 *Trimble v Hill* (1879) 5 App Cas 342, PC; *Carnell v Harrison* [1916] 1 Ch 328; affd on another point [1916] 1 Ch 328 at 336, CA; *Consett Industrial and Provident Society v Consett Iron Co* [1922] 2 Ch 135, CA; *Huddersfield Police Authority v Watson* [1947] KB 842, [1947] 2 All ER 193, DC. Where a colonial statute is in the same terms as an English statute, a court of a dominion or colony should follow a Court of Appeal decision on the construction of the English statute: *Trimble v Hill* (1879) 5 App Cas 342, PC; *Nadarajan Chettiar v Walauwa Mahatmee* [1950] AC 481, PC. But where an appellate court in a dominion or colony regulated by English law differs from the Court of Appeal, it is not right to assume that the former court is wrong: *Robins v National Trust Co* [1927] AC 515, PC. It is the practice of the Australian courts to follow Court of Appeal decisions on questions of law and equity common to both countries, but those decisions do not bind the Privy Council: *New South Wales Stamp Duties Comr v Pearse* [1954] AC 91, [1954] 1 All ER 19, PC.

A judge of first instance should not say that a recent Court of Appeal decision was wrong: *Lane v Willis* [1972] 1 All ER 430, [1972] 1 WLR 326, CA. As to the discretion of a judge of first instance to adjourn a case pending the hearing of an appeal from a relevant Court of Appeal decision which binds him see *Re Yates' Settlement Trusts, Yates v Paterson* [1954] 1 All ER 619, [1954] 1 WLR 564, CA. A judge at first instance is bound by ex parte (without notice) decisions of the Court of Appeal: see *Amanuel v Alexandros Shipping Co, The Alexandros P* [1986] QB 464, [1986] 1 All ER 278.

4 *Re South Durham Iron Co, Smith's Case* (1879) 11 ChD 579, CA; *The Vera Cruz (No 2)* (1884) 9 PD 96, CA; affd sub nom *Seward v The Vera Cruz* 10 App Cas 59, HL; *Velazquez Ltd v IRC* [1914] 3 KB 458, CA; *Speyer Bros v Rodriguez* (1917) 87 LJB 171, CA (affd sub nom *Rodriguez v Speyer Bros* [1919] AC 59, HL); *Consett Industrial and Provident Society v Consett Iron Co* [1922] 2 Ch 135, CA; *Wheeler v Wirrall Estates Ltd* [1935] 1 KB 294, CA; *Marshall v Lindsey County Council* [1935] 1 KB 516, CA; and see *Hughes v Oxenham* [1913] 1 Ch 254, CA; *Birchall v Birch, Crisp & Co* [1913] 2 Ch 375, CA; *Miliangos v George Frank (Textiles) Ltd* [1975] QB 487, [1975] 1 All ER 1076, CA; affd [1976] AC 443, [1975] 3 All ER 801, HL; *Gallie v Lee* [1969] 2 Ch 17, [1969] 1 All ER 1062, CA; *Barrington v Lee* [1972] 1 QB 326, [1971] 3 All ER 1231, CA.

5 *Trimble v Hill* (1879) 5 App Cas 342, PC; *Consett Industrial and Provident Society v Consett Iron Co* [1922] 2 Ch 135, CA; *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, [1944] 2 All ER 293, CA; affd [1946] AC 163, [1946] 1 All ER 98, HL. The rule, which applies to a full court of the Court of Appeal as it applies to the Court of Appeal as normally constituted (*Young v Bristol Aeroplane Co Ltd* [1946] AC 163, [1946] 1 All ER 98, HL), was reaffirmed expressly and unequivocally in *Davis v Johnson* [1979] AC 264, [1978] 1 All ER 1132, HL. The rule applies also to a Divisional Court (*Huddersfield Police Authority v Watson* [1947] KB 842, [1947] 2 All ER 193, DC; *Melias Ltd v Preston* [1957] 2 QB 380, [1957] 2 All ER 449, DC) and to a judge of first instance (*Armstrong v*

Strain [1951] 1 TLR 856). See also *Condé Nast Publications Ltd v Customs and Excise Comrs* [2006] EWCA Civ 976, [2007] 2 CMLR 904.

In order that a decision may be treated as overruled, one must find either a decision of a superior court inconsistent with that arrived at in the case in question, or an expression of opinion on the part of the court as a whole that the case was wrongly decided on its own facts, and not merely that it ought not to be treated as an authority in a case arising out of different facts: *Consett Industrial and Provident Society v Consett Iron Co* [1922] 2 Ch 135, CA. See also *A-G of St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 637, [1979] 3 All ER 129, PC.

6 *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, [1944] 2 All ER 293, CA (where the exceptions are set out); affd [1946] AC 163, [1946] 1 All ER 98, HL. These are the only exceptions: *Davis v Johnson* [1979] AC 264, [1978] 1 All ER 1132, HL. This must be taken as nullifying earlier attempts to spell out further exceptions, eg in *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210, [1971] 3 All ER 708, CA (liberty to depart from earlier decision which had been disapproved by the Privy Council).

7 *Ross Smith v Ross Smith* [1961] P 39, [1961] 1 All ER 255, CA; revsd on another ground [1963] AC 280, [1962] 1 All ER 344, HL; *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146, [1974] 1 All ER 209, CA. See also *Craddock v Hampshire County Council* [1958] 1 All ER 449, [1958] 1 WLR 202, CA, where the court felt bound to accept the interpretation put on one of its decisions by another of its decisions; *W and JB Eastwood Ltd v Herrod (Valuation Officer)* [1968] 2 QB 923 at 934, [1968] 3 All ER 389 at 393, CA, where Lord Denning MR said that such a choice was to be preferred to the endless task of distinguishing the indistinguishable and reconciling the irreconcilable; affd [1971] AC 160, [1970] 1 All ER 774, HL; *Cathrineholm A/S v Norequipment Trading Ltd* [1972] 2 QB 314, [1972] 2 All ER 538, CA, where the preferred decision had not yet been reported.

8 It seems that this exception refers to a House of Lords decision which is subsequent to the Court of Appeal decision, as in *Fitzsimmons v Ford Motor Co Ltd (Aero Engines)* [1946] 1 All ER 429, CA; *Wilson v Chatterton* [1946] KB 360, [1946] 1 All ER 431, CA; *Re Lambton's Marriage Settlement, May v IRC* [1952] Ch 752, [1952] 2 All ER 201, CA; *A and J Mucklow Ltd v IRC* [1954] Ch 615, [1954] 2 All ER 508, CA; *Browning v War Office* [1963] 1 QB 750, [1962] 3 All ER 1089, CA. In *Williams v Glasbrook Bros Ltd* [1947] 2 All ER 884 at 885, CA, where the exception is referred to, the word 'subsequent' is used. An earlier House of Lords decision inconsistent with a later Court of Appeal decision, and not cited to the Court of Appeal, will render the Court of Appeal decision of no value as given per incuriam. But if the earlier House of Lords decision was cited to the Court of Appeal and expressly or impliedly distinguished by that court, a problem of some difficulty arises: see *Noble v Southern Ry Co* [1940] AC 583 at 598, [1940] 2 All ER 383 at 392, HL, where Lord Wright inclined to the view that the law laid down by the House of Lords should be followed.

9 *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876, sub nom *R v Secretary of State for the Home Department, ex p Al-Mehdawi* [1989] 1 All ER 777, CA; revsd on other grounds [1990] 1 AC 876, [1989] 3 All ER 843, HL.

10 See eg *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580, [1977] 2 All ER 293, CA. The per incuriam rule does not only apply to Court of Appeal decisions; but it does not apply to a decision of an appellate court superior to that in which the rule is sought to be invoked: *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL; *Baker v R* [1975] AC 774, [1975] 3 All ER 55, PC.

11 *Practice Note (Judicial Precedent)* [1966] 3 All ER 77, sub nom *Practice Statement* [1966] 1 WLR 1234, HL; *Davis v Johnson* [1979] AC 264, [1978] 1 All ER 1132, HL. However, the Court of Appeal is not precluded from referring a question to the European Court of Justice when that question has already been decided by an earlier Court of Appeal decision: *Trent Taverns v Sykes* [1999] NPC 9, (1999) Times, 5 March, CA. As to references to the European Court see PARA 1720 et seq.

Where the ratio of an earlier decision of the Court of Appeal is directly applicable to the circumstances of a case before the court but that decision has been wrongly distinguished in a later decision of the court, in principle it must be open to the court to apply the ratio of the earlier decision and to decline to follow the later decision: *Starmark Enterprises Ltd v CPL Distribution Ltd* [2001] EWCA Civ 1252, [2002] Ch 306, [2002] 4 All ER 264.

12 *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, [1944] 2 All ER 293, CA; *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1951] 1 KB 711, [1951] 1 All ER 268, DC. In *Farrell v Alexander* [1976] QB 345 at 369, [1976] 1 All ER 129 at 145, CA, Scarman LJ translated 'per incuriam' as 'Homer nodded'. In *Huddersfield Police Authority v Watson* [1947] KB 842, [1947] 2 All ER 193, DC, Lord Goddard CJ said that a decision was given per incuriam when a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute. However, a decision given in ignorance of an EU directive was not per incuriam: *Duke v Reliance Systems Ltd* [1988] QB 108, [1987] 2 All ER 858, CA; affd on different grounds on appeal sub nom *Duke v GEC Reliance Ltd* [1988] AC 618, [1988] 1 All ER 626, HL. See also *Williams v Fawcett* [1986] QB 604, [1985] 1 All ER 787, CA.

13 See note 12.

- 14 *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, [1944] 2 All ER 293, CA. See also *Lancaster Motor Co (London) Ltd v Bremith Ltd* [1941] 1 KB 675, [1941] 2 All ER 11, CA; *A and J Mucklow Ltd v IRC* [1954] Ch 615, [1954] 2 All ER 508, CA; *Willis v Association of Universities of the British Commonwealth (No 2)* [1965] 2 All ER 393, [1965] 1 WLR 836, CA; *Farrell v Alexander* [1976] QB 345, [1976] 1 All ER 129; affd [1978] AC 59, [1976] 2 All ER 721, HL. For a Divisional Court decision disregarded by that court as being per incuriam see *Nicholas v Penny* [1950] 2 KB 466, sub nom *Penny v Nicholas* [1950] 2 All ER 89, DC.
- 15 *Williams v Fawcett* [1986] QB 604, [1985] 1 All ER 787, CA; *Rickards v Rickards* [1990] Fam 194 [1989] 3 All ER 193.
- 16 *Rakhit v Carty* [1990] 2 QB 315, [1990] 2 All ER 202, CA; *Rickards v Rickards* [1990] Fam 194, [1989] 3 All ER 193, CA.
- 17 *Morelle Ltd v Wakeling* [1955] 2 QB 379, [1955] 1 All ER 708, CA.
- 18 *Bryers v Canadian Pacific Steamships Ltd* [1957] 1 QB 134, [1956] 3 All ER 560, CA, per Singleton LJ; affd sub nom *Canadian Pacific Steamships Ltd v Bryers* [1958] AC 485, [1957] 3 All ER 572, HL; *Critchell v Lambeth Borough Council* [1957] 2 QB 535, [1957] 2 All ER 108, CA.
- 19 *A and J Mucklow Ltd v IRC* [1954] Ch 615, [1954] 2 All ER 508, CA; *Morelle Ltd v Wakeling* [1955] 2 QB 379, [1955] 1 All ER 708, CA. See also *Bonsor v Musicians' Union* [1954] Ch 479, [1954] 1 All ER 822, CA, where the per incuriam contention was rejected and, on appeal to the House of Lords, although the House overruled the case which bound the Court of Appeal, the House agreed that that court had been bound by it: see [1956] AC 104, [1955] 3 All ER 518, HL.
- 20 *Williams v Glasbrook Bros Ltd* [1947] 2 All ER 884, CA.
- 21 *The Vera Cruz (No 2)* (1884) 9 PD 96, CA; affd sub nom *Seward v The Vera Cruz* (1884) 10 App Cas 59, HL; *Hobson v Sir WC Leng & Co* [1914] 3 KB 1245, CA. In *Hart v Riversdale Mill Co* [1928] 1 KB 176 at 189, CA, Scrutton LJ expressed the view that the Court of Appeal is bound by a decision of the Exchequer Chamber occasioned by the judges of that court being equally divided; but see *Smith v Lambeth Assessment Committee* (1882) 10 QBD 327, CA, and *The Vera Cruz (No 2)* (1884) 9 PD 96, CA, if, as suggested in *Hanau v Ehrlich* [1911] 2 KB 1056, CA, an Exchequer Chamber decision is to be regarded as equivalent to a Court of Appeal decision. See note 1; and PARA 98.
- 22 *The Vera Cruz (No 2)* (1884) 9 PD 96, CA; affd sub nom *Seward v The Vera Cruz* (1884) 10 App Cas 59, HL.
- 23 *Harnett v Harnett* [1974] 1 All ER 764, [1974] 1 WLR 219, CA; *R v Charles* [1976] 1 All ER 659, [1976] 1 WLR 248, CA; affd sub nom *Metropolitan Police Comr v Charles* [1977] AC 177, [1976] 3 All ER 112, HL.
- 24 *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, [1944] 2 All ER 293, CA, where the previous cases, including some dicta to the contrary, are reviewed. See also that case on appeal [1946] AC 163, [1946] 1 All ER 98, HL; and *Glaskie v Watkins* as reported in (1927) 137 LT 132, CA. See also *Langley v North West Water Authority* [1991] 3 All ER 610, [1991] 1 WLR 697, CA; following *Williams v Fawcett* [1986] QB 604, [1985] 1 All ER 787, CA.
- 25 *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, [1944] 2 All ER 293, CA.
- 26 It is not clear whether the emphatic reaffirmation of the strictures of *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, [1944] 2 All ER 293, CA, in *Davis v Johnson* [1979] AC 264, [1978] 1 All ER 1132, HL (a civil case), extends to the Criminal Division of the Court of Appeal, but it is suggested that, subject to these three exceptions, it does. The first judgment in *Davis v Johnson* [1979] AC 264, [1978] 1 All ER 1132, HL, was given by Lord Diplock who, as Diplock LJ in *R v Gould* [1968] 2 QB 65, [1968] 1 All ER 849, CA, spelt out the exception summarised in head (b) in the text, and specifically accepted that it did not fall within any of the exceptions laid down in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, [1944] 2 All ER 293, CA. See also *R v Charles* [1976] 1 All ER 659, [1976] 1 WLR 248, CA; affd sub nom *Metropolitan Police Comr v Charles* [1977] AC 177, [1976] 3 All ER 112, HL.
- 27 *R v Taylor* [1950] 2 KB 368, [1950] 2 All ER 170, CCA; *R v Spencer*, *R v Smalls* [1985] QB 771, [1985] 1 All ER 673, CA; affd on appeal [1987] AC 128, [1986] 2 All ER 928, HL. See also *R v Jenkins* [1983] 1 All ER 1000, CA.
- 28 *R v Gould* [1968] 2 QB 65, [1968] 1 All ER 849, CA. This power to depart from previous decisions is restricted to cases where such departure is in favour of the accused: *DPP v Merriman* [1973] AC 584, [1972] 3 All ER 42, HL.
- 29 *R v Newsome* [1970] 2 QB 711, [1970] 3 All ER 455, CA.

30 *Boys v Chaplin* [1968] 2 QB 1, [1968] 1 All ER 283, CA; affd on other grounds sub nom *Chaplin v Boys* [1971] AC 356, [1969] 2 All ER 1085, HL. But see *Langley v North West Water* [1991] 3 All ER 610, [1991] 1 WLR 697, CA, explaining and emphasising that the earlier decisions related to appeals in interlocutory proceedings.

31 *Langley v North West Water Authority* [1991] 3 All ER 610, [1991] 1 WLR 697, CA.

32 *McGuigan v Pollock* [1955] NI 74, NI CA; and see the discussion in *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd* [1997] NI 142 at 153, NI CA; cf, however, *R v McCandless* [2001] NI 86, NI CA.

33 *R (on the application of Ivanvskiene) v Special Adjudicator* [2001] EWCA Civ 1271, [2001] All ER (D) 456 (Jul).

UPDATE

96 Court of Appeal decisions

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(11) JUDICIAL DECISIONS AS AUTHORITIES/97. Divisional Court decisions.

97. Divisional Court decisions.

A Divisional Court is generally bound by its own previous decisions¹, regardless of how many judges are sitting², with limited exceptions in criminal cases³, and when exercising its supervisory jurisdiction⁴, subject always to the per incuriam rule⁵. Faced with conflicting earlier decisions the court is free to decide which to follow⁶. Divisional Court decisions bind judges of first instance⁷, even of a different division⁸, but not the Employment Appeal Tribunal⁹.

1 *Huddersfield Police Authority v Watson* [1947] KB 842, [1947] 2 All ER 193, DC, per Lord Goddard CJ, who applied to that court the rule in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, [1944] 2 All ER 293, CA (see PARA 96); *Harrison v Ridgway* (1925) 133 LT 238; *Phillips v Copping* [1935] 1 KB 15, CA; *Cogley v Sherwood* [1959] 2 QB 311, [1959] 2 All ER 313, DC. Earlier dicta to the contrary (eg *Kruse v Johnson* [1898] 2 QB 91, DC) were made when the structure of the courts was very different.

2 *Younghusband v Luftig* [1949] 2 KB 354, [1949] 2 All ER 72, CA.

3 See *R v Taylor* [1950] 2 KB 368, [1950] 2 All ER 170, CCA, and PARA 96 text to note 23.

4 *R v Greater Manchester Coroner, ex p Tal* [1985] QB 67, [1984] 3 All ER 240, in which the supervisory jurisdiction of the Divisional Court was analysed and the authority of *Huddersfield Police Authority v Watson* [1947] KB 842, [1947] 2 All ER 193, DC distinguished and, in the light of later developments, doubted. See also *C (a minor) v DPP* [1996] AC 1, [1994] 3 All ER 190, DC (overruled on other grounds [1996] AC 1 at 14, [1995] 2 All ER 43, HL).

5 *Nicholas v Penny* [1950] 2 KB 466, sub nom *Penny v Nicholas* [1950] 2 All ER 89, DC; *Melias Ltd v Preston* [1957] 2 QB 380, [1957] 2 All ER 449, DC. As to the per incuriam rule see PARA 96.

6 See eg *Ratkinsky v Jacobs* [1929] 1 KB 24, DC. Where two judges of a Divisional Court disagree, the modern practice is to treat the appeal as dismissed, and the old practice by which the junior judge withdrew his judgment is no longer followed: see **COURTS**.

7 *Huddersfield Police Authority v Watson* [1947] KB 842, [1947] 2 All ER 193, DC; *John v John and Goff* [1965] P 289, [1965] 2 All ER 222. The same exceptions apply as apply to Court of Appeal decisions, as laid down in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, [1944] 2 All ER 293, CA: *John v John and Goff* [1965] P 289, [1965] 2 All ER 222. The decisions of the old Court of Common Pleas sitting in banc probably bind a judge at first instance: *Rondel v Worsley* [1967] 1 QB 443, [1966] 1 All ER 467; affd on another point [1967] 1 QB 443, [1966] 3 All ER 657, CA; [1969] 1 AC 191, [1967] 3 All ER 993, HL; now overruled in so far as it laid down immunity for advocates against suits in negligence (see PARA 11 note 2).

8 *Ettenfield v Ettenfield* [1939] P 377, [1939] 2 All ER 743; revsd on other grounds [1940] P 96, [1940] 1 All ER 293, CA.

9 See PARA 98 note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(11) JUDICIAL DECISIONS AS AUTHORITIES/98. Decisions of co-ordinate courts.

98. Decisions of co-ordinate courts.

There is no statute or common law rule by which one court is bound¹ to abide by the decision of another court of co-ordinate jurisdiction². Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision³; and the modern practice is that a judge of first instance will as a matter of judicial comity⁴ usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong⁵. Where there are conflicting decisions of courts of co-ordinate jurisdiction the later decision is to be preferred if reached after full consideration of earlier decisions⁶.

1 For the view that decisions at nisi prius are not of binding authority see *Church v Brown* (1808) 15 Ves 258; *Fentum v Pocock* (1813) 5 Taunt 192; *Forster v Baker* [1910] 2 KB 636; *Gelmini v Moriggia* [1913] 2 KB 549; *Green v Berliner* as reported in [1936] 2 KB 477; see also *R v Beynon* [1957] 2 QB 111, [1957] 2 All ER 513, where Byrne J did not follow a previous decision of Devlin J in *R v Roberts* [1954] 2 QB 329, [1953] 2 All ER 340 at the same assizes, and *Monmouthshire County Council v Smith* [1956] 2 All ER 800, [1956] 1 WLR 1132, where Lynskey J felt himself compelled to differ from a judgment of Slade J given the previous week in *Metropolitan Police District Receiver v Croydon Corp* [1956] 2 All ER 785, [1956] 1 WLR 1113. He was held to have been right when the appeals were heard together at [1957] 2 QB 154, [1957] 1 All ER 78, CA.

2 *The Vera Cruz (No 2)* (1884) 9 PD 96, CA; *Palmer v Johnson* (1884) 13 QBD 351, CA. See *Taylor v Burgess* (1859) 5 H & N 1, and *Casson v Churchley* (1884) 53 LQB 335, for the opinion (doubted in *Huddersfield Police Authority v Watson* [1947] KB 842, [1947] 2 All ER 193, DC) that in a case where there is power to appeal the decision of a court of co-ordinate jurisdiction is binding on another court of co-ordinate jurisdiction. In *Secretary of State for Employment v Atkins Auto Laundries Ltd* [1972] 1 All ER 987, [1972] ICR 76, NIRC, and in *Chapman v Goonvean and Rostowrack China Clay Co Ltd* [1973] 1 All ER 218, [1972] 1 WLR 1634, NIRC (affd [1973] 2 All ER 1063, [1973] 1 WLR 678, CA), the National Industrial Relations Court (the jurisdiction of which is now exercised by the Employment Appeal Tribunal) held that it was not bound by previous decisions of the Divisional Court, with which it was co-ordinate. Decisions of a higher court are binding on lower courts; as a county court is a lower court than the High Court it is bound by its decisions, even where both exercise the same first instance jurisdiction: *Howard de Walden Estates Ltd v Aggio, Earl Cadogan v 26 Cadogan Square Ltd* [2007] EWCA Civ 499, [2008] Ch 26.

3 *Re Smith, Vincent v Smith* [1930] 1 Ch 88; and see *Ex p Whitbread* (1812) 19 Ves 209; and *Re Rouse & Co and Meier & Co* (1871) LR 6 CP 212. On the construction of other instruments, however, a judge should not regard himself as bound by the decision of another judge of equal jurisdiction: see *Re New Callao* (1882) 22 ChD 484, CA; *Re Masson, Morton v Masson* (1917) 117 LT 548, CA; and cf *Re Hotchkiss' Trusts* (1869) LR 8 Eq 643.

4 See *Mirehouse v Rennell* (1833) 1 Cl & Fin 527, HL; *Parkin v Thorold* (1852) 16 Beav 59; *Re Times Life Assurance and Guarantee Co, ex p Nunneley* (1870) 5 Ch App 389n; *Cramb v Goodwin* [1919] WN 86; revsd without affecting this point (1919) 35 TLR 477, CA; *Russian and English Bank v Baring Bros & Co Ltd* [1935] Ch 120, CA.

5 *Huddersfield Police Authority v Watson* [1947] KB 842, [1947] 2 All ER 193, DC, followed in *Metropolitan Police District Receiver v Croydon Corp* [1956] 2 All ER 785, [1956] 1 WLR 1113; revsd on another point [1957] 2 QB 154, [1957] 1 All ER 78, CA. In *The Makedonia* [1958] 1 QB 365, [1958] 1 All ER 236, Pilcher J did not follow a prior decision of a court of co-ordinate jurisdiction (*The Telemachus* [1957] P 47, [1957] 1 All ER 72) on the ground that it was wrong, although in *Re Cohen, National Provincial Bank Ltd v Katz* [1960] Ch 179, [1959] 3 All ER 740, Danckwerts J felt bound to follow a decision of Harman J which had been doubted, although not overruled, in a dissenting Court of Appeal judgment. It is undesirable that different judges of the same division should speak with different voices: *Re Howard's Will Trusts, Levin & Bradley* [1961] Ch 507 at 523, [1961] 2 All ER 413 at 421, per Wilberforce J; *Alma Shipping Co SA v VM Salgaoncar E Irmaos Ltda* [1954] 2 QB 94 at 104,

[1954] 2 All ER 92 at 97, per Devlin J. See also *Osborne to Rowlett* (1880) 13 ChD 774; *Gathercole v Smith* (1881) 44 LT 439; affd on appeal 17 ChD 1, CA.

6 *Minister of Pensions v Higham* [1948] 2 KB 153, [1948] 1 All ER 863; applied in *Colchester Estates (Cardiff) v Carlton Industries plc* [1986] Ch 80, [1984] 2 All ER 601; itself applied in *Re Cromptons Leisure Machines Ltd* [2006] EWHC 3583 (Ch), [2006] All ER (D) 178 (Dec).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(11) JUDICIAL DECISIONS AS AUTHORITIES/99. Decisions followed for long time.

99. Decisions followed for long time.

A long-standing decision of a judge of first instance ought to be followed by another judge of first instance, at least in a case involving the construction of a statute of some complexity, unless he is fully satisfied that the previous decision is wrong¹. Apart from any question as to the courts being of co-ordinate jurisdiction, a decision which has been followed for a long period of time and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by courts of higher authority than the court establishing the rule, even though the court before which the matter arises afterwards might not have given the same decision had the question come before it originally².

The supreme appellate court will, however, not shrink from overruling a decision or series of decisions which establish a doctrine plainly outside a statute and outside the common law, when no title and no contract will be shaken, no person can complain, and no general course of dealing can be altered by the remedy of a mistake³; and, where the course of practice is founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes at any rate that tribunal from correcting the error⁴, although the construction of a statute of doubtful meaning, once laid down and accepted for a long period of time, ought not to be altered unless the House of Lords can say positively that it is wrong and productive of inconvenience⁵. The Court of Appeal may, in a proper case, overrule long-standing decisions of the Divisional Court⁶.

In general the House of Lords will not overrule a long established course of decisions except in plain cases where serious inconvenience or injustice would follow from perpetuating an erroneous construction or ruling of law⁷. The same considerations do not apply where the decision, although followed, has been frequently questioned and doubted. In such a case it may be overruled by any court of superior jurisdiction⁸. Where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which old authorities were based and practical injustice in the consequences that must flow from them, or when old authorities are otherwise plainly wrong, it is the duty of the House of Lords to overrule them⁹.

When, however, some words of doubtful meaning in a statute have received a clear judicial interpretation and the same words are repeated in a subsequent statute, the legislature must be taken to have read them on the second occasion according to the meaning given to them by that interpretation, and it is not then open to a higher court to reverse that interpretation¹⁰. This is merely a rule of construction for the guidance of the courts; it is not a presumption which the courts are bound to make¹¹.

1 *Astley v IRC* [1974] STC 367; affd on another point [1975] 3 All ER 696, [1975] STC 557, CA.

2 *Bourne v Keane* [1919] AC 815, HL; *Cook v Rogers* (1831) 7 Bing 438; *Baker v Tucker* (1850) 3 HL Cas 106; *Harvey v Farquhar* (1872) LR 2 Sc & Div 192, HL; *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 ChD 696, CA; *Pugh v Golden Valley Rly Co* (1880) 15 ChD 330, CA; *Smith v Keal* (1882) 9 QBD 340, CA; *Re Wright, ex p Willey* (1883) 23 ChD 118, CA; *Fraser v Ehrensperger* (1883) 12 QBD 310, CA; *Re Rosher, Rosher v Rosher* (1884) 26 ChD 801; *Palmer v Johnson* (1884) 13 QBD 351, CA; *Pandorf v Hamilton, Fraser & Co* (1886) 17 QBD 670, CA; revsd on another point sub nom *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518, HL; *Airey v Bower* (1887) 12 App Cas 263, HL; *London Founders Association Ltd and Palmer v Clarke* (1888) 20 QBD 576, CA; *Philipps v Rees* (1889) 24 QBD 17, CA; *Tancred, Arrol & Co v Steel Co of Scotland* (1890) 15 App Cas 125, HL; *Re Wallis, ex p Lickorish* (1890) 25 QBD 176, CA; *R v Governor of Stafford Prison, ex p Emery* [1909] 2

KB 81 (practice established by judges at assizes and followed for many years); *R v Martin* [1911] 2 KB 450, DC; *Re Hooley Hill Rubber and Chemical Co Ltd and Royal Insurance Co Ltd* [1920] 1 KB 257, CA; *John Smith & Son v Moore* [1921] 2 AC 13, HL (tax cases ought not to be unsettled); *Goss Millard v Canadian Government Merchant Marine Ltd* [1929] AC 223, HL; *Lord Eldon v Hedley Bros* [1935] 2 KB 1, CA; *Re Warden and Hotchkiss Ltd* [1945] Ch 270, [1945] 1 All ER 507, CA; *Birmingham Corp v West Midland Baptist (Trust) Association (Inc)* [1970] AC 874, [1969] 3 All ER 172, HL; *The Annefield* [1971] P 168, [1971] 1 All ER 394, CA.

As to the importance of following well-established rules in commercial matters see *United States Shipping Board v Frank C Strick & Co* [1926] AC 545, HL. However, the importance of correcting the law with regard to rating and taxation outweighs the doctrine of stare decisis: *Governors of Campbell College, Belfast v Valuation Comr for Northern Ireland* [1964] 2 All ER 705, [1964] 1 WLR 912, HL.

3 *Bourne v Keane* [1919] AC 815, HL; *Triefus & Co Ltd v Office* [1957] 2 QB 352, [1957] 2 All ER 387, CA. See also note 7.

4 *Airey v Bower* (1887) 12 App Cas 263, HL; *The Sara* (1889) 14 App Cas 209, HL; *The Bernina* (1888) 13 App Cas 1, HL. See also *Evans v George* (1825) 12 Price 76.

5 *Bourne v Keane* [1919] AC 815, HL. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

6 *Brownsea Haven Properties Ltd v Poole Corp* [1958] Ch 574, [1958] 1 All ER 205, CA (a construction question where the enactment was one which was attended by penal consequences); *Braithwaite & Co Ltd v Elliott* [1947] KB 177, [1946] 2 All ER 537, CA; *Royal Crown Derby Porcelain Co Ltd v Russell* [1949] 2 KB 417, [1949] 1 All ER 749, CA; *St Marylebone Property Co Ltd v Fairweather* [1962] 1 QB 498, [1961] 3 All ER 560, CA; affd sub nom *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510, [1962] 2 All ER 288, HL.

7 *Admiralty Comrs v Valverde (Owners)* [1938] AC 173, [1938] 1 All ER 162, HL. Even long-established conveyancing practice, although not as authoritative as a judicial decision, will cause the House of Lords to hesitate before declaring it wrong: *Bromley v Tryon* [1952] AC 265, [1951] 2 All ER 1058, HL. See also *Public Trustee v IRC* [1960] AC 398, [1960] 1 All ER 1, HL; *Ross Smith v Ross Smith* [1963] AC 280, [1962] 1 All ER 344, HL; *Button v DPP, Swain v DPP* [1966] AC 591, [1965] 3 All ER 587, HL.

8 *R v Edwards* (1884) 13 QBD 586, CA; *Pearson v Pearson* (1884) 27 ChD 145, CA; *The Bernina* (1888) 13 App Cas 1, HL; *Pontypridd Union v Drew* [1927] 1 KB 214, CA; *Hughes and Vale Pty Ltd v State of New South Wales* [1955] AC 241, [1954] 3 All ER 607, PC.

9 For more than a century trials had been conducted on the hypothesis that there could only be a conviction for an affray if the acts were done in a public place, but the House of Lords held that a conviction for an affray in a private place could be upheld: *Button v DPP, Swain v DPP* [1966] AC 591, [1965] 3 All ER 587, HL. See also *C Czarnikow Ltd v Koufos* [1966] 2 QB 695, [1966] 2 All ER 593, CA; affd [1969] 1 AC 350, [1967] 3 All ER 686, HL. In that case a decision of 1876 on delay in the carriage of goods by sea was not followed on the ground inter alia that in the light of changed conditions the decision had no modern applicability. In *Rondel v Worsley* [1967] 1 QB 443, [1966] 1 All ER 467, the court declined to follow early cases on the status of barristers because of changed circumstances; affd [1967] 1 QB 443, [1966] 3 All ER 657, CA; [1969] 1 AC 191, [1967] 3 All ER 993, HL. See, however, *Saif Ali v Sydney Mitchell & Co (a firm)* [1980] AC 198, [1978] 3 All ER 1033, HL, which modified, and *Arthur J S Hall & Co (a firm) v Simons, Barratt v Ansell (t/a Woolf Seddon (a firm))* [2002] 1 AC 615, [2000] 3 All ER 673 HL, which overruled, *Rondel v Worsley* [1969] 1 AC 191, [1967] 3 All ER 993, HL. Where necessary the courts will find that forms of action etc which were once part of the common law have disappeared: see eg *Neville v London Express Newspaper Ltd* [1919] AC 368, HL (maintenance). Whilst such disappearances are more fittingly announced in the appellate courts than by judges of first instance, if a refusal to recognise obsolescence leads to a complete absurdity, a judge in any court would have to notice it: *Winchester v Fleming* [1958] 1 QB 259, [1957] 3 All ER 711; revsd on another ground [1958] 3 All ER 51n, CA (harbouring).

10 *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402, HL; and see **STATUTES** vol 44(1) (Reissue) PARA 1416.

11 *R v Bow Road Justices (Domestic Proceedings Court), ex p Adedigba* [1968] 2 QB 572, [1968] 2 All ER 89, CA, per Salmon LJ. See also *Dun v Dun* [1959] AC 272, [1959] 2 All ER 134, PC.

UPDATE

99 Decisions followed for long time

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(11) JUDICIAL DECISIONS AS AUTHORITIES/100. Precedent in other courts and tribunals.

100. Precedent in other courts and tribunals.

The Employment Appeal Tribunal¹ is bound by decisions of the House of Lords and the Court of Appeal, but not by decisions of the High Court, the former National Industrial Relations Court or its own previous decisions, although such decisions all have great persuasive authority². An election court³ is bound by decisions of the Court of Appeal⁴. Pensions appeal tribunals are bound by decisions of the High Court⁵. In practice the Lands Tribunal⁶ follows its own previous decisions⁷, but they should never be regarded as binding, especially where the decision was given by a single member⁸. The Transport Tribunal⁹ does not regard its own previous decisions as binding, but as having persuasive force only¹⁰. Decisions of the High Court given on points of law in social security matters made between 1978 and 1980 are not binding on Social Security Commissioners, in whom the former jurisdiction was vested thereafter¹¹. The rules relating to precedent in ecclesiastical courts are discussed elsewhere in this work¹².

1 As to the Employment Appeal Tribunal see **EMPLOYMENT** vol 41 (2009) PARA 1384 et seq.

2 *Portec (UK) Ltd v Mogensen* [1976] 3 All ER 565, [1976] ICR 396, EAT; *Breach v Epsilon Industries Ltd* [1976] ICR 316, EAT. The National Industrial Relations Court, which it replaced, treated its own decisions as normally binding, but would consider itself free to depart from them when it appeared right to do so, bearing in mind, however, the danger of disturbing retrospectively decisions which had formed the general basis of industrial relations agreements and practices: see *Chapman v Goonvean and Rostowrack China Clay Co Ltd* [1973] 1 All ER 218, [1973] ICR 50, NIRC, per Sir John Donaldson P; affd [1973] 2 All ER 1063, [1973] ICR 310, CA; *Dewar and Finlay Ltd v Glazier* [1973] ICR 572, NIRC, per Lord Thomson. The similarity of wording between this statement and *Practice Note (Judicial Precedent)* [1966] 3 All ER 77, sub nom *Practice Statement* [1966] 1 WLR 1234, HL will be noticed. The National Industrial Relations Court was a court of co-ordinate jurisdiction with the Queen's Bench Divisional Court: *Chapman v Goonvean and Rostowrack China Clay Co Ltd* [1973] 1 All ER 218, [1973] ICR 50, NIRC. Decisions of the Employment Appeal Tribunal are to be regarded as guideline authorities only and should not be slavishly followed; reference only to statutory material is to be preferred: see *Anandarajah v Lord Chancellor's Department* [1984] IRLR 131, EAT. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

3 As to election courts see **ELECTIONS AND REFERENDUMS**.

4 *Re Parliamentary Election for Bristol South East* [1964] 2 QB 257, [1961] 3 All ER 354, Election Ct.

5 *Minister of Pensions v Higham* [1948] 2 KB 153, [1948] 1 All ER 863; *Judd v Minister of Pensions and National Insurance* [1966] 2 QB 580, [1965] 3 All ER 642.

6 As to the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. A decision of the tribunal is final subject only to appeal on a point of law: see Lands Tribunal Act 1949 s 3(4); and **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. As to the procedure on such appeals see PARA 1687.

7 See eg *Maker v Central Land Board* (1956) 6 P & CR 158; *Stroud v Central Land Board* (1956) 8 P & CR 37.

8 *West Midland Baptist (Trust) Association Inc v Birmingham Corpn* [1968] 2 QB 188, [1968] 1 All ER 205, CA; affd sub nom *Birmingham Corpn v West Midland Baptist (Trust) Association Inc* [1970] AC 874, [1969] 3 All ER 172, HL.

9 As to the Transport Tribunal see the Transport Act 1985 s 117(2), Sch 4; and **ROAD TRAFFIC**. The tribunal has all the powers of the High Court: see Sch 4 para 8(2).

10 *British Transport Commission v C Bristow Ltd* (1955) 30 Traf Cas 217; *Merchandise Transport Ltd v British Transport Commission* [1962] 2 QB 173, [1961] 3 All ER 495, CA. The former Railway and Canal Traffic Commission (some of the jurisdiction of which was transferred, on the commission's abolition, to the High Court) was a court of record of co-ordinate jurisdiction with the Queen's Bench Division: Railway and Canal Traffic Act 1888 s 2 (repealed); *Sowerby & Co Ltd v Great Northern Rly Co Ltd* (1891) 60 LJQB 467, CA. It was bound by its own previous decisions (*Didcot, Newbury and Southampton Rly Co v Great Western Rly Co and London and South Western Rly Co* (1896) 66 LJQB 33; on appeal [1897] 1 QB 33, CA; *Pickfords Ltd v London and North Western Rly Co* [1905] 1 KB 752, CA) and by decisions of the Queen's Bench Division (*Sowerby & Co Ltd v Great Northern Rly Co* (1891) 60 LJQB 467, CA).

11 *Chief Supplementary Benefit Officer v Leary* [1985] 1 All ER 1061, [1985] 1 WLR 84, CA.

12 See **ECCLESIASTICAL LAW**.

UPDATE

100 Precedent in other courts and tribunals

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(11) JUDICIAL DECISIONS AS AUTHORITIES/101. European Court of Justice decisions.

101. European Court of Justice decisions.

The European Court of Justice tends to follow its own previous decisions, but is not bound to do so¹.

A ruling of the European Court on a question of the interpretation of a Community treaty or the validity or interpretation of another Community instrument made at the request of a domestic court of a member state² is strictly binding only on that domestic court in the case in which the request was made³; it does not bind the domestic court in any other case⁴, although if a judge is faced with a question of interpretation which has already been answered by the European Court in another case he ought to follow that answer⁵, for the procedure is designed to safeguard the uniform judicial interpretation of Community law⁶. The European Court has generally given only broad guidance on interpretation, leaving the domestic court to apply the interpretation to the particular case before it⁷. However, the doctrine of binding precedent has now developed to the stage where the European Court has held, without seeking to derogate from a domestic court's power to refer a case to it, that national courts should regard themselves as bound by decisions of the European Court relating to the interpretation of particular instruments or other matters of Community law⁸.

Nevertheless, any question arising before an English court as to the meaning or effect of a Community treaty or the validity, meaning or effect of another Community instrument is declared by English statute to be a question of law to be determined by the English court in accordance with the principles laid down by, and any relevant decision of, the European Court⁹. Furthermore, where relief is available under European law but is precluded by a rule of national law, that rule must be set aside¹⁰.

1 See Cases 28, 29, 30/62 *Da Costa en Schaake NV v Nederlandse Belastingadministratie* [1963] ECR 31 at 41, [1963] CMLR 224; Case 32/58 *Aciéries du Temple v Haute Autorité* (1958) 5 Recueil 300.

2 As to references to the European Court of Justice see PARA 1720 et seq.

3 See Cases 28, 29, 30/62 *Da Costa en Schaake NV v Nederlandse Belastingadministratie* [1963] ECR 31 at 41, [1963] CMLR 224, ECJ; and eg *Firma Otto Scheer v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1972] CMLR 824 (Germany). An interpretative ruling of the European Court takes precedence over a contrary interpretation given by a national domestic court in different proceedings: Case IC 20/73 *Re Deportation of Aliens* [1977] 2 CMLR 255 (German Federal Supreme Administrative Court). Decisions of Community administrative commissions on the interpretation of Community treaties are not binding on domestic courts: Case 19/67 *Bestuur der Sociale Verzekeringsbank v JH van der Vecht* [1967] ECR 345, [1968] CMLR 151, ECJ. As to the effect of decisions in relation to national law, the powers of national courts and individuals' rights see generally Joined Cases 314-316/81, 83/82 *Procureur de la République v Alex Waterkeyn* [1982] ECR 4337, [1983] 2 CMLR 145, ECJ.

4 *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, [1974] 2 All ER 1226, CA.

5 Cases 28, 29, 30/62 *Da Costa en Schaake NV v Nederlandse Belastingadministratie* [1963] ECR 31, [1963] CMLR 224, ECJ. A national court has been held to be bound by the European Court's answer in a different case in France (*Enterprises Garoche v Société Striker Boats (Nederland)* [1974] 1 CMLR 469 (French Cour de Cassation)), Germany (*Re A Brewery Solus Agreement* [1975] 1 CMLR 611 (German Federal SC)); but see Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1972] CMLR 177 and Belgium (*Advance Transformer Co v Bara* [1972] CMLR 497 (Belgian Cour de Cassation)).

6 Case 19/67 *Bestuur der Sociale Verzekeringsbank v JH van den Vecht* [1967] ECR 345 at 355, [1968] CMLR 151, ECJ; *EMI Records Ltd v CBS United Kingdom Ltd* [1976] RPC 1, [1975] 1 CMLR 285.

7 Case 13/61 *Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH* [1962] ECR 45, ECJ, sub nom *Robert Bosch GmbH v Kleding-Verkoopbedrijf de Geus en Uitdenbogerd* [1962] CMLR 1. See also Case 19/68 *Giovanni De Cicco v Landesversicherungsanstalt Schwaben* [1968] ECR 473, [1969] CMLR 67, ECJ.

8 See Case 66/80 *SpA International Chemical Corpn v Amministrazione delle Finanze dello Stato* [1981] ECR 1191, [1983] 2 CMLR 593, ECJ; Case 283/81 *SRL CILFIT and Lanificio di Gavado SpA v Ministry of Health* [1982] ECR 3415, [1983] CMLR 472, ECJ; Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, [1988] 3 CMLR 57, ECJ. With regard to the rules for citation of authorities by advocates in civil courts, decisions of the European Court are not regarded as 'foreign' decisions: see *Practice Note* [2001] 2 All ER 510, sub nom *Practice Direction (citation of authorities)* [2001] 1 WLR 1001, CA, para 9.3.

9 European Communities Act 1972 s 3(1). The Court of Appeal must follow its own earlier decision in relation to the interpretation of Community law, even where there are strong grounds for thinking that the previous decision was wrong: *Condé Nast Publications Ltd v Customs and Excise Comrs* [2006] EWCA Civ 976, [2007] 2 CMLR 904.

10 *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603, sub nom *Factortame Ltd v Secretary of State for Transport (No 2)* [1991] 1 All ER 70, HL.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(11) JUDICIAL DECISIONS AS AUTHORITIES/102. European Court of Human Rights decisions.

102. European Court of Human Rights decisions.

A court or tribunal determining a question which has arisen in connection with a Convention right¹ must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights and any opinion of the European Human Rights Commission given in a report adopted under the European Convention on Human Rights², whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen³. Evidence of any judgment, decision, declaration or opinion of which account may have to be taken is to be given in proceedings before any court or tribunal in such manner as may be provided by rules of court or, in the case of proceedings before a tribunal, rules made for these purposes⁴.

Because of the status of such authority, cases decided in the organs of the European Convention on Human Rights are not regarded as 'foreign' authorities for the purposes of citation by advocates in English courts⁵.

The European Court of Human Rights is not bound by its previous judgments; however it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case law. Nevertheless, this would not prevent the court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions⁶.

1 As to the meaning of 'Convention right' see the Human Rights Act 1998 s 1; and **JUDICIAL REVIEW** vol 61 (2010) PARA 651; **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

2 Ie adopted under the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)) (the European Convention on Human Rights) art 31: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

3 Human Rights Act 1998 s 2(1)(a), (b). See *R (on the application of Alconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at [26], [2003] 2 AC 295 at [26], [2001] 2 All ER 929 at [26] per Lord Slynn of Hadley ('Although the [Human Rights Act 1998] does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances . . . the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence.'). See, however, *R (on the application of Purdy) v DPP* [2009] EWCA Civ 92, [2009] All ER (D) 197 (Feb) (following an earlier House of Lords decision rather than a conflicting decision of the European Court of Human Rights).

A court or tribunal is also required to take into account any decision of the Commission in accordance with the European Convention on Human Rights art 26 or art 27(2) or any decision of the Committee of Ministers taken under art 46: Human Rights Act 1998 s 2(1)(c), (d).

On 1 November 1998 Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (Strasbourg, 11 May 1994; ETS no 155) entered into force and the European Commission and Court of Human Rights were replaced with a new permanent Court although the Commission continued until 31 October 1999 to deal with those cases declared admissible prior to the date of entry into force.

4 Human Rights Act 1998 s 2(2), (3). Such rules are to be made by the Lord Chancellor or the Secretary of State, in relation to any proceedings outside Scotland, by the Secretary of State, in relation to proceedings in Scotland, or by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland

which deals with transferred matters and for which no rules otherwise made for this purpose are in force: see the Human Rights Act 1998 s 2(3) (amended by SI 2003/1887 and SI 2005/3429). If it is necessary for a party to give evidence at a hearing of an authority referred to in the Human Rights Act 1998 s 2, the authority to be cited must be an authoritative and complete report and the party must give to the court and any other party a list of the authorities he intends to cite and copies of the reports not less than three days before the hearing: *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 8.1(1), (2). Copies of the complete original texts issued by the European Court of Human Rights and the Commission, either paper based or from the court's judgment database (HUDOC), which is available on the Internet, may be used: *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 8.1(3).

5 See *Practice Note* [2001] 2 All ER 510, sub nom *Practice Direction (citation of authorities)* [2001] 1 WLR 1001, CA, para 9.3.

6 See *Cossey v United Kingdom* (1990) 13 EHRR 622, [1990] ECHR 10843/84, ECtHR. This sentiment has been repeated in numerous cases, most recently in *Coster v United Kingdom* [2001] ECHR 24876/94, (2001) Times, 30 January, ECtHR: 'The court considers that, while it is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. Since the Convention is first and foremost a system for the protection of human rights, the court must however have regard to the changing conditions in contracting states and respond, for example, to any emerging consensus as to the standards to be achieved . . .' In *Tyrer v United Kingdom* (1978) 2 EHRR 1, [1978] ECHR 5856/72, ECtHR the court stated that 'the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions' and this idea was reiterated more recently in *V v United Kingdom* (1999) 30 EHRR 121, [1999] ECHR 24888/94, ECtHR ('since the Convention is a living instrument, it is legitimate when deciding whether a certain measure is acceptable under one of its provisions to take account of the standards prevailing amongst the member states of the Council of Europe').

UPDATE

102 European Court of Human Rights decisions

NOTE 3--The Supreme Court may decline to follow a decision of the European Court of Human Rights if it has concerns as to whether the decision sufficiently appreciates or accommodates particular aspects of the domestic process: *R v Horncastle*; *R v Marquis*; *R v Carter* [2009] UKSC 14, [2010] 2 WLR 47, [2009] All ER (D) 88 (Dec).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(11) JUDICIAL DECISIONS AS AUTHORITIES/103. Privy Council decisions.

103. Privy Council decisions.

As a general rule the decisions of the Judicial Committee of the Privy Council are not theoretically binding on English courts¹, but are treated as being of great weight and are commonly followed² in similar cases³. The Privy Council does not act on the rule that it is bound by its own previous decisions, but it will only differ with the greatest hesitation⁴. Where the rationes decidendi of two Privy Council decisions conflict with one another and the later does not purport to overrule the earlier, the colonial courts may choose which ratio decidendi they will follow⁵.

1 *London Joint Stock Bank v Macmillan and Arthur* [1918] AC 777, HL; *Service v Sundell* (1929) 99 LJKB 55, CA. This rule has been applied in the Court of Appeal in *Leask v Scott* (1877) 2 QBD 376, CA; *The City of Chester* (1884) 9 PD 182, CA; *Greenlands Ltd v Wilmshurst and London Association for Protection of Trade* [1913] 3 KB 507, CA; revsd on another point sub nom *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15, HL, where, however, Earl Loreburn said at 28 that a Privy Council decision 'is of equal authority with our own'; *Stephenson v Thompson* [1924] 2 KB 240, CA; *Fanton v Denville* [1932] 2 KB 309, CA; and in the High Court in *Ranelagh v Ranelagh* (1893) 41 WR 549; *Dulieu v White & Sons* [1901] 2 KB 669; *Gore-Booth v Bishop of Manchester* [1920] 2 KB 412, CA; *Diamond Alkali Export Corp v Bourgeois* [1921] 3 KB 443; *Venn v Todesco* [1926] 2 KB 227; *Lynn v Bamber* [1930] 2 KB 72; *Low v Fry* (1935) 152 LT 585; *Re Vitamins Ltd's Application* [1955] 3 All ER 827, [1956] 1 WLR 1; *Smith v Leech Brain & Co Ltd* [1962] 2 QB 405, [1961] 3 All ER 1159; *Doughty v Turner Manufacturing Co Ltd* [1964] 1 QB 518, [1964] 1 All ER 98, CA; *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210, [1971] 3 All ER 708, CA.

Where, however, the Privy Council exercises jurisdiction as an English appellate court, eg in ecclesiastical or prize matters, its decisions are binding on courts of first instance: see eg *Combe v Edwards* (1877) 2 PD 354. As to precedent in ecclesiastical courts see **ECCLESIASTICAL LAW**.

2 Nevertheless in *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146, [1958] 1 All ER 787, Diplock J declined to follow *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108, PC, on the ground that it was wrongly decided.

3 See the decisions cited in note 1. A decision of the Privy Council, when it is the highest court of appeal from the courts of the dominions and colonies, is binding on all such courts (*Robins v National Trust Co* [1927] AC 515, PC), even though the decision can no longer be regarded as a guiding authority in England, Scotland or Ireland (*Stevenson v Bagham* [1922] NZLR 225; *Hogan v City of Regina* [1924] 2 WWR 307; *Penman v Winnipeg Electric Rly Co* [1925] 1 WWR 156; *Johnson v Commonwealth* (1927) 27 SRNSW 133), unless the decision is on a subject governed by English law and there is a subsequent decision of the supreme tribunal to settle English law, namely, the House of Lords (see PARA 95), in which the House differs from the Privy Council and points out in express terms in what respect the Privy Council erred; in such circumstances it is the duty of courts overseas to apply the law as settled by the House of Lords (*Will v Bank of Montreal* [1931] 2 WWR 364). The view was expressed in *Negro v Pietro's Bread Co Ltd* [1933] OR 112 that a Privy Council decision is binding only on the courts of the dominion, dependency or colony from which the appeal is taken, but this view is contrary to the opinion expressed in *Fatuma Binti Mohamed Bin Salim Bakhshuwan v Mohamed Bin Salim Bakhshuwan* [1952] AC 1, PC. In *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590, [1967] 3 All ER 523, PC, the Privy Council held that the decision of the House of Lords in *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL, was not binding on the High Court of Australia, since before that decision it had been settled law in Australia that the award of exemplary damages in libel cases was not so circumscribed as to be permissible only within the limits of the categories defined in *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL. In exceptional circumstances, a Privy Council decision may be regarded as displacing an earlier decision of the House of Lords on the same issue: *R v James*, *R v Karimi* [2006] EWCA Crim 14, [2006] QB 588, [2006] 1 All ER 759 (composition of Privy Council and belief that it was making definitive statement on the issue demonstrated inferior courts were to follow that ruling in future). As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

4 *Gideon Nkambule v R* [1950] AC 379, PC; *Cushing v Dupuy* (1880) 5 App Cas 409, PC; *Read v Bishop of Lincoln* [1892] AC 644, PC; *A-G for Ontario v Canada Temperance Federation* [1946] AC 193, PC. See also *Gore-Booth v Bishop of Manchester* [1920] 2 KB 412, CA; *Will v Bank of Montreal* [1931] 2 WWR 364.

5 *Baker v R* [1975] AC 774, [1975] 3 All ER 55, PC. In *Hughes & Vale Pty Ltd v State of New South Wales* [1955] AC 241, [1954] 3 All ER 607, PC, the Privy Council declined to follow an overseas decision of long standing.

UPDATE

103 Privy Council decisions

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(11) JUDICIAL DECISIONS AS AUTHORITIES/104. Scottish and Irish decisions.

104. Scottish and Irish decisions.

Decisions of the Scottish and Irish courts are not binding upon English courts, although entitled to the highest respect¹. On questions of principle it is desirable that the laws of England and Scotland should be uniform and that a decision of the House of Lords, when founded on principle and not on authority, should be regarded as applicable to both countries, unless the House itself says otherwise². There is a well-settled practice that in revenue and taxation matters courts of first instance in England endeavour to keep in line with the courts of Scotland³. Further, an English court ought to follow the unanimous judgment of the higher Scottish and Northern Ireland courts, where the question is one which turns upon the construction of a statute which extends to those countries as well as to England, leaving it to be reviewed, if thought fit, by the appeal court⁴, as it is desirable that interpretations should be avoided which result in one meaning in one country and a different one in another⁵.

1 *Johnson v Raylton, Dixon & Co* (1881) 7 QBD 438, CA; *Ivay v Hedges* (1882) 9 QBD 80; *Morgan v London General Omnibus Co* (1883) 12 QBD 201; affd (1884) 13 QBD 832, CA; *Great Western Rly Co v Railway Comrs, Re Brown* (1881) 7 QBD 182; on appeal (1881) 7 QBD 192, CA; *Re Parsons, Stockley v Parsons* (1890) 45 ChD 51; *R v Income Tax Comrs* (1888) 22 QBD 296, CA; affd sub nom *Income Tax Special Purposes Comrs v Pemsell* [1891] AC 531, HL; *Re Turner, Klawnsberger v Groombridge* [1917] 1 Ch 422; *IRC v Newcastle Breweries* (1926) 95 LJB 936, CA; affd sub nom *Newcastle Breweries v IRC* (1927) 96 LJB 735, HL (decision of Court of Appeal of Irish Free State); *Modern Light Cars Ltd v Seals* [1934] 1 KB 32 (decision of Court of Appeal of Northern Ireland); *Hillman's Airways Ltd v SA d'Editions Aéronautiques Internationales* [1934] 2 KB 356; *Re Boyer, Neathercoat v Lawrence* [1935] Ch 382; *DPP v Phillips* [1935] 1 KB 391, DC; *Watson v Nikolaisen* [1955] 2 QB 286, [1955] 2 All ER 427, DC; *Cording v Halse* [1955] 1 QB 63, [1954] 3 All ER 287, DC; *Kahn v Newberry* [1959] 2 QB 1, [1959] 2 All ER 202, DC. In tax cases, which apply equally in Scotland, Northern Ireland, and England and Wales, the greatest deference should be paid to the decisions of the courts of Scotland and Northern Ireland: see *Shanks v IRC* [1929] 1 KB 342, CA; *IRC v Crossman* [1935] 1 KB 26, CA; cf *Bailey (Stoke-on-Trent Revenue Officer) v Potteries Electrical Traction Co Ltd* [1931] 1 KB 385, CA; on appeal sub nom *Potteries Electric Traction Co Ltd v Bailey (Stoke-on-Trent Revenue Officer)* [1931] AC 151, HL; *IRC v City of Glasgow Police Athletic Association* [1953] AC 380, [1953] 1 All ER 747, HL; *Westward Television Ltd v Hart (Inspector of Taxes)* [1969] 1 Ch 201, [1968] 3 All ER 91, CA. Although the general considerations on which a case falls to be determined may be the same in Scottish and English law, it is quite a different thing to say that Scottish and English law are so much the same that English cases can be quoted as Scottish authorities: *William Leitch & Co Ltd v Leydon, AG Barr & Co Ltd v MacGeoghegan* [1931] AC 90, HL.

2 *Re Tuck's Settlement Trusts, Public Trustee v Tuck* [1978] Ch 49, [1978] 1 All ER 1047, CA; *Jamieson v Jamieson* [1952] AC 525, [1952] 1 All ER 875, HL; *Wiseburgh v Domville (Inspector of Taxes)* [1956] 1 All ER 754, [1956] 1 WLR 312, CA; *Abbott v Philbin (Inspector of Taxes)* [1960] Ch 27, [1959] 3 All ER 590, CA; revsd [1961] AC 352, [1960] 2 All ER 763, HL, where the House of Lords, whilst holding that the Court of Appeal had been right to follow the Scottish case, found that that case had been wrongly decided. As to the caution to be exercised in using Scottish authorities in fields which are not comparable (eg trusts) see *BS Lyle Ltd v Rosher* [1958] 3 All ER 597, [1959] 1 WLR 8, HL. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

3 *Secretary of State for Employment and Productivity v Clarke, Chapman & Co Ltd* [1971] 2 All ER 798, [1971] 1 WLR 1094, DC.

4 *Re Hartland, Banks v Hartland* [1911] 1 Ch 459; *Kimbers & Co v IRC* [1936] 1 KB 132; *Abbott v Philbin (Inspector of Taxes)* [1961] AC 352, [1960] 2 All ER 763, HL (cited in note 2); and see the cases cited in note 1.

5 See the observations of Lord Simons LC in *City of London Income Tax General Purposes Comrs v Gibbs* [1942] AC 402 at 414, [1942] 1 All ER 415 at 422, HL; *Daley v Hargreaves* [1961] 1 All ER 552, [1961] 1 WLR 487, DC; and see **STATUTES** vol 44(1) (Reissue) PARA 1489.

UPDATE

104 Scottish and Irish decisions

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(11) JUDICIAL DECISIONS AS AUTHORITIES/105. Overseas decisions.

105. Overseas decisions.

A decision of an overseas court in a common law country¹ is not of course binding on an English court, but may be useful as a guide to the court to which it is cited as to what its decision ought to be². Thus, for example, great respect is paid to the views of eminent judges of the United States Supreme Court³ and to decisions of the highest tribunal of the State of New York⁴. English courts should be in keeping with United States courts on carriage by sea⁵ and carriage by air⁶, although if English law proved to be different, effect would have to be given to the difference, whatever the inconvenience⁷.

It is desirable that the great common law jurisdictions should not differ lightly⁸, particularly on so universal a matter as commercial law⁹, or the measure of damages¹⁰, or remoteness of damage¹¹, or interpretation¹², or privilege¹³, or patent law¹⁴.

1 The conclusions of French courts upon articles of a code similar to the civil code of Quebec are not of binding authority in Quebec although entitled to great respect: *Laverdure v Du Tremblay* [1937] AC 666, PC.

2 Cases decided in other jurisdictions can, if properly used, be a valuable source of law in this jurisdiction. At the same time, however, such authority should not be cited without proper consideration of whether it does indeed add to the existing body of law: *Practice Note* [2001] 2 All ER 510, sub nom *Practice Direction (citation of authorities)* [2001] 1 WLR 1001, CA, para 9.1. With effect from 9 April 2001, any advocate who seeks to cite an authority from another jurisdiction must (1) comply, in respect of that authority, with the rules set out in para 8 (see PARA 91); (2) indicate in respect of each authority what that authority adds that is not to be found in authority in this jurisdiction; or, if there is said to be justification for adding to domestic authority, what that justification is; (3) certify that there is no authority in this jurisdiction that precludes the acceptance by the court of the proposition that the foreign authority is said to establish: para 9.2. For the avoidance of doubt, paras 9.1 and 9.2 do not apply to cases decided in either the Court of Justice of the European Communities or the organs of the European Convention on Human Rights: see para 9.3. See also *Castro v R* (1881) 6 App Cas 229, HL; *Macintosh v Dun* [1908] AC 390, PC; *Re Hookey Hill Rubber and Chemical Co Ltd and Royal Insurance Co Ltd* [1920] 1 KB 257, CA; *SS Celia v SS Volturmo* [1921] 2 AC 544, HL; *Haynes v Harwood* [1935] 1 KB 146, HL.

3 *Liddle v Yorkshire (North Riding) County Council* [1934] 2 KB 101, CA.

4 *Guaranty Trust Co of New York v Hannay & Co* [1918] 2 KB 623, CA.

5 *Gosse Millard v Canadian Government Merchant Marine Ltd* [1928] 1 KB 717, CA; revsd on other grounds [1929] AC 223, HL; *C Czarnikow Ltd v Koufos* [1966] 2 QB 695, [1966] 2 All ER 593, CA; affd sub nom *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, [1967] 3 All ER 686, HL.

6 *Samuel Montagu & Co Ltd v Swiss Air Transport Co Ltd* [1966] 2 QB 306, [1966] 1 All ER 814, CA; *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616, [1969] 1 All ER 82, CA.

7 *Samuel Montagu & Co Ltd v Swiss Air Transport Co Ltd* [1966] 2 QB 306, [1966] 1 All ER 814, CA.

8 For an instance where differences may properly arise see *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590, [1967] 3 All ER 523, PC.

9 *Midland Silicones Ltd v Scruttons Ltd* [1961] 1 QB 106, [1960] 2 All ER 737, CA; affd sub nom *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL.

10 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, [1967] 3 All ER 686, HL.

11 *Smith v Leech Brain & Co Ltd* [1962] 2 QB 405, [1961] 3 All ER 1159.

12 *Trimble v Hill* (1879) 5 App Cas 342, PC; *Re Western Manufacturing (Reading) Ltd, Miles v Adamant Engineering Co (Luton) Ltd* [1956] Ch 436, [1955] 3 All ER 339. It is desirable in the interests of uniformity that the interpretation of international conventions should not be rigidly controlled by earlier domestic precedents, but that they should be construed on broad principles of general acceptance: *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328, HL, approved in *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] AC 807, [1961] 1 All ER 495, HL, where United States and Canadian cases were cited on the interpretation of the Hague Rules. See also *Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605, [1998] 1 All ER 495, HL, for an example of the consideration given to American cases in the interpretation of the Hague Rules.

13 *A-G v Clough* [1963] 1 QB 773, [1963] 1 All ER 420, where Lord Parker of Waddington CJ treated an Australian case as 'most persuasive authority'.

14 See *R v Patents Appeal Tribunal, ex p Swift & Co* [1962] 2 QB 647, [1962] 1 All ER 610, DC, where an Australian case and a New Zealand case were followed; this decision, however, predates United Kingdom membership of the European Community which was given legal effect in domestic law from 1 January 1973 by the European Communities Act 1972: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 23. Decisions of the European Patent Office may now be considered by the English courts: see eg *Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc* [2000] All ER (D) 713, [2000] IP & T 908, CA, considering *Eisai/Second Medical Indication Decision* G0005/83 [1985] OJ EPO 64 and *Mobil/Friction-reducing Additive Decision* G0002/88 [1990] OJ EPO 93. As to the European Patent Office and the European Patent Convention see **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 668 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/3. ORGANISATION AND ADMINISTRATION OF CIVIL COURTS/(11) JUDICIAL DECISIONS AS AUTHORITIES/106. Reports of decisions as authorities.

106. Reports of decisions as authorities.

Rules have been laid down governing what types of material may be cited as an authority and the manner in which any such material ought to be cited¹. However, it remains the duty of advocates to draw the attention of the court to any authority not cited by an opponent which is adverse to the case being advanced².

Reports of decisions made by solicitors and those who have a right of audience in the Supreme Court now have the same authority as if made by a barrister³. Formerly, a report of a decision might be cited as an authority only when authenticated by a barrister⁴. The authorised reports should be cited in preference to others⁵ and, when there is a difference between a report of the same case in the authorised reports and in some other series, it is assumed that the former report has been revised by the judge concerned and represents his authoritative opinion⁶. In the House of Lords, transcripts of unreported judgments should only be cited when they contain an authoritative statement of a relevant principle of law not to be found in a reported case or are necessary for the understanding of some other authority⁷.

The standing of the various sets of reports differs and from time to time judges have commented on the quality, or lack of it, of a particular set of reports, although it is pertinent to note that in earlier days a judge who wished to avoid following a case could always maintain that it had been badly reported⁸.

Newspaper reports, when verified by a barrister or other authoritative reporter⁹, may be read when other reports are not available¹⁰, but there is grave danger in citing a newspaper report of a case decided on its own particular facts and citing observations of judges in that case as though they laid down some general rule of law¹¹. If there is no report in any authorised series of reports a shorthand report may only be looked at with leave¹². A record of proceedings made by mechanical means is admissible in the same way as the notes of an official shorthand writer¹³. Practice notes, being directions given without argument, were formerly held to have very little judicial force¹⁴, but this is no longer so and the Civil Procedure Rules may, instead of providing for any matter, refer to provision made or to be made about that matter by practice directions¹⁵. Text books¹⁶ by authors living and dead are frequently cited in court and the court will give credit to the views of any reputable author. They have however no binding authority¹⁷. Hansard may be referred to as an aid to the construction of a statute, but only in limited circumstances where there is ambiguity or obscurity¹⁸.

1 See *Practice Note* [2001] 2 All ER 510, sub nom *Practice Direction (citation of authorities)* [2001] 1 WLR 1001, CA. Judgments relating to applications attended by one party only, applications for permission to appeal, decisions on applications that only decide that the application is arguable, and county court cases, unless cited in order to illustrate the conventional measure of damages in a personal injury case or cited in a county court in order to demonstrate current authority at that level on an issue in respect of which no decision at a higher level of authority is available, may not be cited before any court unless the judgment in question clearly indicates that it purports to establish a new principle or to extend the present law. In respect of judgments delivered after 9 April 2001, that indication must take the form of an express statement to that effect; in respect of judgments delivered before that date, that indication must be present in or clearly deducible from the language used in the judgment: paras 6.1, 6.2. These categories of judgment will be kept under review, such review to include consideration of adding to the categories: para 6.3.

2 *Practice Note* [2001] 2 All ER 510, sub nom *Practice Direction (citation of authorities)* [2001] 1 WLR 1001, CA, para 4.

3 See the Courts and Legal Services Act 1990 s 115 (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 2 para 4(1), (3) to substitute a reference to the Senior Courts for the reference to the Supreme Court; at the date at which this title states the law, no such day had been appointed).

4 See **LEGAL PROFESSIONS**; and *Re Richards, ex p Hawley* (1834) 2 Mont & A 426. For a case where the Court of Appeal refused citation of a report by a person not a member of the Bar see *Birtwistle v Tweedale* [1953] 2 All ER 1598n, [1954] 1 WLR 190, CA. For a case followed but not reported by a member of the Bar see *Smith v Wyles* [1959] 1 QB 164, [1958] 3 All ER 279, DC; see also *Baker v Sims* [1959] 1 QB 114, [1958] 3 All ER 326, CA. As to producing lists of authorities for use in the House of Lords see *Procedure Direction* [1969] 2 All ER 874, sub nom *Practice Direction* [1969] 1 WLR 949, HL; *Procedure Direction* [1977] 1 All ER 624, sub nom *Practice Direction* [1977] 1 WLR 261, HL. As to such lists in the Queen's Bench Division see *Practice Direction* [1961] 1 All ER 541, [1961] 1 WLR 400, DC.

5 The House of Lords requires this to be done in cases before it: see *Practice Directions and Standing Orders applicable to Civil Appeals* (2001) direction 17.3. There is no practice in the House of Lords that in revenue cases Tax Cases reports should be used instead of the authorised reports (*National Bank of Greece SA v Westminster Bank Executor and Trustee Co (Channel Islands) Ltd* [1970] 3 All ER 656n, [1970] 1 WLR 1400, HL, per Lord Hailsham of St Marylebone C); but references to the case, if any, in the Law Reports, should be supplied (see *Bray (Inspector of Taxes) v Best* [1989] 1 All ER 969, [1989] 1 WLR 167, HL; and *Practice Directions and Standing Orders applicable to Civil Appeals* (2001) direction 17.3). As to the citation of cases from the Law Reports in preference to others in the Court of Appeal and the High Court see *Practice Note* [2001] 1 All ER 193, [2001] 1 WLR 194, CA, para 3.1. It is permissible to cite a judgment reported in a series of reports, including those of the Incorporated Council of Law Reporting, by means of a copy of a reproduction of the judgment in electronic form that has been authorised by the publisher of the relevant series, provided that (1) the report is presented to the court in an easily legible form (a 12-point font is preferred but a 10 or 11-point font is acceptable); and (2) the advocate presenting the report is satisfied that it has not been reproduced in a garbled form from the data source. In any case of doubt the court will rely on the printed text of the report (unless the editor of the report has certified that an electronic version is more accurate because it corrects an error contained in an earlier printed text of the report): para 3.2. See also *Practice Direction* [2002] 1 All ER 351, which extends the application of *Practice Note* [2001] 1 All ER 193 with regard to the High Court.

As to the citation of unreported judgments see the comments of Laddie J in *Michaels v Taylor Woodrow Developments Ltd* [2001] Ch 493, [2000] 4 All ER 645. See also note 8.

As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

6 *Fairman v Perpetual Investment Building Society* [1923] AC 74, HL; *R v Agricultural Land Tribunal for South Eastern Area, ex p Bracey* [1960] 2 All ER 518, [1960] 1 WLR 911, DC; *Duke of Buccleuch v IRC* [1967] 1 AC 506, [1967] 1 All ER 129, HL. See however *Young v North Riding Justices* [1965] 1 QB 502, [1965] 1 All ER 141, DC.

7 *Practice Directions and Standing Orders applicable to Civil Appeals* (2001) direction 15.6.

8 As to the citation of authorities in the Court of Appeal see *Practice Direction--Appeals* PD 52 paras 5.10, 15.11; and PARAS 1663 note 13, 1710 note 6. See also *Practice Note* [2001] 1 All ER 193, [2001] 1 WLR 194, CA.

Where an advocate holds himself out to be competent in a particular field of law, he must bring and keep himself up to date with recent authority in that field. Such authority is not necessarily that which can only be found in the specialist reports, but rather authority which has been reported in the general law reports. Thus if a solicitors' firm or barristers' chambers takes either the Weekly Law Reports or the All England Law Reports but not both, they should have systems in place enabling them to keep themselves up to date with cases which have been considered worthy of reporting in the other general series. If that is not done, judges may reach the wrong decision through the default of the advocates appearing before them. Moreover, where a case has been reported, it is not satisfactory to refer to it in court by means of a Court of Appeal transcript. The purpose of cases being reported is, amongst other things, to assist the court and advocates by means of listing the cases that have been referred to and also through providing very helpful headnotes: *Copeland v Smith* [2000] 1 All ER 457, [2000] 1 WLR 1371, CA.

Comments have been made in reported cases on the following sets of reports:

- 27 (1) *Anderson (A-G v Reynolds* [1911] 2 KB 888 per Hamilton J);
- 28 (2) *Atkyn (Olive v Smith* (1813) as reported in 5 Taunt 56 per Lord Mansfield CJ);
- 29 (3) *Barnardiston (Zouch d Woolston v Woolston* (1761) as reported in 2 Burr 1136, per Lord Mansfield CJ; *R v Stone* (1801) 1 East 639 per Lord Kenyon CJ; *Duffield v Elwes* (1827) as

- reported in 1 Bli NS 497, HL, per Lord Eldon; *Holland v Holland* (1869) 4 Ch App 449, per Stuart V-C);
- 30 (4) Beavan (*Beesly v Hallwood Estates Ltd* [1961] Ch 105, [1961] 1 All ER 90, CA (as to vol 33));
- 31 (5) Bunbury (*Tinkler v Poole* (1770) as reported in 5 Burr 2657 per Lord Mansfield; *R v Edwards* (1853) 9 Exch 32 per Platt B);
- 32 (6) Campbell and Carrington and Payne (*Readhead v Midland Rly Co* (1867) LR 2 QB 412 per Blackburn J);
- 33 (7) Carhew (*R v Heaven* (1788) 2 Term Rep 772 per Lord Kenyon CJ);
- 34 (8) Coke (*Lewis v Walter* (1821) 4 B & Ald 605 per Holdroyd J (as to Part XII); *M'Pherson v Daniels* (1829) 10 B & C 263 per Parke J (as to Part XII); *Wensleydale Peerage Case* (1856) as reported in 8 State Tr NS 479, HL, per Lord Cranworth C (as to Parts XII, XIII));
- 35 (9) Cooper (*Baker v Pack* (1860) 3 LT 656 per Stuart V-C);
- 36 (10) Current Law (*Rivoli Hats Ltd v Gooch* [1953] 2 All ER 823, [1953] 1 WLR 1190 per Hallett J);
- 37 (11) Dickens (*Fisher v Fisher* (1847) 2 Ph 236, per Lord Cottenham C; *Livesey v Harding* (1830) Tam 460 per Leach MR);
- 38 (12) Dyer (*Milward v Thatcher* (1787) 2 Term Rep 81, per Buller J; *Jones d Henry v Hancock* (1816) 4 Dow 145, HL, per Gibbs CJ (as to the marginal notes));
- 39 (13) Equity Cases Abridged (*Duffield v Elwes* (1827) as reported in 1 Bli NS 497, HL);
- 40 (14) Espinasse (*Small v Nairne* (1849) as reported in 13 QB 840, per Lord Denman CJ; *Readhead v Midland Rly Co* (1867) LR 2 QB 412 per Blackburn J; *Warren v Keen* [1954] 1 QB 15, [1953] 2 All ER 1118, CA, per Denning LJ);
- 41 (15) (a) Estates Gazette (*Birtwistle v Tweedale* [1953] 2 All ER 1598n, [1954] 1 WLR 190, CA, per Somervell, Denning and Romer LJ). Several cases reported only in the Estates Gazette are referred to in eg the judgments in *United Scientific Holdings Ltd v Burnley Corp* [1976] Ch 128, [1976] 2 All ER 220, CA); (b) Estates Gazette Digest (*George Trollope & Sons v Martyn Bros* (1934) 150 LT 376, per Horridge J; affd on another point [1934] 2 KB 436, CA (but see at 462 per Maugham LJ));
- 42 (16) Godbolt and Gouldsbrough (*A-G v Reynolds* [1911] 2 KB 888 per Hamilton J);
- 43 (17) Jurist Reports (*Francome v Francome* (1865) 5 New Rep 289 per Lord Westbury C);
- 44 (18) Justice of the Peace Reports (*Young v North Riding Justices* [1965] 1 QB 502, [1965] 1 All ER 141, DC);
- 45 (19) Keble (*Short v Coffin* (1771) 5 Burr 2730 per Lord Mansfield CJ; *Doe d Shore v Porter* (1789) 3 Term Rep 13 per Lord Kenyon CJ; *Farrall v Hilditch* (1859) 5 CBNS 840 per Williams J);
- 46 (20) Kelyng (*Woolmington v DPP* [1935] AC 462, HL, per Viscount Sankey LC);
- 47 (21) Leonard (*A-G v Reynolds* [1911] 2 KB 888 per Hamilton J);
- 48 (22) Levinz (*Short v Coffin* (1771) 5 Burr 2730 per Lord Mansfield CJ; *Doe d Shore v Porter* (1789) 3 Term Rep 13 per Lord Kenyon CJ);
- 49 (23) Lewin (*R v Francis* (1874) as reported in 43 LJMC 97, CCR, per Blackburn J);
- 50 (24) Modern Reports (*R v Allen* (1862) 8 Jur NS 230 per Blackburn J (generally); *Sandon v Jervis* (1859) as reported in EB & E 935 per Willes J; *R v Lyme Regis Corp* (1779) 1 Doug KB 79 per Buller J);
- 51 (25) Moseley (*Quantock v England* (1770) as reported in 5 Burr 2638, per Lord Mansfield CJ; *Mills v Farmer* (1815) 1 Mer 55 per Eldon LC; *Parkhurst v Lowten* (1819) 2 Swan 195n);

- 52 (26) Noy (*Petrie v Hannay* (1789) 3 Term Rep 418 per Buller J);
- 53 (27) Owen (*A-G v Reynolds* [1911] 2 KB 888 per Hamilton J);
- 54 (28) Peere Williams (*Woods v Huntingford* (1796) 3 Ves 128 per Arden MR (generally); *Gervis v Gervis* (1874) 14 Sim 654 per Shadwell V-C (as to vol 3, compared with vol 1 and vol 2));
- 55 (29) Saunders (*Bissex v Bissex* (1765) 3 Burr 1729 per Wilmot J; *Doe d Foquett v Worsley* (1801) 1 East 416 per Lord Kenyon CJ; *Kenrick v Lord Beauclerk* (1802) 3 Bos & P 175 per Lord Alvanley);
- 56 (30) Solicitors' Journal (*Re Chaplin and Staffordshire Potteries Waterworks Co's Contract* [1922] 2 Ch 824 per Sargant J; *Pearson v Pearson* [1971] P 16, [1969] 3 All ER 323 per Latey J);
- 57 (31) Taunton (*Hadley v Baxendale* (1854) 9 Exch 341 per Parke B (as to vol 8)); Tax Cases (see note 5);
- 58 (32) Times Law Reports (*Straker v Reynolds* (1889) 22 QBD 262, DC, per Wills J; *West Derby Union Guardians v Atcham Union Guardians* (1889) as reported in 24 QBD 117, CA, per Lord Esher MR);
- 59 (33) Vesey Junior (*Turner v Wright* (1860) 2 De GF & J 234 per Lord Campbell C);
- 60 (34) Weekly Notes (*Newson v Pender* (1884) 27 ChD 50n, CA, per Cotton LJ; *Bridgend Gas and Water Co v Lord Dunraven* (1885) 31 ChD 219 per Chitty J; *Pooley's Trustee v Whetham* (1886) as reported in 33 ChD 76, CA, per Cotton LJ; *Re Loveridge, Drayton v Loveridge* [1902] 2 Ch 859 per Buckley J; *Re Smith's Settlement, Wilkins v Smith* (1902) [1903] 1 Ch 373 per Swinfen Eady J; *Bishop Auckland Industrial Co-operative Society Ltd v Butterknowle Colliery Co Ltd* [1904] 2 Ch 419 per Farwell J; *Stirling v Burdett* [1911] 2 Ch 418 per Warrington J; *Re Howell, Re Buckingham, Liggins v Buckingham* [1915] 1 Ch 241, CA, per Lord Cozens-Hardy MR; *Re Masson, Morton v Masson* (1917) 86 LJ Ch 753, CA, per Swinfen Eady LJ; *Re Chaplin and Staffordshire Potteries Waterworks Co's Contract* [1922] 2 Ch 824, CA, per Sargant J);
- 61 (35) Winch (*Troward v Calland* (1795) 6 Term Rep 439 per Lord Kenyon).

The above does not purport to be an exhaustive list. For a further discussion on the comments of judges on reports see Sir Robert Megarry, 'A Second Miscellany-at-Law', ch II, 'Soldiers of Cadmus'.

9 See note 3.

10 *R v Labouchere* (1884) 12 QBD 320; *Walter v Emmott* (1885) 54 LJ Ch 1061n, CA, where a report from The Times was allowed to be read, having been verified by an affidavit sworn by the barrister who had written it. As to the value of reports in The Times see *Pearson v Pearson* [1971] P 16, [1969] 3 All ER 323.

11 *Mahon v Osborne* [1939] 2 KB 14, [1939] 1 All ER 535, CA.

12 See *Renshaw v Dixon* [1911] WN 40. As to inconsistencies between the original transcript and the transcript as revised by the judge see *Bromley v Bromley* [1965] P 111, [1964] 3 All ER 226, CA. See also *Practice Note* [1995] 3 All ER 256, sub nom *Practice Direction* [1995] 1 WLR 1096, CA.

13 As to the recording of proceedings see PARA 1134.

14 *Re Dorman, Long & Co Ltd, Re South Durham Steel and Iron Co Ltd* [1934] Ch 635. But see *Langley v North West Water Authority* [1991] 3 All ER 610, [1991] 1 WLR 697, CA, for the effect of a local practice direction.

15 See the Civil Procedure Act 1997 s 1, Sch 1 para 6; and PARA 27.

16 As to the Year Books see *Swinfen v Lord Chelmsford* (1860) 5 H & N 890; *Rondel v Worsley* [1967] 1 QB 443, [1966] 1 All ER 467, per Lawton J; affd on another point [1967] 1 QB 443, [1966] 3 All ER 657, CA; [1969] 1 AC 191, [1967] 3 All ER 993, HL; now overruled in so far as it laid down immunity for advocates against suits in negligence (see PARA 11 note 2).

17 *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, [1968] 3 All ER 746; *Union Bank of London v Munster* (1888) 37 ChD 51; *Greenlands Ltd v Wilmshurst and London Association for Protection of Trade* (1913) as reported in 29 TLR 685 at 687, CA, in argument per Vaughan Williams LJ ('counsel are not entitled to quote living authors as authorities . . . but they may adopt the author's statements as part of their argument'). In his judgment, as reported in [1913] 3 KB 507 at 522, Vaughan Williams LJ quoted from a text book 'because . . . I think it correctly states what the decision [in another case] was', and added that the author 'goes on and says

something which one, of course, has to take into consideration, although it in no way binds us'. The case was revsd sub nom *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15, HL.

18 *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, [1993] 1 All ER 42, HL. For the procedure as to citation of Hansard see *Practice Note* [1995] 1 All ER 234, sub nom *Practice Direction* [1995] 1 WLR 192. The courts may also look at such travaux préparatoires as reports of the Law Commission, Royal Commissions, select committees etc: see *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, [1975] 1 All ER 810, HL; *Davis v Johnson* [1979] AC 264, [1978] 1 All ER 1132, HL.

UPDATE

106 Reports of decisions as authorities

NOTES 3, 5--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/4. PRE-COMMENCEMENT PROCEDURES/(1) THE PRE-ACTION PROTOCOLS/107. The pre-action protocols practice direction.

4. PRE-COMMENCEMENT PROCEDURES

(1) THE PRE-ACTION PROTOCOLS

107. The pre-action protocols practice direction.

A practice direction¹ introduces and approves eight protocols² governing pre-action conduct in cases involving personal injury³, clinical disputes (medical negligence claims)⁴, construction and engineering disputes⁵, defamation⁶, professional negligence⁷, judicial review⁸, personal injury resulting in disease or illness⁹, housing disrepair¹⁰ and housing possession¹¹. Moreover, the practice direction applies the spirit of those protocols to other categories of case, by providing that, in cases not covered by any approved protocol, the court will expect the parties to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings¹². The practice direction and the approved protocols are all in accordance with the overriding objective¹³.

On 12 October 2001, the Lord Chancellor's Department published proposals for the introduction of a general pre-action protocol for civil disputes which would apply in most claims where an approved protocol does not exist¹⁴.

1 See *Practice Direction--Protocols*.

2 As to the meaning of 'pre-action protocol' see PARA 13.

3 The *Pre-action Protocol for Personal Injury Claims* (1999) is intended to apply to all claims which include a claim for personal injury (except industrial disease claims) and to the entirety of those claims, not only to the personal injury element of a claim which also includes, for instance, property damage: para 2.2. The protocol is primarily designed for those road traffic, tripping and slipping and accident at work cases which include an element of personal injury with a value of less than £15,000 which are likely to be allocated to the fast track: para 2.3. The protocol came into force on 26 April 1999: see *Practice Direction--Protocols* para 5.1. As to disclosure of medical reports under the protocol see *Carlson v Townsend* [2001] EWCA Civ 511, [2001] 3 All ER 663, [2001] 1 WLR 2415. As to allocation to the fast track see PARAS 268, 286 et seq.

4 The *Pre-action Protocol for the Resolution of Clinical Disputes* (1999) was the first major initiative of the Clinical Disputes Forum, a multi-disciplinary body formed in 1997, and was drawn up by a working party of that forum. The general aims of the protocol are to 'maintain/restore the protected party/healthcare provider relationship and to resolve as many disputes as possible without litigation': para 2.1. The protocol came into force on 26 April 1999: see *Practice Direction--Protocols* para 5.1.

5 The *Pre-action Protocol for Construction and Engineering Disputes* (2000) applies to all construction and engineering disputes (including professional negligence claims against architects, engineers and quantity surveyors) with the exception of proceedings (1) for the enforcement of the decision of an adjudicator to whom a dispute has been referred pursuant to the Housing Grants, Construction and Regeneration Act 1996 s 108; (2) including a claim for interim injunctive relief; (3) the subject of a claim for summary judgment pursuant to CPR Pt 24 (see PARA 524 et seq); or (4) relating to the same or substantially the same issues as have been the subject of recent adjudication under the 1996 Act, or some other formal alternative dispute resolution procedure: see the *Pre-action Protocol for Construction and Engineering Disputes* (2000) paras 1.1, 1.2. The protocol came into force on 2 October 2000: see *Practice Direction--Protocols* para 5.1. As to alternative dispute resolution see generally **ARBITRATION**.

6 The *Pre-action Protocol for Defamation* (2000) is intended to encourage exchange of information between parties at an early stage and to provide a clear framework within which parties to a claim in defamation, acting

in good faith, can explore the early and appropriate resolution of that claim: para 1.3. The protocol came into force on 2 October 2000: see *Practice Direction--Protocols* para 5.1.

7 The *Professional Negligence Pre-action Protocol* (2001) is designed to apply when a claimant wishes to claim against a professional (other than construction professionals (to whom the *Pre-action Protocol for Construction and Engineering Disputes* (2000) applies: see note 4) and healthcare providers (to whom the *Pre-action Protocol for the Resolution of Clinical Disputes* (1999) applies: see note 3)) as a result of that professional's alleged negligence or equivalent breach of contract or breach of fiduciary duty: *Professional Negligence Pre-action Protocol* (2001) para A1. The protocol's aim is to establish a framework in which there is an early exchange of information so that the claim can be fully investigated and, if possible, resolved without the need for litigation: para A2. The protocol came into force on 16 July 2001: see *Practice Direction--Protocols* para 5.1.

8 The *Pre-action Protocol for Judicial Review* (2002) sets out a code of good practice and contains the steps which parties should generally follow before making a claim for judicial review. In particular, the protocol deals with the information required to be contained in a letter before claim and in a response to such a letter, and contains guidelines as to the levels of public funding which may be provided to assist persons making a claim for judicial review. The protocol came into force on 4 March 2002: see *Practice Direction--Protocols* para 5.1.

9 The *Pre-action Protocol for Disease and Illness Claims* (2003) sets out a code of good practice which parties should follow in all personal injury claims where the injury is not as a result of an accident but takes the form of an illness or disease: see paras 2.1, 4. The protocol covers disease claims which are likely to be complex and frequently not suitable for fast track procedures, even though they may fall within fast track limits. Disease for the purpose of the protocol primarily covers any illness physical or psychological, any disorder, ailment, affliction, complaint, malady, or derangement other than a physical or psychological injury solely caused by an accident or other similar single event: para 2.2. The protocol is not limited to diseases occurring in the workplace but will embrace diseases occurring in other situations for example through occupation of premises or the use of products. It is not intended to cover those cases, which are dealt with as a 'group' or 'class' action: para 2.3. The protocol came into force on 8 December 2003: see *Practice Direction--Protocols* para 5.1.

10 The *Pre-action Protocol for Housing Disrepair Cases* (2003) is intended to apply to civil law claims which include a claim for disrepair: see paras 3.1, 4.2. For the purposes of the protocol, a disrepair claim is a civil claim arising from the condition of residential premises and may include a related personal injury claim. However, it does not include disrepair claims which originate as counterclaims or set-offs in other proceedings: para 3.1(a). The types of claim which it is intended to cover include those brought under the Landlord and Tenant Act 1985 s 11, the Defective Premises Act 1972 s 4, common law nuisance and negligence, and those brought under the express terms of a tenancy agreement or lease. It does not cover claims brought under the Environmental Protection Act 1990 s 82, which are heard in the magistrates' court: *Pre-action Protocol for Housing Disrepair Cases* para 3.1(b). The protocol covers claims by any person with a disrepair claim as referred to above, including tenants, lessees and members of the tenant's family: para 3.1(c). The protocol came into force on 8 December 2003: see *Practice Direction--Protocols* para 5.1.

11 The *Pre-action Protocol for Possession Claims based on Rent Arrears* (2006) applies to residential possession claims by social landlords (such as local authorities, registered social landlords and housing action trusts) which are based solely on claims for rent arrears. The protocol does not apply to claims in respect of long leases or to claims for possession where there is no security of tenure. The protocol reflects the guidance on good practice given to social landlords in the collection of rent arrears. It recognises that it is in the interests of both landlords and tenants to ensure that rent is paid promptly and to ensure that difficulties are resolved wherever possible without court proceedings. The protocol came into force on 2 September 2006: see *Practice Direction--Protocols* para 5.1.

12 *Practice Direction--Protocols* para 5.1. Where a person enters into a funding arrangement within the meaning of CPR 43.2(1)(k) (see PARA 1830) he should inform other potential parties to the claim that he has done so, and this requirement applies to all proceedings whether proceedings to which a pre-action protocol applies or otherwise: *Practice Direction--Protocols* para 4A.

13 As to the overriding objective see PARA 33.

14 See *General Pre-action Protocol Consultation Paper* CP15/01, responses to which were invited by 31 January 2002.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/4. PRE-COMMENCEMENT PROCEDURES/(1) THE PRE-ACTION PROTOCOLS/108. Objectives and effect of pre-action protocols.

108. Objectives and effect of pre-action protocols.

While the approved pre-action protocols vary in their detail¹, their intention and effect is to impose a formal structure upon the procedure for the exchange of information about the claim and details of the quantum of the claim being made². The objectives of the protocols are:

- 141 (1) to encourage the exchange of early and full information about the prospective legal claim;
- 142 (2) to enable the parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings; and
- 143 (3) to support the efficient management of proceedings where litigation cannot be avoided³.

The information provided by the intended claimant must be sufficient to enable the intended defendant to investigate and evaluate the prospective claim and decide whether to make an offer to settle the claim before proceedings are commenced⁴. Such information includes the disclosure of the identity of any expert witness upon whose evidence and opinion the party intends to rely and the disclosure of documents supporting the party's claim or its quantum. The intended defendant's response must be reasoned and contain sufficient comment and detail to enable the intended claimant to evaluate and respond to any offer made⁵.

The court will expect all parties to have complied in substance with the terms of an approved protocol⁶.

¹ As to the approved pre-action protocols see PARA 107; and as to the meaning of 'pre-action protocol' see PARA 13.

² See eg the *Pre-action Protocol for Personal Injury Claims* (1999) para 2.6 (early notification); the *Pre-action Protocol for Construction and Engineering Disputes* (2000) para 2 (general aim).

³ *Practice Direction--Protocols* para 1.4. When making an order for costs, the court will take into account an offer to settle the claim made by a person before proceedings are begun: see CPR 36.10(1); and PARA 115.

⁴ See eg the *Pre-action Protocol for the Resolution of Clinical Disputes* (1999) para 3.19.

⁵ See eg the *Pre-action Protocol for the Resolution of Clinical Disputes* (1999) para 3.25.

⁶ *Practice Direction--Protocols* para 2.2. As to non-compliance with protocols, and the consequences of non-compliance see PARAS 109-110. In *Infantino v Maclean* [2001] 3 All ER 802, where the claimant's solicitors had not only complied with, but gone beyond the requirements of, the relevant pre-action protocol but had then failed to comply with the time limit for service because of an administrative error, the court made an order dispensing with service under CPR 6.9 (now CPR 6.16: see PARA 153); but this decision has been disapproved in *Godwin v Swindon Borough Council* [2001] EWCA Civ 1478, [2001] 4 All ER 641, [2001] All ER (D) 135 (Oct).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/4. PRE-COMMENCEMENT PROCEDURES/(1) THE PRE-ACTION PROTOCOLS/109. Failure to comply with approved pre-action protocols.

109. Failure to comply with approved pre-action protocols.

A claimant may be found to have failed to comply¹ with a pre-action protocol by, for example, not having provided sufficient information to the defendant, or not having followed the procedure required by the protocol² to be followed³.

A defendant may be found to have failed to comply with a protocol by, for example:

- 144 (1) not making a preliminary response to the letter of claim within the time fixed for that purpose by the relevant protocol⁴;
- 145 (2) not making a full response within the time fixed for that purpose by the relevant protocol⁵;
- 146 (3) not disclosing documents required to be disclosed by the relevant protocol⁶.

1 The court will take compliance or non-compliance with a relevant protocol into account where the claim was started after the coming into force of that protocol but will not do so where the claim was started before that date: *Practice Direction--Protocols* para 5.2. Parties in a claim started after a relevant protocol came into force, who have, by work done before that date, achieved the objectives sought to be achieved by certain requirements of that protocol, need not take any further steps to comply with those requirements. They will not be considered to have not complied with the protocol for the purposes of paras 2, 3 (see PARA 108 text and note 6; heads (1)-(3) in the text; and PARA 110): para 5.3. Parties in a claim started after a relevant protocol came into force, who have not been able to comply with any particular requirements of that protocol because the period of time between the publication date and the date of coming into force was too short, will not be considered to have not complied with the protocol for the purposes of paras 2, 3: para 5.4. As to the dates when the approved protocols came into force see PARA 107; and as to the consequences of non-compliance with the protocols see PARA 110.

2 Eg not having followed the medical expert instruction procedure set out in the *Pre-action Protocol for Personal Injury Claims* (1999): see paras 3.14-3.21.

3 *Practice Direction--Protocols* para 3.1. As to the pre-action protocols see PARAS 107-108; and as to the meaning of 'pre-action protocol' see PARA 13. As to the meaning of 'claimant' see PARA 18.

4 Eg 21 days under the *Pre-action Protocol for Personal Injury Claims* (1999) (see para 3.6); 14 days under the *Pre-action Protocol for the Resolution of Clinical Disputes* (1999) (see para 3.24).

5 Eg within three months of the letter of claim under *Pre-action Protocol for the Resolution of Clinical Disputes* (1999) (see para 3.25); within three months from the date of acknowledgment of the letter of claim under the *Pre-action Protocol for Personal Injury Claims* (1999) (see para 3.7).

6 *Practice Direction--Protocols* para 3.2. As to pre-action disclosure see PARA 111 et seq. See also *Carlson v Townsend* [2001] EWCA Civ 511, [2001] 3 All ER 663, [2001] 1 WLR 2415.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/4. PRE-COMMENCEMENT PROCEDURES/(1) THE PRE-ACTION PROTOCOLS/110. Consequences of failure to comply with pre-action protocols practice direction or with the protocols.

110. Consequences of failure to comply with pre-action protocols practice direction or with the protocols.

In order to ensure that parties comply with the requirements of the pre-action protocols practice direction and with the protocols, the Civil Procedure Rules enable the court to take into account compliance or non-compliance¹ with an applicable protocol when giving directions for the management of proceedings² and when making orders for costs³.

Furthermore, if, in the opinion of the court, non-compliance has led to the commencement of proceedings which might otherwise not have needed to be commenced, or has led to costs being incurred in the proceedings that might otherwise not have been incurred, the orders the court may make include:

- 147 (1) an order that the party at fault pay the costs of the proceedings, or part of those costs, of the other party or parties;
- 148 (2) an order that the party at fault pay those costs on an indemnity basis;
- 149 (3) if the party at fault is a claimant in whose favour an order for the payment of damages or some specified sum is subsequently made, an order depriving that party of interest on such sum and in respect of such period as may be specified, and/or awarding interest at a lower rate than that at which interest would otherwise have been awarded;
- 150 (4) if the party at fault is a defendant and an order for the payment of damages or some specified sum is subsequently made in favour of the claimant, an order awarding interest on such sum and in respect of such period as may be specified at a higher rate, not exceeding 10 per cent above base rate, than the rate at which interest would otherwise have been awarded⁴.

The court will exercise its powers under these provisions with the object of placing the innocent party in no worse a position than he would have been in if the protocol had been complied with⁵.

When completing and filing the allocation questionnaire the parties are required to state whether they have complied with any relevant pre-action protocol and, if not, the reason why⁶. Moreover, if a potential party fails or refuses to give disclosure of relevant documents in his control, upon the application of the potential claimant the court has power to order such documents to be disclosed⁷.

1 As to the duty to comply with pre-action protocols see *Practice Direction--Protocols* para 2.2; and PARA 108. As to non-compliance see PARA 109.

2 See CPR 3.1(4), (5), 3.9(e). In giving directions the court may take into account the extent of non-compliance with pre-action protocols (see CPR 3.1(4); and PARA 247) and may order a party to pay money into court if, without good reason, a protocol has not been complied with (see CPR 3.1(5); and PARA 247). The extent of compliance with a protocol is to be taken into account by the court when deciding whether to grant relief from a sanction: see CPR 3.9(e); and PARA 256.

3 *Practice Direction--Protocols* para 2.1. As to making orders for costs see CPR 44.3(5)(a). In deciding what order for costs to make, the court must have regard to the conduct of the parties including all pre-action conduct, whether or not a pre-action protocol applies; and in deciding the quantum of costs, the court must

have regard to the conduct of all the parties including conduct before as well as during the proceedings and the efforts made, if any, before and during the proceedings in order to try to resolve the dispute: see CPR 44.3(5) (a); and see eg *Mars UK Ltd v Teknowledge Ltd* [1999] IP & T 26, sub nom *Mars UK Ltd v Teknowledge Ltd (No 2)* (1999) Times, 8 July. Furthermore, in the case of pre-action or third party disclosure, non-compliance with a pre-action protocol may result in an order for costs being different from the usual order that the party seeking disclosure pay the costs of the disclosing party: see CPR 31.16, 31.17; and PARAS 112, 550.

- 4 *Practice Direction--Protocols* para 2.3.
- 5 *Practice Direction--Protocols* para 2.4.
- 6 As to the allocation questionnaire see PARA 263.
- 7 See PARA 111.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/4. PRE-COMMENCEMENT PROCEDURES/(2) DISCLOSURE/111. Pre-action disclosure.

(2) DISCLOSURE

111. Pre-action disclosure.

Subject to rules of court¹, on the application of any person who appears to the court to be likely to be a party to subsequent proceedings², the court has power to order a person who is likely to be a party to those proceedings and to be likely to have in his possession, custody or power documents which are relevant to an issue arising or likely to arise out of that claim³:

- 151 (1) to disclose whether those documents are in his possession, custody or power⁴; and
- 152 (2) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order:
- 11
- 18. (a) to the applicant's legal advisers; or
- 19. (b) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or
- 20. (c) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant⁵.
- 12

A court should be hesitant about determining a substantive issue in the anticipated proceedings when hearing an application for pre-action disclosure⁶.

1 See CPR 31.16; and PARA 112.

2 A party who makes or responds to such an application may be seen as submitting to the jurisdiction of the court: see *Caltex Trading Pte Ltd v Metro Trading International Inc (Glencore International AG, third parties) (Sea Victory Shipping, fourth parties)*[2000] 1 All ER (Comm) 108 (decided under the old rules). Cf, however, *SDL International Ltd v Centre De Co-operation International* [2000] All ER (D) 1041 (filing an acknowledgment of service is not submitting to the jurisdiction); and PARA 120 note 4.

3 See the Supreme Court Act 1981 s 33(2) (amended by SI 1998/2940); and the County Courts Act 1984 s 52(2) (amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(2); and by SI 1998/2940). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

4 Supreme Court Act 1981 s 33(2)(a); County Courts Act 1984 s 52(2)(a).

5 Supreme Court Act 1981 s 33(2)(b); County Courts Act 1984 s 52(2)(b). As to the inspection, preservation etc of evidence or property see PARA 114. As to search orders see PARAS 315 head (8) in the text, 319, 402 et seq; and as to freezing injunctions see PARAS 315 head (6) in the text, 318, 396 et seq.

6 *Rose v Lynx Express Ltd*[2004] EWCA Civ 447, [2004] 1 BCLC 455.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/4. PRE-COMMENCEMENT PROCEDURES/(2) DISCLOSURE/112. Procedure for pre-action disclosure.

112. Procedure for pre-action disclosure.

An application to the court¹ to exercise the power to order disclosure² before proceedings have started³ must be supported by evidence⁴. The court may make an order under this rule only where:

- 153 (1) the respondent is likely to be a party to subsequent proceedings⁵;
- 154 (2) the applicant is also likely to be a party to those proceedings⁶;
- 155 (3) if proceedings had started, the respondent's duty by way of standard disclosure⁷ would extend to the documents⁸ or classes of documents of which the applicant seeks disclosure⁹; and
- 156 (4) disclosure before proceedings have started is desirable in order to dispose fairly of the anticipated proceedings¹⁰, assist the dispute to be resolved without proceedings¹¹, or save costs¹².

Such an order must specify the documents or the classes of documents which the respondent must disclose¹³ and require him, when making disclosure, to specify any of those documents which are no longer in his control¹⁴ or in respect of which he claims a right or duty to withhold inspection¹⁵. Such an order may also require the respondent to indicate what has happened to any documents which are no longer in his control¹⁶ and specify the time and place for disclosure and inspection¹⁷.

1 As to the meaning of 'court' see PARA 22.

2 As to disclosure generally see PARA 538 et seq.

3 See PARA 111.

4 CPR 31.1, 31.16(1), (2). The application should be made under CPR Pt 23 to the court where the claim to which the application relates will be started unless there is good reason to make the application to a different court (see PARA 303); CPR 23.2(4); *Practice Direction--Applications* PD 23A para 5.

5 CPR 31.16(3)(a).

6 CPR 31.16(3)(b).

7 Ie set out in CPR 31.6 (see PARA 542); see CPR 31.16(3)(c).

8 As to the meaning of 'document' see PARA 538.

9 CPR 31.16(3)(c).

10 CPR 31.16(3)(d)(i).

11 CPR 31.16(3)(d)(ii).

12 CPR 31.16(3)(d)(iii). See *Black v Sumitomo Corpn* [2001] EWCA Civ 1819, [2003] 3 All ER 643.

Pre-action disclosure is applicable in a vast range of cases and it is peculiarly for judges in their case management role to work out the circumstances in which it will be ordered. The circumstances spelt out by the rule show that it will only be ordered where the court can say that the documents asked for are documents that would have to be produced at the standard disclosure stage. The court therefore has to be clear what the issues in the litigation are likely to be and then form a view as to whether the case is one in which pre-action

disclosure is desirable: see *Bermuda International Securities Ltd v KPMG (a firm)* [2001] EWCA Civ 269, [2001] All ER (D) 337 (Feb), [2001] CPLR 252 (where the Court of Appeal upheld the judge's 'impeccable' exercise of his discretion to order pre-action disclosure); and see also eg *Burrells Wharf Freeholds Ltd v Galliard Homes Ltd* [1999] 33 EG 82 (pre-action disclosure ordered); cf *Nabina v Chief Constable of the Greater Manchester Police Forces* [2000] All ER (D) 2217 (application refused). A court should consider separately the jurisdictional and discretionary elements of CPR 31.16(3)(d): *Black v Sumitomo Corpn* [2001] EWCA Civ 1819, [2003] 3 All ER 643, [2002] 1 WLR 1562; applied in *BSW Ltd v Balltec Ltd* [2006] EWHC 822 (Ch), [2007] FSR 1. See also *SES Contracting Ltd v UK Coal plc* [2007] EWHC 161 (QB), [2007] All ER (D) 189 (Mar) (allegation of fraudulent or wrongful conduct; pre-action disclosure ordered); *OCS Group v Wells* [2008] EWHC 919 (QB), [2008] PIQR P321, [2008] All ER (D) 408 (Apr) (disclosure of medical records refused where claimant did not know full details set out in them and might find them embarrassing or disturbing).

13 CPR 31.16(4)(a).

14 CPR 31.16(4)(b)(i).

15 CPR 31.16(4)(b)(ii).

16 CPR 31.16(5)(a).

17 CPR 31.16(5)(b). CPR 31.16 does not limit any other power which the court may have to order disclosure before proceedings have started: CPR 31.18(a). See further PARA 113.

UPDATE

112 Procedure for pre-action disclosure

NOTE 12--See also *EDO Corpn v Ultra Electronics Ltd* [2009] EWHC 682 (Ch), [2009] Bus LR 1306.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/4. PRE-COMMENCEMENT PROCEDURES/(2) DISCLOSURE/113. Claim for pre-action disclosure otherwise than under statutory provisions.

113. Claim for pre-action disclosure otherwise than under statutory provisions.

Where the court has no power under statute¹ to order pre-action disclosure and production of documents, because the party in whose control the documents are is not likely to be a party to subsequent proceedings, a potential claimant may commence proceedings for an order for disclosure and production by issuing proceedings against a person who has such documents in certain circumstances². Since the person who has control of the documents is not likely to be a party, the claimant has no cause of action against him as a wrongdoer. However, if the defendant to such proceedings can be shown to have become involved in the wrongdoing of others, whether voluntarily or not, albeit innocently, to an extent which has facilitated the wrongdoing of those others, he comes under a duty to assist the victim of the wrongdoing by giving full information, by disclosure of documents or otherwise, which will identify the wrongdoers to the victim³. A victim of a tort may also obtain such information from such a person innocently involved in the wrong, even though the victim cannot show that the third party had committed a tort against the victim without that information⁴.

¹ See under the Supreme Court Act 1981 s 33(2) and the County Courts Act 1984 s 52(2); see PARA 111. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

² *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, [1973] 2 All ER 943, HL; *British Steel Corp v Granada Television Ltd* [1981] AC 1096, [1981] 1 All ER 417, HL; *Harrington v North London Polytechnic* [1984] 3 All ER 666, [1984] 1 WLR 1293, CA; *Ashworth Hospital Authority v MGN Ltd* [2001] 1 All ER 991, [2001] 1 WLR 515, CA (affd [2002] UKHL 29, [2002] 4 All ER 193, [2002] 1 WLR 2033); *Totalise plc v Motley Fool Ltd* [2001] NLJR 644, [2001] All ER (D) 213 (Feb). See also *Mersey Care NHS Trust v Ackroyd (No 2)* [2007] EWCA Civ 101, 94 BMLR 84; and **CONFIDENCE AND DATA PROTECTION** vol 8(1) (Reissue) PARA 475. See further *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin), [2008] All ER (D) 123 (Aug), DC (where terrorist suspect faced charges in a country where he might face death penalty, Secretary of State should disclose information necessary for fair consideration of case and a fair trial).

³ See *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133 at 175, [1973] 2 All ER 943 at 948, HL, per Lord Reid.

⁴ *P v T Ltd* [1997] 4 All ER 200, [1997] 1 WLR 1309.

UPDATE

113 Claim for pre-action disclosure otherwise than under statutory provisions

NOTE 2--*Mohamed*, cited, reported at [2009] 1 WLR 2579.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/4. PRE-COMMENCEMENT PROCEDURES/(3) INSPECTION AND PRESERVATION OF EVIDENCE OR PROPERTY/114.

Inspection, preservation etc of evidence or property before commencement of proceedings.

(3) INSPECTION AND PRESERVATION OF EVIDENCE OR PROPERTY

114. Inspection, preservation etc of evidence or property before commencement of proceedings.

On the application of any person in accordance with rules of court, the High Court and a county court have power, in such circumstances as may be specified in the rules¹, to make an order providing for any one or more of the following matters, that is to say:

- 157 (1) the inspection, photographing, preservation, custody and detention of property² which appears to the court to be property which may become the subject-matter of subsequent proceedings in the court, or as to which any question may arise in any such proceedings; and
- 158 (2) the taking of samples of any such property as is mentioned in head (1) above and the carrying out of any experiment on or with any such property³.

The court may not make such an order if it considers that compliance with the order, if made, would be likely to be injurious to the public interest⁴.

1 See CPR 25.5; and PARA 323.

2 For these purposes, 'property' includes any land, chattel or other corporeal property of any description: Supreme Court Act 1981 s 35(5) (amended by the Administration of Justice Act 1982 s 6(2)); County Courts Act 1984 s 54(5). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

3 Supreme Court Act 1981 s 33(1); County Courts Act 1984 s 52(1) (amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(1), (2)). As to the procedure on such applications see PARA 323. As to search orders see PARAS 315 head (8) in the text, 319, 402 et seq; and as to freezing injunctions see PARAS 315 head (6) in the text, 318, 396 et seq.

4 Supreme Court Act 1981 s 35(1); County Courts Act 1984 s 54(1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/4. PRE-COMMENCEMENT PROCEDURES/(4) OFFERS OF SETTLEMENT/115. Offers to settle before commencement of proceedings.

(4) OFFERS OF SETTLEMENT

115. Offers to settle before commencement of proceedings.

A party may make an offer to settle in whatever way he chooses¹. If he makes an offer to settle before proceedings are begun which complies with the provisions of the relevant rule², the court will take that offer into account when making any order as to costs³.

The offer must:

- 159 (1) be in writing⁴;
- 160 (2) state on its face that it is intended to have the consequences of Part 36 of the Civil Procedure Rules⁵;
- 161 (3) specify a period of not less than 21 days within which the defendant⁶ will be liable for the claimant's costs⁷ if the offer is accepted⁸;
- 162 (4) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue⁹; and
- 163 (5) state whether it takes into account any counterclaim¹⁰.

If the offeror is a defendant to a money claim:

- 164 (a) a Part 36 offer by the defendant to pay a sum of money in settlement of a claim must be an offer to pay a single sum of money¹¹;
- 165 (b) but an offer that includes an offer to pay all or part of the sum, if accepted, at a date later than 14 days following the date of acceptance will not be treated as a Part 36 offer unless the offeree accepts the offer¹².

The court's permission is required to accept a Part 36 offer in certain circumstances¹³. An offer made under these provisions is made when it is served on the offeree¹⁴.

1 See CPR 36.1(1), (2). If that offer is not made in accordance with CPR 36.2, it will not have the consequences specified in CPR 36.10, 36.11 and 36.14: CPR 36.1(2). An offer made in accordance with CPR Pt 36 is called a 'Part 36 offer': CPR 36.2(1); and see PARA 729. A Part 36 offer has the costs and other consequences set out in CPR 36.10, 36.11 and 36.14 (see PARAS 736, 737, 740). As to payments into court and offers to settle once proceedings have begun see PARA 729 et seq. As to the meaning of 'court' see PARA 22.

2 See with the provisions of CPR 36.10: see the text and notes 3-10.

3 See CPR 36.10(1); and PARA 736. This provision, intended to encourage settlements of disputes before litigation commences, is in accordance with the overriding objective and reflects the provision of *Practice Direction--Protocols*, in particular, of paras 1.4(2), 4.

4 CPR 36.2(2)(a).

5 CPR 36.2(2)(b).

6 As to the meaning of 'defendant' see PARA 18.

7 See in accordance with CPR 36.10.

8 CPR 36.2(2)(c). This does not apply if the offer is made less than 21 days before the start of the trial: CPR 36.2(3).

9 CPR 36.2(2)(d). An offeror may make a Part 36 offer solely in relation to liability: CPR 36.2(5).

10 CPR 36.2(2)(e). In appropriate cases, a Part 36 offer must contain such further information as is required by CPR 36.5 (personal injury claims for future pecuniary loss), CPR 36.6 (offer to settle a claim for provisional damages), and CPR 36.15 (deduction of benefits): CPR 36.2(4).

11 CPR 36.4(1). This is subject to CPR 36.5(3) and CPR 36.6(1) (see PARA 733): CPR 36.4(1).

12 CPR 36.4(2).

13 See CPR 36.9(3); and PARA 735.

14 CPR 36.7(1). As to the meaning of 'service' see PARA 138 note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(1) IN GENERAL/116. Court where proceedings are to be started.

5. COMMENCEMENT OF PROCEEDINGS

(1) IN GENERAL

116. Court where proceedings are to be started.

Restrictions on where proceedings may be started are set out in the relevant practice direction¹. Subject to the following provisions, proceedings which both the High Court and the county courts have jurisdiction to deal with may be started in the High Court or in a county court², but a claim should be started in the High Court if by reason of:

- 166 (1) the financial value of the claim and the amount in dispute; and/or
- 167 (2) the complexity of the facts, legal issues, remedies or procedures involved; and/or
- 168 (3) the importance of the outcome of the claim to the public in general,

the claimant believes that the claim ought to be dealt with by a High Court judge³.

Proceedings (whether for damages or for a specified sum) may not be started in the High Court unless the value of the claim is more than £25,000⁴ and proceedings which include a claim for damages in respect of personal injuries must not be started in the High Court unless the value of the claim is £50,000 or more⁵. A claim must be issued in the High Court or a county court if an enactment so requires⁶.

A claim relating to Chancery business⁷ may, subject to any enactment, rule or practice direction, be dealt with in the High Court or in a county court⁸. A claim relating to certain specified matters⁹ must be dealt with in the High Court¹⁰ as must a claim for damages in respect of a judicial act under the Human Rights Act 1998¹¹.

Particular provision is made by the relevant rules and practice directions with regard to the commencement and conduct of the following specialist proceedings¹²:

- 169 (a) Admiralty proceedings¹³;
- 170 (b) arbitration proceedings¹⁴;
- 171 (c) commercial and mercantile actions¹⁵;
- 172 (d) intellectual property claims, namely matters arising under the Patents Act 1977, the Copyright, Designs and Patents Act 1988, the Trade Marks Act 1994, the Olympic Symbol etc Protection Act 1995 and the Olympics Association Rights (Infringement Proceedings) Regulations 1995¹⁶;
- 173 (e) Technology and Construction Court Business¹⁷; and
- 174 (f) proceedings under the Companies Act 1985, the Companies Act 1989 and the Companies Act 2006¹⁸.

A contentious probate claim must be commenced in the relevant office¹⁹ and using the normal procedure²⁰. Claims for the recovery of goods under, and claims relating to agreements regulated by, the Consumer Credit Act 1974 must be issued in the county court for the district in which the debtor resides or carries on business²¹. Landlord and tenant claims²² must normally

be started in the county court for the district in which the land is situated²³, as must a claim for the recovery of possession of land (including buildings)²⁴.

The following proceedings may not be started in a county court unless the parties have agreed otherwise in writing:

- 175 (i) a claim for damages or other remedy for libel or slander; and
- 176 (ii) a claim in which the title to any toll, fair, market or franchise is in question²⁵.

Applications for an access order under the Access to Neighbouring Land Act 1992 must be commenced in a county court²⁶.

Cases are allocated to different lists depending on the subject matter of the case. The lists are used for administrative purposes and may also have their own procedures and judges²⁷.

1 CPR 7.1. See the text and notes 2-25. As to practice directions generally see PARA 12.

2 *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 1.

3 *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 2.4. As to the transfer to the county court of proceedings started in the High Court and vice versa see CPR Pt 30; and PARA 66 et seq.

4 *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 2.1; and see the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 4A (added by SI 1999/1014; and amended by SI 2009/577). For proceedings issued before 6 April 2009, a claim for money in which the county courts have jurisdiction could only be commenced in the High Court if the value of the claim was more than £15,000: see the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 4A (as so added); and the High Court and County Courts Jurisdiction (Amendment) Order 2009, SI 2009/577, art 8.

5 *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 2.2; and see the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 5(1) (art 5(1) substituted by SI 1999/1014; and amended by SI 2009/577). For these purposes, 'personal injuries' means personal injuries to the claimant or any other person, and includes disease, impairment of physical or mental condition, and death: High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 5(2) (amended by SI 1999/1014). The High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 5 does not, however, apply to proceedings which include a claim for damages in respect of an alleged breach of duty of care committed in the course of the provision of clinical or medical services (including dental or nursing services): art 5(3) (added by SI 1999/1014). The value of the claim must be calculated in accordance with CPR 16.3(6): High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 9 (substituted by SI 1999/1014; and amended by SI 2009/577). When calculating how much he expects to recover, the claimant must disregard any possibility (1) that he may recover interest and/or costs; (2) that the court may make a finding of contributory negligence against him; (3) that the defendant may make a counterclaim or that the defence may include a set-off; or (4) that the defendant may be liable to pay an amount of money which the court awards to the claimant to the Secretary of State for Social Security under the Social Security (Recovery of Benefits) Act 1997 s 6 (see **DAMAGES** vol 12(1) (Reissue) PARA 915): CPR 16.3(6). As to the meanings of 'claimant' and 'defendant' see PARA 18; and as to the meaning of 'counterclaim' see PARA 618 note 3.

6 *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 2.3.

7 For these purposes, 'Chancery business' includes any of the matters specified in the Supreme Court Act 1981 s 61(1), (3), Sch 1 para 1 (see PARA 44): *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 2.5. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to probate claims, however, see the text and notes 19-20; as to intellectual property claims see head (d) in the text; and as to proceedings under the Companies Acts see head (f) in the text.

8 *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 2.5. The claim form must, if issued in the High Court, be marked in the top right hand corner 'Chancery Division' and, if issued in the county court, be marked 'Chancery Business': para 2.5. As to the equity jurisdiction of county courts see the County Courts Act 1984 s 23; and PARA 58 note 9.

9 Is a claim relating to any of the matters specified in the Supreme Court Act 1981 Sch 1 para 2(a), (b): *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 2.6. The specified matters are applications for writs of habeas corpus, except applications made by a parent or guardian of a minor for such a writ concerning the custody of the minor, and applications for judicial review: see PARA 45 heads (1), (2) in the

text. Such a claim will be assigned to the Queen's Bench Division: *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 2.6. If a claim in the High Court for which a jury trial is directed is not already being dealt with in the Queen's Bench Division it will be transferred there: see para 2.8. As to jury trial in civil proceedings see PARA 1132.

10 *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 2.6.

11 CPR 7.11(1); *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 2.10(2). If the claim is made in a notice of appeal then it will be dealt with according to the normal rules governing where that appeal is heard. Otherwise, the normal rules apply in deciding in which court and specialist list a claim that includes issues under the Human Rights Act 1998 should be started, and in deciding which procedure (ie CPR Pt 7, CPR Pt 8, or CPR Pt 54: see PARAS 117 et seq, 1530) to use to start the claim: see CPR 7.11(2); *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 2.10(1). Note that a county court cannot make a declaration of incompatibility in accordance with the Human Rights Act 1998 s 4: see s 4(5). As to the meaning of 'specialist list' see PARA 67 note 8. As to specialist lists see PARA 1536 et seq. As to lists generally see the text and note 27.

12 *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 2.7. As to specialist proceedings see PARA 1536 et seq.

13 See CPR Pt 61; and *Practice Direction--Admiralty Claims* PD 61.

14 See CPR Pt 62; and *Practice Direction--Arbitration* PD 62.

15 See CPR Pt 58, CPR Pt 59; *Practice Direction--Commercial Court* PD 58; and *Practice Direction--Mercantile Courts* PD 59. See further PARA 1536 et seq.

16 See CPR Pt 63; and *Practice Direction--Patents and other Intellectual Property Claims* PD 63. As to proceedings under the Copyright, Designs and Patents Act 1988 and the Trade Marks Act 1994 see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS; TRADE MARKS AND TRADE NAMES**; and as to proceedings under the Olympic Symbol etc Protection Act 1995 and the Olympics Association Rights (Infringement Proceedings) Regulations 1995, SI 1995/3325, see **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 492 et seq. Patents cases should be transferred from the High Court to the county court or vice versa where it is in the interests of efficiency and expediency to do so: see *CIBA Vision (UK) Ltd v Coopervision Ltd* [2001] All ER (D) 20 (Jul), sub nom *Wesley Jessen Corpn v Coopervision Ltd* (2001) Times, 31 July, per Neuberger J.

17 See CPR Pt 60; and *Practice Direction--Technology and Construction Court Claims* PD 60. A Technology and Construction Court ('TCC') claim is a claim which involves issues or questions which are technically complex or for which a trial by a judge of the TCC is desirable and which has been issued in or transferred into the specialist list for such claims: CPR 60.1(2)(a), (3). See further PARA 1546.

18 See CPR 49; *Practice Direction--Applications under the Companies Acts and Related Legislation* PD 49.

19 'Relevant office' means (1) in the case of High Court proceedings in a Chancery district registry, that registry; (2) in the case of any other High Court proceedings, Chancery Chambers at the Royal Courts of Justice, Strand, London, WC2A 2LL; and (3) in the case of county court proceedings, the office of the county court in question: CPR 57.1(2)(b).

20 CPR 57.3. CPR 57 came into force on 15 October 2001. The 'normal procedure' referred to is the procedure under CPR Pt 7: see PARA 117 et seq.

21 See *Practice Direction--Consumer Credit Act Claim* PD 7B para 4.1. In any other claim to recover goods, the claim may only be started in the court for the district: (1) in which the defendant, or one of the defendants, resides or carries on business; or (2) in which the goods are situated: para 4.2. A claim of a debtor or hirer for an order under the Consumer Credit Act 1974 s 129(1)(b) or (ba) (a time order: see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 292) may only be started in the court where the claimant resides or carries on business: *Practice Direction--Consumer Credit Act Claim* PD 7B para 4.3. The claimant may recover fixed costs in certain circumstances where such a claim is made: see CPR 45.1(2)(b). As to costs generally see also PARA 1729 et seq.

22 'Landlord and tenant claim' means a claim under (1) the Landlord and Tenant Act 1927; (2) the Leasehold Property (Repairs) Act 1938; (3) the Landlord and Tenant Act 1954; (4) the Landlord and Tenant Act 1985; (5) the Landlord and Tenant Act 1987; or (6) the Housing Act 2004 s 214: CPR 56.1(1). See further **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 57.

23 See CPR 56.2(1). Unless an enactment provides otherwise, the claim may be started in the High Court if the claimant files with the claim form a certificate stating the reasons for bringing the claim in that court verified by a statement of truth in accordance with CPR 22.1(1) (see PARA 613): CPR 56.2(2). The practice direction refers to circumstances which may justify starting the claim in the High Court: CPR 56.2(3).

Circumstances which may, in an appropriate case, justify starting a claim in the High Court are if there are complicated disputes of fact or there are points of law of general importance: *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 2.4. The value of the property and the amount of any financial claim may be relevant circumstances, but these factors alone will not normally justify starting the claim in the High Court: para 2.5.

24 See CPR 55.1(a), 55.3; *Practice Direction--Possession Claims* PD 55 para 1.1. Circumstances which may, in an appropriate case, justify starting a claim in the High Court are if there are complicated disputes of fact; there are points of law of general importance; or the claim is against trespassers and there is a substantial risk of public disturbance or of serious harm to persons or property which properly require immediate determination: para 1.3. The value of the property and the amount of any financial claim may be relevant circumstances, but these factors alone will not normally justify starting the claim in the High Court: para 1.4. High Court claims for the possession of land subject to a mortgage will be assigned to the Chancery Division: para 1.6. The claimant must use the appropriate claim form and particulars of claim form: para 1.5. A claim which is not a possession claim may be brought under the procedure set out in CPR 55 Section I if it is started in the same claim form as a possession claim which, by virtue of CPR 55.2(1) must be brought in accordance with that Section: *Practice Direction--Possession Claims* PD 55 para 1.7.

25 *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 2.9; and see the County Courts Act 1984 s 15 (amended by SI 1991/724). The parties to any claim, other than a claim which if commenced in the High Court would have been assigned to the Chancery Division, or proceedings which would have been assigned to the Family Division or have involved the exercise of the High Court's Admiralty jurisdiction, may agree, by a memorandum signed by them or by their respective legal representatives, to confer jurisdiction on the county court: see the County Courts Act 1984 s 18 (amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 49(3)).

26 See the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 6A (added by the Access to Neighbouring Land Act 1992 s 7(2)).

27 See CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31.

UPDATE

116 Court where proceedings are to be started

TEXT AND NOTES--Applications under European Parliament and EC Council Regulation 861/2007 establishing a European small claims procedure (see PARAS 1651-1656) must be commenced in a county court: SI 1991/724 art 6B (added by SI 2008/2934).

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

NOTE 16--CPR Pt 63 substituted: SI 2009/2092.

NOTE 18--CPR 49 substituted: SI 2009/2092.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(1) IN GENERAL/117. Methods of starting proceedings.

117. Methods of starting proceedings.

There are two methods of starting proceedings:

- 177 (1) the normal method, using the procedure under Part 7 of the Civil Procedure Rules¹ and a claim form prescribed under the practice direction to Part 7²;
- 178 (2) the alternative method, using the procedure under Part 8 of the Civil Procedure Rules³ and a claim form prescribed under the practice directions to Parts 7 and 8⁴.

Where a remedy is sought before the issue of proceedings⁵, then an application must be made to the court where the proceedings are likely to be started, unless there is good reason to make it to a different court, under Part 23 of the Civil Procedure Rules⁶.

A practice direction may make provision for a claimant to start a claim by requesting the issue of a claim form electronically⁷.

1 See CPR 7.2; and PARA 118.

2 *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 3.1. As to the contents of the claim form see CPR 16.2, 16.3; and PARAS 585-586. Where the normal procedure is used, the claim form is part of the statement of case (see PARA 584 et seq) and is considered further in that context.

3 See CPR 8.1; and PARA 127.

4 *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 3.1; *Practice Direction--Alternative Procedure for Claims* PD 8 para 4.2. As to the contents of the claim form see CPR 8.2; and PARA 128. If the claimant wishes his claim to proceed under CPR Pt 8, or if the claim is required to proceed under Pt 8, the claim form must so state. Otherwise the claim will proceed under CPR Pt 7: see *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 3.3. Where the claim proceeds under Pt 8, the rules relating to statements of case (ie CPR Pt 16) do not apply: see CPR 16.1.

As to the endorsement of the claim form and any separate particulars of claim where the claim is to be served out of the jurisdiction and is one which the court has power to deal with under the judgments regulation (as defined: see PARA 169) see *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 3.5A.

5 Eg for pre-action disclosure under the Supreme Court Act 1981 s 33 and CPR 31.16: see PARAS 111-112. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

6 CPR 23.2(4); *Practice Direction--Applications* PD 23AA para 5. Further, an application for a remedy in relation to proceedings which are taking place, or will take place, in another jurisdiction must also be made under CPR Pt 23 (see PARA 303 et seq): see CPR 7.2(2) note. 'Jurisdiction' means, unless the context requires otherwise, England and Wales and any part of the territorial waters of the United Kingdom adjoining England and Wales: CPR 2.3(1). As to service of foreign proceedings see PARA 181; and as to the appropriate forum for civil proceedings see PARAS 535-536; and see generally **CONFLICT OF LAWS**.

7 CPR 7.12(1). The practice direction may, in particular (1) specify the types of claim which may be issued electronically and the conditions which a claim must meet before it may be issued electronically; (2) specify the court where the claim will be issued and the circumstances in which the claim will be transferred to another court; (3) provide for the filing of other documents electronically where a claim has been started electronically; (4) specify the requirements that must be fulfilled for any document filed electronically; and (5) provide how a fee payable on the filing of any document is to be paid where that document is filed electronically: CPR 7.12(2). The practice direction may disapply or modify the CPR as appropriate in relation to claims started electronically: CPR 7.12(3). See *Practice Direction--Money Claim Online* PD 7E.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(1) IN GENERAL/118. Time when proceedings are started.

118. Time when proceedings are started.

Proceedings are started when the court¹ issues a claim form at the request of the claimant². A claim form is issued on the date entered on the form by the court³. However, where the claim form as issued is received in the court office on a date earlier than the date at which it was issued by the court, then, for the purposes of any relevant statutory limitation period⁴, the claim is brought on the date when the claim form is received at the court⁵, which will be recorded by the court⁶.

1 As to the meaning of 'court' see PARA 22.

2 CPR 7.2(1). As to the meaning of 'claimant' see PARA 18.

3 CPR 7.2(2).

4 Eg under the Limitation Act 1980: see generally **LIMITATION PERIODS**.

5 See *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 5.1.

6 See *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 5.2. The date on which the claim form was received by the court will be recorded by a date stamp either on the claim form held on the court file or on the letter that accompanied the claim form when it was received by the court: para 5.2. An inquiry as to the date on which the claim form was received by the court should be directed to a court officer: para 5.3. Parties proposing to start a claim which is approaching the expiry of the limitation period should recognise the potential importance of establishing the date the claim form was received by the court and should themselves make arrangements to record the date: para 5.4. As to the meaning of 'court officer' see PARA 49 note 3. See *Barnes v St Helens Metropolitan Borough Council* [2006] EWCA Civ 1372, [2007] 3 All ER 525, [2006] All ER (D) 303 (Oct) (claim commenced when court received claim form).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(1) IN GENERAL/119. Right to use one claim form to start two or more claims.

119. Right to use one claim form to start two or more claims.

A claimant¹ may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings².

1 As to the meaning of 'claimant' see PARA 18.

2 CPR 7.3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(1) IN GENERAL/120. Requirements for service of a claim form.

120. Requirements for service of a claim form.

Where the claim form is served¹ within the jurisdiction², the claimant must complete the required step³ in relation to the particular method of service chosen, before 12.00 midnight on the calendar day four months after the date of issue of the claim form⁴. The required steps are:

- 179 (1) where the method of service is first class post, document exchange or other service which provides for delivery on the next business day, posting, leaving with, delivering to or collection by the relevant service provider;
- 180 (2) where the method of service is delivery of the document to or leaving it at the relevant place, delivering to or leaving the document at the relevant place;
- 181 (3) where the method of service is personal service⁵, completing the relevant step⁶;
- 182 (4) where the method of service is fax, completing the transmission of the fax;
- 183 (5) where the method of service is another electronic method, sending the e-mail or other electronic transmission⁷.

Where the claim form is to be served out of the jurisdiction, the claim form must be served⁸ within six months of the date of issue⁹.

With regard to certain alternative procedure claims¹⁰, the claim form must be served not less than 21 days before the hearing date¹¹.

1 As to the methods of service see PARA 139. As to the meaning of 'service' see PARA 138 note 2.

2 As to the meaning of 'jurisdiction' see PARA 117 note 6.

3 I.e. the step required by CPR 7.5(1), Table.

4 CPR 7.5(1). As to the meaning of 'defendant' see PARA 18. As to extension of time for serving the claim form see PARA 121. It remains the case that proceedings are not 'definitively pending' for the purposes of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 art 21, and an English court is not seised of a matter, until the service of the claim form on the defendant; it is not the case that, on issue of a claim form, a claimant has effectively 'crossed the Rubicon': *SDL International Ltd v Centre De Co-operation International* [2000] All ER (D) 1041.

5 I.e. in accordance with CPR Pt 6.

6 I.e. the step required by CPR 6.5(3): see PARA 142.

7 CPR 7.5(1), Table.

8 I.e. in accordance with CPR Pt 6 Section IV: see PARA 168 et seq.

9 CPR 7.5(2). Once a claim form specifies an address within the jurisdiction, the court is not thereby precluded from giving permission to serve out of the jurisdiction after the four month period. If, however, the effect of permission for service out of the jurisdiction would be to revive a claim form after the four month period, that would be an important consideration in deciding whether or not permission to serve out of the jurisdiction should be given: *National Bank of Greece SA v RM Outhwaite 317 Syndicate at Lloyds* [2001] Lloyd's Rep IR 652. A claim form addressed to a claimant resident abroad is potentially valid for six months under CPR 7.5(2) even if it is marked 'Not for service out of the jurisdiction': *ST Shipping & Transport Inc v Vyzantio Shipping Ltd, The Byzantio* [2004] EWHC 3339 (Comm), [2005] 1 Lloyd's Rep 531. As to time limits see generally PARA 88 et seq.

10 le an application for an injunction to prevent environmental harm under the Town and Country Planning Act 1990 s 187B (see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 585) or s 214A (see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARAS 876-877), the Planning (Listed Buildings and Conservation Areas) Act 1990 s 44A (see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1151), or the Planning (Hazardous Substances) Act 1990 s 26AA (see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARA 1283); see *Practice Direction--Alternative Procedure for Claims* PD 8 para 20.1.

11 *Practice Direction--Alternative Procedure for Claims* PD 8 para 20.8.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(1) IN GENERAL/121. Extension of time for serving a claim form.

121. Extension of time for serving a claim form.

The claimant¹ may apply for an order extending the period for compliance with the requirements as to the time within which the claim form must be served². The general rule is that an application to extend the time for compliance must be made within the period specified for service by the Civil Procedure Rules³ or, where an order has been made extending that time, within the period for service specified by that order⁴. If the claimant applies for an order to extend the time for compliance after the end of the period specified by the Civil Procedure Rules or by an order extending that time, the court⁵ may make such an order only if the court has failed to serve the claim form⁶, or the claimant has taken all reasonable steps to comply with the rule but has been unable to do so⁷ and, in either case, the claimant has acted promptly in making the application⁸. An application for an order extending the time for compliance with the time limits for service must be supported by evidence⁹ and may be made without notice¹⁰.

1 As to the meaning of 'claimant' see PARA 18.

2 CPR 7.6(1). As to the period within which the claim form must be served see PARA 120; and as to the meaning of 'service' see PARA 138 note 2.

3 I.e. specified by CPR 7.5: see PARA 120.

4 CPR 7.6(2).

5 As to the meaning of 'court' see PARA 22.

6 CPR 7.6(3)(a). It was held that the former wording, 'unable to serve' includes the court's negligent failure to serve a claim form: *Cranfield v Bridegrove Ltd* [2003] EWCA Civ 656, [2003] 3 All ER 129, [2003] 1 WLR 2441.

7 CPR 7.6(3)(b). See *Drury v British Broadcasting Corp* [2007] EWCA Civ 497, (2007) Times, 11 June (attempts to effect service on last available day did not constitute taking all reasonable steps).

8 CPR 7.6(3)(c). As to the exercise of discretion under CPR 7.6 see *Hashtroodi v Hancock* [2004] EWCA Civ 652, [2004] 3 All ER 530. The wording of CPR 7.6(3) excludes the court from exercising power to extend time for service under CPR 3.1(2)(a) (see PARA 249) and CPR 3.10 (rectifying an error of procedure: see PARA 257) is of no avail: see *Vinos v Marks & Spencer Ltd* [2001] 3 All ER 784, [2000] CPLR 570, CA; *Nangle v Royal Free Hospital NHS Trust* [2001] EWCA Civ 127, [2001] 3 All ER 793, [2002] 1 WLR 1043. For an example of a case where a judge's order to extend the time for service was set aside because the claimants had failed to act promptly see *Elf Oil UK Ltd v Besiktas Denizcilik Ve Tasimacilik Sanayive Ticaret AS* [2000] All ER (D) 2401. Solicitors must be aware of the time limits for service in each category of litigation and must serve proceedings promptly and within those time limits: *Chabba v Turbogame Ltd* [2001] EWCA Civ 1073, [2001] All ER (D) 77 (Jul). See also *Corus UK Ltd v Erewash BC* [2006] EWCA Civ 1175, [2006] All ER (D) 91 (Nov); *NV Procter & Gamble International Ltd v Gartner KG* [2005] EWHC 960 (Comm), [2006] 1 Lloyd's Rep 82.

9 CPR 7.6(4)(a).

10 CPR 7.6(4)(b).

UPDATE

121 Extension of time for serving a claim form

NOTE 4--See also *Imperial Cancer Research Fund v Ove Arup & Partners* [2009] EWHC 1453 (TCC), [2009] BLR 458, [2009] All ER (D) 282 (Jun).

NOTE 8--Where there is no reason for failure to serve the claim form within time other than incompetence that, though not an absolute bar, is a powerful reason in refusing to grant an extension of time: *F G Hawkes (Western) Ltd v Beli Shipping Co Ltd, the 'Katarina'* [2009] EWHC 1740 (Comm), [2010] 1 Lloyd's Rep 449, [2009] All ER (D) 207 (Jul).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(1) IN GENERAL/122. Application by defendant for service of claim form.

122. Application by defendant for service of claim form.

Where a claim form has been issued against a defendant¹, but has not yet been served² on him, the defendant may serve a notice on the claimant³ requiring him to serve the claim form or discontinue the claim within a period specified in the notice⁴. If the claimant fails to comply with the notice, the court⁵ may, on the application of the defendant, dismiss the claim⁶ or make any other order it thinks just⁷.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the requirement of service see PARA 120; and as to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'claimant' see PARA 18.

4 CPR 7.7(1). The period so specified must be at least 14 days after service of the notice: CPR 7.7(2). As to time limits see PARA 88 et seq.

5 As to the meaning of 'court' see PARA 22.

6 CPR 7.7(3)(a).

7 CPR 7.7(3)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(1) IN GENERAL/123. Particulars of claim.

123. Particulars of claim.

Where the normal procedure is used¹, particulars of claim must be contained in or served with the claim form² or be served on the defendant³ by the claimant⁴ within 14 days after service of the claim form⁵. In any event, they must be served on the defendant no later than the latest time for serving a claim form⁶. Where the claimant serves particulars of claim separately from the claim form⁷, the claimant must generally, within seven days of service on the defendant, file⁸ a copy of the particulars⁹.

The court has discretion to extend time for the service of particulars of claim¹⁰.

1 Ie the procedure under CPR Pt 7: see PARAS 117 et seq, 124 et seq.

2 CPR 7.4(1)(a). As to the contents of the particulars of claim see CPR Pt 16; and PARA 584 et seq. As to the requirement for service of the claim form see PARA 120; and as to the meaning of 'service' see PARA 138 note 2. CPR Pt 16 (statements of case) does not apply where the procedure under Pt 8 is followed, so particulars of claim are not required: see CPR 8.9(a)(i). Provision is made in CPR Pt 8 for the matters which must be stated in the claim form: see PARA 128.

3 As to the meaning of 'defendant' see PARA 18.

4 As to the meaning of 'claimant' see PARA 18.

5 CPR 7.4(1)(b). As to time limits generally see PARA 88 et seq.

6 CPR 7.4(2). CPR 7.5 (see PARA 120) prescribes the latest time for serving a claim form.

7 Ie in accordance with CPR 7.4(1)(b): see CPR 7.4(3).

8 As to the meaning of 'filing' see PARA 1832 note 8.

9 CPR 7.4(3). This does not apply where *Practice Direction--Production Centre* PD 7C para 5.2(4) applies, or where *Practice Direction--Money Claim Online* PD 7E para 6.4 applies: CPR 7.4(3).

CPR Pt 22 (see PARA 613 et seq) requires particulars of claim to be verified by a statement of truth. As to statements of truth see CPR 22.1(4); and PARA 613.

10 *Totty v Snowden, Hewitt v Wirral and West Cheshire Community Trust* [2001] EWCA Civ 1415, [2001] 4 All ER 577, [2001] All ER (D) 60 (Oct). The court, when considering whether or not to grant an extension, need only give brief, clear reasons as to its decision: *Robert v Momentum Services Ltd* [2003] EWCA Civ 299, [2003] 2 All ER 74. See also *Price v Price (t/a Poppyland Headware)* [2003] EWCA Civ 888, [2003] 3 All ER 911.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(1) IN GENERAL/124. Form for defence etc must be served with particulars of claim.

124. Form for defence etc must be served with particulars of claim.

When particulars of claim are served¹ on a defendant², whether they are contained in the claim form, served with it or served subsequently, they must be accompanied by a form for defending the claim³, a form for admitting the claim⁴ and a form for acknowledging service⁵.

1 As to the requirement for service of particulars of claim see PARA 120; and as to the meaning of 'service' see PARA 138 note 2.

2 As to the meaning of 'defendant' see PARA 18.

3 CPR 7.8(1)(a).

4 CPR 7.8(1)(b).

5 CPR 7.8(1)(c). Where the claimant is using the alternative procedure for claims set out in CPR Pt 8 (see PARA 127 et seq), CPR 7.8(1) does not apply and a form for acknowledging service must accompany the claim form: CPR 7.8(2), 8.9(b)(ii). As to the meaning of 'claimant' see PARA 18.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(1) IN GENERAL/125. Fixed date and other claims.

125. Fixed date and other claims.

A practice direction:

- 184 (1) may set out the circumstances in which the court¹ may give a fixed date for a hearing when it issues a claim²;
- 185 (2) may list claims in respect of which there is a specific claim form for use and set out the claim form in question³; and
- 186 (3) may disapply or modify the Civil Procedure Rules as appropriate in relation to the claims referred to in heads (1) and (2) above⁴.

Practice directions have been made making special provisions for fixed date hearings where certain types of claim are made under the Consumer Credit Act 1974⁵ and where claims are made for the recovery of taxes⁶.

1 As to the meaning of 'court' see PARA 22.

2 CPR 7.9(a).

3 CPR 7.9(b).

4 CPR 7.9(c). CPR 7.9 has no application in the Commercial Court: see PARA 1537 note 4.

5 See *Practice Direction--Consumer Credit Act Claim* PD 7B paras 3.1, 5.1. The particulars of claim must be served with the claim form: para 5.2. Each party must be given at least 28 days' notice of the hearing date: para 5.6. Where the claimant serves the claim form, he must serve notice of the hearing date at the same time, unless the hearing date is specified in the claim form: para 5.7. As to the meaning of 'claimant' see PARA 18. As to time limits generally see PARA 88 et seq.

6 See *Practice Direction--Claims for the Recovery of Taxes* PD 7D paras 1.1, 2.1. If a defence is filed, the court will fix a date for the hearing, and may dispose of the claim on that date: paras 2.1, 3.1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(1) IN GENERAL/126. Production centre for claims.

126. Production centre for claims.

There is a production centre for the issue of claim forms and other related matters¹. The relevant practice direction² makes provision for:

- 187 (1) which claimants may use the production centre³;
- 188 (2) the type of claims which the production centre may issue⁴;
- 189 (3) the functions which are to be discharged by the production centre⁵;
- 190 (4) the place where the production centre is to be located⁶; and
- 191 (5) other related matters⁷.

The relevant practice direction may disapply or modify the Civil Procedure Rules as appropriate in relation to claims issued by the production centre⁸.

1 CPR 7.10(1). There is no production centre for the issue of claim forms for the Commercial Court: see PARA 1537 the text and note 2.

2 See *Practice Direction--Production Centre* PD 7C; and the text and notes 3-8.

3 CPR 7.10(2)(a). Only a centre user may issue or conduct claims through the centre: *Practice Direction--Production Centre* PD 7C para 3.1. 'Centre user' means a person who is for the time being permitted to issue claims through the centre, and includes a solicitor acting for such a person: para 1.1. The officer may permit any person to be a centre user and may withdraw the permission for any person to be a centre user: paras 3.2, 3.3. A centre user must comply with the provisions of the Code of Practice in his dealings with the centre, and will be allotted a national creditor code: see paras 3.4, 3.5. 'Officer' means the officer in charge of the centre or another officer of the centre acting on his behalf; 'national creditor code' means the number or reference allotted to a centre user by the officer; and 'Code of Practice' means any code of practice which may at any time be issued by the Court Service relating to the discharge by the centre of its functions and the way in which a centre user is to conduct business with the centre: para 1.1.

4 CPR 7.10(2)(b). The centre will not issue any claim form which is to be issued in the High Court: *Practice Direction--Production Centre* PD 7C para 2.1. The centre will only issue a claim form if the claim is for a specified sum of money less than £100,000; and will not issue any of the following types of claim: (1) a claim against more than two defendants; (2) a claim against two defendants where a different sum is claimed against each of them; (3) a claim where particulars of claim separate from the claim form are required; (4) a claim against the Crown; (5) a claim for an amount in a foreign currency; (6) a claim where either party is known to be a child or protected party within CPR Pt 21 (see PARA 222); (7) a claim where the claimant is a legally assisted person within the meaning of the Legal Aid Act 1988 (repealed: see now the access to Justice Act 1999); (8) a claim where the defendant's address for service as it appears on the claim form is not in England or Wales or Scotland; (9) a claim which is to be issued under CPR Pt 8 (see PARA 127 et seq): *Practice Direction--Production Centre* PD 7C paras 2.2, 2.3.

5 CPR 7.10(2)(c). The functions of the centre include the provision of a facility which, through the use of information technology, enables a centre user to have claim forms issued and served, whether or not those claim forms are to be treated as issued in the Northampton County Court or in another county court: see *Practice Direction--Production Centre* PD 7C para 1.3(1).

6 CPR 7.10(2)(d). The production centre is established at Northampton County Court: see *Practice Direction--Production Centre* PD 7C.

7 CPR 7.10(2)(e).

8 CPR 7.10(3). See *Practice Direction--Production Centre* PD 7C paras 1.4, 5.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(2) ALTERNATIVE PROCEDURE FOR CLAIMS/127. Types of claim in which alternative procedure under Part 8 of the Civil Procedure Rules may be followed.

(2) ALTERNATIVE PROCEDURE FOR CLAIMS

127. Types of claim in which alternative procedure under Part 8 of the Civil Procedure Rules may be followed.

A claimant¹ may use the Part 8 procedure² where he seeks the court's³ decision on a question which is unlikely to involve a substantial dispute of fact⁴ or where a rule or practice direction, in relation to a specified type of proceedings, requires or permits the use of the Part 8 procedure⁵. Such a rule or practice direction may disapply or modify any of the rules set out in Part 8 of the Civil Procedure Rules as they apply to proceedings specified in such rule or practice direction⁶. The court may at any stage order the claim to continue as if the claimant had not used the Part 8 procedure and, if it does so, the court may give any directions it considers appropriate⁷. Where the claimant uses the Part 8 procedure he may not obtain⁸ default judgment⁹.

The rules and directions applicable to all claims¹⁰ apply to claims under the Part 8 procedure where appropriate¹¹.

A modified form of Part 8 procedure must be used for claims for judicial review¹².

Practitioners should be aware of the different regime concerning appeals which applies where the Part 8 procedure is used¹³.

1 As to the meaning of 'claimant' see PARA 18.

2 The 'Part 8 procedure' is the procedure set out in CPR Pt 8 (see the text and notes 3-10; and PARA 128 et seq): CPR 8.1(1).

3 As to the meaning of 'court' see PARA 22.

4 CPR 8.1(2)(a).

5 CPR 8.1(2)(b), (6)(a); *Practice Direction--Alternative Procedure for Claims* PD 8 para 2.1. The types of claim for which the Part 8 procedure may be used include (1) a claim by or against a child or protected party which has been settled before the commencement of proceedings and where the sole purpose of the claim is to obtain the approval of the court to the settlement; (2) a claim for provisional damages which has been settled before the commencement of proceedings and where the sole purpose of the claim is to obtain a consent judgment: *Practice Direction--Alternative Procedure for Claims* PD 8 para 3.1. CPR 8.1(2) does not apply if a practice direction provides that the Part 8 procedure may not be used in relation to the type of claim in question: CPR 8.1(4).

The Part 8 procedure must be used for any claim or application in relation to which an Act, rule or practice direction provides that the claim or application is brought by originating summons, originating motion or originating application: *Practice Direction--Alternative Procedure for Claims* PD 8 para 3.3. Landlord and tenant claims must use the Part 8 procedure: see *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 2.1. Other types of claims for which that procedure is required are set out in *Practice Direction--Alternative Procedure for Claims* PD 8 Section B, Table: see paras 3.2(1), 9.1. Special provisions apply to specified types of claim: see paras 3.2(2), 9.2, Section C. As to the meaning of 'child' see PARA 222 note 3; as to the meaning of 'protected party' see PARA 222 note 1; and as to the meaning of 'landlord and tenant claim' see PARA 116 note 22.

6 CPR 8.1(6)(b). CPR 8.9 provides for other modifications to the general rules where the Part 8 procedure is being used: see PARA 136.

7 CPR 8.1(3); *Practice Direction--Alternative Procedure for Claims* PD 8 para 3.5. Where it appears to a court officer that a claimant is using the Part 8 procedure inappropriately, he may refer the claim to a judge for the judge to consider the point: para 3.4. As to the meaning of 'court officer' see PARA 49 note 3; and as to the meaning of 'judge' see PARA 49.

8 Ie under CPR Pt 12: see PARA 506 et seq.

9 CPR 8.1(5).

10 Ie CPR Pt 7 and *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A: see PARA 117 et seq.

11 See *Practice Direction--Alternative Procedure for Claims* PD 8 para 4.1.

12 See *Practice Direction--Judicial Review* PD 54; and PARA 1530 note 3.

13 See *Yenula Properties Ltd v Naidu* [2001] All ER (D) 236 (Jul) per Lloyd J. A claim where the Part 8 procedure is used is treated as allocated to the multi-track (see CPR 8.9(c); and PARA 136) but appeal lies to the Court of Appeal where the decision to be appealed is a final decision in a claim allocated by a court to the multi-track under CPR 12.7, 14.8 or 26.5 (see the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 4 (amended by SI 2003/490)) and not where a claim is deemed to be allocated to that track (see *Yenula Properties Ltd v Naidu* [2001] All ER (D) 236 (Jul)). As to appeals see PARA 1657 et seq; and as to allocation to the multi-track see PARA 269.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(2) ALTERNATIVE PROCEDURE FOR CLAIMS/128. Contents of the claim form.

128. Contents of the claim form.

Where the claimant¹ uses the Part 8 procedure², the rules about statements of case do not apply³ and the claim form itself must contain all the necessary details of the claim⁴. The claim form must state:

- 192 (1) that Part 8 of the Civil Procedure Rules applies⁵;
- 193 (2) the question which the claimant wants the court⁶ to decide⁷ or the remedy which the claimant is seeking and the legal basis for the claim to that remedy⁸;
- 194 (3) if the claim is being made under an enactment, what that enactment is⁹;
- 195 (4) if the claimant is claiming in a representative capacity¹⁰, what that capacity is¹¹; and
- 196 (5) if the defendant is sued in a representative capacity, what that capacity is¹².

The claim form must be verified by a statement of truth¹³.

1 As to the meaning of 'claimant' see PARA 18.

2 As to the meaning of 'Part 8 procedure' see PARA 127 note 2.

3 See CPR 16.1; and note 11. As to statements of case see PARA 584 et seq.

4 See CPR 8.2; *Practice Direction--Alternative Procedure for Claims* PD 8 para 4.2. The prescribed claim form is Form N208; see *The Civil Court Practice*. As to the information required to be filed with the claim form to comply with CPR 44.15 (information about funding arrangements) see *Practice Direction Relating to Part 44--General Rules About Costs* PD 44 para 19; and see *The Civil Court Practice*. As to costs generally see also PARA 1729 et seq.

5 CPR 8.2(a).

6 As to the meaning of 'court' see PARA 22.

7 CPR 8.2(b)(i).

8 CPR 8.2(b)(ii).

9 CPR 8.2(c). Claims under the enactments listed in *Practice Direction--Alternative Procedure for Claims* PD 8 Section B, Table are required to be brought under the Part 8 procedure: see PARA 127 note 5.

10 As to parties suing and being sued in a representative capacity see PARA 229 et seq.

11 CPR 8.2(d).

12 CPR 8.2(e). As to the meaning of 'defendant' see PARA 18. CPR Pt 16 (statements of case: see PARA 584 et seq) does not apply (CPR 16.1); cf claim forms under the normal procedure, which form part of the statement of case, and the contents of which are prescribed by CPR 16.2 (see PARA 585).

13 See CPR Pt 22; and PARA 613. As to the requirement for service of the claim form see PARA 120; and as to the meaning of 'service' see PARA 138 note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(2) ALTERNATIVE PROCEDURE FOR CLAIMS/129. Issue of claim form without naming defendants.

129. Issue of claim form without naming defendants.

A practice direction may set out the circumstances in which the court¹ may give permission for a claim form to be issued under the Part 8 procedure² without naming a defendant³ and may set out those cases in which an application for permission must be made by application notice before the claim form is issued⁴. The application notice for permission need not be served⁵ on any other person⁶ and must be accompanied by a copy of the claim form that the applicant proposes to issue⁷. Where the court gives permission it will give directions about the future management of the claim⁸.

1 As to the meaning of 'court' see PARA 22.

2 Ie under CPR Pt 8 (see PARA 127 et seq): see CPR 8.2A(1). As to the meaning of 'Part 8 procedure' see PARA 127 note 2.

3 CPR 8.2A(1). As to the meaning of 'defendant' see PARA 18.

4 CPR 8.2A(2). The application should be made under CPR Pt 23: see PARA 303 et seq.

5 As to the meaning of 'service' see PARA 138 note 2.

6 CPR 8.2A(3)(a).

7 CPR 8.2A(3)(b).

8 CPR 8.2A(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(2) ALTERNATIVE PROCEDURE FOR CLAIMS/130. Acknowledgment of service.

130. Acknowledgment of service.

The defendant¹ must file² an acknowledgment of service in the relevant practice form³ not more than 14 days after service⁴ of the claim form⁵ and serve the acknowledgment of service on the claimant⁶ and any other party⁷. The acknowledgment of service must state whether the defendant contests the claim⁸, and, if the defendant seeks a different remedy from that set out in the claim form, what that remedy is⁹.

The rules relating to defence and reply¹⁰ do not apply where the claim form is a Part 8 claim form¹¹.

Where the defendant objects to the use of the Part 8 procedure, he must state his reasons when he files his acknowledgment of service¹².

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 The acknowledgment of service must be in practice form N210 (see *The Civil Court Practice*): *Practice Direction--Alternative Procedure for Claims* PD 8 para 5.2. As to the meaning of 'practice form' see PARA 14 note 5.

4 As to the meaning of 'service' see PARA 138 note 2. As to time limits generally see PARA 88 et seq.

5 CPR 8.3(1)(a).

6 As to the meaning of 'claimant' see PARA 18.

7 CPR 8.3(1)(b).

8 CPR 8.3(2)(a).

9 CPR 8.3(2)(b). The following rules of CPR Pt 10 (acknowledgment of service: see PARAS 184, 186) apply: (1) CPR 10.3(2) (exceptions to the period for filing an acknowledgment of service: see PARA 186); and (2) CPR 10.5 (contents of acknowledgment of service: see PARA 184): CPR 8.3(3).

10 Ie CPR Pt 15: see PARAS 199 et seq, 604.

11 *Practice Direction--Alternative Procedure for Claims* PD 8 para 5.1. 'Part 8 claim form' means a claim form which so states: para 4.2.

12 See PARA 135. As to the meaning of 'Part 8 procedure' see PARA 127 note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(2) ALTERNATIVE PROCEDURE FOR CLAIMS/131. Consequence of not filing an acknowledgment of service.

131. Consequence of not filing an acknowledgment of service.

Where the defendant¹ to a claim under the Part 8 procedure² has failed to file³ an acknowledgment of service⁴, and the time period for doing so has expired⁵, the defendant may attend the hearing of the claim but may not take part in the hearing unless the court⁶ gives permission⁷.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'Part 8 procedure' see PARA 127 note 2.

3 As to the meaning of 'filing' see PARA 1832 note 8.

4 As to acknowledgment of service see PARA 130.

5 As to the time limit for filing an acknowledgment of service see PARA 130; and as to time limits generally see PARA 88 et seq.

6 As to the meaning of 'court' see PARA 22.

7 CPR 8.4(1), (2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(2) ALTERNATIVE PROCEDURE FOR CLAIMS/132. Filing and serving written evidence.

132. Filing and serving written evidence.

The claimant¹ must file² any written evidence on which he intends to rely when he files his Part 8 claim form³ unless the evidence is contained in the claim form itself⁴. He may rely on the matters set out in his claim form as evidence if the claim form is verified by a statement of truth⁵. The claimant's evidence must be served⁶ on the defendant⁷ with the claim form⁸.

A defendant who wishes to rely on written evidence must file it when he files his acknowledgment of service⁹. If he does so, he must also, at the same time, serve a copy of his evidence on the other parties¹⁰.

The claimant may, within 14 days of service of the defendant's evidence on him, file further written evidence in reply¹¹. If he does so, he must also, within the same time limit, serve a copy of his evidence on the other parties¹².

A party may apply to the court for an extension of time to serve and file evidence under these provisions¹³. Furthermore, the parties may agree in writing on an extension of time for serving and filing evidence by the defendant¹⁴ or for the claimant to file and serve further evidence¹⁵ in reply¹⁶.

1 As to the meaning of 'claimant' see PARA 18.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 See CPR 8.5(1). As to the meaning of 'Part 8 claim form' see PARA 130 note 11. Evidence will normally be in the form of a witness statement or an affidavit but a claimant may rely on the matters set out in his claim form provided that it has been verified by a statement of truth: *Practice Direction--Alternative Procedure for Claims* PD 8 para 7.2. As to the meaning of 'witness statement' see PARA 751 note 1; as to the meaning of 'affidavit' see PARA 540 note 5; and as to statements of truth see PARA 613.

4 *Practice Direction--Alternative Procedure for Claims* PD 8 para 7.1.

5 CPR 8.5(7).

6 As to the meaning of 'service' see PARA 138 note 2.

7 As to the meaning of 'defendant' see PARA 18.

8 CPR 8.5(2).

9 CPR 8.5(3); *Practice Direction--Alternative Procedure for Claims* PD 8 para 7.3. As to acknowledgment of service see PARA 130.

10 CPR 8.5(4).

11 CPR 8.5(5). As to time limits generally see PARA 88 et seq; and as to extension of this time limit see the text and notes 13-16.

12 CPR 8.5(6).

13 *Practice Direction--Alternative Procedure for Claims* PD 8 para 7.4. As to making applications see CPR Pt 23; and PARA 303 et seq. As to the meaning of 'court' see PARA 22.

14 Ie under CPR 8.5(3): see the text and note 9. An agreement extending time for a defendant to file evidence under CPR 8.5 must be filed by the defendant at the same time as he files his acknowledgment of

service and must not extend time by more than 14 days after the defendant files his acknowledgment of service: *Practice Direction--Alternative Procedure for Claims* PD 8 para 7.5(2).

15 le under CPR 8.5(5): see the text and note 11. An agreement extending time for a claimant to file evidence in reply under CPR 8.5(5) must not extend time to more than 28 days after service of the defendant's evidence on the claimant: *Practice Direction--Alternative Procedure for Claims* PD 8 para 7.5(3).

16 *Practice Direction--Alternative Procedure for Claims* PD 8 para 7.5(1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(2) ALTERNATIVE PROCEDURE FOR CLAIMS/133. Evidence under the Part 8 procedure; in general.

133. Evidence under the Part 8 procedure; in general.

No written evidence may be relied on at the hearing of the claim unless it has been served¹ in accordance with the relevant rule² or the court³ gives permission⁴ on application by a party for permission to serve and file⁵ additional evidence⁶.

The court may require or permit a party to give oral evidence at the hearing⁷ and may also give directions requiring the attendance for cross-examination⁸ of a witness who has given written evidence⁹.

1 As to the meaning of 'service' see PARA 138 note 2.

2 Ie in accordance with CPR 8.5: see PARA 132.

3 As to the meaning of 'court' see PARA 22.

4 CPR 8.6(1).

5 As to the meaning of 'filing' see PARA 1832 note 8.

6 See *Practice Direction--Alternative Procedure for Claims* PD 8 para 7.4. As to making applications see CPR Pt 23; and PARA 303 et seq.

7 CPR 8.6(2).

8 As to the meaning of 'cross-examination' see PARA 50 note 4.

9 CPR 8.6(3). As to the court's general power to control evidence see CPR 32.1; and PARA 791.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(2) ALTERNATIVE PROCEDURE FOR CLAIMS/134. Part 20 claims where the Part 8 procedure is used.

134. Part 20 claims where the Part 8 procedure is used.

Where the Part 8 procedure¹ is used, Part 20 of the Civil Procedure Rules, which relates to counterclaims and other additional claims² applies, except that a party may not make a Part 20 claim³ without the court's⁴ permission⁵.

1 As to the meaning of 'Part 8 procedure' see PARA 127 note 2.

2 Ie CPR Pt 20: see PARA 618 et seq. As to the meaning of 'counterclaim' see PARA 618 note 3.

3 As to the meaning of 'Part 20 claim' see PARA 618.

4 As to the meaning of 'court' see PARA 22.

5 CPR 8.7.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(2) ALTERNATIVE PROCEDURE FOR CLAIMS/135. Procedure where the defendant objects to use of the Part 8 procedure.

135. Procedure where the defendant objects to use of the Part 8 procedure.

Where the defendant¹ contends that the Part 8 procedure² should not be used because there is a substantial dispute of fact, and the use of the Part 8 procedure is not required or permitted by a rule or practice direction, he must state his reasons when he files³ his acknowledgment of service⁴. When the court⁵ receives the acknowledgment of service and any written evidence it will give directions as to the future management of the case⁶.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'Part 8 procedure' see PARA 127 note 2.

3 As to the meaning of 'filing' see PARA 1832 note 8.

4 CPR 8.8(1). If the statement of reasons includes matters of evidence it must be verified by a statement of truth: *Practice Direction--Alternative Procedure for Claims* PD 8 para 5.3. As to statements of truth see CPR Pt 22; and PARA 613. CPR 8.5 requires a defendant who wishes to rely on written evidence to file it when he files his acknowledgment of service: see PARA 132. As to acknowledgment of service see PARA 130.

5 As to the meaning of 'court' see PARA 22.

6 CPR 8.8(2). CPR 8.1(3) allows the court to make an order that the claim continue as if the claimant had not used the Part 8 procedure: see PARA 127. As to management of the case see further PARA 137.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(2) ALTERNATIVE PROCEDURE FOR CLAIMS/136. Modifications to the general rules where Part 8 procedure is followed.

136. Modifications to the general rules where Part 8 procedure is followed.

Where the Part 8 procedure¹ is followed, particular provision is made² for the matters which must be stated in the claim form and the defendant³ is not required to file⁴ a defence and therefore the provisions relating to statements of case⁵ and defence and reply⁶ do not apply⁷. Nor does the requirement to serve on the defendant a form for defending the claim⁸ apply⁹. Furthermore, any time limit in the Civil Procedure Rules which prevents the parties from taking a step before a defence is filed does not apply¹⁰.

Where the Part 8 procedure is followed, the claimant¹¹ may not obtain judgment by request on an admission and therefore the rules relating to admission of whole or part of the claim for a specified amount of money¹² and the rules relating to admission of liability to pay a claim for an unspecified amount of money¹³ do not apply¹⁴.

Finally, the claim is treated as allocated to the multi-track and therefore the rules relating to the preliminary stage of case management¹⁵ do not apply¹⁶.

1 As to the meaning of 'Part 8 procedure' see PARA 127 note 2.

2 Ie in CPR Pt 8: see PARA 127 et seq.

3 As to the meaning of 'defendant' see PARA 18.

4 As to the meaning of 'filing' see PARA 1832 note 8.

5 Ie CPR Pt 16: see PARA 584 et seq.

6 Ie CPR Pt 15: see PARAS 199-205, 604.

7 CPR 8.9(a)(i), (ii).

8 Ie under CPR 7.8: see PARA 124. As to the meaning of 'service' see PARA 138 note 2.

9 CPR 8.9(a)(iv).

10 CPR 8.9(a)(iii).

11 As to the meaning of 'claimant' see PARA 18.

12 Ie CPR 14.4, 14.5: see PARAS 191-192.

13 Ie CPR 14.6, 14.7: see PARAS 193-194.

14 CPR 8.9(b)(i). Nor does CPR 7.8 apply: CPR 8.9(b)(ii); and see the text and notes 8-9.

15 Ie CPR Pt 26: see PARA 260 et seq.

16 CPR 8.9(c). As to the effect of this provision on the regime concerning appeals see PARA 127 note 12.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/5. COMMENCEMENT OF PROCEEDINGS/(2) ALTERNATIVE PROCEDURE FOR CLAIMS/137. Managing the claim.

137. Managing the claim.

The court¹ may give directions immediately a Part 8 claim form² is issued either on the application of a party or on its own initiative³. The directions may include fixing a hearing date where:

- 197 (1) there is no dispute, such as in child⁴ and protected party⁵ settlements; or
- 198 (2) where there may be a dispute, such as in claims for mortgage possession or appointment of trustees, but a hearing date could conveniently be given⁶.

Where the court does not fix a hearing date when the claim form is issued, it will give directions for the disposal of the claim as soon as practicable after the defendant⁷ has acknowledged service of the claim form or, as the case may be, after the period for acknowledging service has expired⁸.

Certain applications, such as a consent application under specified provisions of the Landlord and Tenant Act 1954⁹, may not require a hearing¹⁰.

The court may convene a directions hearing before giving directions¹¹.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'Part 8 claim form' see PARA 130 note 11.

3 *Practice Direction--Alternative Procedure for Claims* PD 8 para 6.1.

4 As to the meaning of 'child' see PARA 222 note 3.

5 As to the meaning of 'protected party' see PARA 222 note 1.

6 *Practice Direction--Alternative Procedure for Claims* PD 8 para 6.1(1), (2).

7 As to the meaning of 'defendant' see PARA 18.

8 *Practice Direction--Alternative Procedure for Claims* PD 8 para 6.2. As to acknowledgment of service see PARA 130; and as to the meaning of 'service' see PARA 138 note 2.

9 *le* under the Landlord and Tenant Act 1954 s 38: see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 709.

10 *Practice Direction--Alternative Procedure for Claims* PD 8 para 6.3.

11 *Practice Direction--Alternative Procedure for Claims* PD 8 para 6.4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(1) SERVICE GENERALLY/138. Rules about service apply generally.

6. SERVICE OF DOCUMENTS

(1) SERVICE GENERALLY

138. Rules about service apply generally.

The rules in Part 6 of the Civil Procedure Rules¹ apply to the service² of documents, except where another Part of those Rules, any other enactment, or a practice direction makes a different provision³ or the court⁴ orders otherwise⁵. Different sections of Part 6 apply to service of the claim form⁶ and other documents⁷ in the jurisdiction⁸, to service of the claim form and other documents out of the jurisdiction⁹, and to service of documents from foreign courts or tribunals¹⁰.

1 Ie CPR Pt 6 (see PARA 139 et seq): see CPR 6.1. Part 6 has been entirely replaced with effect from 1 October 2008 by the Civil Procedure (Amendment) Rules 2008, SI 2008/2178.

2 'Service' means the steps required by rules of court to bring documents used in court proceedings to a person's attention: CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31.

3 CPR 6.1(a). Other enactments making different provision include the Companies Act 1985 ss 694A, 695, 725, relating to the service of documents at the registered offices of companies or, in respect of overseas companies, at notified addresses, and the Companies Act 2006 ss 1056, 1139, 1140: see **COMPANIES** vol 14 (2009) PARA 671 et seq, **COMPANIES** vol 15 (2009) PARAS 1826, 1836. See, however, CPR 6.3(2); and PARA 139 text and note 10. Other rules which deal with service include the following: (1) CPR 54.7 relating to service of the claim form in judicial review proceedings; (2) CPR 55.6 (service on trespassers in possession proceedings) and CPR 55.10 (service of possession claims relating to mortgaged residential property). As to service on prisoners see **PRISONS** vol 36(2) (Reissue) PARA 611.

4 As to the meaning of 'court' see PARA 22.

5 CPR 6.1(b).

6 See CPR Pt 6 Section II (CPR 6.3-6.19). 'Claim' includes petition and any application made before action or to commence proceedings and 'claim form', 'claimant' and 'defendant' are to be construed accordingly: CPR 6.2(c). As to the meaning of 'filing' see PARA 1832 note 8. As to the meanings of 'claimant' and 'defendant' generally see PARA 18. Any reference in CPR Pt 6 Section I to a defendant or a party to be served includes the person to be served with the claim form on behalf of a child or protected party under CPR 6.13(1) or (2) (see PARA 148): CPR 6.13(3).

7 See CPR Pt 6 Section III (CPR 6.20-6.29).

8 As to the meaning of 'jurisdiction' see PARA 117 note 6.

9 See CPR Pt 6 Section IV (CPR 6.30-6.47); and PARA 168 et seq.

10 See CPR Pt 6 Section V (CPR 6.48-6.52); and PARA 181.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION/139. Methods of service of a claim form or other document.

(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION

139. Methods of service of a claim form or other document.

A claim form¹ or other document may be served² by any of the following methods:

- 199 (1) personal service³;
- 200 (2) first class post, document exchange or other service which provides for delivery on the next business day, in accordance with the relevant practice direction⁴;
- 201 (3) leaving the document at a specified place⁵;
- 202 (4) by fax or other means of electronic communication⁶ in accordance with the relevant practice direction⁷; or
- 203 (5) by any method authorised⁸ by the court⁹.

A company may be served by any method permitted under Part 6 of the Civil Procedure Rules or by any of the methods of service set out in the Companies Act 1985 or the Companies Act 2006¹⁰, and a limited liability partnership may be served by any method permitted under Part 6 of the Civil Procedure Rules or by any of the methods of service on a British company set out¹¹ in the Companies Act 1985¹².

1 As to the meaning of 'claim form' see PARA 138 note 6.

2 As to the meaning of 'service' see PARA 138 note 2. As to the requirements for service of a claim form see further PARA 120; and as to the extension of time for serving a claim form see PARA 121.

3 In accordance with CPR 6.5 (claim form) or 6.22 (other documents) (see PARA 142); see CPR 6.3(1)(a), 6.20(1)(a).

4 CPR 6.3(1)(b), 6.20(1)(b). Service by document exchange (DX) may take place only where (1) the address at which the party is to be served includes a numbered box at a DX; or (2) the writing paper of the party who is to be served or of the solicitor acting for that party sets out the DX box number; and (3) the party or the solicitor acting for that party has not indicated in writing that they are unwilling to accept service by DX: *Practice Direction--Service* PD 6A para 2.1. Service by post, DX or other service which provides for delivery on the next business day is effected by (a) placing the document in a post box; (b) leaving the document with or delivering the document to the relevant service provider; or (c) having the document collected by the relevant service provider: para 3.1.

5 In a place specified in CPR 6.7, 6.8, 6.9 or 6.10 (claim form) (see PARA 143) or 6.23 (other documents) (see PARA 144): see CPR 6.3(1)(c), 6.20(1)(c).

6 Where a document is to be served by fax or other electronic means, the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving (1) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and (2) the fax number, e-mail address or other electronic identification to which it must be sent: *Practice Direction--Service* PD 6A para 4.1(1). The following are to be taken as sufficient written indications for these purposes: (a) a fax number set out on the writing paper of the solicitor acting for the party to be served; (b) an e-mail address set out on the writing paper of the solicitor acting for the party to be served but only where it is stated that the e-mail address may be used for service; or (c) a fax number, e-mail address or electronic identification set out on a statement of case or a response to a claim filed with the court: para 4.1(2). Where a party intends to serve a document by

electronic means (other than by fax) that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means (for example, the format in which documents are to be sent and the maximum size of attachments that may be received): para 4.2. 'Solicitor' includes other authorised litigators within the meaning of the Courts and Legal Services Act 1990: CPR 6.2(d).

7 CPR 6.3(1)(d), 6.20(1)(d). Where a document is served by electronic means, the party serving the document need not in addition send or deliver a hard copy: *Practice Direction--Service* PD 6A para 4.3.

8 le under CPR 6.15 (claim form) or 6.27 (other documents): see PARA 152.

9 CPR 6.3(1)(e), 6.20(1)(e).

10 See CPR 6.3(2), 6.20(2); and PARA 152. As to the methods of service permitted by the Companies Acts 1985 and 2006 see PARA 138 note 3. It appears that following the introduction of what is now CPR 6.3(2) and CPR 6.9 (see PARA 143), the position has now reverted to what it was before the Companies Act 1985 s 694A(2) was enacted, namely that process can be served on a foreign company with a place of business in London without the necessity for establishing any link between the process and the business being carried on in London: *Saab v Saudi American Bank* [1999] 4 All ER 321, [1999] 1 WLR 1861, CA. On its true construction, the Companies Act 1985 s 694A is permissive, not mandatory, and does not prevent some other statutory provision, whether original or subordinate legislation, from making other provision for service on overseas companies with a branch in Great Britain. Nor is there any statutory provision which provides that an overseas company with a branch in Great Britain can only be sued in respect of the carrying on of the business of that branch. It follows that the relevant provisions of CPR Pt 6 are not ultra vires: *Sea Assets Ltd v PT Garuda Indonesia* [2000] 4 All ER 371.

11 le in the Companies Act 1985 s 725: see **COMPANIES** vol 14 (2009) PARA 671 et seq.

12 CPR 6.3(3), 6.20(3).

UPDATE

139 Methods of service of a claim form or other document

NOTE 6--'Solicitor' now includes any other person who, for the purposes of the Legal Services Act 2007, is an authorised person () in relation to an activity which constitutes the conduct of litigation: CPR 6.2(d) (substituted by SI 2009/3390).

NOTES 7, 8--See *Brown v Innovatorone plc* [2009] EWHC 1376 (Comm), [2009] All ER (D) 211 (Jun), (no authorisation given by defendants' solicitors to accept service of claim form by fax).

TEXT AND NOTES 10-12--CPR 6.3(2), (3), 6.20(2), (3) amended: SI 2009/2092.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION/140. Who is to serve the claim form.

140. Who is to serve the claim form.

The court¹ will serve² the claim form³ except where:

- 204 (1) a rule or practice direction provides that the claimant⁴ must serve it⁵;
- 205 (2) the claimant notifies the court that the claimant wishes to serve it⁶;
- 206 (3) the court orders or directs otherwise⁷.

Where the court is to serve the claim form, it is for the court to decide which method of service is to be used⁸. Where the court is to serve the claim form, the claimant must, in addition to filing a copy for the court, provide a copy for each defendant⁹ to be served¹⁰. Where the court has sent a notification of outcome of postal service to the claimant¹¹ or a notification of non-service by a bailiff¹², the court will not try to serve the claim form again¹³.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'claim form' see PARA 138 note 6.

4 As to the meaning of 'claimant' see PARA 138 note 6.

5 CPR 6.4(1)(a).

6 CPR 6.4(1)(b).

7 CPR 6.4(1)(c). Where the court serves a document the method will normally be by first class post: *Practice Direction--Service* PD 6A para 8.1.

8 CPR 6.4(2). As to methods of service see PARA 139.

9 As to the meaning of 'defendant' see PARA 138 note 6.

10 CPR 6.4(3).

11 In accordance with CPR 6.18: see PARA 155.

12 In accordance with CPR 6.19: see PARA 155.

13 CPR 6.4(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION/141. Who is to serve other documents.

141. Who is to serve other documents.

A party to proceedings will serve¹ a document which that party has prepared except where a rule or practice direction provides that the court² will serve the document or the court orders otherwise³.

The court will serve a document which it has prepared except where (1) a rule or practice direction provides that a party must serve the document; (2) the party on whose behalf the document is to be served notifies the court that the party wishes to serve it; or (3) the court orders otherwise⁴. Where the court is to serve a document, it is for the court to decide which method of service is to be used⁵. Where the court is to serve a document prepared by a party, that party must provide a copy for the court and for each party to be served⁶.

1 As to the meaning of 'service' see PARA 138 note 2. As to methods of service see PARA 139.

2 As to the meaning of 'court' see PARA 22.

3 CPR 6.21(1).

4 CPR 6.21(2).

5 CPR 6.21(3).

6 CPR 6.21(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION/142. Personal service.

142. Personal service.

Where required by another Part of the Civil Procedure Rules, any other enactment, a practice direction or a court order, a claim form¹ must be served² personally³. In other cases, a claim form may be served personally except:

- 207 (1) where (a) the defendant⁴ has given in writing the business address within the jurisdiction⁵ of a solicitor⁶ as an address at which the defendant may be served with the claim form; or (b) a solicitor acting for the defendant has notified the claimant⁷ in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction, when the claim form must be served at the business address of that solicitor⁸; or
- 208 (2) in any proceedings against the Crown⁹.

A claim form is served personally on an individual by leaving it with that individual¹⁰ and is served personally on a company or other corporation by leaving it with a person holding a senior position within the company or corporation¹¹. A document is served personally on a partnership (where partners are being sued in the name of their firm) by leaving it with a partner or a person who, at the time of service, has the control or management of the partnership business at its principal place of business¹².

Where required by another Part of the Civil Procedure Rules, any other enactment, a practice direction or a court order, a document other than a claim form must be served personally¹³. In other cases, a document may be served personally except:

- 209 (i) where the party to be served has given the business address within the United Kingdom of his solicitor as an address for service¹⁴; or
- 210 (ii) in any proceedings by or against the Crown¹⁵.

A document may be served personally as if the document were a claim form in accordance with the above provisions¹⁶.

1 As to the meaning of 'claim form' see PARA 138 note 6.

2 As to the meaning of 'service' see PARA 138 note 2.

3 CPR 6.5(1). As to personal service on members of the armed forces see *Practice Direction--Service* PD 6A Annex.

4 As to the meaning of 'defendant' see PARA 138 note 6.

5 As to the meaning of 'jurisdiction' see PARA 117 note 6.

6 As to the meaning of 'solicitor' see PARA 139 note 6.

7 As to the meaning of 'claimant' see PARA 138 note 6.

8 CPR 6.5(2)(a), 6.7. A solicitor does not generally have implied authority to accept service of a claim form on behalf of a client and if he accepts such service in the absence of express authority he may be in breach of

his professional duty to his client: see *Smith v Probyn* [2000] All ER (D) 250. See also *Nangle v Royal Free Hospital NHS Trust* [2001] EWCA Civ 127, [2001] 3 All ER 793, [2001] CPLR 225. Where a claim form has been served on any other person, the court should not exercise its power to dispense with service: *Cranfield v Bridegrove Ltd* [2003] EWCA Civ 656, [2003] 3 All ER 129, [2003] 1 WLR 2441 (claim form served on defendant's insurer). The notification by a solicitor that he is authorised to accept service of a particular claim is not ordinarily notification that he is entitled to accept service of a claim brought by another party in relation to the same matter: *Firstdale Ltd v Quinton* [2004] EWHC 1926 (Comm), [2005] 1 All ER 639, (2004) Times, 27 October (notification to solicitors of party seeking recovery of debt did not constitute notification to assignee of debt).

9 CPR 6.5(2)(b). As to service on the Crown see PARA 145.

10 CPR 6.5(3)(a).

11 CPR 6.5(3)(b); *Practice Direction--Service* PD 6A para 6.1. Each of the following persons is a person holding a senior position: (1) in respect of a registered company or corporation, a director, the treasurer, secretary, chief executive, manager or other officer of the company or corporation; (2) in respect of a corporation which is not a registered company, in addition to those persons set out in head (1), the mayor, chairman, president, town clerk or similar officer: para 6.2.

12 CPR 6.5(3)(c).

13 CPR 6.22(1).

14 Ie under CPR 6.23(2)(a) (see PARA 144): CPR 6.22(2)(a).

15 CPR 6.22(2)(b).

16 CPR 6.22(3).

UPDATE

142 Personal service

NOTE 8--CPR 6.7 substituted: SI 2009/3390.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION/143. Address for service of claim form.

143. Address for service of claim form.

The claim form¹ must be served² within the jurisdiction³ except where there is a contractually agreed method for serving the claim form⁴ or as provided by the rules⁵ relating to service out of the jurisdiction⁶. The claimant⁷ must include in the claim form an address at which the defendant⁸ may be served, which must include a full postcode, unless the court orders otherwise⁹. Generally, the defendant may be served with the claim form at an address within the jurisdiction which the defendant has given for the purpose of being served with the proceedings¹⁰. In any claim by a tenant against a landlord, however, the claim form may be served at an address given by the landlord¹¹.

Where the requirements for personal service and as to service on a solicitor do not apply, the defendant does not give an address at which the defendant may be served and the claimant does not wish to effect personal service¹², the claim form must be served on the defendant at a particular place according to the nature of the defendant being served¹³.

Where a claimant has reason to believe that the address of a defendant who is an individual, an individual being sued in the name of a business or an individual being sued in the business name of a partnership is an address at which the defendant no longer resides or carries on business, the claimant must take reasonable steps to ascertain the address of the defendant's current residence or place of business¹⁴. Where, having taken the required reasonable steps, the claimant ascertains the defendant's current address, the claim form must be served at that address; or if the claimant is unable to ascertain the defendant's current address, the claimant must consider whether there is an alternative place where, or an alternative method by which, service may be effected¹⁵. If there is such a place where, or a method by which, service may be effected, the claimant must make an application¹⁶ for service of the claim form by an alternative method or at an alternative place¹⁷. Where the claimant (1) cannot ascertain the defendant's current residence or place of business; and (2) cannot ascertain an alternative place or an alternative method, the claimant may serve on the defendant's usual or last known address¹⁸.

1 As to the meaning of 'claim form' see PARA 138 note 6.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'jurisdiction' see PARA 117 note 6.

4 Ie where CPR 6.11 applies: see PARA 146.

5 Ie under CPR Pt 6 Section IV (CPR 6.03-6.47).

6 CPR 6.6(1). As to the rules for service out of the jurisdiction see PARA 156 et seq.

7 As to the meaning of 'claimant' see PARA 138 note 6.

8 As to the meaning of 'defendant' see PARA 138 note 6.

9 CPR 6.6(2). Paragraph (2) does not apply where an order made by the court under CPR 6.15 (service by an alternative method or at an alternative place: see PARA 152) specifies the place or method of service of the claim form: CPR 6.6(3). As to post codes see *Practice Direction--Statement of Case* PD 16 para 2.4.

10 CPR 6.8(a). This is subject to CPR 6.5(1) (requirements as to personal service: see PARA 142) and CPR 6.7 (service on a solicitor: see PARA 142).

11 CPR 6.8(b). I.e an address given under the Landlord and Tenant Act 1987 s 48: see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 53.

12 I.e under CPR 6.5(2).

13 CPR 6.9(1), (2). The prescribed place is, in the case of (1) an individual, his usual or last known residence; (2) an individual being sued in the name of a business, his usual or last known residence or place of business or last known place of business; (3) an individual being sued in the business name of a partnership, his usual or last known residence or the principal or last known place of business of the partnership; (4) a limited liability partnership, the principal office of the partnership or any place of business of the partnership within the jurisdiction which has a real connection with the claim; (5) a corporation incorporated in England and Wales other than a company, the principal office of the corporation or any place within the jurisdiction where the corporation carries on its activities and which has a real connection with the claim; (6) a company registered in England and Wales, the principal office of the company or any place of business of the company within the jurisdiction which has a real connection with the claim; and (7) any other company or corporation, any place within the jurisdiction where the corporation carries on its activities or any place of business of the company within the jurisdiction: CPR 6.9(2), Table. As to the statutory methods of service on a company see CPR 6.3(2); and PARA 138 note 3.

See *Chellaram v Chellaram (No 2)* [2002] EWHC 632 (Ch), [2002] 3 All ER 17 (address, used only occasionally by defendant on rare visits to England, not a 'residence' so could not be his 'last known residence'); *Lakah Group v Al Jazeera Satellite Channel* [2003] All ER (D) 398 (Mar) (address where claim form served was business address of company working with defendant company; it was not actually defendant's place of business within United Kingdom and so service not validly effected); *Cranfield v Bridegrove Ltd* [2003] EWCA Civ 656, [2003] 3 All ER 129, [2003] 1 WLR 2441 (service effected where claimant sent documents to last known residence even when he knew that defendant was not living at that residence); *Mersey Docks Property Holdings Ltd v Kilgour* [2004] EWHC 1638 (TCC), [2004] BLR 412 (claimant had to have taken reasonable steps to find out, at the date of service, the current or last place of business); *Collier v Williams* [2006] EWCA Civ 20, [2007] 1 All ER 991, [2006] 1 WLR 1945 ('last known residence' cannot include an address at which the defendant never resided; but see Zuckerman *Civil Procedure: Principles of Practice* (2nd Edn, 2006) para 4.68 et seq); and *Cherney v Deripaska* [2007] EWHC 965 (Comm), [2007] 2 All ER (Comm) 785 (delivery to address used infrequently did not constitute service).

14 CPR 6.9(3).

15 CPR 6.9(4).

16 I.e under CPR 6.15.

17 CPR 6.9(5).

18 I.e in accordance with CPR 6.9(2), Table: CPR 6.9(6).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION/144. Address for service of other documents.

144. Address for service of other documents.

A party to proceedings must give an address at which that party may be served with documents relating to those proceedings¹. The address must include a full postcode unless the court orders otherwise². A party's address for service must be (1) the business address within the United Kingdom of a solicitor³ acting for the party to be served⁴; or (2) where there is no solicitor acting for the party to be served, an address within the United Kingdom at which the party resides or carries on business⁵. Where there is no solicitor acting for the party to be served and the party does not have an address within the United Kingdom at which that party resides or carries on business, the party must give an address for service within the United Kingdom⁶.

Any document to be served in proceedings must be sent or transmitted to, or left at, the party's address for service as above unless it is to be served personally or the court orders otherwise⁷. Where a party indicates or is deemed to have indicated that they will accept service by fax⁸, the fax number given by that party must be at the address for service⁹. Where a party indicates¹⁰ that they will accept service by electronic means other than fax, the e-mail address or electronic identification given by that party will be deemed to be at the address for service¹¹.

These provisions do not apply where an order made by the court¹² specifies where a document may be served¹³.

Where the address for service of a party changes, that party must give notice in writing of the change as soon as it has taken place to the court and every other party¹⁴.

1 CPR 6.23(1).

2 CPR 6.23(1). As to post codes see *Practice Direction--Statement of Case* PD 16 para 2.4.

3 As to the meaning of 'solicitor' see PARA 139 note 6.

4 CPR 6.23(2)(a). Where a party gives the business address of a solicitor as that party's address for service, that solicitor will be considered to be acting for the party until the provisions of CPR Pt 42 (change of solicitor: see PARA 240 et seq) are complied with: CPR 42.1.

5 CPR 6.23(2)(b).

6 CPR 6.23(3).

7 CPR 6.23(4).

8 Ie in accordance with *Practice Direction--Service* PD 6A para 4.1: see PARA 139 note 6.

9 CPR 6.23(5).

10 Ie in accordance with *Practice Direction--Service* PD 6A para 4.1: see PARA 139 note 6.

11 CPR 6.23(6).

12 Ie under CPR 6.27 (service by an alternative method or at an alternative place): see PARA 152.

13 CPR 6.23(7). As to service on the Crown see PARA 145.

14 CPR 6.24.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION/145. Service on the Crown.

145. Service on the Crown.

In proceedings against the Crown, service of the claim form¹ on the Attorney General must be effected on the Treasury Solicitor and service on a government department must be effected on the solicitor acting for that department². In proceedings by or against the Crown, service of any document in the proceedings on the Crown must be effected in the same manner as if the document were a claim form³.

1 As to the meaning of 'claim form' see PARA 138 note 6.

2 CPR 6.10. As to the list of the solicitors acting in civil proceedings for the different government departments on whom service is to be effected, and of their addresses, see PARA 220 note 3.

3 CPR 6.23(7).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION/146. Service of the claim form by contractually agreed method.

146. Service of the claim form by contractually agreed method.

Where a contract contains a term providing that, in the event of a claim¹ being started in relation to the contract, the claim form² may be served³ by a method or at a place specified in the contract, and a claim solely in respect of that contract is started, the claim form may be served on the defendant⁴ by the method or at the place specified in the contract⁵. Where in accordance with the contract the claim form is to be served out of the jurisdiction⁶, it may be served if permission to serve it out of the jurisdiction has been granted⁷ or without permission⁸.

1 As to the meaning of 'claim' see PARA 138 note 6.

2 As to the meaning of 'claim form' see PARA 138 note 6.

3 As to the meaning of 'service' see PARA 138 note 2.

4 As to the meaning of 'defendant' see PARA 138 note 6.

5 CPR 6.11(1).

6 As to the meaning of 'jurisdiction' see PARA 117 note 6.

7 Ie under CPR 6.36: see PARA 170.

8 Ie under CPR 6.32 or 6.33 (see PARAS 168, 169): CPR 6.11(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION/147. Service of the claim form relating to a contract on an agent.

147. Service of the claim form relating to a contract on an agent.

The court¹ may, on application, permit a claim form² relating to a contract to be served³ on the defendant's agent where:

- 211 (1) the defendant⁴ is out of the jurisdiction⁵;
- 212 (2) the contract to which the claim⁶ relates was entered into within the jurisdiction with or through the defendant's agent; and
- 213 (3) at the time of the application either the agent's authority has not been terminated or the agent is still in business relations with the defendant⁷.

Such an application must be supported by evidence setting out (a) details of the contract and that it was entered into within the jurisdiction or through an agent who is within the jurisdiction; (b) that the principal for whom the agent is acting was, at the time the contract was entered into and is at the time of the application, out of the jurisdiction; and (c) why service out of the jurisdiction cannot be effected⁸. An application may be made without notice⁹.

An order for service on an agent under these provisions must state the period within which the defendant must respond to the particulars of claim¹⁰. Where the court makes an order, a copy of the application notice and the order must be served with the claim form on the agent; and unless the court orders otherwise, the claimant must send to the defendant a copy of the application notice, the order and the claim form¹¹. These provisions do not exclude the court's power¹² to order service by an alternative method or at an alternative place¹³.

- 1 As to the meaning of 'court' see PARA 22.
- 2 As to the meaning of 'claim form' see PARA 138 note 6.
- 3 As to the meaning of 'service' see PARA 138 note 2.
- 4 As to the meaning of 'defendant' see PARA 138 note 6.
- 5 As to the meaning of 'jurisdiction' see PARA 117 note 6.
- 6 As to the meaning of 'claim' see PARA 138 note 6.
- 7 CPR 6.12(1).
- 8 CPR 6.12(2)(a).
- 9 CPR 6.12(2)(b).
- 10 CPR 6.12(3).
- 11 CPR 6.12(4).
- 12 Ie under CPR 6.15: see PARA 152.
- 13 CPR 6.12(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION/148. Service of claim form on children and protected parties.

148. Service of claim form on children and protected parties.

Special provision is made for the service¹ of the claim form² on children³ and protected parties⁴. Where the defendant⁵ is a child who is not also a protected party, the claim form must be served on one of the child's parents or guardians or, if there is no parent or guardian, an adult with whom the child resides or in whose care the child is⁶. Where the defendant is a protected party, the claim form must be served on one of the following persons with authority in relation to the protected party as (1) the attorney under a registered enduring power of attorney; (2) the donee of a lasting power of attorney; or (3) the deputy appointed by the Court of Protection⁷. If there is no such person, the claim form must be served on an adult with whom the protected party resides or in whose care the protected party is⁸.

The court⁹ may make an order permitting a claim form to be served on a child or protected party, or on a person other than the person specified above¹⁰. An application for such an order may be made without notice¹¹. The court may order that, although a claim form has been sent or given to someone other than the person specified in above, it is to be treated as if it had been properly served¹².

These provisions do not apply where the court has made an order¹³ allowing a child to conduct proceedings without a litigation friend¹⁴.

1 As to the meaning of 'service' see PARA 138 note 2.

2 As to the meaning of 'claim form' see PARA 138 note 6.

3 As to the meaning of 'child' see PARA 222 note 3.

4 See CPR 6.13. As to the meaning of 'protected party' see PARA 222 note 1.

5 As to the meaning of 'defendant' see PARA 138 note 6.

6 CPR 6.13(1).

7 CPR 6.13(2)(a). As to enduring powers of attorney and lasting powers of attorney see **AGENCY** vol 1 (2008) PARAS 194 et seq, 217 et seq. As to the Court of Protection see **MENTAL HEALTH** vol 30(2) Reissue PARA 750 et seq.

8 CPR 6.13(2)(b).

9 As to the meaning of 'court' see PARA 22.

10 CPR 6.13(4).

11 CPR 6.13(5).

12 CPR 6.13(6).

13 Ie under CPR 21.2(3): see PARA 222; and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1411.

14 CPR 6.13(7). As to litigation friends see PARA 222.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION/149. Service of other documents on children and protected parties.

149. Service of other documents on children and protected parties.

An application for an order appointing a litigation friend¹ where a child² or protected party³ has no litigation friend must be served in accordance with the relevant rules⁴. Any other document which would otherwise be served on a child or a protected party must be served on the litigation friend conducting the proceedings on behalf of the child or protected party⁵.

The court⁶ may make an order permitting a document to be served on the child or protected party or on some person other than the litigation friend or other person required to be served with an application for appointment of a litigation friend⁷. An application for such an order may be made without notice⁸. The court may order that, although a document has been sent or given to someone other than the litigation friend or other specified persons⁹, the document is to be treated as if it had been properly served¹⁰.

These provisions do not apply where the court has made an order¹¹ allowing a child to conduct proceedings without a litigation friend¹².

1 As to litigation friends see PARA 222.

2 As to the meaning of 'child' see PARA 222 note 3.

3 As to the meaning of 'protected party' see PARA 222 note 1.

4 Ie in accordance with CPR 21.8(1), (2) (see PARA 222; and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1415; **MENTAL HEALTH** vol 30(2) (Reissue) PARA 636): CPR 6.25(1).

5 CPR 6.25(2).

6 As to the meaning of 'court' see PARA 22.

7 CPR 6.25(3).

8 CPR 6.25(4).

9 Ie other than the person specified in CPR 21.8 or 6.25(2).

10 CPR 6.25(5).

11 Ie under CPR 21.2(3): see PARA 222; and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1411.

12 CPR 6.25(6).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION/150. Service on members of the regular forces and of the United States Air Force.

150. Service on members of the regular forces and of the United States Air Force.

Information and guidance has been issued for litigants and legal representatives¹ who wish to serve legal documents in civil proceedings on parties who are, or at the material time were, regular members of the regular forces (within the meaning of the Armed Forces Act 2006)² or who are members of the United States Air Force in the United Kingdom³.

1 As to the meaning of 'legal representative' see PARA 1833 note 13.

2 See *Practice Direction--Service* PD 6A para 5.1, Annex paras 1-14. As to members of the regular forces see **ARMED FORCES**.

3 See *Practice Direction--Service* PD 6A Annex paras 15, 16.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION/151. Deemed service.

151. Deemed service.

A claim form¹ served² in accordance with Part 6 of the Civil Procedure Rules is deemed to be served on the second business day³ after completion of the relevant step⁴ after it has been issued⁵.

A document, other than a claim form, served in accordance with the Civil Procedure Rules or any relevant practice direction, is deemed to be served as follows⁶. If served by:

- 214 (1) first class post or other service which provides for delivery on the next business day, it is deemed to be served on the second day after it was posted, left with, delivered to or collected by the relevant service provider provided that day is a business day or, if not, the next business day after that day;
- 215 (2) document exchange, it is deemed to be served on the second day after it was left with, delivered to or collected by the relevant service provider provided that day is a business day or, if not, the next business day after that day;
- 216 (3) delivering the document to or leaving it at a permitted address, it is deemed to be served, if it is delivered to or left at the permitted address on a business day before 4.30 pm, on that day or, in any other case, on the next business day after that day;
- 217 (4) fax, if the transmission of the fax is completed on a business day before 4.30 pm, it is deemed to be served on that day or, in any other case, on the next business day after the day on which it was transmitted;
- 218 (5) other electronic method, if the e-mail or other electronic transmission is sent on a business day before 4.30 pm, it is deemed to be served on that day or, in any other case, on the next business day after the day on which it was sent;
- 219 (6) personal service, if the document is served personally before 4.30 pm on a business day, it is deemed to be served on that day or, in any other case, on the next business day after that day⁷.

It has been held that in order to establish whether a document has been served in time, the court will not look to the day on which the document actually arrived, whether that day is earlier or later than the date to be derived from the provisions set out above, since uncertainties in the postal system and similar considerations in respect of the other methods of service make it sensible that there should be a date of service which is certain and not subject to challenge on grounds of uncertain and potentially contentious fact⁸.

1 As to the meaning of 'claim form' see PARA 138 note 6.

2 As to the meaning of 'service' see PARA 138 note 2.

3 'Business day' means any day except Saturday, Sunday, a bank holiday, Good Friday or Christmas Day: CPR 6.2(b). 'Bank holiday' means a bank holiday under the Banking and Financial Dealings Act 1971 in the part of the United Kingdom where service is to take place: CPR 6.2(a). See also CPR 2.8(4), which excludes a Saturday, Sunday, a Bank Holiday, Christmas Day or Good Friday from calculations of periods of five days or less; and PARA 88.

4 Ie under CPR 7.5(1): see PARA 120.

5 CPR 6.14.

6 CPR 6.26.

7 CPR 6.26, Table.

8 *Godwin v Swindon Borough Council* [2001] EWCA Civ 1478, [2001] 4 All ER 641, [2001] All ER (D) 135 (Oct); *Anderton v Clwyd County Council* [2002] EWCA Civ 933, [2002] 3 All ER 813.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION/152. Service by an alternative method or at an alternative place.

152. Service by an alternative method or at an alternative place.

Where it appears to the court¹ that there is a good reason to authorise service² of the claim form³ by a method or at a place not otherwise permitted by Part 6 of the Civil Procedure Rules, the court may make an order permitting service by an alternative method or at an alternative place⁴. On such an application, the court may order that steps already taken to bring the claim form to the attention of the defendant⁵ by an alternative method or at an alternative place constitute good service⁶. An application must be supported by evidence⁷ and may be made without notice⁸. The order permitting service by an alternative method or at an alternative place must specify the method or place of service⁹, the date on which the claim form is deemed served¹⁰, and the period for filing an acknowledgment of service, filing an admission or filing a defence¹¹.

These provisions apply to any document in the proceedings as they apply to a claim form¹². They are intended to be used prospectively, rather than retrospectively, and may not be applied to correct a past error with regard to service¹³.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'claim form' see PARA 138 note 6.

4 CPR 6.15(1). See *Albon (t/a N A Carriage Co) v Naza Motor Trading SDN BHD* [2007] EWHC 327 (Ch), [2007] 1 All ER (Comm) 813 (overriding objective practically dictated that order authorising service by alternative method be made). See also *BAS Capital Funding Corp v Medfinco Ltd* [2003] EWHC 1798 (Ch), [2004] 1 Lloyd's Rep 652. The test of whether there is 'good reason' for making the order applies at the time of making the order: *Addax BV Geneva Branch v Coral Suki SA* [2004] EWHC 2882 (Comm), [2005] 2 All ER (Comm) 137. As to the extension of time for serving a claim form see PARA 121.

5 As to the meaning of 'defendant' see PARA 138 note 6. See also note 12.

6 CPR 6.15(2).

7 CPR 6.15(3)(a). Where an application for an order under CPR 6.15 is made before the document is served, the application must be supported by evidence stating (1) the reason why an order is sought; (2) what alternative method or place is proposed, and (3) why the applicant believes that the document is likely to reach the person to be served by the method or at the place proposed: *Practice Direction--Service* PD 6A para 9.1. Where the application for an order is made after the applicant has taken steps to bring the document to the attention of the person to be served by an alternative method or at an alternative place, the application must be supported by evidence stating: (a) the reason why the order is sought; (b) what alternative method or alternative place was used; (c) when the alternative method or place was used; and (d) why the applicant believes that the document is likely to have reached the person to be served by the alternative method or at the alternative place: para 9.2. An application for service by alternative means under what is now CPR 6.15 is to be construed solely by reference to 'good reason'; the discretion is otherwise unfettered: *Knauf UK GmbH v British Gypsum Ltd* [2001] 2 All ER (Comm) 332, [2001] All ER (D) 310 (Mar); revsd on the facts as to what constituted 'good reason' [2001] EWCA Civ 1570, [2001] 2 All ER (Comm) 960, [2001] All ER (D) 338 (Oct).

8 CPR 6.15(3)(b).

9 CPR 6.15(4)(a). As to methods of service generally see PARA 139.

10 CPR 6.15(4)(b). As to deemed service generally see PARA 151.

11 CPR 6.15(4)(c). As to the period for filing an acknowledgment of service, an admission or a defence see PARA 184 et seq.

12 CPR 6.27. Reference to the defendant in CPR 6.15 is modified accordingly: CPR 6.27.

13 *Elmes v Hygrade Food Products plc* [2001] EWCA Civ 121, [2001] All ER (D) 158 (Jan).

UPDATE

152 Service by an alternative method or at an alternative place

NOTE 4--See *Brown v Innovatorone plc* [2009] EWHC 1376 (Comm), [2009] All ER (D) 211 (Jun) (no proper basis for exercising power in CPR 6.15 where claimants' solicitors left service of claim form until very late and not observed rules for service).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION/153. Power of court to dispense with service.

153. Power of court to dispense with service.

The court¹ may dispense with service² of a claim form³ in exceptional circumstances⁴. An application for an order to dispense with service may be made at any time and must be supported by evidence; it may be made without notice⁵.

The court may dispense with service of any document which is to be served in the proceedings⁶. An application for such an order must be supported by evidence and may be made without notice⁷.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'claim form' see PARA 138 note 6.

4 CPR 6.16(1). As to the exercise of this power see *Infantino v Maclean* [2001] 3 All ER 802, disapproved in *Godwin v Swindon Borough Council* [2001] EWCA Civ 1478, [2001] 4 All ER 641, [2001] All ER (D) 135 (Oct). The power to dispense with service can be both retrospective and prospective, with the vast majority of orders being sought prospectively: *Anderton v Clwyd County Council* [2002] EWCA Civ 933, [2002] 3 All ER 813, [2002] 1 WLR 3174. Cf *Wilkey v British Broadcasting Corp* [2002] EWCA Civ 1561, [2002] 4 All ER 1177, [2003] 1 WLR 1, where it was held that a strict approach is to be adopted and the power to dispense with service should not be exercised in a claimant's favour. See also *Shiblaq v Sadikoglu* [2004] EWHC 1890 (Comm), [2004] 2 All ER (Comm) 596; *Phillips v Symes (No 3)* [2008] UKHL 1, [2008] 2 All ER 537, [2008] 1 WLR 180; *Nesheim v Kosa* [2006] EWHC 2710 (Ch), [2007] WTLR 149; *Olafsson v Gissurarson* [2008] EWCA Civ 152, [2008] 1 All ER (Comm) 1106, [2008] 1 WLR 2016.

5 CPR 6.16(2).

6 CPR 6.28(1).

7 CPR 6.28(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION/154. Notice and certificate of service.

154. Notice and certificate of service.

Where the court¹ serves² a claim form³, the court will send to the claimant⁴ a notice which will include the date on which the claim form is deemed served⁵. Where the claimant serves the claim form, the claimant must file a certificate of service within 21 days of service of the particulars of claim, unless all the defendants⁶ to the proceedings have filed acknowledgments of service within that time; and may not obtain judgment in default⁷ unless a certificate of service has been filed⁸. The certificate of service must in most cases⁹ state the category of address at which the claimant believes the claim form has been served and give the following details¹⁰. If the method of service was by:

- 220 (1) personal service, the date of personal service;
- 221 (2) first class post, document exchange or other service which provides for delivery on the next business day, the date of posting or leaving with, delivering to or collection by the relevant service provider;
- 222 (3) delivery of the document to or leaving it at a permitted place, the date when the document was so delivered or left;
- 223 (4) fax, the date of completion of the transmission;
- 224 (5) other electronic method, the date of sending the e-mail or other electronic transmission; and
- 225 (6) an alternative method or place permitted by the court¹¹, details as required by the court¹².

Where a rule, practice direction or court order requires a certificate of service of a document other than the claim form, the certificate must state the following details, which in some instances require the time of service to be stated¹³. If the method of service was by:

- 226 (a) personal service, the date and time of personal service;
- 227 (b) first class post, document exchange or other service which provides for delivery on the next business day, the date of posting or leaving with, delivering to or collection by the relevant service provider;
- 228 (c) delivery of the document to or leaving it at a permitted place, the date and time when the document was so delivered or left;
- 229 (d) fax, the date and time of completion of the transmission;
- 230 (e) other electronic method, the date and time of sending the e-mail or other electronic transmission; and
- 231 (f) an alternative method permitted or place permitted by the court¹⁴, details as required by the court¹⁵.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'claim form' see PARA 138 note 6.

4 As to the meaning of 'claimant' see PARA 138 note 6.

5 CPR 6.17(1). As to deemed service see CPR 6.14; and PARA 151. Where the court serves a claim form, delivers a defence to a claimant or notifies a claimant that the defendant has filed an acknowledgment of service, the court will also serve or deliver a copy of any notice of funding that has been filed, if it was filed at the same time as the claim form, defence or acknowledgment of service and copies of it were provided for service: see *Practice Direction--Service* PD 6A para 8.2. As to funding by the Community Legal Service see generally **LEGAL AID**.

6 As to the meaning of 'defendant' see PARA 138 note 6.

7 le under CPR Pt 12: see PARA 506 et seq.

8 CPR 6.17(2). As to filing an acknowledgment of service see PARA 184. Where, pursuant to CPR 6.17(2), the claimant files a certificate of service, the claimant is not required to and should not file (1) a further copy of the claim form with the certificate of service; and (2) a further copy of (a) the particulars of claim (where not included in the claim form); or (b) any document attached to the particulars of claim, with the certificate of service where that document has already been filed with the court: *Practice Direction--Service* PD 6A para 7.1.

9 le where CPR 6.7, 6.8, 6.9 or 6.10 applies: see PARAS 138-143.

10 CPR 6.17(3).

11 See CPR 6.15; and PARA 152.

12 CPR 6.17(3), Table.

13 CPR 6.29.

14 See CPR 6.27; and PARA 152.

15 CPR 6.29, Table.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(2) SERVICE OF CLAIM FORM AND OTHER DOCUMENTS WITHIN THE JURISDICTION/155. Notification by court of return or non-service of claim form.

155. Notification by court of return or non-service of claim form.

Where the court¹ serves² the claim form³ by post and the claim form is returned to the court, the court will send notification to the claimant⁴ that the claim form has been returned⁵. The claim form will be deemed to be served unless the address for the defendant⁶ on the claim form is not the relevant address⁷ required for service⁸.

Where the court bailiff⁹ is to serve a claim form and the bailiff is unable to serve it on the defendant, the court will send notification to the claimant¹⁰.

- 1 As to the meaning of 'court' see PARA 22.
- 2 As to the meaning of 'service' see PARA 138 note 2.
- 3 As to the meaning of 'claim form' see PARA 138 note 6.
- 4 As to the meaning of 'claimant' see PARA 138 note 6.
- 5 CPR 6.18(1).
- 6 As to the meaning of 'defendant' see PARA 138 note 6.
- 7 Ie for the purpose of CPR 6.7-6.10: see PARAS 138-143.
- 8 CPR 6.18(2).
- 9 As to the court bailiff see PARA 1259.
- 10 CPR 6.19.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(i) Introduction/156. Special provisions about service out of the jurisdiction.

(3) SERVICE OUT OF THE JURISDICTION

(i) Introduction

156. Special provisions about service out of the jurisdiction.

There are special provisions¹ containing rules about service² out of the jurisdiction³, about when the permission of the court⁴ is required to serve out of the jurisdiction and how to obtain such permission⁵ and the procedure for serving out of the jurisdiction⁶. The requirements of those special provisions apply with modifications to Scotland and Northern Ireland⁷ but in general do not apply to the Isle of Man and the Channel Islands, any Commonwealth state or any British overseas territory⁸; service in those countries should be effected by the claimant⁹ or his agent direct except in a Commonwealth state whose judicial authorities have required service to be in accordance with the rule¹⁰ for service through foreign governments, judicial authorities and British consular authorities¹¹.

Where service is to be effected in another member state of the European Union, the regulation on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (the 'service regulation')¹² applies¹³ and its provisions prevail over other provisions contained in bilateral or multilateral agreements or arrangements concluded by the member states¹⁴.

1 Ie CPR 6.30-47: see PARA 168 et seq. See also *Practice Direction--Service out of the Jurisdiction* PD 6B; and EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79); and PARA 157 et seq.

2 As to the meaning of 'service' see PARA 138 note 2.

3 CPR 6.30(a). As to the meaning of 'jurisdiction' see PARA 117 note 6.

4 As to the meaning of 'court' see PARA 22.

5 CPR 6.30(b).

6 CPR 6.30(c).

7 See PARAS 168, 171-173.

8 See PARA 175. For these purposes, the following are British Overseas Territories: Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn, Henderson, Ducie and Oeno, St Helena and Dependencies, South Georgia and the South Sandwich Islands, Sovereign Base Areas of Akrotiri and Dhekelia, Turks and Caicos Islands and British Virgin Islands: *Practice Direction--Service out of the Jurisdiction* PD 6B para 5.2.

9 As to the meaning of 'claimant' see PARA 138 note 6.

10 Ie in accordance with CPR 6.42(1)(b)(i): see PARAS 173-175.

11 *Practice Direction--Service out of the Jurisdiction* PD 6B para 5.1.

12 Ie EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (service of documents): CPR 6.31(e). As to the provisions of the service regulation see PARA 157 et seq.

13 *Practice Direction--Service out of the Jurisdiction* PD 6B para 8.

14 *Practice Direction--Service out of the Jurisdiction* PD 6B para 8; EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 20(1). In particular, the service regulation prevails over the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters Protocol art IV (OJ L 299, 13.12.1972, p 32; consolidated version, OJ C27, 26.01.1998, p 1) and over the Hague Convention (15 November 1965; Cmnd 3986). The service regulation does not preclude individual member states from maintaining or concluding agreements or arrangements to expedite further or simplify the transmission of documents, provided that they are compatible with the regulation: EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 20(1), (2). Member states must send to the Commission (1) a copy of the agreements or arrangements referred to in art 20(2) concluded between the member states as well as drafts of such agreements or arrangements which they intend to adopt; and (2) any denunciation of, or amendments to, these agreements or arrangements: art 20(3). The service regulation does not affect the application of the Convention on Civil Procedure of 17 July 1905 art 23, the Convention on Civil Procedure of 1 March 1954 art 24 or the Convention on International Access to Justice of 25 October 1980 art 13 between the member states parties to those Conventions (legal aid): EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 21.

See *Tavoulareas v Tsavlis* [2004] EWCA Civ 48, [2004] 2 All ER (Comm) 221 (service of documents on Greek Public Prosecutor in accordance with national law invoked the service regulation).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(ii) European Union Provisions for Service in another Member State/157. In general.

(ii) European Union Provisions for Service in another Member State

157. In general.

The service regulation¹ applies in civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one member state² to another for service there³, except where the address of the person to be served with the document is not known⁴.

Each member state must designate the public officers, authorities or other persons ('transmitting agencies') competent for the transmission of judicial or extrajudicial documents to be served in another member state⁵ and the public officers, authorities or other persons ('receiving agencies') competent for the receipt of judicial or extrajudicial documents from another member state⁶. A member state may designate one transmitting agency and one receiving agency or one agency to perform both functions. A federal state, a state in which several legal systems apply or a state with autonomous territorial units is free to designate more than one such agency. The designation has effect for a period of five years and may be renewed at five-year intervals⁷.

Each member state must provide the Commission with the following information:

- 232 (1) the names and addresses of the receiving agencies referred to above;
- 233 (2) the geographical areas in which they have jurisdiction;
- 234 (3) the means of receipt of documents available to them; and
- 235 (4) the languages that may be used for the completion of the standard form⁸.

Member states must notify the Commission of any subsequent modification of such information⁹.

Each member state must designate a central body responsible for:

- 236 (a) supplying information to the transmitting agencies;
- 237 (b) seeking solutions to any difficulties which may arise during transmission of documents for service;
- 238 (c) forwarding, in exceptional cases, at the request of a transmitting agency, a request for service to the competent receiving agency¹⁰.

A federal state, a state in which several legal systems apply or a state with autonomous territorial units is free to designate more than one central body¹¹.

1 le EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79): see PARA 156 text and note 12; the text and notes 2-10; and PARA 158 et seq. The regulation replaces the former service regulation, EC Council Regulation 1348/2000 (OJ L160, 30.06.2000, p 37) (repealed by EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 25(1)), and applies from 13 November 2008 with the exception of art 23, which applies from 13 August 2008: art 26.

2 In the service regulation, the term 'member state' means the member states with the exception of Denmark: EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 1(3).

- 3 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 1(1). It does not extend in particular to revenue, customs or administrative matters or to liability of the state for actions or omissions in the exercise of state authority: art 1(1).
- 4 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 1(2).
- 5 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 2(1).
- 6 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 2(2).
- 7 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 2(3).
- 8 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 2(4). The standard form referred to in the text is the standard form in Annex I to the service regulation.
- 9 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 2(4).
- 10 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 3(a)-(c).
- 11 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 3.

UPDATE

157 In general

NOTE 2--Note that in accordance with EC Council Decision 2006/326 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters (OJ L120, 5.5.2006 p 23), Denmark, by letter of 20 November 2007, notified the EC Commission of its decision to implement the contents of Regulation 1393/2007 from the date of its entry into force in the other member states (for which see NOTE 1): see OJ L331, 10.12.2008 p 21.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(ii) European Union Provisions for Service in another Member State/158. Transmission of judicial documents.

158. Transmission of judicial documents.

Judicial documents must be transmitted directly and as soon as possible between the designated agencies¹. The transmission of documents, requests, confirmations, receipts, certificates and any other papers between transmitting agencies and receiving agencies may be carried out by any appropriate means, provided that the content of the document received is true and faithful to that of the document forwarded and that all information in it is easily legible². The document to be transmitted must be accompanied by a request drawn up using the standard form³. The form must be completed in the official language of the member state⁴ addressed or, if there are several official languages in that member state, the official language or one of the official languages of the place where service is to be effected, or in another language which that member state has indicated it can accept. Each member state must indicate the official language or languages of the European Union other than its own which is or are acceptable to it for completion of the form⁵. The documents and all papers that are transmitted must be exempted from legalisation or any equivalent formality⁶.

When the transmitting agency wishes a copy of the document to be returned together with a certificate of service and copy of the document served⁷, it must send the document in duplicate⁸.

Information, including in particular personal data, transmitted under the service regulation⁹ must be used by the receiving agency only for the purpose for which it was transmitted¹⁰. Receiving agencies must ensure the confidentiality of such information, in accordance with their national law¹¹. This provision does not, however, affect national laws enabling data subjects to be informed of the use made of information transmitted under the regulation¹².

1 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 4(1). As the service regulation does not establish any hierarchy between the method of transmission and service referred to in arts 4-11 and that in art 14 (see PARA 165), it is possible to serve in another member state a judicial document such as a judgment by one or other or both of those methods: Case C-473/04 *Plumex v Young Sports NV* [2006] All ER (D) 120 (Feb), ECJ.

2 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 4(2). As to receiving agencies and transmitting agencies see PARA 157.

3 For the standard form see EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) Annex I.

4 As to the meaning of 'member state' for these purposes see PARA 157 note 2.

5 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 4(3).

6 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 4(4).

7 I.e the certificate referred to in EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 10: see PARA 163.

8 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 4(5).

9 I.e EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79): see PARA 157 text and note 10. As to the meaning of 'service regulation' see PARA 156 text and note 12.

10 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 22(1).

11 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 22(2).

12 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 22(3). The regulation is without prejudice to EC Directive 95/46 (OJ L281, 23.11.1995, p 31) on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the data protection directive) and European Parliament and Council Directive 2002/58 (OJ L201, 31.7.2002, p 37) concerning the processing of personal data and the protection of privacy in the telecommunications sector: EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 22(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(ii) European Union Provisions for Service in another Member State/159. Translation of documents.

159. Translation of documents.

The applicant must be advised by the transmitting agency¹ to which he or she forwards the document for transmission that the addressee may refuse to accept it if it is not in one of the specified languages². The applicant must bear any costs of translation prior to the transmission of the document, without prejudice to any possible subsequent decision by the court or competent authority on liability for such costs³.

1 As to transmitting agencies see PARA 157.

2 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 5(1). The specified languages are those provided for in art 8, ie (1) the official language of the member state addressed or, if there are several official languages in that member state, the official language or one of the official languages of the place where service is to be effected; or (2) a language of the member state of transmission which the addressee understands: arts 5(1), 8(1)(a), (b). As to the meaning of 'member state' for these purposes see PARA 157 note 2.

3 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 5(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(ii) European Union Provisions for Service in another Member State/160. Receipt of documents by receiving agency.

160. Receipt of documents by receiving agency.

On receipt of a document, a receiving agency¹ must, as soon as possible and in any event within seven days of receipt, send a receipt to the transmitting agency² by the swiftest possible means of transmission using the standard form³. Where the request for service cannot be fulfilled on the basis of the information or documents transmitted, the receiving agency must contact the transmitting agency by the swiftest possible means in order to secure the missing information or documents⁴.

If the request for service is manifestly outside the scope of the service regulation⁵ or if non-compliance with the formal conditions required makes service impossible, the request and the documents transmitted must be returned, on receipt, to the transmitting agency, together with the notice of return in the standard form⁶.

A receiving agency receiving a document for service but not having territorial jurisdiction to serve it must forward it, as well as the request, to the receiving agency having territorial jurisdiction in the same member state⁷ if the request complies with the prescribed conditions⁸ and must inform the transmitting agency accordingly, using the standard form⁹. That receiving agency must inform the transmitting agency when it receives the document¹⁰.

1 As to receiving agencies see PARA 157.

2 As to transmitting agencies see PARA 157.

3 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 6(1). The standard form referred to in the text is contained in Annex I to the regulation.

4 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 6(2).

5 I.e EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79): see PARA 156 text and note 12.

6 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 6(3). The standard form referred to in the text is contained in Annex I to the regulation.

7 As to the meaning of 'member state' for these purposes see PARA 157 note 2.

8 I.e the conditions laid down in EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 4(3): see PARA 158.

9 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 6(4). The standard form referred to in the text is contained in Annex I to the regulation.

10 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 6(4). The transmitting agency must be informed in the manner provided for in art 6(1) (see the text and notes 1-3): art 6(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(ii) European Union Provisions for Service in another Member State/161. Service of documents.

161. Service of documents.

The receiving agency¹ must itself serve the document or have it served, either in accordance with the law of the member state² addressed or by a particular form requested by the transmitting agency³, unless such a method is incompatible with the law of that member state⁴. The receiving agency must take all necessary steps to effect the service of the document as soon as possible, and in any event within one month of receipt⁵. If it has not been possible to effect service within one month of receipt, the receiving agency must immediately inform the transmitting agency by means of the certificate in the standard form⁶, which must be drawn up under the prescribed conditions⁷; and continue to take all necessary steps to effect the service of the document, unless indicated otherwise by the transmitting agency, where service seems to be possible within a reasonable period of time⁸.

The date of service of a document pursuant to this provision is⁹ the date on which it is served in accordance with the law of the member state addressed¹⁰. However, where according to the law of a member state a document has to be served within a particular period, the date to be taken into account with respect to the applicant must be that determined by the law of that member state¹¹.

1 As to receiving agencies see PARA 157.

2 As to the meaning of 'member state' for these purposes see PARA 157 note 2.

3 As to transmitting agencies see PARA 157. See Case C-473/04 *Plumex v Young Sports NV* [2006] All ER (D) 120 (Feb), ECJ; and PARA 158 note 1.

4 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 7(1).

5 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 7(2).

6 For the standard form see EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79), Annex I.

7 I.e. the conditions laid down in EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 10 (see PARA 163): art 7(2).

8 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 7(2).

9 I.e. without prejudice to EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 8 (see PARA 162): art 9(1).

10 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 9(1).

11 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 9(2). The provisions of art 9(1), (2) also apply to the other means of transmission and service of judicial documents provided for in Section 2 (arts 12-15) (see PARA 165): art 9(3). Member states must communicate to the Commission if, according to their law, a document has to be served within a particular period as referred to in art 9(2): art 23(1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(ii) European Union Provisions for Service in another Member State/162. Refusal to accept a document.

162. Refusal to accept a document.

The receiving agency¹ must inform the addressee, using the standard form², that he may refuse to accept the document to be served at the time of service or by returning the document to the receiving agency within one week if it is not written in, or accompanied by a translation into, either of the following languages: (1) a language which the addressee understands; or (2) the official language of the member state³ addressed or, if there are several official languages in that member state, the official language or one of the official languages of the place where service is to be effected⁴. Where the receiving agency is informed that the addressee refuses to accept the document in accordance with this provision, it must immediately inform the transmitting agency⁵ by means of the certificate of service⁶ and return the request and the documents of which a translation is requested⁷.

If the addressee has refused to accept the document pursuant to the above provision, the service of the document can be remedied through the service on the addressee in accordance with the provisions of the service regulation⁸ of the document accompanied by a translation into a language provided for above⁹. In that case, the date of service of the document is the date on which the document accompanied by the translation is served in accordance with the law of the member state addressed¹⁰. However, where according to the law of a member state, a document has to be served within a particular period, the date to be taken into account with respect to the applicant is the date of the service of the initial document determined¹¹ by the law of the member state concerned¹².

1 As to receiving agencies see PARA 157.

2 I.e. the form set out in EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) Annex II.

3 As to the meaning of 'member state' for these purposes see PARA 157 note 2.

4 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 8(1). As to the prescribed languages see PARA 159 note 2. For the purposes of art 8(1), the diplomatic or consular agent, where service is effected in accordance with art 13 (see PARA 165), or the authority or person, where service is effected in accordance with art 14 (see PARA 165), must inform the addressee that he may refuse to accept the document and that any document refused must be sent to those agents or to that authority or person respectively: art 8(5).

5 As to transmitting agencies see PARA 157.

6 I.e. the certificate provided for in EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 10 (see PARA 163): art 8(2).

7 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 8(2).

8 As to the meaning of 'service regulation' see PARA 156 text and note 12.

9 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 8(3). The provisions of art 8(1)-(3) also apply to the other means of transmission and service of judicial documents provided for in Section 2 (arts 12-15) (see PARA 165): art 8(4).

10 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 8(3).

11 le determined in accordance with EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 9(2): see PARA 161.

12 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 8(3). Member states must communicate to the Commission if, according to their law, a document has to be served within a particular period as referred to in art 8(3): art 23(1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(ii) European Union Provisions for Service in another Member State/163. Certificate of service and copy of the document served.

163. Certificate of service and copy of the document served.

When the formalities concerning the service of the document have been completed, a certificate of completion of those formalities must be drawn up in the standard form¹ addressed to the transmitting agency². When the transmitting agency wishes a copy of the document to be returned³, the certificate must be drawn up together with a copy of the document served⁴.

The certificate must be completed in the official language or one of the official languages of the member state⁵ of origin or in another language which the member state of origin has indicated that it can accept. Each member state must indicate the official language or languages of the institutions of the European Union other than its own which is or are acceptable to it for completion of the form⁶.

1 The standard form referred to in the text is contained in EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) Annex I.

2 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 10(1). As to transmitting agencies see PARA 157.

3 I.e. when EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 4(5) applies (see PARA 158): art 10(1).

4 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 10(1).

5 As to the meaning of 'member state' for these purposes see PARA 157 note 2.

6 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 10(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(ii) European Union Provisions for Service in another Member State/164. Costs of service.

164. Costs of service.

The service of judicial documents coming from a member state¹ must not give rise to any payment or reimbursement of taxes or costs for services rendered by the member state addressed². The applicant must, however, pay or reimburse the costs occasioned by recourse to a judicial officer or to a person competent under the law of the member state addressed, and the use of a particular method of service³. Costs occasioned by recourse to a judicial officer or to a person competent under the law of the member state addressed must correspond to a single fixed fee laid down by that member state in advance which respects the principles of proportionality and non-discrimination⁴. Member states must communicate such fixed fees to the Commission⁵.

1 As to the meaning of 'member state' for these purposes see PARA 157 note 2.

2 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 11(1).

3 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 11(2).

4 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 11(3).

5 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 11(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(ii) European Union Provisions for Service in another Member State/165. Other means of transmission and service of judicial documents.

165. Other means of transmission and service of judicial documents.

Each member state¹ is free, in exceptional circumstances, to use consular or diplomatic channels to forward judicial documents, for the purpose of service, to designated agencies² of another member state³. Each member state is also free to effect service of judicial documents on persons residing in another member state, without application of any compulsion, directly through its diplomatic or consular agents⁴. Any member state may, however, make it known⁵ that it is opposed to such service within its territory, unless the documents are to be served on nationals of the member state in which the documents originate⁶.

Each member state is free to effect service of judicial documents directly by postal services on persons residing in another member state by registered letter with acknowledgment of receipt or equivalent⁷.

Any person interested in a judicial proceeding may effect service of judicial documents directly through the judicial officers, officials or other competent persons of the member state addressed, where such direct service is permitted under the law of that member state⁸.

1 As to the meaning of 'member state' for these purposes see PARA 157 note 2.

2 I.e. agencies which are designated pursuant to EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 2 or art 3: see PARA 157.

3 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 12.

4 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 13(1).

5 I.e. in accordance with EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 23(1): art 13(2). Member states must communicate the relevant information to the Commission, which must publish that information in the Official Journal of the European Union (with the exception of the addresses and other contact details of the agencies and of the central bodies and the geographical areas in which they have jurisdiction): art 23(1), (2).

6 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 13(2).

7 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 14. See Case C-473/04 *Plumex v Young Sports NV* [2006] All ER (D) 120 (Feb), ECJ; and PARA 158 note 1.

8 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 15.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(ii) European Union Provisions for Service in another Member State/166. Transmission of extrajudicial documents.

166. Transmission of extrajudicial documents.

Extrajudicial documents may be transmitted for service in another member state¹ in accordance with the provisions of the service regulation².

1 As to the meaning of 'member state' for these purposes see PARA 157 note 2.

2 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 16. As to the meaning of 'service regulation' see PARA 156 text and note 12.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(ii) European Union Provisions for Service in another Member State/167. Service to be established before judgment given where defendant does not enter an appearance.

167. Service to be established before judgment given where defendant does not enter an appearance.

Where a claim form or an equivalent document has had to be transmitted to another member state¹ for the purpose of service, under the provisions of the service regulation², and the defendant has not appeared, judgment must not be given until it is established that:

- 239 (1) the document was served by a method prescribed by the internal law of the member state addressed for the service of documents in domestic actions upon persons who are within its territory; or
- 240 (2) the document was actually delivered to the defendant or to his residence by another method provided for by the service regulation,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend³. Each member state may, however, make it known⁴ that the judge, notwithstanding the above provisions, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled:

- 241 (a) the document was transmitted by one of the methods provided for in the service regulation;
- 242 (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document;
- 243 (c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities or bodies of the member state addressed⁵.

Notwithstanding the above provisions, the judge may order, in case of urgency, any provisional or protective measures⁶.

When a claim form or an equivalent document has had to be transmitted to another member state for the purpose of service, under the provisions of the service regulation, and a judgment has been entered against a defendant who has not appeared, the judge has the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled:

- 244 (i) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal; and
- 245 (ii) the defendant has disclosed a prima facie defence to the action on the merits⁷.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment⁸. This provision does not, however, apply to judgments concerning status or capacity of persons⁹.

- 1 As to the meaning of 'member state' for these purposes see PARA 157 note 2.
- 2 Ie EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79): see PARA 156 text and note 12.
- 3 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 19(1).
- 4 Ie in accordance with EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 23(1) (see PARA 165 note 5): art 19(2).
- 5 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 19(2).
- 6 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 19(3).
- 7 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 19(4)(a), (b).
- 8 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 19(4). Each member state may make it known, in accordance with art 23(1), that such application will not be entertained if it is filed after the expiry of a time to be stated by it in that communication, but which must in no case be less than one year following the date of the judgment: art 19(4).
- 9 EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 19(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(iii) Provisions under Domestic Law for Service out of the Jurisdiction/168. Service of claim form where permission of the court is not required: Scotland or Northern Ireland.

(iii) Provisions under Domestic Law for Service out of the Jurisdiction

168. Service of claim form where permission of the court is not required: Scotland or Northern Ireland.

The claimant¹ may serve² the claim form on a defendant³ in Scotland or Northern Ireland where each claim made against the defendant to be served and included in the claim form is a claim which the court⁴ has power to determine under the Civil Jurisdiction and Judgments Act 1982⁵ and:

- 246 (1) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom⁶; and
- 247 (2) the defendant is domiciled⁷ in the United Kingdom⁸, the proceedings are within the provision of the 1982 Act relating to exclusive jurisdiction⁹, or the defendant is a party to an agreement conferring jurisdiction¹⁰ under the 1982 Act¹¹.

The claimant may serve the claim form on a defendant in Scotland or Northern Ireland where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under any enactment other than the 1982 Act notwithstanding that the person against whom the claim is made is not within the jurisdiction or the facts giving rise to the claim did not occur within the jurisdiction¹².

Where the claimant intends to serve a claim form on a defendant under these provisions, the claimant must file¹³ with the claim form a notice containing a statement of the grounds on which the claimant is entitled to serve the claim form out of the jurisdiction and serve a copy of that notice with the claim form¹⁴. Where the claimant fails to file with the claim form a copy of the notice, the claim form may only be served once the claimant files the notice or if the court gives permission¹⁵.

1 As to the meanings of 'claimant' and 'claim form' for the purposes of CPR Pt 6 see PARA 138 note 6.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'defendant' see PARA 138 note 6.

4 As to the meaning of 'court' see PARA 22.

5 CPR 6.32(1).

6 CPR 6.32(1)(a).

7 For these purposes, 'domicile' is to be determined (1) in relation to a Convention territory, in accordance with the Civil Jurisdiction and Judgments Act 1982 ss 41-46 (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 84 et seq); and (2) in relation to a member state, in accordance with EC Council Regulation 44/2001 (OJ L12, 16.1.2001, p 1) and the Civil Jurisdiction and Judgments Order 2001, SI 2002/3929, Sch 1 paras 9-12: CPR 6.31(i). For these purposes, 'Convention territory' means the territory or territories of any contracting state to which the Brussels or Lugano Conventions (as defined in the Civil Jurisdiction and Judgments Act 1982 s 1(1) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65)) apply: CPR 6.31(h). As to the meaning of 'contracting state' see, by virtue of CPR 6.31(g), the Civil Jurisdiction and Judgments Act 1982 s 1(3); and **CONFLICT OF LAWS** vol

8(3) (Reissue) PARA 65. The following countries are parties to the 1982 Act: Austria, Belgium, Denmark, France, Finland, Germany, Gibraltar, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Scotland, Spain, Switzerland and Sweden.

8 CPR 6.32(1)(b)(i).

9 CPR 6.32(1)(b)(ii). The text refers to proceedings within the Civil Jurisdiction and Judgments Act 1982 s 16, Sch 4 para 11 (EC Council Regulation 44/2001 (OJ L12, 16.1.2001, p 1) Ch II as modified for the allocation of jurisdiction within the United Kingdom).

10 Is an agreement within the Civil Jurisdiction and Judgments Act 1982 Sch 4 para 12 (EC Council Regulation 44/2001 (OJ L12, 16.1.2001, p 1) Ch II as modified for the allocation of jurisdiction within the United Kingdom, relating to prorogation of jurisdiction: see **CONFLICT OF LAWS**): CPR 6.19(1)(b)(iii).

11 CPR 6.32(1)(b)(iii).

12 CPR 6.32(2). As to the meaning of 'jurisdiction' see PARA 117 note 6.

13 As to the meaning of 'filing' see PARA 1832 note 8.

14 CPR 6.34(1). Where CPR 6.34 applies, the claimant must file practice form N510 when filing the claim form: *Practice Direction--Service out of the Jurisdiction* PD 6B para 2.1.

15 CPR 6.34(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(iii) Provisions under Domestic Law for Service out of the Jurisdiction/169. Service of claim form where permission of the court is not required: out of the United Kingdom.

169. Service of claim form where permission of the court is not required: out of the United Kingdom.

The claimant¹ may serve² the claim form on a defendant³ out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court⁴ has power to determine under the Civil Jurisdiction and Judgments Act 1982⁵ and:

- 248 (1) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom or any other Convention territory⁶; and
- 249 (2) the defendant is domiciled in the United Kingdom or in any Convention territory⁷, the provisions of the 1982 Act relating to exclusive jurisdiction⁸ refer to the proceedings⁹ or the defendant is a party to an agreement conferring jurisdiction¹⁰ under the 1982 Act¹¹.

The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under the judgments regulation¹² and:

- 250 (a) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom or any other member state¹³; and
- 251 (b) the defendant is domiciled¹⁴ in the United Kingdom or in any member state¹⁵, the proceedings are within the exclusive jurisdiction provision of the judgments regulation¹⁶ or the defendant is a party to an agreement conferring jurisdiction¹⁷.

The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine other than under the 1982 Act or the judgments regulation, notwithstanding that the person against whom the claim is made is not within the jurisdiction or that the facts giving rise to the claim did not occur within the jurisdiction¹⁸.

Where the claimant intends to serve a claim form on a defendant out of the jurisdiction under these provisions, the claimant must file¹⁹ with the claim form a notice containing a statement of the grounds on which the claimant is entitled to serve the claim form out of the jurisdiction and serve a copy of that notice with the claim form²⁰. Where the claimant fails to file with the claim form a copy of the notice, the claim form may only be served once the claimant files the notice or if the court gives permission²¹.

1 As to the meanings of 'claimant' and 'claim form' for the purposes of CPR Pt 6 see PARA 138 note 6.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'defendant' see PARA 138 note 6.

4 As to the meaning of 'court' see PARA 22.

5 CPR 6.33(1).

6 CPR 6.33(1)(a). As to the meaning of 'Convention territory' see PARA 168 note 7.

7 CPR 6.33(1)(b)(i).

8 Ie the proceedings are within the Civil Jurisdiction and Judgments Act 1982 s 16, s 2(2), Sch 1 art 16 or s 3A(2), Sch 3C art 16 (provisions of, respectively, the Brussels Convention and the Lugano Convention, in each case relating to courts having exclusive jurisdiction regardless of domicile): see **CONFLICT OF LAWS**.

9 CPR 6.33(1)(b)(ii).

10 Ie an agreement within the Civil Jurisdiction and Judgments Act 1982 Sch 1 art 17 or Sch 3C art 17 (provisions of, respectively, the Brussels Convention and the Lugano Convention, in each case relating to prorogation of jurisdiction): CPR 6.33(1)(b)(iii).

11 CPR 6.33(1)(b)(iii).

12 Ie EC Council Regulation 44/2001 (OJ L12, 16.1.2001, p 1) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (CPR 6.31(d)): CPR 6.33(2).

13 CPR 6.33(2)(a).

14 As to the meaning of 'domicile' see PARA 168 note 7.

15 CPR 6.33(2)(b)(i).

16 Ie within EC Council Regulation 44/2001 (OJ L12, 16.1.2001, p 1) art 22: CPR 6.33(2)(b)(ii).

17 Ie within EC Council Regulation 44/2001 (OJ L12, 16.1.2001, p 1) art 23: CPR 6.33(2)(b)(iii).

18 CPR 6.33(3).

19 As to the meaning of 'filing' see PARA 1832 note 8.

20 CPR 6.34(1). Where CPR 6.34 applies, the claimant must file practice form N510 when filing the claim form: *Practice Direction--Service out of the Jurisdiction* PD 6B para 2.1.

21 CPR 6.34(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(iii) Provisions under Domestic Law for Service out of the Jurisdiction/170. Service out of the jurisdiction where the permission of the court is required.

170. Service out of the jurisdiction where the permission of the court is required.

In any proceedings to which the rules providing that the permission of the court¹ is not required for service² out of the jurisdiction³ do not apply, the claimant⁴ may serve a claim form out of the jurisdiction with the permission of the court if any of the following grounds apply⁵:

- 252 (1) a claim is made for a remedy against a person domiciled⁶ within the jurisdiction⁷;
- 253 (2) a claim is made for an injunction⁸ ordering the defendant⁹ to do or refrain from doing an act within the jurisdiction¹⁰;
- 254 (3) a claim is made against a person (the 'defendant') on whom the claim form has been or will be served, and there is between the claimant and that person a real issue which it is reasonable for the court to try and the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim¹¹;
- 255 (4) a claim is an additional claim¹² and the person to be served is a necessary or proper party to the claim or additional claim¹³;
- 256 (5) a claim is made¹⁴ for an interim remedy¹⁵;
- 257 (6) a claim is made in respect of a contract where the contract was made within the jurisdiction, was made by or through an agent trading or residing within the jurisdiction, is governed by English law or contains a term conferring jurisdiction on the court to determine any claim in respect of the contract¹⁶;
- 258 (7) a claim is made in respect of a breach of contract committed within the jurisdiction¹⁷;
- 259 (8) a claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in head (6) above¹⁸;
- 260 (9) a claim is made in tort where damage was sustained within the jurisdiction or the damage sustained resulted from an act committed within the jurisdiction¹⁹;
- 261 (10) a claim is made to enforce any judgment or arbitral award²⁰;
- 262 (11) the whole subject matter of a claim relates to property located within the jurisdiction²¹;
- 263 (12) a claim is made for any remedy which might be obtained in proceedings to execute the trusts of a written instrument where the trusts ought to be executed according to English law and the person on whom the claim form is to be served is a trustee of the trusts²²;
- 264 (13) a claim is made for any remedy which might be obtained in proceedings for the administration of the estate of a person who died domiciled within the jurisdiction²³;
- 265 (14) a probate claim or a claim for the rectification of a will is made²⁴;
- 266 (15) a claim is made for a remedy against the defendant as constructive trustee where the defendant's alleged liability arises out of acts committed within the jurisdiction²⁵;
- 267 (16) a claim is made for restitution where the defendant's alleged liability arises out of acts committed within the jurisdiction²⁶;
- 268 (17) a claim is made by the Commissioners of Revenue and Customs relating to duties or taxes against a defendant not domiciled in Scotland or Northern Ireland²⁷;

- 269 (18) a claim is made by a party to proceedings for an order that the court exercise its power²⁸ to make a costs order in favour of or against a person who is not a party to those proceedings²⁹;
- 270 (19) a claim is made in the nature of salvage and any part of the services took place within the jurisdiction or a claim is made³⁰ to enforce a claim for liability for oil pollution³¹;
- 271 (20) a claim is made under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to above or under the relevant European legislation³² where service is to be effected in a member state of the European Union³³.

The above procedure is concerned in substance with claims asserted by the claimant, not claims asserted against the claimant, and with claims for relief founded on a right asserted by the claimant in the proceedings³⁴.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'service' see PARA 138 note 2.

3 Ie in any proceedings to which CPR 6.32 (see PARA 168) or CPR 6.33 (see PARA 169) does not apply: CPR 6.36. As to the meaning of 'jurisdiction' see PARA 117 note 6.

4 As to the meanings of 'claimant' and 'claim form' for the purposes of CPR Pt 6 see PARA 138 note 6. For these purposes, 'claim form' should be construed as including a Pt 20 claim form: *Shahar v Tsitsekos, Kolomoisky v Shahar* [2004] EWHC 2659 (Ch), [2004] All ER (D) 283 (Nov).

5 CPR 6.36.

6 As to the determination of domicile see PARA 168 note 7.

7 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(1).

8 As to the meaning of 'injunction' see PARA 315 note 2.

9 As to the meaning of 'defendant' see PARA 138 note 6.

10 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(2).

11 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(3). The court's power to permit service out of the jurisdiction under this provision is no less wide than the court's wide powers to add or substitute a party under CPR 19.1(2) (see PARA 210): *United Film Distribution Ltd v Chhabria* [2001] EWCA Civ 416, [2001] 2 All ER (Comm) 865, [2001] All ER (D) 329 (Mar) (on the former CPR 6.20(3)). Such a requirement is intended to ensure that the claim is brought in good faith against the defendant in the jurisdiction, and not simply in order to bring the foreign defendant in as a necessary party: *Konamanemi v Rolls Royce Industrial Power (India) Ltd* [2002] 1 All ER 979, [2002] 1 WLR 1269.

12 Ie under CPR Pt 20. As to Part 20 claims see PARA 618 et seq. Where the court is considering the grant of permission to serve proceedings out of the jurisdiction in relation to a question of contribution, the court must be guided by the interests of the parties and considerations of practical justice: *Petroleo Brasileiro SA v Mellitus Shipping Inc* [2001] EWCA Civ 418, [2001] 1 All ER (Comm) 993.

13 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(4).

14 Ie under the Civil Jurisdiction and Judgments Act 1982 s 25(1): see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 138.

15 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(5).

16 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(6). See *CGU International Insurance plc v Szabo* [2002] 1 All ER (Comm) 83 (permission granted based on strong argument that contract governed by English law); and *Marubeni Hong Kong and South China Ltd v Mongolian Government* [2002] 2 All ER (Comm) 873.

- 17 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(7).
- 18 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(8).
- 19 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(9). See *Ashton Investments Ltd v OJSC Russian Aluminium (RUSAL)* [2006] EWHC 2545 (Comm), [2007] 1 All ER (Comm) 857 (computer server in London hacked from abroad; tort committed within jurisdiction); *OT Africa Line Ltd v Magic Sportswear Corp* [2005] EWCA Civ 710, [2006] 1 All ER (Comm) 32.
- 20 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(10). It is not a precondition of the exercise of the jurisdiction under this provision that there are assets within the jurisdiction: *Tasarruf Mevduati Sigorta Fonu v Demirel* [2007] EWCA Civ 799, [2007] 4 All ER 1014, [2007] 1 WLR 2508 (on the former CPR 6.20(9)).
- 21 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(11). This provision is not to be construed as confined to claims relating to the ownership or possession of property; it extends to any claim for relief so long as it relates to property within the jurisdiction: *Banca Carige SpA Cassa Di Risparmio Di Genova e Imperia v Banco Nacional De Cuba* [2001] 3 All ER 923, [2001] All ER (D) 120 (Apr) per Lightman J (on the former CPR 6.20(10)). See also *Ashton Investments Ltd v OJSC Russian Aluminium (RUSAL)* [2006] EWHC 2545 (Comm), [2007] 1 All ER (Comm) 857 (see note 19); and *OT Africa Line Ltd v Magic Sportswear Corp* [2005] EWCA Civ 710, [2006] 1 All ER (Comm) 32.
- 22 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(12).
- 23 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(13).
- 24 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(14).
- 25 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(15).
- 26 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(16).
- 27 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(17).
- 28 Ie under the Supreme Court Act 1981 s 51: see PARA 217; and see eg *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira (No 2)* [1986] AC 965, [1986] 2 All ER 409, HL; *Symphony Group plc v Hodgson* [1994] QB 179, [1993] 4 All ER 143, CA. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.
- 29 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(18). See CPR 48.2; and PARA 217.
- 30 Ie under the Merchant Shipping Act 1995 s 153, 154, 175 or 176A (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 443 et seq): *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(19).
- 31 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(19).
- 32 Ie EC Council Directive 76/308 (OJ L73, 18.03.1976, p 18) (directive on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund and of the agricultural levies and customs duties). As to service in a member state see further PARA 157 et seq.
- 33 *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(20).
- 34 See *Cool Carriers AB v HSBC Bank USA* [2001] 2 All ER (Comm) 177 per Tomlinson J (inappropriate to allow the CPR 6.20 regime to be used by charterers to compel owners to submit to English jurisdiction in respect of the resolution of their dispute with the relevant bank in circumstances where the bank could not itself bring about that result and where the issue as between the bank and the owners, however insecure the owners' position might seem, could not be characterised in terms which brought it within the connecting factors set out in the rule). See also *Douglas v Hello! Ltd (No 2)* [2003] EWCA Civ 139, [2003] EMLR 585.

UPDATE

170 Service out of the jurisdiction where the permission of the court is required

NOTE 16--See *Rimpacific Navigation INC v Daehan Shipbuilding Co Ltd* [2009] EWHC 2941 (Comm), [2009] All ER (D) 277 (Nov) (exclusive jurisdiction clause granting jurisdiction to English courts in contract of guarantee not separable; issue of jurisdiction decided under main contract of guarantee).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(iii) Provisions under Domestic Law for Service out of the Jurisdiction/171. Application for permission to serve claim form out of jurisdiction.

171. Application for permission to serve claim form out of jurisdiction.

An application for permission to serve¹ a claim form² out of the jurisdiction³ must set out:

- 272 (1) which ground⁴ is relied on⁵;
- 273 (2) that the claimant⁶ believes that the claim has a reasonable prospect of success⁷; and
- 274 (3) the defendant's⁸ address or, if not known, in what place the defendant is, or is likely, to be found⁹.

The court will not give permission unless satisfied that England or Wales is a proper place in which to bring the claim¹⁰. In particular, where the application is for permission to serve a claim form in Scotland or Northern Ireland and it appears to the court that the claimant may also be entitled to a remedy there, the court, in deciding whether to give permission, will compare the cost and convenience of proceeding there or in the jurisdiction and, where relevant, have regard to the powers and jurisdiction of the sheriff court in Scotland or the county courts or courts of summary jurisdiction in Northern Ireland¹¹.

Where the court gives permission to serve a claim form out of the jurisdiction, it will specify the periods within which the defendant may file¹² an acknowledgment of service¹³, file or serve an admission¹⁴, file a defence¹⁵ or file any other response or document required by a rule in another Part of the Civil Procedure Rules, any other enactment or a practice direction¹⁶, and it may give directions about the method of service¹⁷ and give permission for other documents in the proceedings to be served out of the jurisdiction¹⁸.

1 As to the meaning of 'service' see PARA 138 note 2.

2 As to the meaning of 'claim form' and 'claim' for the purposes of CPR Pt 6 see PARA 138 note 6.

3 Ie under CPR 6.36 (see PARA 170): CPR 6.37(1). As to the meaning of 'jurisdiction' see PARA 117 note 6. As to service of documents other than the claim form see PARA 172.

4 Ie in *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1 (see PARA 170 heads (1)-(20)).

5 CPR 6.37(1)(a)

6 As to the meaning of 'claimant' see PARA 138 note 6.

7 CPR 6.37(1)(b). The merits threshold test under CPR 6.36 (see PARA 170) does not differ in substance from that under CPR 24.2 (summary judgment: see PARA 524); that is demanded by the whole philosophy of the overriding objective and the fact that a defendant is foreign makes no difference in principle: see *De Molestina v Ponton* [2002] 1 All ER (Comm) 587, [2001] All ER (D) 206 (May) per Colman J. See also *Cherney v Deripaska* [2008] EWHC 1530 (Comm), [2008] All ER (D) 37 (Jul). As to the overriding objective see PARA 33.

8 As to the meaning of 'defendant' see PARA 138 note 6.

9 CPR 6.37(1)(c). Where the application is made in respect of a claim referred to in *Practice Direction--Service out of the Jurisdiction* PD 6B para 3.1(3) (see PARA 170 head (3)), the application must also state the grounds on which the claimant believes that there is, between the claimant and the defendant a real issue which it is reasonable for the court to try: CPR 6.37(2). As to the meaning of 'court' see PARA 22. A claimant who has been granted permission to serve out of the jurisdiction remains under a duty to make full and frank disclosure until the proceedings are served: *Network Telecom (Europe) Ltd v Telephone Systems International*

Inc [2003] EWHC 2890 (QB), [2004] 1 All ER (Comm) 418 (failure to notify court of prior existence of relevant foreign proceedings; order set aside). See also *Pearson Education Ltd v Prentice Hall India Pte Ltd* [2005] EWHC 636 (QB), [2006] FSR 111 (duty required disclosure of receipt of 'without prejudice' letter, but not its contents).

10 CPR 6.37(3). See eg *Spiliada Maritime Corp v Cansulex Ltd, The Spiliada* [1987] AC 460, [1986] 3 All ER 843, HL (decided under the old rules but applied in *Lubbe v Cape plc* [2000] 4 All ER 268, [2000] 1 WLR 1545, HL). See also *Ace Insurance SA-NV v Zurich Insurance Co* [2000] 2 All ER (Comm) 449; affd [2001] EWCA Civ 173, [2001] 1 All ER (Comm) 802 (permission to amend by adding US company as a party to the proceedings was set aside as the US company had instituted proceedings in Texas).

11 CPR 6.37(4).

12 As to the meaning of 'filing' see PARA 1832 note 8.

13 CPR 6.37(5)(a)(i). Where an order grants permission to serve a claim form out of the jurisdiction, the periods within which the defendant may file an acknowledgment of service, file or serve an admission and file a defence are calculated in accordance with *Practice Direction--Service out of the Jurisdiction* PD 6B para 6.3, 6.4 or 6.5 having regard to the Table set out in that practice direction: para 6.2. The period for filing an acknowledgment of service under CPR Pt 10 or filing or serving an admission under CPR Pt 14 is the number of days listed in the Table after service of the particulars of claim: para 6.3; eg, where a defendant has been served with a claim form in the Bahamas, the period for acknowledging service or admitting the claim is 22 days after service. Where service is effected on a foreign state, the state being served is allowed an additional two months: para 6.5; see PARAS 185 note 14, 204 note 14, 177 text and note 14.

14 CPR 6.37(5)(a)(ii); and see note 13.

15 CPR 6.37(5)(a)(iii). The period for filing a defence under CPR Pt 15 is (1) the number of days listed in the Table after service of the particulars of claim; or (2) where the defendant has filed an acknowledgment of service, the number of days listed in the Table plus an additional 14 days after the service of the particulars of claim; eg where a defendant has been served with particulars of claim in Gibraltar and has acknowledged service, the period for filing a defence is 45 days after service of the particulars of claim: *Practice Direction--Service out of the Jurisdiction* PD 6B para 6.4. See also CPR Pt 11 (procedure by which a defendant may dispute the court's jurisdiction); and PARA 206. CPR 6.37(5)(a)(i)-(iii) does not apply where an application notice is to be served on a non party out of the jurisdiction: see CPR 6.39; and PARA 172.

16 CPR 6.37(5)(a)(iv).

17 CPR 6.37(5)(b)(i).

18 CPR 6.37(5)(b)(ii)

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(iii) Provisions under Domestic Law for Service out of the Jurisdiction/172. Application for permission to serve documents other than claim form out of jurisdiction.

172. Application for permission to serve documents other than claim form out of jurisdiction.

Unless the provisions following apply, where the permission of the court¹ is required for the claimant² to serve³ the claim form out of the jurisdiction⁴, the claimant must obtain permission to serve any other document in the proceedings out of the jurisdiction⁵.

Where the court gives permission for a claim form to be served on a defendant⁶ out of the jurisdiction and the claim form states that particulars of claim are to follow, the permission of the court is not required to serve the particulars of claim⁷; and the permission of the court is not required if a party has given an address for service in Scotland or Northern Ireland⁸.

Where an application notice is to be served out of the jurisdiction on a person who is not a party to the proceedings there is no requirement for a period to be specified for the filing of an acknowledgment of service, a form of admission or a defence⁹ and the provisions of the rules relating to the time for calculating those periods and filing such documents¹⁰ do not apply¹¹. Where an application is served out of the jurisdiction on a person who is not a party to the proceedings, that person may make an application to the court disputing the court's jurisdiction¹² as if that person were a defendant, but he is not required to file an acknowledgment of service¹³.

1 As to the meaning of 'court' see PARA 22.

2 As to the meanings of 'claimant' and 'claim form' see PARA 138 note 6.

3 As to the meaning of 'service' see PARA 138 note 2.

4 I.e. under CPR 6.37: see PARA 171. As to the meaning of 'jurisdiction' see PARA 117 note 6.

5 CPR 6.38(1); and see *C Inc plc v L* [2001] 2 All ER (Comm) 446, [2001] All ER (D) 376 (Mar).

6 As to the meaning of 'defendant' see PARA 138 note 6.

7 CPR 6.38(2). As to the particulars of claim see PARA 123.

8 CPR 6.38(3).

9 I.e. CPR 6.35 (see PARAS 185, 204) does not apply: CPR 6.39(1).

10 I.e. CPR 6.37(5)(a)(i), (ii) and (iii) (see PARA 171) does not apply: CPR 6.39(1).

11 CPR 6.39(1). Where an application notice or order is served out of the jurisdiction, the period for responding to service is seven days less than the number of days listed in *Practice Direction--Service out of the Jurisdiction* PD 6B, Table: see para 7.1.

12 I.e. under CPR Pt 11: see PARA 206.

13 CPR 6.39(2). I.e. CPR 11(2) (see PARA 206) does not apply: CPR 6.39(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(iii) Provisions under Domestic Law for Service out of the Jurisdiction/173. Method of service; general provisions.

173. Method of service; general provisions.

Where a party serves¹ any document on a party in Scotland or Northern Ireland, it must be served by a permitted method for service², and any document to be served in proceedings must be sent or transmitted to, or left at, the party's address for service³ unless it is to be served personally or the court orders otherwise⁴.

Where the claimant wishes to serve a claim form⁵ or any other document on a defendant⁶ out of the United Kingdom, it may be served:

- 275 (1) by any method provided for by the rule relating to service in accordance with the service regulation⁷, the rule relating to service through foreign governments, judicial authorities and British Consular authorities⁸ or the rule⁹ relating to service on a state¹⁰;
- 276 (2) by any method permitted by a Civil Procedure Convention¹¹; or
- 277 (3) by any other method permitted by the law of the country in which it is to be served¹².

Nothing in heads (1) to (3) or in any court order authorises or requires any person to do anything which is contrary to the law of the country where the claim form or other document is to be served¹³.

1 As to the meaning of 'service' see PARA 138 note 2.

2 I.e. a method permitted by CPR Pt 6 Section II (CPR 6.3-6.19) or CPR Pt 6 Section III (CPR 6.20-6.29): see PARA 139 et seq. References to 'jurisdiction' in Section II are modified accordingly: CPR 6.40(2). As to the meaning of 'jurisdiction' see PARA 117 note 6.

3 I.e. under CPR 6.23(2) or (3): see PARA 144.

4 CPR 6.23(4), applied by CPR 6.40(1), (2).

5 As to the meaning of 'claim form' and 'claim' for the purposes of CPR Pt 6 see PARA 138 note 6.

6 As to the meaning of 'defendant' see PARA 138 note 6.

7 I.e. provided for by CPR 6.41: see PARA 174. As to the meaning of 'service regulation' see PARA 156 text and note 12. As to the provisions of the service regulation see PARA 157 et seq.

8 I.e. provided for by CPR 6.42: see PARA 175.

9 I.e. provided for by CPR 6.44: see PARA 177.

10 CPR 6.40(3)(a).

11 CPR 6.40(3)(b). For these purposes, 'Civil Procedure Convention' means the Brussels and Lugano Conventions and any other Convention entered into by the United Kingdom regarding service outside the jurisdiction (eg the Hague Convention (15 November 1965; Cmnd 3986): see PARAS 175, 181; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 120): CPR 6.31(c). As to the Brussels and Lugano Conventions see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65.

12 CPR 6.40(3)(c).

13 CPR 6.40(4). It is implicit in this provision that the court can permit any alternative method of service so long as it does not contravene the law of the country where service is to be effected: *Habib Bank Ltd v Central Bank of Sudan* [2006] EWHC 1767 (Comm), [2007] 1 All ER (Comm) 53, [2007] 1 WLR 470.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(iii) Provisions under Domestic Law for Service out of the Jurisdiction/174. Service in accordance with the service regulation.

174. Service in accordance with the service regulation.

The following provisions apply where the claimant¹ wishes to serve² the claim form or other document in accordance with the service regulation³. The claimant must file the claim form or other document, any translation and any other documents required by the service regulation⁴. When the claimant files those documents, the court officer⁵ will seal ⁶the copy of the claim form and forward the documents to the Senior Master⁷.

The rule relating to proof of service⁸ does not apply⁹.

1 As to the meanings of 'claimant' and 'claim form' for the purposes of CPR Pt 6 see PARA 138 note 6.

2 As to the meaning of 'service' see PARA 138 note 2.

3 CPR 6.41(1). As to the meaning of 'service regulation' see PARA 156 text and note 12. As to the provisions of that regulation see PARA 157 et seq.

4 CPR 6.41(2).

5 As to the meaning of 'court officer' see PARA 49 note 3.

6 As to the meaning of 'seal' see PARA 81 note 2.

7 CPR 6.41(3). As to the Senior Master see PARA 176 note 17.

8 Ie CPR 6.47: see PARA 180.

9 CPR 6.41(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(iii) Provisions under Domestic Law for Service out of the Jurisdiction/175. Service through foreign governments, judicial authorities and British Consular authorities.

175. Service through foreign governments, judicial authorities and British Consular authorities.

Where the claimant¹ wishes to serve² a claim form or any other document on a defendant³ in any country which is a party to a Civil Procedure Convention⁴ providing for service in that country, it may be served through the authority designated under the Hague Convention⁵ (where relevant) in respect of that country⁶ or, if the law of that country permits, through the judicial authorities of that country⁷ or through a British Consular authority in that country (subject to any provisions of the applicable convention about the nationality of persons who may be served by such a method)⁸.

Where the claimant wishes to serve a claim form or any other document on a defendant in any country with respect to which there is no Civil Procedure Convention providing for service in that country, the claim form or other document may be served, if the law of that country so permits, through the government of that country, where that government is willing to serve it⁹, or through a British Consular authority in that country¹⁰.

Where the claimant wishes to serve the claim form or other document in any Commonwealth state¹¹ which is not a party to the Hague Convention, the Isle of Man or the Channel Islands or any British overseas territory¹², the methods of service through the judicial authorities or through a British Consular authority¹³ are not available and the claimant or the claimant's agent must effect service direct, unless the relevant practice direction provides otherwise¹⁴.

1 As to the meanings of 'claimant' and 'claim form' for the purposes of CPR Pt 6 see PARA 138 note 6.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'defendant' see PARA 138 note 6.

4 As to the meaning of 'Civil Procedure Convention' see PARA 173 note 12.

5 For these purposes, the 'Hague Convention' means the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters signed at the Hague on 15 November 1965 (Cmnd 3986); CPR 6.31(a). See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 120; and PARA 181.

6 CPR 6.42(1)(a).

7 CPR 6.42(1)(b)(i).

8 CPR 6.42(1)(b)(ii).

9 CPR 6.42(2)(a).

10 CPR 6.42(2)(b).

11 'Commonwealth state' means a state listed in the British Nationality Act 1981 Sch 3: CPR 6.31(f). See **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 11.

12 As to British overseas territories see PARA 156 note 8.

13 Ie the methods permitted by CPR 6.42(1)(b), (2).

14 CPR 6.42(3). The judicial authorities of certain Commonwealth states which are not a party to the Hague Convention require service to be in accordance with CPR 6.42(1)(b)(i) and not 6.42(3). A list of such countries can be obtained from the Foreign Process Section (Room E02) at the Royal Courts of Justice: *Practice Direction-- Service out of the Jurisdiction* PD 6B para 5.1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(iii) Provisions under Domestic Law for Service out of the Jurisdiction/176. Procedure where service is to be through foreign governments, judicial authorities and British Consular authorities.

176. Procedure where service is to be through foreign governments, judicial authorities and British Consular authorities.

Where the claimant¹ wishes to serve² a claim form³ or any other document through:

- 278 (1) the authority designated under the Hague Convention⁴ in respect of that country⁵;
- 279 (2) the judicial authorities of the country where the claim form is to be served⁶;
- 280 (3) a British Consular authority in that country⁷; or
- 281 (4) the government of that country⁸,

the claimant must file⁹ a request for service of the claim form or other document specifying one or more of the methods set out above¹⁰. He must also file a copy of the claim form or other document¹¹, any other documents or copies of documents required by the relevant practice direction¹², and any required¹³ translation¹⁴. Where the claimant files the specified documents, the court officer¹⁵ will seal¹⁶ the copy of the claim form or other document and forward the documents to the Senior Master¹⁷. Where the claim form or other document is being served through the authority designated under the Hague Convention, the Senior Master will send documents forwarded to that authority¹⁸. In any other case, he will send the documents to the Foreign and Commonwealth Office with a request that it arranges for the claim form or other document to be served¹⁹.

An official certificate which:

- 282 (a) states that the method requested has been performed and the date of such performance;
- 283 (b) states, where more than one method is requested, which method was used; and
- 284 (c) is made by a British Consular authority in the country where the method requested was performed, the government or judicial authorities in that country or the authority designated in respect of that country under the Hague Convention,

is evidence of the facts stated in the certificate²⁰ and a document purporting to be such an official certificate is to be treated as such a certificate, unless it is proved not to be²¹.

1 As to the meanings of 'claimant' and 'claim form' for the purposes of CPR Pt 6 see PARA 138 note 6.

2 As to the meaning of 'service' see PARA 138 note 2.

3 I.e. under CPR 6.42(1) or 6.42(2) (see PARA 175): CPR 6.43(1).

4 As to the Hague Convention (15 November 1965; Cmnd 3986) see PARAS 175, 181; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 120.

5 I.e. under CPR 6.42(1)(a).

6 I.e. under CPR 6.42(1)(b)(i).

7 le under CPR 6.42(1)(b)(ii), (2)(b).

8 le under CPR 6.42(2)(a).

9 As to the meaning of 'filing' see PARA 1832 note 8.

10 CPR 6.43(2)(a).

11 CPR 6.43(2)(b).

12 CPR 6.43(2)(c). The claimant must provide the following documents for each party to be served out of the jurisdiction: (1) a copy of the particulars of claim if not already contained in or served with the claim form; (2) a duplicate of the claim form, of the particulars of claim (if not already contained in or served with the claim form) and of any documents accompanying the claim form; (3) forms for responding to the claim; and (4) any translation required under CPR 6.45 in duplicate: *Practice Direction--Service out of the Jurisdiction* PD 6B para 4.1. Some countries require legalisation of the document to be served and some require a formal letter of request which must be signed by the Senior Master: see para 4.2.

13 le under CPR 6.45: see PARA 178.

14 CPR 6.43(2)(d).

15 As to the meaning of 'court officer' see PARA 49 note 3.

16 As to the meaning of 'seal' see PARA 81 note 2.

17 CPR 6.43(3). The Senior Master is the Senior Master of the Queen's Bench Division as the designated authority for England and Wales under The Hague Convention and other conventions.

18 CPR 6.43(4)(a).

19 CPR 6.43(4)(b).

20 CPR 6.43(5).

21 CPR 6.43(6).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(iii) Provisions under Domestic Law for Service out of the Jurisdiction/177. Service on a state where the court permits service out of the jurisdiction.

177. Service on a state where the court permits service out of the jurisdiction.

Where a claimant¹ wishes to serve² a claim form or other document on a state³ he must file⁴ in the Central Office of the Royal Courts of Justice a request for service to be arranged by the Foreign and Commonwealth Office, a copy of the claim form or other document and any translation⁵ required⁶. The Senior Master⁷ will send the documents so filed to the Foreign and Commonwealth Office with a request that it arranges for them to be served⁸. An official certificate by the Foreign and Commonwealth Office stating that a claim form has been duly served on a specified date in accordance with a request made under this rule is evidence of that fact⁹ and a document purporting to be such a certificate is to be treated as such a certificate, unless it is proved not to be¹⁰. Where the state has agreed to a method of service¹¹ other than through the Foreign and Commonwealth Office, the claim form or other document may be served either by the method agreed or in accordance with this rule¹².

Where service is effected on a state the usual period for acknowledging service¹³ is extended by two months¹⁴.

1 As to the meanings of 'claimant' and 'claim form' for the purposes of CPR Pt 6 see PARA 138 note 6.

2 As to the meaning of 'service' see PARA 138 note 2.

3 For these purposes, 'state' has the meaning given by the State Immunity Act 1978 s 14 (see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 245): CPR 6.44(2).

4 As to the meaning of 'filing' see PARA 1832 note 8.

5 Ie any translation required under CPR 6.45: see PARA 178.

6 CPR 6.44(1), (3).

7 As to the Senior Master see PARA 176 note 17.

8 CPR 6.44(4).

9 CPR 6.44(5).

10 CPR 6.44(6).

11 Ie where the State Immunity Act 1978 s 12(6) (which provides that s 12(1), prescribing a method of serving documents on a state, does not prevent the service of a claim form or other document in a manner to which the state has agreed: see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 256) applies: see CPR 6.44(7) (a).

12 CPR 6.44(7).

13 As to the period for acknowledging service see CPR 6.22; and PARA 185.

14 See the State Immunity Act 1978 s 12(2); and PARAS 185 note 14, 204 note 14.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(iii) Provisions under Domestic Law for Service out of the Jurisdiction/178. Translation of claim form or other document.

178. Translation of claim form or other document.

Subject to certain specific exceptions¹, every copy of the claim form or other document filed under the rules providing for service through foreign governments, judicial and other authorities² or for service on a state³ must be accompanied by a translation of it⁴. The translation must be in the official language of the country in which the claim form or other document is to be served⁵ or, if there is more than one official language of that country, in any official language which is appropriate to the place in the country where the claim form or other document is to be served⁶. Every translation filed under this rule must be accompanied by a statement by the person making it that it is a correct translation, and the statement must include that person's name, address and qualifications for making a translation⁷.

1 Ie except where CPR 6.45(4) or (5) applies: see CPR 6.45(1). The claimant is not required to file a translation of a claim form or other document filed under CPR 6.43 (see PARA 176) where the claim form or other document is to be served (1) in a country of which English is an official language; or (2) on a British citizen, unless a Civil Procedure Convention expressly requires a translation: CPR 6.45(4). Nor is the claimant required to file a translation of a claim form or other document filed under CPR 6.44 (see PARA 177) where English is an official language of the state where the claim form or other document is to be served: CPR 6.45(5). As to the meanings of 'claimant' and 'claim form' for the purposes of CPR Pt 6 see PARA 138 note 6; as to the meaning of 'filing' see PARA 1832 note 8; and as to the meaning of 'service' see PARA 138 note 2. As to the meaning of 'Civil Procedure Convention' see PARA 173 note 12.

2 Ie filed under CPR 6.43: see PARA 176.

3 Ie filed under CPR 6.44: see PARA 177.

4 CPR 6.45(1).

5 CPR 6.45(2)(a).

6 CPR 6.45(2)(b).

7 CPR 6.45(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(iii) Provisions under Domestic Law for Service out of the Jurisdiction/179. Undertaking to be responsible for expenses of the Foreign and Commonwealth Office.

179. Undertaking to be responsible for expenses of the Foreign and Commonwealth Office.

Every request for service through foreign governments, judicial authorities or British Consular authorities¹ or for service on a state² must contain an undertaking by the person making the request to be responsible for all expenses incurred by the Foreign and Commonwealth Office or foreign judicial authority³ and to pay those expenses to the Foreign and Commonwealth Office or foreign judicial authority on being informed of the amount⁴.

1 Ie filed under CPR 6.43: see PARA 176. As to the meaning of 'filing' see PARA 1832 note 8; and as to the meaning of 'service' see PARA 138 note 2.

2 Ie filed under CPR 6.44: see PARA 177.

3 CPR 6.46(a).

4 CPR 6.46(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(3) SERVICE OUT OF THE JURISDICTION/(iii) Provisions under Domestic Law for Service out of the Jurisdiction/180. Proof of service.

180. Proof of service.

Where a hearing is fixed when the claim is issued and the claim form¹ is served² on a defendant³ out of the jurisdiction⁴ and that defendant does not appear at the hearing, the claimant⁵ may not obtain judgment against that defendant until the claimant files⁶ written evidence showing that the claim form has been duly served⁷.

1 As to the meaning of 'claim form' and 'claim' for the purposes of CPR Pt 6 see PARA 138 note 6.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'defendant' see PARA 138 note 6.

4 As to the meaning of 'jurisdiction' see PARA 117 note 6.

5 As to the meaning of 'claimant' see PARA 138 note 6.

6 As to the meaning of 'filing' see PARA 1832 note 8.

7 CPR 6.47. Such evidence may, eg, take the form of a certificate under the Hague Convention: see CPR 6.26(5); and PARA 176. See also PARA 167.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/6. SERVICE OF DOCUMENTS/(4) SERVICE OF FOREIGN PROCEEDINGS WITHIN THE JURISDICTION/181. Procedure for service of foreign process.

(4) SERVICE OF FOREIGN PROCEEDINGS WITHIN THE JURISDICTION

181. Procedure for service of foreign process.

The following provisions apply to the service in England or Wales of any document in connection with civil or commercial proceedings in a foreign court or tribunal¹ but not where the service regulation² applies³.

The Senior Master⁴ will serve a relevant document upon receipt of:

- 285 (1) a written request for service, where the foreign court or tribunal is in a Convention country⁵, from a consular or other authority of that country⁶; or a written request from the Secretary of State for Foreign and Commonwealth Affairs, with a recommendation that service should be effected⁷; or
- 286 (2) a translation of that request into English⁸;
- 287 (3) two copies of the document to be served⁹; and
- 288 (4) unless the foreign court or tribunal certifies that the person to be served understands the language of the document, two copies of a translation of it into English¹⁰.

The Senior Master will determine the method of service¹¹. Where service of a document has been effected by a process server¹², the process server must:

- 289 (a) send to the Senior Master a copy of the document, and either proof of service or a statement why the document could not be served¹³; and
- 290 (b) if the Senior Master directs, specify the costs incurred in serving or attempting to serve the document¹⁴.

The Senior Master will send to the person who requested service (i) a certificate, sealed¹⁵ with the seal of the Supreme Court¹⁶ for use out of the jurisdiction, stating when and how the document was served or the reason why it has not been served; and where appropriate, an amount certified by a costs judge to be the costs of serving or attempting to serve the document¹⁷; and (ii) a copy of the document¹⁸.

Special provision is made under the service regulation¹⁹ for service by the designated agency in another member state²⁰.

1 CPR 6.48(a). 'Foreign court or tribunal' means a court or tribunal in a country outside of the United Kingdom: CPR 6.49(b).

2 As to the meaning of 'service regulation' see PARA 156 text and note 12, definition applied by CPR 6.48(b).

3 CPR 6.48(b).

4 I.e. the Senior Master of the Queen's Bench Division: see PARA 176 note 17.

5 'Convention country' means a country in relation to which there is a Civil Procedure Convention: CPR 6.49(a). As to the meaning of 'Civil Procedure Convention' see PARA 173 note 12. Note, however, that the

provisions of EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) prevail over the provisions of the Hague Convention: see PARA 156 note 14.

6 CPR 6.50(a)(i).

7 CPR 6.50(a)(ii).

8 CPR 6.50(b).

9 CPR 6.50(c).

10 CPR 6.50(d).

11 CPR 6.51.

12 'Process server' means (1) a process server appointed by the Lord Chancellor to serve documents to which CPR Pt 6 Section IV (CPR 6.03-6.47) applies; or (2) the process server's agent: CPR 6.49(c).

13 CPR 6.52(1)(a)

14 CPR 6.52(1)(b).

15 As to the meaning of 'seal' see PARA 81 note 2.

16 As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

17 CPR 6.52(2)(a).

18 CPR 6.52(2)(b).

19 Ie EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79): see PARA 156 text and note 12.

20 See PARA 157 et seq.

UPDATE

181 Procedure for service of foreign process

TEXT AND NOTES 15-17--CPR 6.52(2)(a) amended: SI 2009/2092.

NOTE 16--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(1) IN GENERAL/182. Methods of responding.

7. RESPONDING TO A CLAIM

(1) IN GENERAL

182. Methods of responding.

When particulars of claim are served¹ on a defendant², he may respond to the claim by:

- 291 (1) filing³ or serving an admission⁴;
- 292 (2) filing a defence⁵;
- 293 (3) both filing or serving an admission and filing a defence, if he admits only part of the claim⁶; or
- 294 (4) filing⁷ an acknowledgment of service⁸.

If the defendant fails to respond by one these methods, then the claimant⁹ may be entitled to have judgment by reason of such default¹⁰.

Where the alternative procedure for claims¹¹ has been used by the claimant, the defendant must file an acknowledgment of service¹².

1 As to the requirement for serving particulars of claim where the normal procedure for starting a claim is used see PARA 123; and as to the contents of the particulars of claim see PARA 587. As to the meaning of 'service' see PARA 138 note 2.

2 As to the meaning of 'defendant' see PARA 18.

3 As to the meaning of 'filing' see PARA 1832 note 8.

4 Ie in accordance with CPR Pt 14 (see PARA 187 et seq): see CPR 9.2(a).

5 Ie in accordance with CPR Pt 15 (see PARA 199 et seq): see CPR 9.2(b).

6 See CPR 9.2(b).

7 Ie in accordance with CPR Pt 10 (see PARAS 184, 186): see CPR 9.2(c).

8 CPR 9.1(1), 9.2.

9 As to the meaning of 'claimant' see PARA 18.

10 See CPR Pt 12; and PARA 506 et seq. See also CPR 10.2; and PARA 186.

11 Ie the procedure under CPR Pt 8 (the Part 8 procedure): see PARA 127 et seq.

12 See CPR 8.3; and PARA 130. Where the Part 8 procedure is used, CPR Pt 16 (statements of case: see PARA 584 et seq) does not apply and details of the claim must be included in the claim form: see PARA 123 note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(1) IN GENERAL/183. Responding after service of claim form without particulars of claim.

183. Responding after service of claim form without particulars of claim.

Where the defendant¹ receives a claim form which states that particulars of claim are to follow, he need not respond to the claim until the particulars of claim have been served² on him³.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'service' see PARA 138 note 2.

3 CPR 9.1(1), (2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(2) ACKNOWLEDGMENT OF SERVICE/184. Acknowledgment of service; in general.

(2) ACKNOWLEDGMENT OF SERVICE

184. Acknowledgment of service; in general.

A defendant¹ may file² an acknowledgment of service if he is unable to file a defence within the specified period³ or he wishes to dispute the court's⁴ jurisdiction⁵. Generally the period for filing an acknowledgment of service is 14 days after service of the claim form⁶.

An acknowledgment of service must be signed by the defendant or the defendant's legal representative⁷ and include the defendant's address for service⁸. The defendant's name must be set out in full⁹.

On receipt of an acknowledgment of service, the court is required to notify the claimant in writing¹⁰.

An acknowledgment of service may be amended or withdrawn only with the permission of the court¹¹.

Where the claimant uses the alternative procedure for claims¹², the provisions relating to the acknowledgment of service are modified¹³.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 The period specified in CPR 15.4 (see PARA 201): see CPR 10.1(3)(a).

4 As to the meaning of 'court' see PARA 22.

5 CPR 10.1(1), (3). As to the meaning of 'jurisdiction' see PARA 117 note 6. As to the procedure for disputing the court's jurisdiction see CPR Pt 11; and PARA 206.

6 See CPR 10.3; and PARA 186 note 3.

7 *Practice Direction--Acknowledgment of Service* PD 10 para 4.1. Where the defendant is a company or other corporation, a person holding a senior position in the company or corporation may sign the acknowledgment of service on the defendant's behalf, but must state the position he holds: para 4.2. Each of the following persons is a person holding a senior position: (1) in respect of a registered company or corporation, a director, the treasurer, secretary, chief executive, manager or other officer of the company or corporation; and (2) in respect of a corporation which is not a registered company, in addition to those persons set out in head (1), the mayor, chairman, president, town clerk or similar officer of the corporation: para 4.3. Where a claim is brought against a partnership, service must be acknowledged in the name of the partnership on behalf of all persons who were partners at the time when the cause of action accrued, and the acknowledgment of service may be signed by any of those partners, or by any person authorised by any of those partners to sign it: para 4.4. Children and protected parties may acknowledge service only by their litigation friend or his legal representative unless the court otherwise orders: para 4.5. As to the meaning of 'legal representative' see PARA 1833 note 13; as to the meaning of 'child' see PARA 222 note 3; as to the meaning of 'protected party' see PARA 222 note 1; and as to litigation friends see PARA 222.

8 CPR 10.5. An address for service must be within the United Kingdom: see CPR 6.23; and PARA 143. Where the defendant is represented by a legal representative and the legal representative has signed the acknowledgment of service form, the address must be the legal representative's business address; otherwise the address for service that is given should be as set out in CPR 6.23: see *Practice Direction--Acknowledgment of Service* PD 10 para 3.2. As to the application of CPR 10.5 to Part 8 claims see PARA 130 note 9.

9 See *Practice Direction--Acknowledgment of Service* PD 10 para 5.1. Where the defendant's name has been incorrectly set out in the claim form, it should be correctly set out on the acknowledgment of service followed by the words 'described as' and the incorrect name: para 5.2.

10 CPR 10.4. As to the meaning of 'claimant' see PARA 18.

11 *Practice Direction--Acknowledgment of Service* PD 10 para 5.4. An application for permission must be made in accordance with CPR Pt 23 (see PARA 303 et seq) and supported by evidence: *Practice Direction--Acknowledgment of Service* PD 10 para 5.5. As to the considerations to be taken into account in dealing with an application to amend see eg *Davies Attbrook (Chemists) Ltd v Benchmark Group plc* [2005] EWHC 3413 (Ch), [2006] 1 WLR 2493.

12 Ie the procedure set out in CPR Pt 8 (the Part 8 procedure): see PARA 127 et seq.

13 CPR 10.1(2). As to the modifications that apply see CPR 8.3; and PARA 130.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(2) ACKNOWLEDGMENT OF SERVICE/185. Period for filing acknowledgment of service where claim form is served out of the jurisdiction and permission of the court was not required for service.

185. Period for filing acknowledgment of service where claim form is served out of the jurisdiction and permission of the court was not required for service.

Where the claimant¹ serves² the claim form on a defendant³ in Scotland or Northern Ireland, or in a Convention territory⁴ within Europe or a member state, without the court's permission being required⁵, the following provisions apply⁶. The period for filing⁷ an acknowledgment of service⁸ or admission⁹ is 21 days after service of the particulars of claim¹⁰.

Where the claimant serves the claim form on a defendant in a Convention territory outside Europe without the court's permission being required¹¹, the period for filing an acknowledgment of service or admission is 31 days after service of the particulars of claim¹².

Where the claimant serves the claim form¹³ in a country not referred to above, the period for responding to the claim form is set out in the relevant practice direction¹⁴.

1 As to the meanings of 'claimant' and 'claim form' for the purposes of CPR Pt 6 see PARA 138 note 6.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'defendant' see PARA 138 note 6.

4 As to the meaning of 'Convention territory' see PARA 168 note 7.

5 Ie the claim form is served under CPR 6.32 (see PARA 168) or CPR 6.33 (see PARA 169). As to the meaning of 'court' see PARA 22.

6 See CPR 6.35(1), (2)(a), (3)(a). CPR 6.35 does not apply where an application notice is to be served on a non party out of the jurisdiction: see CPR 6.39; and PARA 172.

7 As to the meaning of 'filing' see PARA 1832 note 8.

8 As to filing an acknowledgment of service see PARA 184.

9 As to admissions see PARA 187.

10 CPR 6.35(1), (2)(a), (3)(a).

11 Ie under CPR 6.33: see PARA 169.

12 CPR 6.35(4)(a).

13 Ie under CPR 6.33: see PARA 169.

14 CPR 6.35(5). See *Practice Direction--Service out of the Jurisdiction* PD 6B para 6. Where CPR 6.35(5) applies, the periods within which the defendant must file an acknowledgment of service or file or serve an admission or file a defence, will be calculated in accordance with para 6.3 or 6.5: para 6.1. The period for filing an acknowledgment of service under CPR Pt 10 or for filing or serving an admission under CPR Pt 14 is the number of days listed in the Table after service of the particulars of claim: para 6.3. The Table lists a large number of foreign countries and territories and gives the number of days allowed for responding to service. Under the State Immunity Act 1978 (see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 244 et seq), where a state is served, the period permitted under para 6.3 for filing an acknowledgment of service or for filing or serving an admission does not begin to run until two months after the date on which the state is served: *Practice Direction--Service out of the Jurisdiction* PD 6B para 6.5. See also PARA 177.

Where particulars of claim are served out of the jurisdiction any statement as to the period for responding to the claim contained in any of the forms required by CPR 7.8 to accompany the particulars of claim must specify the period prescribed under CPR 6.35: *Practice Direction--Service out of the Jurisdiction* PD 6B para 6.6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(2) ACKNOWLEDGMENT OF SERVICE/186. Consequence of not filing an acknowledgment of service.

186. Consequence of not filing an acknowledgment of service.

If a defendant¹ fails to file² an acknowledgment of service within the specified period³ and does not within that period file a defence⁴ or serve or file an admission⁵, the claimant⁶ may be entitled to obtain default judgment⁷.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 The period specified in CPR 10.3: see CPR 10.2(a). The general rule is that the period for filing an acknowledgment of service is 14 days after service of the claim form: CPR 10.3(1)(b). Where the defendant is served with a claim form which states that particulars of claim are to follow, the period for filing an acknowledgment of service is 14 days after service of the particulars of claim: CPR 10.3(1)(a). The general rule is subject to (1) CPR 6.35 (calculation of period for filing an acknowledgment of service when the claim form is served out of the jurisdiction: see PARA 185); (2) CPR 6.12(3) (court required to specify the period for responding to particulars of claim when making an order under the rule relating to service on the agent of an overseas principal: see PARA 147); and (3) CPR 6.37(5) (court to specify period within which the defendant may file an acknowledgment of service when it makes an order giving permission to serve a claim form out of the jurisdiction): see CPR 10.3(2). As to the period when service is effected out of the jurisdiction see PARAS 171 note 13, 204. Where service is to be effected on a foreign state, the state being served is allowed an additional two months: see PARAS 185 note 14, 204 note 14, 177 text and notes 13-14. As to the meaning of 'service' see PARA 138 note 2. As to the application of CPR 10.3(2) to Part 8 claims see PARA 130 note 9.

4 In accordance with CPR Pt 15 (see PARA 199 et seq): see CPR 10.2(b).

5 In accordance with CPR Pt 14 (see PARA 187 et seq): see CPR 10.2(b).

6 As to the meaning of 'claimant' see PARA 18.

7 CPR 10.2. The entitlement to a default judgment depends on its being allowed by CPR Pt 12 (see PARA 506 et seq): see CPR 10.2. As to the meaning of 'default judgment' see PARA 506. As to restrictions on obtaining default judgment without proof of service where service has been effected out of the jurisdiction see PARAS 167, 180. The court will normally exercise its discretion to permit a defendant to file an acknowledgment of service or a defence out of time: *Coll v Tatum* (2001) Times, 3 December.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(3) ADMISSIONS/187. Making an admission after commencement of proceedings.

(3) ADMISSIONS

187. Making an admission after commencement of proceedings.

A party may admit the truth of the whole or any part of another party's case¹, which he may do by giving notice in writing (such as in a statement of case² or by letter)³. Where the only remedy which the claimant⁴ is seeking is the payment of money, the defendant⁵ may also make an admission⁶. Where the defendant makes such an admission, the claimant has a right to enter judgment except where the defendant is a child⁷ or protected party⁸ or the claimant is a child or protected party and the admission is made under the rule relating to the admission of part of a claim for a specified amount of money⁹ or under the rule relating to the admission of liability for an unspecified amount¹⁰ where the defendant offers a sum in satisfaction of the claim¹¹.

The permission of the court is required to amend or withdraw an admission¹².

1 CPR 14.1(1).

2 As to the meaning of 'statement of case' see PARA 584.

3 CPR 14.1(2). When particulars of claim are served on a defendant the forms for responding to the claim that will accompany them will include a form for making an admission: see *Practice Direction--Admissions* PD 14 para 2.1. The form will be either Practice form N9A (specified amount) or Practice form N9C (unspecified amount). As to admission before commencement of proceedings see PARA 188.

4 As to the meaning of 'claimant' see PARA 18.

5 As to the meaning of 'defendant' see PARA 18.

6 CPR 14.1(3). The admission may be made in accordance with (1) CPR 14.4 (admission of whole claim for specified amount of money: see PARA 191); (2) CPR 14.5 (admission of part of claim for specified amount of money: see PARA 192); (3) CPR 14.6 (admission of liability to pay whole of claim for unspecified amount of money: see PARA 193); or (4) CPR 14.7 (admission of liability to pay claim for unspecified amount of money where defendant offers a sum in satisfaction of the claim: see PARA 194): CPR 14.1(3)(a)-(d).

7 As to the meaning of 'child' see PARA 222 note 3.

8 CPR 14.1(4)(a). As to the meaning of 'protected party' see PARA 222 note 1.

9 Ie under CPR 14.5: see PARA 192.

10 Ie under CPR 14.7: see PARA 194.

11 See CPR 14.1(4)(b). See also CPR 21.10, which provides that, where a claim is made by or on behalf of a child or protected party or against a child or protected party, no settlement, compromise or payment can be valid, so far as it relates to that person's claim, without the approval of the court; and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1422. As to the meaning of 'court' see PARA 22.

12 CPR 14.1(5). CPR 3.1(3) provides that the court may attach conditions when it makes an order: see PARA 247. As to withdrawal of admission see *White v Greensand Homes Ltd* [2007] EWCA Civ 643, [2007] All ER (D) 371 (Jun).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(3) ADMISSIONS/188. Admissions made before commencement of proceedings.

188. Admissions made before commencement of proceedings.

A person may, by giving notice in writing, admit the truth of the whole or any part of another party's case before commencement of proceedings (a 'pre-action admission')¹. The provisions below apply to a pre-action admission made in the specified types of proceedings² if one of the following conditions is met:

- 295 (1) it is made after the party making it has received a letter before claim in accordance with Practice Direction (Pre-action Conduct) or any relevant pre-action protocol; or
- 296 (2) it is made before such letter before claim has been received, but it is stated to be made under the specified part³ of the Civil Procedure Rules⁴.

A person may, by giving notice in writing, withdraw a pre-action admission (a) before commencement of proceedings, if the person to whom the admission was made agrees; (b) after commencement of proceedings, if all parties to the proceedings consent or with the permission of the court⁵.

After commencement of proceedings, any party may apply for judgment on the pre-action admission; and the party who made the pre-action admission may apply to withdraw it⁶. An application to withdraw a pre-action admission or to enter judgment on such an admission must be made in accordance with the general rules about applications for court orders⁷. It may be made as a cross-application⁸.

1 CPR 14.1A(1).

2 Ie those listed in *Practice Direction--Admissions* PD 14 para 1.1(2). CPR 14.1A applies only to admissions in proceedings to which one of the following pre-action protocols apply: (1) the pre-action protocol for personal injury claims; (2) the pre-action protocol for the resolution of clinical disputes; or (3) the pre-action protocol for disease and illness claims: *Practice Direction--Admissions* PD 14 para 1.1(2). As to the pre-action protocols see PARA 107. The pre-action protocol for personal injury claims states that it is primarily designed for certain types of personal injury claim with a value of less than £15,000; but the Pre-action Protocol for Personal Injury Claims (1999) para 2.2 indicates that it generally applies to all claims which include a claim for personal injury: *Practice Direction--Admissions* PD 14 para 1.1(2).

3 Ie CPR Pt 14.

4 CPR 14.1A(2).

5 CPR 14.1A(3). See *White v Greensand Homes Ltd* [2007] EWCA Civ 643, [2007] All ER (D) 371 (Jun).

6 CPR 14.1A(4).

7 Ie CPR Pt 23: see PARA 303 et seq.

8 CPR 14.1A(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(3) ADMISSIONS/189. Period for making an admission.

189. Period for making an admission.

The period for returning an admission in respect of the whole of a claim for a specified amount of money¹ or for filing² an admission in other cases³ is 14 days after service of the claim form⁴. Where, however, the defendant⁵ is served with a claim form which states that particulars of claim will follow, the prescribed period for returning or filing an admission is 14 days after service of the particulars⁶. These provisions are subject to the special rules (1) specifying how the period for filing or returning an admission is calculated where the claim form is served out of the jurisdiction⁷; and (2) requiring the court to specify the period for responding to the particulars of claim⁸ when it makes an order⁹ permitting a claim form relating to a contract to be served on the agent of an overseas principal¹⁰.

A defendant may return¹¹ or file¹² an admission after the end of the specified period¹³ for returning or filing it, if the claimant has not obtained default judgment¹⁴ and, if he does so, the provisions relating to admissions will apply as if he had made the admission within the specified period¹⁵.

The defendant may also file a defence¹⁶.

1 Ie under CPR 14.4: see PARA 191.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 Ie under CPR 14.5 (see PARA 192), CPR 14.6 (see PARA 193) or CPR 14.7 (see PARA 194): see CPR 14.2(1).

4 CPR 14.2(1)(b).

5 As to the meaning of 'defendant' see PARA 18.

6 CPR 14.2(1)(a); and see *Practice Direction--Admissions* PD 14 paras 3.1, 3.2. As to the meaning of 'service' see PARA 138 note 2; and as to the particulars of claim see PARA 587.

7 Ie CPR 6.35: see PARA 185.

8 Ie CPR 6.12(3): see PARA 147.

9 Ie an order under CPR 6.12(3): see PARA 147.

10 See CPR 14.2(2)(a), (b).

11 Ie under CPR 14.4: see PARA 191.

12 Ie under CPR 14.5, 14.6 or 14.7: see PARAS 192-194.

13 Ie the period specified in CPR 14.2(1): see text and notes 1-6.

14 CPR 14.2(3). As to default judgment see CPR Pt 12; and PARA 506 et seq.

15 CPR 14.2(4).

16 See *Practice Direction--Admissions* PD 14 para 3.3; CPR 15.2; and PARA 199.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(3) ADMISSIONS/190. Admission by notice in writing; application for judgment.

190. Admission by notice in writing; application for judgment.

Where a party makes an admission by notice in writing¹, any other party may apply for judgment based on that admission² which will be such judgment as it appears to the court³ that the applicant is entitled to on the admission⁴.

1 Ie under CPR 14.1(2): see PARA 187.

2 CPR 14.3(1). See eg *NCR Ltd v Buchanan* [2000] All ER (D) 1986.

3 As to the meaning of 'court' see PARA 22.

4 CPR 14.3(2). See PARAS 191-194.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(3) ADMISSIONS/191. Admission of whole of claim for specified amount of money.

191. Admission of whole of claim for specified amount of money.

Where the only remedy which the claimant¹ is seeking is the payment of a specified amount of money², and the defendant³ admits the whole of the claim⁴, the defendant may admit the claim by returning to the claimant a form of admission⁵. The claimant may obtain judgment by filing a request form⁶ and if the defendant has not requested time to pay⁷, the claimant may specify in his request for judgment the date by which the whole of the judgment debt is to be paid⁸ or the times and rate at which it is to be paid by instalments⁹. On receipt of the request for judgment the court¹⁰ will enter judgment¹¹ which will be for the amount of the claim (less any payments made) and costs to be paid by the date or at the rate specified by the claimant in the request for judgment¹² or, if no date or rate is specified, immediately¹³.

Judgment under the above provisions will include the amount of interest claimed to the date of judgment if:

- 297 (1) the particulars of claim include the requisite details¹⁴;
- 298 (2) where interest is claimed under the Supreme Court Act 1981¹⁵ or the County Courts Act 1984¹⁶, the rate is no higher than the rate of interest payable on judgment debts at the date when the claim form was issued¹⁷; and
- 299 (3) the claimant's request for judgment includes a calculation of the interest claimed for the period from the date up to which interest was stated to be calculated in the claim form to the date of the request for judgment¹⁸.

In any case where judgment is entered under these provisions but the above conditions are not satisfied, the judgment will be for an amount of interest to be decided by the court¹⁹ and the court will give directions for the management of the case²⁰.

A different procedure applies if the defendant has requested time to pay²¹.

- 1 As to the meaning of 'claimant' see PARA 18.
- 2 See CPR 14.4(1)(a).
- 3 As to the meaning of 'defendant' see PARA 18.
- 4 See CPR 14.4(1)(b).
- 5 CPR 14.4(1), (2). See Forms N9A and N9C in *The Civil Court Practice*.
- 6 See Form N255 in *The Civil Court Practice*.
- 7 CPR 14.4(3)(a).
- 8 CPR 14.4(4)(a).
- 9 CPR 14.4(4)(b).
- 10 As to the meaning of 'court' see PARA 22.
- 11 CPR 14.4(5).
- 12 CPR 14.4(6)(a).

13 CPR 14.4(6)(b).

14 le required by CPR 16.4 (see PARA 587): see CPR 14.14(1)(a).

15 le the Supreme Court Act 1981 s 35A: see PARA 1149 note 2. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

16 le the County Courts Act 1984 s 69: see PARA 1149 note 2.

17 CPR 14.14(1)(b) (amended, as from a day to be appointed, by virtue of the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2), to refer to the Senior Courts Act 1981 instead of the Supreme Court Act 1981; at the date at which this title states the law, no such day had been appointed).

18 CPR 14.14(1)(c).

19 CPR 14.14(2).

20 CPR 14.14(3). Such management will be for the assessment of interest. As to case management see PARA 246 et seq.

21 CPR 14.4(3)(b). See CPR 14.9; and PARA 195.

UPDATE

191 Admission of whole of claim for specified amount of money

NOTE 17--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(3) ADMISSIONS/192. Admission of part of a claim for a specified amount of money.

192. Admission of part of a claim for a specified amount of money.

Where the only remedy which the claimant¹ is seeking is the payment of a specified amount of money² and the defendant³ admits part of the claim⁴, he may do so by filing⁵ a form of admission⁶. On receipt of the admission, the court⁷ will serve⁸ a notice on the claimant requiring him to return the notice stating that:

- 300 (1) he accepts the amount admitted in satisfaction of the claim⁹;
- 301 (2) he does not accept the amount admitted by the defendant and wishes the proceedings to continue¹⁰; or
- 302 (3) if the defendant has requested time to pay, he accepts the amount admitted in satisfaction of the claim, but not the defendant's proposals as to payment¹¹.

The claimant must file the notice and serve a copy on the defendant within 14 days after it is served on him¹². If he does not, the claim must be stayed¹³ until he files the notice¹⁴.

If the claimant accepts the amount admitted in satisfaction of the claim, he may obtain judgment by filing a request form¹⁵ and, if the defendant has not requested time to pay¹⁶, the claimant may specify in his request for judgment the date by which the whole of the judgment debt is to be paid¹⁷ or the time and rate at which it is to be paid by instalments¹⁸. On receipt of the request for judgment, the court will enter judgment¹⁹, which will be for the amount admitted (less any payments made) and costs to be paid by the date or at the rate specified by the claimant in the request for judgment²⁰ or, if no date or rate is specified, immediately²¹.

A different procedure applies if the defendant has requested time to pay²².

1 As to the meaning of 'claimant' see PARA 18.

2 See CPR 14.5(1)(a).

3 As to the meaning of 'defendant' see PARA 18.

4 See CPR 14.5(1)(b).

5 As to the meaning of 'filing' see PARA 1832 note 8.

6 CPR 14.5(1), (2). See Forms N9A and N9C in *The Civil Court Practice*.

7 As to the meaning of 'court' see PARA 22.

8 As to the meaning of 'service' see PARA 138 note 2.

9 CPR 14.5(3)(a).

10 CPR 14.5(3)(b). If the claimant files notice under CPR 14.5(3) that he wishes the proceedings to continue, the procedure which then follows is set out in CPR Pt 26 (preliminary stages of case management and allocation to track: see PARA 260 et seq): see CPR 14.5(9) note.

11 CPR 14.5(3)(c).

12 CPR 14.5(4).

13 As to the meaning of 'stay' see PARA 233 note 11.

- 14 CPR 14.5(5).
- 15 See Form N255 in *The Civil Court Practice*.
- 16 See CPR 14.5(6)(a).
- 17 CPR 14.5(7)(a).
- 18 CPR 14.5(7)(b).
- 19 CPR 14.5(8).
- 20 CPR 14.5(9)(a).
- 21 CPR 14.5(9)(b). As to costs generally see also PARA 1729 et seq.
- 22 CPR 14.5(6)(b). See CPR 14.9; and PARA 195.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(3) ADMISSIONS/193. Admission of liability to pay whole of claim for unspecified amount of money.

193. Admission of liability to pay whole of claim for unspecified amount of money.

Where:

- 303 (1) the only remedy which the claimant¹ is seeking is the payment of money²;
- 304 (2) the amount of the claim is not specified³; and
- 305 (3) the defendant⁴ admits liability but does not offer to pay a specified amount of money in satisfaction of the claim⁵,

the defendant may admit the claim by filing⁶ a form of admission⁷. On receipt of the admission, the court⁸ will serve⁹ a copy on the claimant¹⁰.

The claimant may obtain judgment by filing a request in the relevant practice form¹¹. If the claimant does not file a request for judgment within 14 days after service of the admission on him, the claim is stayed¹² until he files the request¹³. On receipt of the request for judgment the court will enter judgment¹⁴ which will be for an amount to be decided by the court and costs¹⁵. Where the court enters judgment for an amount so decided, it will give any directions it considers appropriate¹⁶ and, if it considers it appropriate, allocate the case¹⁷.

1 As to the meaning of 'claimant' see PARA 18.

2 See CPR 14.6(1)(a).

3 See CPR 14.6(1)(b).

4 As to the meaning of 'defendant' see PARA 18.

5 See CPR 14.6(1)(c).

6 As to the meaning of 'filing' see PARA 1832 note 8.

7 CPR 14.6(1), (2). See Form N9C in *The Civil Court Practice*.

8 As to the meaning of 'court' see PARA 22.

9 As to the meaning of 'service' see PARA 138 note 2.

10 CPR 14.6(3).

11 CPR 14.6(4). See Form N226 in *The Civil Court Practice*.

12 As to the meaning of 'stay' see PARA 233 note 11.

13 CPR 14.6(5).

14 CPR 14.6(6).

15 CPR 14.6(7). As to costs generally see also PARA 1729 et seq.

16 CPR 14.8(a).

17 CPR 14.8(b). As to allocation of the case to the small claims track, fast track or multi-track see CPR Pt 26; and PARA 260 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(3) ADMISSIONS/194. Admission of liability to pay claim for unspecified amount of money where defendant offers a sum in satisfaction of the claim.

194. Admission of liability to pay claim for unspecified amount of money where defendant offers a sum in satisfaction of the claim.

Where:

- 306 (1) the only remedy which the claimant¹ is seeking is the payment of money²;
- 307 (2) the amount of the claim is not specified³; and
- 308 (3) the defendant⁴ admits liability⁵ and offers to pay a specified amount of money in satisfaction of the claim⁶,

the defendant may admit the claim by filing⁷ a form of admission⁸. On receipt of the admission, the court⁹ will serve¹⁰ a notice on the claimant requiring him to return the notice stating whether or not he accepts the amount in satisfaction of the claim¹¹. If the claimant does not file the notice within 14 days after it is served on him, the claim must be stayed¹² until he files the notice¹³.

If the claimant accepts the offer he may obtain judgment by filing a form of request and, if the defendant has not requested time to pay¹⁴, the claimant may specify in his request for judgment the date by which the whole of the judgment debt is to be paid¹⁵ or the times and rate at which it is to be paid by instalments¹⁶. On receipt of the request for judgment, the court will enter judgment¹⁷, which will be for the amount offered by the defendant (less any payments made) and costs to be paid on the date or at the rate specified by the claimant in the request for judgment¹⁸ or, if no date or rate is specified, immediately¹⁹.

If the claimant does not accept the amount offered by the defendant, he may obtain judgment by filing a request in the relevant practice form²⁰. Judgment will then be for an amount to be decided by the court and costs²¹. Where the court enters judgment for an amount so decided, it will give any directions it considers appropriate²² and, if it considers it appropriate, allocate the case²³.

A different procedure applies if the defendant has requested time to pay²⁴.

- 1 As to the meaning of 'claimant' see PARA 18.
- 2 See CPR 14.7(1)(a).
- 3 See CPR 14.7(1)(b).
- 4 As to the meaning of 'defendant' see PARA 18.
- 5 See CPR 14.7(1)(c)(i).
- 6 See CPR 14.7(1)(c)(ii).
- 7 As to the meaning of 'filing' see PARA 1832 note 8.
- 8 CPR 14.7(1), (2). See Form N9C in *The Civil Court Practice*.
- 9 As to the meaning of 'court' see PARA 22.
- 10 As to the meaning of 'service' see PARA 138 note 2.

- 11 CPR 14.7(3). See Form N226 in *The Civil Court Practice*.
- 12 As to the meaning of 'stay' see PARA 233 note 11.
- 13 CPR 14.7(4).
- 14 See CPR 14.7(5)(a).
- 15 CPR 14.7(6)(a).
- 16 CPR 14.7(6)(b).
- 17 CPR 14.7(7).
- 18 CPR 14.7(8)(a).
- 19 CPR 14.7(8)(b). As to costs generally see also PARA 1729 et seq.
- 20 CPR 14.7(9).
- 21 See CPR 14.7(10).
- 22 CPR 14.8(a).
- 23 CPR 14.8(b). As to allocation of the case see CPR Pt 26; and PARA 260 et seq.
- 24 CPR 14.7(5)(b). See CPR 14.9; and PARA 195.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(3) ADMISSIONS/195. Request for time to pay.

195. Request for time to pay.

A defendant¹ who makes an admission relating to a claim for a specified amount of money or offering to pay a specified amount of money² may make a request for time to pay³, which is a proposal about the date of payment or a proposal to pay by instalments at the times and rate specified in the request⁴. The defendant's request for time to pay must be served⁵ or filed⁶, as the case may be, with his admission⁷. If the claimant⁸ accepts the defendant's request, he may obtain judgment by filing a request in the relevant practice form⁹. On receipt of the request for judgment, the court¹⁰ will enter judgment¹¹, which will be for the amount:

- 309 (1) of the claim (less any payments made) and costs, where the admission is of the whole claim, which is for a specified amount¹²;
- 310 (2) admitted (less any payments made) and costs, where the admission is of part of a claim for a specified amount of money¹³; or
- 311 (3) offered by the defendant in satisfaction of the claim (less any payments made) and costs, where the admission is of liability to pay a claim¹⁴ for an unspecified amount of money¹⁵.

In all cases the judgment will be for payment at the time and rate specified in the defendant's request for time to pay¹⁶.

A different procedure applies if the claimant does not accept the defendant's request for time to pay¹⁷.

1 As to the meaning of 'defendant' see PARA 18.

2 Ie under CPR 14.4 (see PARA 191), CPR 14.5 (see PARA 192) or CPR 14.7 (see PARA 194): see CPR 14.9(1).

3 See CPR 14.9(1).

4 CPR 14.9(2).

5 As to the meaning of 'service' see PARA 138 note 2.

6 As to the meaning of 'filing' see PARA 1832 note 8.

7 CPR 14.9(3). If the defendant is requesting time to pay he should complete as fully as possible the statement of means contained in the admission form, or otherwise give in writing the same details of his means as could have been given in the admission form: *Practice Direction--Admissions* PD 14 para 2.2.

8 As to the meaning of 'claimant' see PARA 18.

9 CPR 14.9(4). See Form N225A in *The Civil Court Practice*.

10 As to the meaning of 'court' see PARA 22.

11 CPR 14.9(5).

12 Ie where CPR 14.4 (see PARA 191) applies: CPR 14.9(6)(a). As to costs generally see also PARA 1729 et seq.

13 Ie where CPR 14.5 (see PARA 192) applies: CPR 14.9(6)(b).

14 Ie where CPR 14.7 (see PARA 194) applies: CPR 14.9(6)(c).

- 15 CPR 14.9(6)(a)-(c).
- 16 CPR 14.9(6).
- 17 See CPR 14.10; and PARA 196.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(3) ADMISSIONS/196. Determination of rate of payment.

196. Determination of rate of payment.

Where the defendant¹ makes a request for time to pay² but the claimant³ does not accept the defendant's proposals for payment, the claimant must file⁴ a notice in the relevant practice form⁵. Where the defendant's admission was served⁶ direct on the claimant, a copy of the admission and the request for time to pay must be filed with the claimant's notice⁷. When the court⁸ receives the claimant's notice, it will enter judgment for the amount admitted (less any payments made) to be paid at the time and rate of payment determined by the court⁹. A court officer¹⁰ may exercise the powers of the court to determine the rate and time for payment where the amount outstanding (including costs) is not more than £50,000¹¹. He must do so without a hearing¹² and will have regard to the defendant's statement of means¹³, the claimant's objections¹⁴ and any other relevant factors¹⁵.

Either party may, on account of a change of circumstances since the date of the decision, apply to vary the time and rate of payment of instalments still remaining unpaid¹⁶.

1 As to the meaning of 'defendant' see PARA 18.

2 Ie under CPR 14.9 (see PARA 195): see CPR 14.10(1).

3 As to the meaning of 'claimant' see PARA 18.

4 As to the meaning of 'filing' see PARA 1832 note 8.

5 CPR 14.10(1), (2). See Forms N225, N225A and N226 in *The Civil Court Practice*.

6 As to the meaning of 'service' see PARA 138 note 2.

7 CPR 14.10(3).

8 As to the meaning of 'court' see PARA 22.

9 CPR 14.10(4).

10 As to the meaning of 'court officer' see PARA 49 note 3.

11 CPR 14.11(1); *Practice Direction--Admissions* PD 14 para 5.2(2).

12 CPR 14.11(2). Where the determination is made by a judge it may be made with or without a hearing: see *Practice Direction--Admissions* PD 14 para 5.2(1); and PARA 197.

13 See Forms N9A and N9C in *The Civil Court Practice*, which permit the defendant to give details of his assets and liabilities.

14 Ie set out in the claimant's notice: see *Practice Direction--Admissions* PD 14 para 5.1(1).

15 *Practice Direction--Admissions* PD 14 para 5.1(1)-(3).

16 *Practice Direction--Admissions* PD 14 para 6.1. Such an application must be made in accordance with CPR Pt 23 (see PARA 303 et seq): *Practice Direction--Admissions* PD 14 para 6.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(3) ADMISSIONS/197. Determination of rate of payment by judge.

197. Determination of rate of payment by judge.

Where a judge¹ is to determine the time and rate of payment, he may do so without a hearing², but where a judge is to do so at a hearing, the proceedings must be transferred automatically to the defendant's home court³ if:

- 312 (1) the only claim is for a specified amount of money⁴;
- 313 (2) the defendant is an individual⁵;
- 314 (3) the claim has not been transferred to another defendant's home court for the hearing of an application to set aside or vary a default judgment⁶ or by automatic transfer⁷ upon the filing of a defence⁸;
- 315 (4) the claim was not started in the defendant's home court⁹; and
- 316 (5) the claim was not started in a specialist list¹⁰.

If there is to be a hearing to determine the time and rate of payment, the court must give each party at least seven days' notice of the hearing¹¹.

The judge will have regard to the defendant's statement of means¹², the claimant's objections¹³ and any other relevant factors¹⁴.

Either party may, on account of a change of circumstances since the date of the decision, apply to vary the time and rate of payment of instalments still remaining unpaid¹⁵.

1 As to the meaning of 'judge' see PARA 49.

2 CPR 14.12(1).

3 As to the meaning of 'defendant's home court' see PARA 58 note 16; and as to the meaning of 'defendant' see PARA 18.

4 CPR 14.12(2)(a).

5 CPR 14.12(2)(b).

6 *Ie* under CPR 13.4: see PARA 518. 'Set aside' means cancelling a judgment or order or a step taken by a party in the proceedings: CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31.

7 *Ie* under CPR 26.2: see PARA 261.

8 CPR 14.14(2)(c).

9 CPR 14.12(2)(d).

10 CPR 14.12(2)(e). As to the meaning of 'specialist list' see PARA 67 note 8; and as to specialist proceedings see PARA 1536 *et seq*.

11 CPR 14.12(3). As to time limits generally see PARA 88 *et seq*.

12 See Forms N9A and N9C in *The Civil Court Practice* which permit the defendant to give details of his assets and liabilities.

13 *Ie* set out in the claimant's notice: see *Practice Direction--Admissions* PD 14 para 5.1(2).

14 *Practice Direction--Admissions* PD 14 para 5.1.

15 *Practice Direction--Admissions* PD 14 para 6.1. Such an application must be made in accordance with CPR
Pt 23 (see PARA 303 et seq): *Practice Direction--Admissions* PD 14 para 6.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(3) ADMISSIONS/198. Right of re-determination.

198. Right of re-determination.

Where a court officer¹ has determined the time and rate of payment² or a judge³ has determined the time and rate of payment⁴ without a hearing, either party may apply for the decision to be re-determined by a judge⁵. An application for re-determination must be made within 14 days after service⁶ of the determination on the applicant⁷. Where an application for re-determination is made, the proceedings must be transferred to the defendant's home court⁸ if:

- 317 (1) the only claim (apart from a claim for interest or costs) is for a specified amount of money⁹;
- 318 (2) the defendant is an individual¹⁰;
- 319 (3) the claim has not been transferred to another defendant's home court for the hearing of an application to set aside or vary a default judgment¹¹ or by automatic transfer¹² upon the filing of a defence¹³;
- 320 (4) the claim was not started in the defendant's home court¹⁴; and
- 321 (5) the claim was not started in a specialist list¹⁵.

If the decision was made by a court officer the re-determination may take place without a hearing, unless a hearing is requested in the application notice¹⁶, but if the decision was made by a judge the re-determination must be made at a hearing unless the parties otherwise agree¹⁷.

Either party may, on account of a change of circumstances since the date of the re-determination, apply to vary the time and rate of payment of instalments still remaining unpaid¹⁸.

1 As to the meaning of 'court officer' see PARA 49 note 3.

2 *Ie* under CPR 14.11: see PARA 196.

3 As to the meaning of 'judge' see PARA 49.

4 *Ie* under CPR 14.12: see PARA 197.

5 CPR 14.13(1); *Practice Direction--Admissions* PD 14 para 5.3.

6 As to the meaning of 'service' see PARA 138 note 2.

7 CPR 14.13(2).

8 As to the meaning of 'defendant's home court' see PARA 58 note 16; and as to the meaning of 'defendant' see PARA 18.

9 CPR 14.13(3)(a).

10 CPR 14.13(3)(b).

11 *Ie* under CPR 13.4: see PARA 518.

12 *Ie* under CPR 26.2: see PARA 261.

13 CPR 14.13(3)(c).

14 CPR 14.13(3)(d).

15 CPR 14.13(3)(e). As to the meaning of 'specialist list' see PARA 67 note 8; and as to specialist proceedings see PARA 1536 et seq.

16 *Practice Direction--Admissions* PD 14 para 5.4.

17 *Practice Direction--Admissions* PD 14 para 5.5.

18 *Practice Direction--Admissions* PD 14 para 6.1. An application to vary the re-determination must be made in accordance with CPR Pt 23 (see PARA 303 et seq): *Practice Direction--Admissions* PD 14 para 6.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(4) DEFENCE/199. Filing and serving a defence.

(4) DEFENCE

199. Filing and serving a defence.

A defendant¹ who wishes to defend all or part of a claim must file² a defence³, except where the claimant uses the alternative procedure for claims⁴. A copy of the defence must be served on every other party⁵. When a defence is filed the court will serve an allocation questionnaire on each party and the court will commence the management of the case⁶.

In relation to specialist proceedings⁷ in respect of which special provisions for defence and reply are made by the rules and practice directions applicable to those claims, the general rules relating to defence and reply⁸ apply only to the extent that they are not inconsistent with those rules and practice directions⁹.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 CPR 15.2. Form N9B (specified amount) or N9D (unspecified amount or non-money claims) (see *The Civil Court Practice*) may be used for the purpose of defence and is included in the response pack served on the defendant with the particulars of claim: see *Practice Direction--Defence and Reply* PD 15 para 1.3. As to the contents of a defence see CPR Pt 16; and PARA 599. A defence must be verified by a statement of truth: see CPR Pt 22; and PARA 613. The form of the statement of truth is as follows: 'I believe][the defendant believes] that the facts stated in this defence are true.': *Practice Direction--Defence and Reply* PD 15 paras 2.1, 2.2. As to the provisions applying where the defendant admits a claim see CPR Pt 14; and PARA 187 et seq. As to the particulars of claim see PARA 587 et seq.

4 CPR 15.1. As to the alternative procedure (the Part 8 procedure) see PARA 127 et seq.

5 CPR 15.6. As to the meaning of 'service' see PARA 138 note 2.

6 See CPR 26.3; and PARA 263.

7 As to specialist proceedings see CPR Pt 49; and PARA 1536 et seq.

8 Ie CPR Pt 15: see the text and notes 1-5; and PARA 200 et seq.

9 See *Practice Direction--Defence and Reply* PD 15 para 1.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(4) DEFENCE/200. Consequence of not filing a defence.

200. Consequence of not filing a defence.

If a defendant¹ fails to file² a defence, the claimant³ may obtain default judgment⁴.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 As to the meaning of 'claimant' see PARA 18.

4 See CPR 15.3. As to default judgment see CPR Pt 12; and PARA 506 et seq. As to the restrictions on obtaining default judgment without proof of service where service has been effected out of the jurisdiction see PARAS 167, 180.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(4) DEFENCE/201. The period for filing a defence; in general.

201. The period for filing a defence; in general.

The general rule is that the period for filing¹ a defence is 14 days after service² of the particulars of claim³ or, if the defendant⁴ files an acknowledgment of service⁵, 28 days after service of the particulars of claim⁶. This general rule is, however, subject to a number of exceptions⁷.

The defendant and the claimant may agree that the period specified above is to be extended by up to 28 days⁸. Where the defendant and the claimant agree to extend the period for filing a defence, the defendant must notify the court⁹ in writing¹⁰.

1 As to the meaning of 'filing' see PARA 1832 note 8.

2 As to the meaning of 'service' see PARA 138 note 2.

3 CPR 15.4(1)(a). See also CPR 9.1 (which provides that a defendant served with a claim form which states that particulars of claim are to follow is not required to respond until served with particulars of claim); and PARAS 182-183. As to time limits see generally PARA 88 et seq.

4 As to the meaning of 'defendant' see PARA 18.

5 CPR 15.4(1)(b). As to filing an acknowledgment of service see CPR Pt 10; and PARAS 184-186.

6 CPR 15.4(1)(b). See CPR 7.4 (which provides for the particulars of claim to be contained in or served with the claim form or served within 14 days of service of the claim form); and PARA 123.

7 See CPR 15.4(2). Those exceptions are: (1) CPR 6.35 (which specifies how the period for filing a defence is calculated where the claim form is served out of the jurisdiction: see PARA 204); (2) CPR Pt 11 (which provides that, where the defendant makes an application disputing the court's jurisdiction, he need not file a defence before the hearing: see PARA 206); (3) CPR 24.4(2) (which provides that, if the claimant applies for summary judgment before the defendant has filed a defence, the defendant need not file a defence before the summary judgment hearing: see PARA 525); and (4) CPR 6.12(3) (which requires the court to specify the period for responding to the particulars of claim when it makes an order there under: see PARA 147); CPR 15.4(2)(a)-(d). See also PARA 199 text and notes 7-9. As to the meaning of 'claimant' see PARA 18.

8 CPR 15.5(1).

9 As to the meaning of 'court' see PARA 22.

10 CPR 15.5(2). As to replying to a defence see PARA 604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(4) DEFENCE/202. Making a counterclaim.

202. Making a counterclaim.

Part 20 of the Civil Procedure Rules¹ applies to a defendant² who wishes to make a counterclaim³, which should normally be made in the same document as the defence, following on from the defence⁴.

1 Ie CPR Pt 20: see PARA 618 et seq.

2 As to the meaning of 'defendant' see PARA 18.

3 CPR 15.7. As to the meaning of 'counterclaim' see PARA 618 note 3.

4 *Practice Direction--Defence and Reply* PD 15 para 3.1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(4) DEFENCE/203. Claimant's notice where defence is that money claimed has been paid.

203. Claimant's notice where defence is that money claimed has been paid.

Where the only claim (apart from a claim for costs and interest) is for a specified amount of money and the defendant¹ states in his defence that he has paid to the claimant² the amount claimed, the court³ will send a notice to the claimant requiring him to state in writing whether he wishes the proceedings to continue⁴. When the claimant responds, he must serve⁵ a copy of his response on the defendant⁶.

If the claimant fails to respond under this rule within eight days after service of the court's notice on him the claim must be stayed⁷. Where a claim is so stayed any party may apply for the stay to be lifted⁸.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'claimant' see PARA 18.

3 As to the meaning of 'court' see PARA 22.

4 CPR 15.10(1). If he responds that he wishes the claim to continue, the court will send the parties an allocation questionnaire and the court will commence management of the case: see CPR 26.3; and PARA 263 et seq.

5 As to the meaning of 'service' see PARA 138 note 2.

6 CPR 15.10(2).

7 CPR 15.10(3). As to the meaning of 'stay' see PARA 233 note 11. As to time limits generally see PARA 88 et seq.

8 CPR 15.10(4). The application must be made in accordance with CPR Pt 23 (see PARA 303 et seq) and must give the reason for the applicant's delay in proceeding with or responding to the claim: *Practice Direction--Defence and Reply* PD 15 para 3.4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(4) DEFENCE/204. Period for filing a defence where claim form is served out of the jurisdiction and permission of the court was not required for service.

204. Period for filing a defence where claim form is served out of the jurisdiction and permission of the court was not required for service.

Where the claimant¹ serves² the claim form on a defendant³ in Scotland or Northern Ireland, or in a Convention territory⁴ within Europe or a member state, without the court's permission being required⁵, the following provisions apply⁶. The period for filing⁷ a defence is 21 days after service of the particulars of claim or⁸, where the defendant files an acknowledgment of service⁹, 35 days after service of the particulars of claim¹⁰.

Where the claimant serves the claim form on a defendant in a Convention territory outside Europe without the court's permission being required¹¹, the period for filing a defence is 31 days after service of the particulars of claim or, where the defendant files an acknowledgment of service, 45 days after service of the particulars of claim¹².

Where the claimant serves the claim form¹³ in a country not referred to above, the period for responding to the claim form is set out in the relevant practice direction¹⁴.

1 As to the meanings of 'claimant' and 'claim form' for the purposes of CPR Pt 6 see PARA 138 note 6.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'defendant' see PARA 138 note 6.

4 As to the meaning of 'Convention territory' see PARA 168 note 7.

5 Ie the claim form is served under CPR 6.32 (see PARA 168) or CPR 6.33 (see PARA 169). As to the meaning of 'court' see PARA 22.

6 See CPR 6.35(1), (2)(b), (3)(b). CPR 6.35 does not apply where an application notice is to be served on a non party out of the jurisdiction: see CPR 6.39; and PARA 172.

7 As to the meaning of 'filing' see PARA 1832 note 8.

8 CPR 6.35(2)(b)(i), (3)(b)(i).

9 As to filing an acknowledgment of service in such proceedings see PARA 185.

10 CPR 6.35(2)(b)(ii), (3)(b)(ii). As to the defence see CPR Pt 15; and PARAS 199-203, 205.

11 Ie the claim form is served under CPR 6.33: see PARA 169.

12 CPR 6.35(4)(b).

13 Ie under CPR 6.33: see PARA 169.

14 CPR 6.35(5). See *Practice Direction--Service out of the Jurisdiction* PD 6B para 6. Where CPR 6.35(5) applies, the period within which the defendant must file a defence will be calculated in accordance with *Practice Direction--Service out of the Jurisdiction* PD 6B para 6.4 or 6.5: para 6.1. The period for filing a defence under CPR Pt 15 is (1) the number of days listed in the Table after service of the particulars of claim; or (2) where the defendant has filed an acknowledgment of service, the number of days listed in the Table plus an additional 14 days after the service of the particulars of claim: *Practice Direction--Service out of the Jurisdiction* PD 6B para 6.4. The Table lists a large number of foreign countries and territories and gives the number of days allowed for responding to service. Under the State Immunity Act 1978 (see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 244 et seq), where a state is served, the period permitted under *Practice Direction--Service out of the*

Jurisdiction PD 6B para 6.4 for filing a defence does not begin to run until two months after the date on which the state is served: para 6.5. See also PARA 177.

Where particulars of claim are served out of the jurisdiction any statement as to the period for responding to the claim contained in any of the forms required by CPR 7.8 to accompany the particulars of claim must specify the period prescribed under CPR 6.35: *Practice Direction--Service out of the Jurisdiction* PD 6B para 6.6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(4) DEFENCE/205. Claim stayed if it is not defended or admitted.

205. Claim stayed if it is not defended or admitted.

Where at least six months have expired since the end of the period for filing¹ a defence², no defendant³ has served⁴ or filed an admission or filed a defence or counterclaim⁵ and the claimant⁶ has not entered or applied for default judgment⁷ or summary judgment⁸, the claim is stayed⁹.

Any party may apply for the stay to be lifted¹⁰.

1 As to the meaning of 'filing' see PARA 1832 note 8.

2 Ie the period specified in CPR 15.4: see PARA 201. As to time limits generally see PARA 88 et seq.

3 As to the meaning of 'defendant' see PARA 18.

4 As to the meaning of 'service' see PARA 138 note 2.

5 As to the meaning of 'counterclaim' see PARA 618 note 3; and as to counterclaims see PARA 618 et seq.

6 As to the meaning of 'claimant' see PARA 18.

7 Ie under CPR Pt 12: see PARA 506 et seq.

8 Ie under CPR Pt 24: see PARA 524 et seq.

9 CPR 15.11(1). As to the meaning of 'stay' see PARA 233 note 11.

10 CPR 15.11(2). The application must be made in accordance with CPR Pt 23 (see PARA 303 et seq) and must give the reason for the applicant's delay in proceeding with or responding to the claim: *Practice Direction--Defence and Reply* PD 15 para 3.4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/7. RESPONDING TO A CLAIM/(5) DISPUTING THE JURISDICTION OF THE COURT/206. Procedure for disputing the court's jurisdiction.

(5) DISPUTING THE JURISDICTION OF THE COURT

206. Procedure for disputing the court's jurisdiction.

A defendant¹ who wishes to dispute the court's² jurisdiction to try the claim, or argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have³. A defendant who wishes to make such an application must first file⁴ an acknowledgment of service⁵; he does not, by doing so, lose any right that he may have to dispute the court's jurisdiction⁶.

Such an application must be made within 14 days after filing an acknowledgment of service⁷ and be supported by evidence⁸. If the defendant files an acknowledgment of service and does not make such an application within the period specified, he is to be treated as having accepted that the court has jurisdiction to try the claim⁹.

An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including:

- 322 (1) setting aside¹⁰ the claim form¹¹;
- 323 (2) setting aside service¹² of the claim form¹³;
- 324 (3) discharging any order made before the claim was commenced or before the claim form was served¹⁴; and
- 325 (4) staying¹⁵ the proceedings¹⁶.

If on such an application the court does not make a declaration, the acknowledgment of service ceases to have effect¹⁷, the defendant may file a further acknowledgment of service within 14 days or such other period as the court may direct¹⁸ and the court must give directions as to the filing and service of the defence¹⁹ or, if the claimant²⁰ uses the alternative procedure for claims²¹, the filing of evidence in the event that a further acknowledgment of service is filed²². If the defendant files such a further acknowledgment of service he must be treated as having accepted that the court has jurisdiction to try the claim²³.

If a defendant makes such an application, he must file and serve his written evidence in support with the application notice, but he need not before the hearing of the application file a defence²⁴ or, in an alternative procedure claim²⁵, any other written evidence²⁶.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'court' see PARA 22.

3 CPR 11(1). CPR Pt 11 lays down the correct procedure for making such a challenge and the court's jurisdiction cannot be made for the first time before the Court of Appeal: *R (on the application of Shah) v Immigration Appeal Tribunal, Secretary of State for the Home Department, interested party* (2004) Times, 22 November, CA.

4 In accordance with CPR Pt 10: see PARAS 184, 186. As to the meaning of 'filing' see PARA 1832 note 8.

5 CPR 11(2).

6 CPR 11(3).

7 CPR 11(4)(a).

8 CPR 11(4)(b). CPR 11.4 makes it clear that the relevant period within which an application to challenge the jurisdiction should be issued is the period for filing a defence, which is ascertained by reference to CPR 15.4 without any extension thereof: see *Montrose Investments Ltd v Orion Nominees Ltd* [2001] All ER (D) 265 (Jul). As to the period for filing a defence see CPR 15.4; and PARA 201.

9 CPR 11(5). See *Global Multimedia International Ltd v Ara Media Services* [2006] EWHC 3107 (Ch), [2007] 1 All ER (Comm) 1160 (defendant evinced intention to dispute jurisdiction five weeks after acknowledgment of service; defendant had submitted to court's jurisdiction); and *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203, [2007] All ER (D) 321 (Nov).

10 As to the meaning of 'set aside' see PARA 197 note 6.

11 CPR 11(6)(a).

12 As to the meaning of 'service' see PARA 138 note 2.

13 CPR 11(6)(b).

14 CPR 11(6)(c).

15 As to the meaning of 'stay' see PARA 233 note 11.

16 CPR 11(6)(d).

17 CPR 11(7)(a).

18 CPR 11(7)(b). As to time limits generally see PARA 88 et seq.

19 Ie in a claim under CPR Pt 7.

20 As to the meaning of 'claimant' see PARA 18.

21 Ie the 'Part 8 procedure' set out in CPR Pt 8: see PARA 127 et seq.

22 CPR 11(7)(c).

23 CPR 11(8).

24 CPR 11(9)(a). As to filing a defence see PARA 199 et seq.

25 Ie a Part 8 claim.

26 CPR 11(9)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(1) INTRODUCTION/207. Parties generally.

8. PARTIES

(1) INTRODUCTION

207. Parties generally.

The general rule of law is that any person, natural or artificial, may sue or be sued in the English courts¹, but, whilst this rule remains paramount, the exceptions to it are extensive and reflect the enormous diversities which inevitably exist between different persons or bodies and the legal rights and duties attaching to each of them, and the consequent necessity for the provision of special rules of procedure to regulate legal proceedings brought by or against each of them.

In order that a claim may be properly constituted, there must be at least two persons, one the claimant or the person who sues and the other the defendant or the person who is sued².

In general, parties must be named in the claim form. However this is subject to certain exceptions³.

A cause or matter will not be defeated by reason of the misjoinder or non-joinder of any party, and the court may determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter⁴. As a general principle, the court will permit all necessary and proper parties, but no others, to be made parties to the proceedings in order to enable the court to reach an effectual and complete determination of the questions or issues arising in the proceedings.

1 A person under disability, whether a child or a protected party, may sue or be sued, but proceedings by or against him are subject to special rules of procedure (see CPR Pt 21; and PARA 222), and there may be special rules about granting particular relief or a particular remedy in such cases. For instance, it was formerly held that specific performance could not be granted in favour of or against a minor: *Flight v Bolland* (1828) 4 Russ 298; *Lumley v Ravenscroft*[1895] 1 QB 683, CA. An English body corporate, including a limited liability company, or an unincorporated body such as partners carrying on business within the jurisdiction, may sue and be sued and so may individual foreigners and foreign corporations (see *Dutch West India Co v Henriques Van Moses* (1728) 1 Stra 612, HL; *Newby v Von Oppen and Colt's Patent Firearms Manufacturing Co*(1872) LR 7 QB 293; *Compagnie Générale Trans-Atlantique v Thomas Law & Co, La Bourgogne*[1899] AC 431, HL; *Logan v Bank of Scotland (No 2)*[1906] 1 KB 141, CA). But an alien enemy cannot sue as claimant (*Porter v Freudenberg*[1915] 1 KB 857, CA) or issue a third party notice (*Halsey v Lowenfeld*[1916] 2 KB 707, CA), although he may be sued in England and, if sued to judgment, may appeal (see *Porter v Freudenberg*[1915] 1 KB 857, CA). The rule that a national of a state with which the United Kingdom is in a state of war may not sue in the United Kingdom courts does not extend to nationals of states with which the United Kingdom is involved in lesser forms of armed conflict: *Amin v Brown*[2005] EWHC 1670 (Ch), [2005] All ER (D) 380 (Jul). An alien friend may sue, even though under disability in his own country, if his disability is not recognised in England: see *Re Selot's Trust*[1902] 1 Ch 488.

2 As to joinder of parties see PARAS 210-212; as to change of parties see PARA 213 et seq; and as to representative parties see PARAS 229-231. The same person cannot be a claimant and a defendant in the same proceedings: *Re Phillips, Public Trustee v Meyer* [1931] WN 271. A party should not be named twice on the record, in his personal capacity and in a representative capacity: *Hardie and Lane Ltd v Chiltern*[1928] 1 KB 663, CA. Partners carrying on business within the jurisdiction may sue or be sued in the partnership name if it has one (see PARA 224), but a partnership firm is not a legal entity (see *Sadler v Whiteman*[1910] 1 KB 868, CA, and **PARTNERSHIP** vol 79 (2008) PARAS 1-3).

3 See CPR 8.2A, which provides that in certain circumstances, such as for an order that a fund in court be paid out, a claim form may be issued with the permission of the court; and PARA 129. Where persons whose identity is unknown are or remain in possession of land without the consent of a claimant entitled to possession

of the land they may be sued as 'persons unknown': see CPR 55.3(4). But a description of defendants as owners of certain property is not enough: *Friern Barnet UDC v Adams*[1927] 2 Ch 25, CA. See also *South Cambridgeshire District Council v Persons Unknown*[2004] EWCA Civ 1280, [2005] JPL 680 (injunction to prevent breach of planning control granted against persons unknown). As to the claim form see further PARA 117 et seq.

4 As to joinder of parties see CPR 19.1, 19.3; and PARA 210 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(1) INTRODUCTION/208. Claimants generally.

208. Claimants generally.

Claimants, formerly called plaintiffs, are persons who make a claim¹. A person cannot be a claimant unless he has an interest in the subject matter of the claim².

In a claim founded on contract, the proper claimant is the person with whom or on whose behalf the contract was made, or in whom the rights under the contract are vested³.

Subject to the provisions of any Act and unless the court gives permission to the contrary, all parties jointly entitled with the claimant to any relief must be parties to the proceedings, and, subject to any order of the court made on an application for permission⁴, any of them who does not consent to being joined as a claimant must be made a defendant⁵.

In a claim in tort the proper claimant is the person who has been injured by the wrongdoer, or the person in whom a right to sue is vested or by whom it has since been acquired⁶.

In a claim for the recovery of land the proper claimant is the person in whom the legal estate is vested and who is entitled to possession of the land⁷.

In a claim where the claimant has only an equitable right in the thing demanded, he may be the proper claimant⁸, but the person having the legal right to demand the thing must in due course be made a party to the claim⁹. In proceedings concerning trust property the trustees usually are the proper claimants, for the legal title is in them¹⁰, but if a trustee refuses to bring a claim, the beneficiary who is interested in obtaining the relief may¹¹ bring the claim, making the trustee a defendant¹².

In a representative claim¹³, a person represented although not named in the proceedings is a party to the claim and may be added or substituted as the named claimant¹⁴.

1 See CPR 2.3(1); and PARA 18.

2 *Clowes v Hilliard* (1876) 4 ChD 413; *Viola v Hickman* (1912) 47 LJNC 257. As to a claim on behalf of a child see CPR Pt 21; PARA 222; and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1409 et seq. As to a claim by a protected party see CPR Pt 21; PARA 222; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 634 et seq. As to claims by corporations see PARA 223; and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1286 et seq. As to claims by industrial and provident societies see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2545. As to claims by trade unions see PARA 227; and **EMPLOYMENT** vol 40 (2009) PARA 846 et seq. As to persons in receipt of funding under the Access to Justice Act 1999 see **LEGAL AID** vol 65 (2008) PARAS 54 et seq, 131 et seq. As a rule objection to the right to bring a claim should be taken not at the trial but by application under CPR Pt 23 (see PARA 303 et seq), but where want of capacity or authority to sue plainly appears at any stage, the court may order the claim to be struck out (*John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113, CA), and it may be bound to do so on its own initiative (see CPR 3.4; PARA 252; and *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307, HL; *Lazard Bros & Co v Banque Industrielle de Moscou* [1932] 1 KB 617, CA (affd sub nom *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, HL)). Where the whole of the claimant's rights, title and interest in the subject matter of the action had passed to the Custodian of Enemy Property, the statement of claim was struck out: *Maerkle v British and Continental Fur Co Ltd* [1954] 3 All ER 50, [1954] 1 WLR 1242, CA. The same person cannot be both claimant and defendant.

3 All the members of an unincorporated members' club should, prima facie, join as claimants in a claim on a contract made on their behalf: see **CLUBS** vol 13 (2009) PARA 271; but cf PARA 227. As to representative actions see PARA 229 et seq. As to legal assignees of contracts bringing proceedings in their own names, and as to equitable assignees, see **CHOSES IN ACTION** vol 13 (2009) PARAS 68, 82. As to the effect of the death of the person entitled see PARA 238; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 814 et seq. As to the effect of bankruptcy see PARA 226; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 434 et seq. As to the rights and liabilities of strangers to a contract see **CONTRACT** vol 9(1) (Reissue) PARA 748 et seq; **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 61; **EQUITY** vol 16(2) (Reissue) PARA 616; **TRUSTS** vol

48 (2007 Reissue) PARA 698; and see *Re Pryce, Nevill v Pryce* [1917] 1 Ch 234. A person may take an interest in land or other property, or the benefit of any condition or covenant respecting land or other property, even if he is not a party to the conveyance or other instrument: see the Law of Property Act 1925 s 56(1); and **CONTRACT** vol 9(1) (Reissue) PARA 617; **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 61; **SALE OF LAND** vol 42 (Reissue) PARA 335. As to specific performance see **SPECIFIC PERFORMANCE**; as to claims by and against principals and agents see **AGENCY** vol 1 (2008) PARAS 125, 156 et seq; and as to claims by consignors and consignees see **CARRIAGE AND CARRIERS**.

4 Permission is sought by application under CPR Pt 23 (see PARA 303 et seq) supported by evidence stating the grounds relied upon.

5 See CPR 19.3(1), (2); and PARA 211. This rule does not apply in probate proceedings: CPR 19.3(3).

6 As to loss caused by death see **NEGLIGENCE** vol 78 (2010) PARA 24 et seq. As to injuries to property, and as to tort generally, see **TORT**. The court has power to alter the capacity in which a party sues, and not only in claims in tort, if the new capacity is one which that party had at the commencement of the proceedings or has since acquired: see CPR Pt 17, CPR Pt 19; and PARAS 216, 607 et seq.

7 *Cole's Law and Practice in Ejectment* 66, 73. See further **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 661; **REAL PROPERTY** vol 39(2) (Reissue) PARA 263 et seq. As to claims for possession by mortgagors and mortgagees see the Law of Property Act 1925 s 98; and **MORTGAGE** vol 77 (2010) PARA 546 et seq. See also CPR Pt 55 (possession proceedings); CPR Pt 56 (landlord and tenant proceedings).

8 Eg where the claimant is an equitable assignee: see *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1, HL. As to the enforcement of equitable charges see **MORTGAGE** vol 77 (2010) PARA 144 et seq.

9 *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1, HL. See **EQUITY** vol 16(2) (Reissue) PARA 609 text and note 9. See also *Gandy v Gandy* (1885) 30 ChD 57, CA (separation deed).

10 See generally **TRUSTS**. Where trustees are doubtful whether to bring the claim, they should apply to the court for directions under CPR Pt 64; otherwise they may not be allowed their costs out of the trust property: see *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547, CA. In the case of settled land, the legal estate is normally in the tenant for life, who is the proper claimant: see **SETTLEMENTS**. Note however that since the commencement of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997, it has not been possible to create any new settlements under the Settled Land Act 1925 and except in the case of existing settlements, life interests now take effect behind a trust of land where the legal estate will generally be vested in trustees: see **REAL PROPERTY** vol 39(2) (Reissue) PARA 144.

11 On the other hand, it may be proper for the beneficiary to apply for the appointment of a receiver or, possibly, for permission to bring the proceedings in the name of the trustees: see **TRUSTS** vol 48 (2007 Reissue) PARA 1082; and see eg *Fletcher v Fletcher* (1844) 4 Hare 67 (liberty to sue in name of trustee); *Hamp v Robinson* (1865) 3 De GJ & Sm 97 (receiver). See also *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1, HL, and **EQUITY** vol 16(2) (Reissue) PARA 609.

12 See *Re Brogden, Billing v Brogden* (1888) 38 ChD 546 at 556, CA, per North J; and **TRUSTS** vol 48 (2007 Reissue) PARA 1084 et seq.

13 As to representative claims see CPR 19.6; and PARA 229 et seq.

14 *Moon v Atherton* [1972] 2 QB 435, [1972] 3 All ER 145, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(1) INTRODUCTION/209. Defendants generally.

209. Defendants generally.

A defendant is a person against whom a claim is made¹. Generally, a person cannot be a defendant unless the claimant claims some relief, even if only a declaration, against him².

The proper defendant in a claim on a contract is the person who made the promise for the breach of which the claim is brought, or the party who is liable upon the contract made by that person³ or to whom the liability under the contract has passed⁴.

The proper defendant in a claim in tort is the wrongdoer, or the person who is liable for the acts of the wrongdoer, or to whom the liability for the injury has passed⁵. If several persons jointly commit a tort, the claimant may sue any one or more of them⁶, but the court may order a person to be added as a new party if it is desirable to do so in order to resolve all the matters in dispute in the proceedings or if there is an issue involving the new party and an existing party concerning the matters in dispute and the addition of the new party is desirable in order to enable the court to resolve the issue⁷.

In a claim brought for the recovery of land, all the persons who are in possession should, in general, be joined as defendants⁸.

The proper defendant in proceedings brought to enforce an equitable right is the person against whom the relief claimed in the proceedings is sought⁹. In such proceedings all persons whose presence before the court is desirable in order to enable it to resolve all the matters in dispute should be made defendants¹⁰.

1 CPR 2.3(1); and see PARA 18.

2 *Deutsche National Bank v Paul* [1898] 1 Ch 283; *Hood Barrs v Frampton, Knight and Clayton* (1924) 69 Sol Jo 125. As to the joinder of persons as defendants see PARA 212. A claimant will not, generally, be compelled to add defendants: *Norris v Beazley* (1877) 2 CPD 80; *Horwell v London General Omnibus Co Ltd* (1877) 2 Ex D 365, CA; *Sanders & Co v Peek* (1884) 50 LT 630, DC; *McCheane v Gyles (No 2)* [1902] 1 Ch 911; *Chalmers, Guthrie & Co Ltd v Guthrie* (1923) 156 LT Jo 382. See, however, CPR 19.3(2); and PARAS 208, 211. The same person cannot be both defendant and claimant. As to the meaning of 'claimant' see PARA 18.

3 See **AGENCY** vol 1 (2008) PARA 167 et seq; **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

4 See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 1511 et seq.

5 The court must decide the case as between the parties before it and, in order to succeed, the claimant must establish the liability of the defendant to him: *Adams v Naylor* [1946] AC 543, [1946] 2 All ER 241, HL; *Royster v Cavey* [1947] KB 204, [1946] 2 All ER 642, CA. See eg **AGENCY** vol 1 (2008) PARAS 150 et seq, 164 et seq; **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 828 et seq; **TORT**. As to insurers conducting the defence of proceedings in the name of the insured see **INSURANCE** vol 25 (2003 Reissue) PARA 199. Residents of member states now have the right to issue proceedings directly against the insurer of a person responsible for a motor accident in the United Kingdom: see the European Communities (Rights against Insurers) Regulations 2002, SI 2002/3061; and **INSURANCE** vol 25 (2003 Reissue) PARA 747.

6 *Sutton v Clarke* (1815) 6 Taunt 29; *The Bernina (2)* (1887) 12 PD 58 at 83, CA, per Lord Esher MR (affd sub nom *Mills v Armstrong, The Bernina* (1888) 13 App Cas 1, HL); and see **TORT**.

7 See CPR 19.2(1), (2); and PARA 213.

8 As to claims to recover land generally see CPR Pts 55, 56; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 656 et seq; **REAL PROPERTY** vol 39(2) (Reissue) PARA 259 et seq. As to mortgaged land see

MORTGAGE. As to suing persons whose identity is unknown who are in possession of land without the consent of a claimant entitled to possession see PARA 207 note 3.

9 *Deutsche National Bank v Paul* [1898] 1 Ch 283.

10 See CPR 19.2(2); and PARA 213.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(2) JOINDER OF PARTIES/210. In general.

(2) JOINDER OF PARTIES

210. In general.

Any number of claimants or defendants¹ may be joined as parties to a claim².

¹ As to the meanings of 'claimant' and 'defendant' see PARA 18.

² CPR 19.1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(2) JOINDER OF PARTIES/211. Persons jointly entitled to a remedy.

211. Persons jointly entitled to a remedy.

Where a claimant¹ claims a remedy to which some other person is jointly entitled with him, all persons jointly entitled to the remedy must be parties unless the court² orders otherwise³. If any person does not agree to be a claimant, he must be made a defendant⁴, unless the court orders otherwise⁵. This provision does not apply in probate proceedings⁶.

1 As to the meaning of 'claimant' see PARA 18.

2 As to the meaning of 'court' see PARA 22.

3 CPR 19.3(1).

4 As to the meaning of 'defendant' see PARA 18.

5 CPR 19.3(2).

6 CPR 19.3(3). As to probate proceedings see CPR Pt 57; and **EXECUTORS AND ADMINISTRATORS**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(2) JOINDER OF PARTIES/212. Joinder of parties in the alternative.

212. Joinder of parties in the alternative.

Where there is reasonable doubt as to which of two or more persons is entitled to the relief or remedy claimed against the defendant, they may be joined as claimants and each may make his respective claim in the alternative, in which event the extra costs of adding the unsuccessful claimant may be ordered to be paid by the defendant, particularly where the doubt has been caused by the defendant. Similarly, where the claimant is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, so that the questions as to which, if any, of the defendants is liable, and to what extent, may be determined as between all the parties¹.

Where a claim is properly and reasonably brought against two or more defendants² as being liable severally or in the alternative and judgment is recovered against one only, the unsuccessful defendant may be ordered to pay to the plaintiff the costs payable by him to the successful defendant³ or to pay the costs of the successful defendant direct to that defendant⁴. The court has a discretion whether or not to make such an order⁵.

¹ The court has a wide discretion as to who should pay the costs: see CPR 44.3 and, by analogy, *Bullock v London General Omnibus Co* [1907] 1 KB 264, CA. See *Roberts v Gill & Co* [2008] EWCA Civ 803, [2008] All ER (D) 162 (Jul). As to costs generally see also PARA 1729 et seq.

A defendant to a claim for wrongful interference with goods may apply for a direction that another person be made a party to the claim to establish whether the other person has a better right to the goods than the claimant or has a claim which might render the defendant doubly liable under the Torts (Interference with Goods) Act 1977 s 7: CPR 19.5A(2). The application notice must be served on all parties and on the person referred to above: CPR 19.5A(4). Where such person fails to attend the hearing of the application, or comply with any directions, the court may order that he is deprived of any claim against the defendant in respect of the goods: CPR 19.5A(3). The court may make an order subject to conditions: see CPR 3.1(3); and PARA 247.

² The circumstances must justify the joinder, in that they raise a doubt as to which of the defendants is liable (*Henry and MacGregor Ltd v Marten and North of England Protection and Indemnity Association* (1918) 34 TLR 504; *The Theodoros, The Blidensol* [1923] P 26; *Anglo-Celtic Shipping Co Ltd v Elliott and Jeffery* (1926) 42 TLR 297), but doubt or mistake by the claimant as to the law is not a good reason for joinder (*Poulton v Moore* (1913) 83 LJB 875, DC; revsd on other points [1915] 1 KB 400, CA). If there is no doubt or dilemma, the successful defendant will recover his costs against the claimant, who will not be able to recover those costs from the unsuccessful defendant: *Salsbury v Woodland* [1970] 1 QB 324, [1969] 3 All ER 863, CA. It is not necessary that the unsuccessful defendant should have blamed the successful defendant: *Vine v National Motor Cab Co Ltd* (1913) 29 TLR 311; *Mulhern v National Motor Cab Co Ltd* (1913) 29 TLR 677; *Besterman v British Motor Cab Co Ltd* [1914] 3 KB 181, CA. See also *The Koursk* [1924] P 140, CA. This practice applies also in Admiralty: see *The WH Randall* [1928] P 41, CA.

³ *Bullock v London General Omnibus Co* [1907] 1 KB 264, CA; *Besterman v British Motor Cab Co Ltd* [1914] 3 KB 181, CA (explained in *Hong v A and R Brown Ltd* [1948] 1 KB 515, [1948] 1 All ER 185, CA); *Pratt v Patrick* [1924] 1 KB 488; *Nicholson v Southern Rly Co* [1935] 1 KB 558, 152 LT 349; *Dryden v Surrey County Council and Stewart* [1936] 2 All ER 535, where the order was refused; *Bowmaker (Commercial) Ltd v Day* [1965] 2 All ER 856n, [1965] 1 WLR 1396. This form of order is known as a 'Bullock order'. As to obtaining the order on appeal see *Riches v London General Omnibus Co* [1916] WN 86. An order against the unsuccessful defendant giving the plaintiff his 'costs of the action' was held to include his costs incurred in pursuing his claim against the successful defendant: *Kelly's Directories Ltd v Gavin and Lloyds* [1901] 2 Ch 763. An unsuccessful defendant should not be ordered to pay the costs of an issue raised by other defendants where he has admitted the facts in his defence: *Donovan v Walters* (1926) 135 LT 12, CA. Where both defendants are represented by the same solicitor, half costs will generally be allowed: *Beaumont v Senior* [1903] 1 KB 282; *Ellingsen v Det Skandinaviske Compani* [1919] 2 KB 567, CA; but see *Korner v H Korner & Co Ltd* [1951] Ch 10, [1950] 2 All ER 451, CA.

4 *Sanderson v Blyth Theatre Co* [1903] 2 KB 533, CA; *The Esrom and The Hopper Wills No 66* [1914] WN 81. This form of order is known as a 'Sanderson order'. Such an order should ordinarily be made where the unsuccessful defendant is insolvent or is a 'man of straw' (*Rudow v Great Britain Mutual Life Assurance Society* (1881) 17 ChD 600, CA), but the court has a discretion to order the claimant to pay the costs of the successful defendant even where the unsuccessful defendant is an undischarged bankrupt (*Mayer v Harte* [1960] 2 All ER 840, [1960] 1 WLR 770, CA). See also *McGlenn v Waltham Contractors Ltd (No 4)* [2007] EWHC 698 (TCC), [2008] Bus LR 278.

5 *Hong v A and R Brown Ltd* [1948] 1 KB 515, [1948] 1 All ER 185, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(3) CHANGE OF PARTIES/213. Change of parties; in general.

(3) CHANGE OF PARTIES

213. Change of parties; in general.

Except where a relevant limitation period has expired, when different provisions apply¹, the court² may order a person to be added as a new party if:

- 326 (1) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings³; or
- 327 (2) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue⁴.

The court may order any person to cease to be a party if it is not desirable for that person to be party to the proceedings⁵. The court may also order a new party to be substituted for an existing one if the existing party's interest or liability has passed to the new party⁶ and it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings⁷.

1 Where the case falls within CPR 19.5 (special provisions about changing parties after the end of a relevant limitation period): see PARA 215. 'Limitation period' means the period within which a person who has a right to claim against another person must start court proceedings to establish that right. The expiry of the period may be a defence to the claim: see CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31.

2 As to the meaning of 'court' see PARA 22.

3 CPR 19.2(1), (2)(a). The word 'proceedings' in CPR Pt 19 should be given a broad interpretation encompassing all stages of a claim from the time it has been started until it becomes finally complete or moribund: *C Inc plc v L* [2001] 2 All ER (Comm) 446, [2001] All ER (D) 376 (Mar). The court has power to join a new party when judgment has already been obtained against the only existing party: *C Inc plc v L* [2001] 2 All ER (Comm) 446, [2001] All ER (D) 376 (Mar). However, CPR Pt 19 does not apply to public law proceedings: *River Thames Society v First Secretary of State* [2006] EWHC 2829 (Admin), [2006] All ER (D) 105 (Sep) (inherent jurisdiction of court used to substitute parties).

4 CPR 19.2(1), (2)(b). See *Davies v Department of Trade and Industry* [2006] EWCA Civ 1360, [2007] 1 All ER 518, [2007] 1 WLR 3232 (judge had exercised discretion not to join party correctly).

5 CPR 19.2(3). See *Australia and New Zealand Banking Group Ltd v National Westminster Bank plc* (2002) Times, 14 February.

6 CPR 19.2(4)(a).

7 CPR 19.2(4)(b). As to whether a named defendant who has made incorrect admissions of liability should be permitted to withdraw those admissions in order that the correct defendant be substituted see *Sollitt v DJ Broady Ltd and TJ Broady Investments Ltd* [2000] CPLR 259, CA. CPR 19.2(4) confers on the court the power to substitute a new party for an existing party or join a party to an action after a judgment has been given: *Dunwoody Sports Marketing v Prescott* [2007] EWCA Civ 461, [2007] 1 WLR 2343.

UPDATE

213 Change of parties; in general

NOTE 3--See *PNPF Trust Co Ltd v Taylor*[2009] EWHC 1693 (Ch), [2009] WTLR 1215, [2009] All ER (D) 119 (Jul).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(3) CHANGE OF PARTIES/214. Procedure for adding and substituting parties.

214. Procedure for adding and substituting parties.

The court's¹ permission is required to remove, add or substitute a party, except where the claim form has not been served². An application for such permission may be made by an existing party³ or a person who wishes to become a party⁴. An application for an order substituting a new party where an existing party's interest or liability has passed⁵ may be made without notice⁶ and must be supported by evidence⁷. No person may be added or substituted as a claimant⁸ unless he has given his consent in writing⁹ and that consent has been filed¹⁰ with the court¹¹. An order for the removal, addition or substitution of a party must be served on all parties to the proceedings¹² and any other person affected by the order¹³. When the court makes an order for the removal, addition or substitution of a party, it may give consequential directions about filing and serving the claim form on any new defendant¹⁴, serving relevant documents on the new party¹⁵ and the management of the proceedings¹⁶.

Where a party is joined to existing proceedings, the party joined is entitled to require the party joining him to supply, without charge, copies of all statements of case, written evidence and any documents appended or exhibited to them which have been served in the proceedings by or upon the joining party which relate to any issues between the joining party and the party joined, and copies of all orders made in those proceedings¹⁷. The documents must be supplied within 48 hours after a written request for them is received¹⁸.

1 As to the meaning of 'court' see PARA 22.

2 CPR 19.4(1). As to service of the claim form see PARA 120.

3 CPR 19.4(2)(a). Such an application must be made under the provisions of CPR Pt 23: see PARA 303 et seq.

4 CPR 19.4(2)(b); and see note 3. Parties may be removed, added or substituted in existing proceedings either on the court's own initiative or on the application of either an existing party or a person who wishes to become a party: *Practice Direction--Addition and Substitution of Parties* PD 19A para 1.1. The application may be dealt with without a hearing where all the existing parties and the proposed new party are in agreement: para 1.2. The application to add or substitute a new party must be supported by evidence setting out the proposed new party's interest in or connection with the claim and must be filed in accordance with CPR 23.3 (see PARA 306) and, unless the application is made CPR 19.2(4) (see PARA 213), be served in accordance with CPR 23.4 (see PARA 307): *Practice Direction--Addition and Substitution of Parties* PD 19A (2000) paras 1.3, 1.4. An order giving permission to amend will, unless the court orders otherwise, be drawn up. It will be served by the court unless the parties wish to serve it or the court orders them to do so: para 1.5.

5 I.e. an application for an order under CPR 19.2(4): see PARA 213.

6 CPR 19.4(3)(a).

7 CPR 19.4(3)(b); and see *Practice Direction--Addition and Substitution of Parties* PD 19A paras 5.1, 5.2.

8 As to the meaning of 'claimant' see PARA 18. Where an application is made to the court to add or to substitute a new party to the proceedings as claimant, the party applying must file (1) the application notice; (2) the proposed amended claim form and particulars of claim; and (3) the signed, written consent of the new claimant to be so added or substituted: *Practice Direction--Addition and Substitution of Parties* PD 19A para 2.1. Where the court makes an order adding or substituting a party as claimant but the signed, written consent of the new claimant has not been filed, the order, and the addition or substitution of the new party as claimant, will not take effect until the signed, written consent of the new claimant is filed: para 2.2. Where the court has made an order adding or substituting a new claimant, the court may direct (a) a copy of the order to be served on every party to the proceedings and any other person affected by the order; (b) copies of the statements of case and of documents referred to in any statement of case to be served on the new party; (c) the party who made the application to file within 14 days an amended claim form and particulars of claim: para 2.3.

9 CPR 19.4(4)(a). The Commissioners for Revenue and Customs may be added as a party to proceedings only if they consent in writing: CPR 19.4(4A).

10 As to the meaning of 'filing' see PARA 1832 note 8.

11 CPR 19.4(4)(b).

12 CPR 19.4(5)(a).

13 CPR 19.4(5)(b). Where the court makes an order for the removal of a party from the proceedings: (1) the claimant must file with the court an amended claim form and particulars of claim; and (2) a copy of the order must be served on every party to the proceedings and on any other person affected by the order: *Practice Direction--Addition and Substitution of Parties* PD 19A para 4.

14 CPR 19.4(6)(a). As to the meaning of 'defendant' see PARA 18. The Civil Procedure Rules apply to a new defendant who has been added or substituted as they apply to any other defendant (see in particular the provisions of CPR Pts 9, 10, 11 and 15; and PARA 182 et seq): *Practice Direction--Addition and Substitution of Parties* PD 19A para 3.1. Where the court has made an order adding or substituting a defendant whether on its own initiative or on an application, the court may direct (1) the claimant to file with the court within 14 days (or as ordered) an amended claim form and particulars of claim for the court file; (2) a copy of the order to be served on all parties to the proceedings and any other person affected by it; (3) the amended claim form and particulars of claim, forms for admitting, defending and acknowledging the claim and copies of the statements of case and any other documents referred to in any statement of case to be served on the new defendant; (4) unless the court orders otherwise, the amended claim form and particulars of claim to be served on any other defendants: para 3.2. A new defendant does not become a party to the proceedings until the amended claim form has been served on him: para 3.3.

15 CPR 19.4(6)(b).

16 CPR 19.4(6)(c).

17 *Practice Direction--Court Documents* PD 5A para 3.1. The party by whom a copy is supplied or, if he is acting by a solicitor, his solicitor, is responsible for it being a true copy: para 3.3. This is subject to para 3.3A, which provides that a party may file by e-mail an application notice in the Preston Combined Court where he is permitted to do so by PREMA (Preston E-mail Application Service) User Guide and Protocols; and to *Practice Direction--Appeals* PD 52 para 15.1A, which provides for filing by e-mail an appeal notice or application notice in proceedings in the Court of Appeal, Civil Division. As to statements of case see PARA 584 et seq.

18 *Practice Direction--Court Documents* PD 5A para 3.1. If the party joined is not supplied with copies of the documents requested under para 3.1 within 48 hours, he may apply under CPR Pt 23 for an order that they be supplied: *Practice Direction--Court Documents* PD 5A para 3.2. As to time limits generally see PARA 88 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(3) CHANGE OF PARTIES/215. Adding or substituting parties after the end of a relevant limitation period.

215. Adding or substituting parties after the end of a relevant limitation period.

After the end of a period of limitation prescribed by statute¹, the court² may only add or substitute a party if the relevant limitation period was current when the proceedings were started³ and the addition or substitution is necessary⁴. It is provided that the addition or substitution of a party is necessary only if the court is satisfied that:

- 328 (1) the new party is to be substituted for a party who was named in the claim form in mistake for the new party⁵;
- 329 (2) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant⁶ or defendant⁷; or
- 330 (3) the original party has died or had a bankruptcy order made against him and his interest or liability has passed to the new party⁸.

In addition, in a claim for personal injuries⁹ the court may add or substitute a party where it directs that certain specified provisions of the Limitation Act 1980¹⁰ are not to apply to the claim by or against the new party¹¹ or the issue of whether those provisions apply is to be determined at trial¹².

1 le a limitation period under (1) the Limitation Act 1980; (2) the Foreign Limitation Periods Act 1984; or (3) any other enactment which allows such a change, or under which such a change is allowed: CPR 19.5(1)(a)-(c). As to the meaning of 'limitation period' see PARA 213 note 1. CPR r 19.5(1)(c) applies to enactments which allow or which do not prohibit a change of parties after the end of a relevant limitation period: *Parsons v George* [2004] EWCA Civ 912, [2004] 3 All ER 633, [2004] 1 WLR 3264.

2 As to the meaning of 'court' see PARA 22.

3 CPR 19.5(2)(a).

4 CPR 19.5(2)(b). It is necessary to bear in mind the potential for injustice when the addition or substitution of a party under CPR 19.5(2), (3) deprives that party of a limitation defence: *Martin v Kaisary* [2005] EWCA Civ 594, [2006] PIQR P5.

5 CPR 19.5(3)(a). There is no reason to place a restrictive interpretation on the word 'mistake' for these purposes: see *Re MMR and MR Vaccine Litigation (No 2)*, *Roberts v Merck & Co Inc* [2001] All ER (D) 320 (Feb); affd sub nom *Horne-Roberts (A Child) v SmithKline Beecham plc* [2001] EWCA Civ 2006, [2002] 1 WLR 1662. The overriding objective of doing justice is likely to be undermined if 'in mistake' is interpreted too restrictively: *Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd* [2005] EWCA Civ 134, [2005] 3 All ER 135, [2005] 1 WLR 2557. The substitution is not permissible if the claim is thereby significantly altered: *Weston v Gribben* [2006] EWCA Civ 1425, [2006] All ER (D) 29 (Nov). See also *Adelson v Associated Newspapers* [2007] EWCA Civ 701, [2007] 4 All ER 330, [2008] 1 WLR 585; *ABB Asea Brown Boveri Ltd v Hiscox Dedicated Corporate Member Ltd*, *ABB Asea Brown Boveri Ltd v Jardine Lloyd Thompson Ltd* [2007] EWHC 1150 (Comm), [2007] All ER (D) 259 (May); *Broadhurst v Broadhurst* [2007] EWHC 726 (Ch), [2007] All ER (D) 522 (Mar); and **LIMITATION PERIODS** vol 68 (2008) PARA 944.

6 As to the meaning of 'claimant' see PARA 18.

7 CPR 19.5(3)(b). As to the meaning of 'defendant' see PARA 18.

8 CPR 19.5(3)(c).

9 As to the meaning of 'claim for personal injuries' see PARA 19.

10 See the Limitation Act 1980 s 11 (special time limit for claims for personal injuries); or s 12 (special time limit for claims under fatal accidents legislation): see **LIMITATION PERIODS** vol 68 (2008) PARAS 998, 1000.

11 CPR 19.5(4)(a). This refers to the court's discretionary powers under the Limitation Act 1980 s 33 to exclude time limits in such claims in certain circumstances where certain criteria are met: see **LIMITATION PERIODS** vol 68 (2008) PARA 1001.

12 CPR 19.5(4)(b). See also CPR 17.4, which deals with other amendments after the end of a relevant limitation period; and PARA 216.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(3) CHANGE OF PARTIES/216. Misnomer.

216. Misnomer.

Where a party has made a mistake as to the name of a party and a period of limitation prescribed by statute has expired¹, the court² may allow an amendment of the statement of case to correct the mistake, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question³.

1 le a limitation period under (1) the Limitation Act 1980; (2) the Foreign Limitation Periods Act 1984; or (3) any other enactment which allows such an amendment, or under which such an amendment is allowed: CPR 17.4(1)(b)(i)-(iii). As to the meaning of 'limitation period' see PARA 213 note 1.

2 As to the meaning of 'court' see PARA 22.

3 CPR 17.4(1)(a), (3). See eg *Gregson v Channel Four Television Corp* [2000] All ER (D) 956, CA. If the mistakenly named party does not exist, little confusion will have ensued; however if the mistakenly named party does exist (and has even been served), then the mistaken party may be unable to rely upon this provision, but may seek to rely upon CPR 19.5: see PARA 215. See also *Adelson v Associated Newspapers* [2007] EWCA Civ 701, [2007] 4 All ER 330. As to the statement of case see PARA 584 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(3) CHANGE OF PARTIES/217. Addition of party for purposes of obtaining a costs order.

217. Addition of party for purposes of obtaining a costs order.

A person who is not a party to proceedings may nevertheless be liable for the costs of a successful party in those proceedings¹. In such circumstances, the person who is alleged to be liable for such costs must be made a party to enable him to defend the claim for costs against him².

¹ See the Supreme Court Act 1981 s 51(3) (substituted by the Courts and Legal Services Act 1990 s 4); and *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira (No 2)* [1986] AC 965, [1986] 2 All ER 409, HL; *Symphony Group plc v Hodgson* [1994] QB 179, [1993] 4 All ER 143, CA; *Bristol and West plc v Bhadresa (No 2), Bristol and West plc v Mascarenhas* [1998] All ER (D) 580, [1999] CPLR 209; *Robertson Research International Ltd v ABG Exploration BV* [1999] All ER (D) 1125, [1999] CPLR 756; *SBJ Stephenson Ltd v Mandy* [1999] All ER (D) 1363, [1999] CPLR 500; *Globe Equities Ltd v Globe Legal Services Ltd* [2000] CPLR 233, CA; *Cormack v Washbourne (formerly t/a Washbourne & Co (a firm))* [2000] All ER (D) 353, sub nom *Cormack v Excess Insurance Co Ltd* [2000] CPLR 358, CA; *Stocznia Gdanska SA v Latreefers Inc* [2000] All ER (D) 148, [2000] CPLR 65, CA. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

² CPR 48.2(1); and see *National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer (No 2)* [2000] 1 All ER 37, [1999] 2 All ER (Comm) 673, CA, where the court suggested that CPR 48.2(1) may contain a lacuna where the non-party is outside the jurisdiction. As to costs generally see also PARA 1729 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(3) CHANGE OF PARTIES/218. Removal of party.

218. Removal of party.

The court¹ may effectively remove a party when it exercises its powers to strike out² a statement of case³ if it appears:

- 331 (1) that the statement of case discloses no reasonable grounds for bringing or defending the claim⁴;
- 332 (2) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings⁵; or
- 333 (3) that there has been a failure to comply with a rule, practice direction or court order⁶.

1 As to the meaning of 'court' see PARA 22.

2 'Striking out' means the court ordering written material to be deleted so that it may no longer be relied upon: CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31.

3 In CPR 3.4, 3.5 (see PARAS 520, 521), reference to a statement of case includes reference to part of a statement of case: CPR 3.4(1). As to the meaning of 'statement of case' see PARA 584. As to the meaning of 'Part 20 claim' see PARA 618.

4 CPR 3.4(2)(a).

5 CPR 3.4(2)(b).

6 CPR 3.4(2)(c). CPR 3.4(2) does not limit any other power of the court to strike out a statement of case: CPR 3.4(5).

UPDATE

218 Removal of party

NOTE 5--The fact that the defendant as well as the claimant has been guilty of misconduct is not a reason for a judge not to exercise the power to strike out the claims on the grounds of the claimant's misconduct; the defendant's misconduct is irrelevant: *Masood v Zahoor* [2009] EWCA Civ 650, [2010] 1 All ER 888 (claimants relied on forged documents and perjured evidence; defendants forged documents in support of defence).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(4) PARTICULAR PARTIES/219. The Crown.

(4) PARTICULAR PARTIES

219. The Crown.

The Sovereign may sue a subject in her own courts, but under the common law no proceeding could be maintained against the Sovereign by a subject in those courts, for it is a maxim of English law that the king can do no wrong¹.

Under the Crown Proceedings Act 1947, the Crown² may sue and be sued by subjects in the appropriate courts³, subject to certain exceptions, in the same manner as that in which subjects may sue each other⁴. The Act does not apply to proceedings by or against Her Majesty in her private capacity⁵, nor to proceedings by or against the Crown otherwise than in respect of Her Majesty's Government in the United Kingdom⁶, and Her Majesty's prerogative powers are still preserved⁷. The Act does not affect proceedings on the Crown side of the Queen's Bench Division (now called proceedings in the Administrative Court)⁸. Proceedings by or against the Crown are to be instituted either in the name of or against an authorised government department or by or against the Attorney General⁹.

1 *Viscount Canterbury v A-G* (1843) 1 Ph 306; *Tobin v R* (1864) 16 CBNS 310; *Feather v R* (1865) 6 B & S 257 at 295. According to Comyns (Dig tit 'Action'), until the reign of Edward I the king might have been sued in all actions as a common person.

2 Ie the Crown in right of Her Majesty's Government in the United Kingdom or the Scottish Administration: Crown Proceedings Act 1947 s 40(2)(c) (amended by the Scotland Act 1998 s 125, Sch 8 para 7(3)(a)).

3 Ie the High Court and county courts: Crown Proceedings Act 1947 s 23(4).

4 See the Crown Proceedings Act 1947 ss 1, 2, 13, 15; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 381 et seq; **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 107 et seq. See also CPR Pt 66, which governs the practice in the High Court relating to proceedings by or against the Crown, and **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 117 et seq. The Crown Proceedings (Armed Forces) Act 1987 repeals the Crown Proceedings Act 1947 s 10, in order to permit members of the armed forces of the Crown to sue the Crown (in reality the Ministry of Defence) in tort in certain circumstances: see **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 103 note 14. As to joinder of the Crown in proceedings involving a claim under the Human Rights Act 1998 see CPR 19.4A; and PARA 596.

5 See the Crown Proceedings Act 1947 s 40(1). Any reference to Her Majesty in her private capacity is to be construed as including a reference to Her Majesty in right of the Duchy of Lancaster and to the Duke of Cornwall: s 38(3).

6 See the Crown Proceedings Act 1947 s 40(2)(b), (c). As to the application of these provisions to the Scottish Administration see s 40(2)(b), (c) (amended by the Scotland Act 1998 Sch 8 para 7(3)(a)); and see also the Crown Proceedings Act 1947 Pt V (ss 41-51). As to the application of the Crown Proceedings Act 1947 to Northern Ireland see s 53 (amended by the Statute Law Revision Act 1953; and the Northern Ireland Constitution Act 1973 Sch 6 Pt 1).

7 See the Crown Proceedings Act 1947 s 11; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 383.

8 See the definition of 'civil proceedings' in the Crown Proceedings Act 1947 s 38(2); and see **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 103 note 19. As to the renaming of the Crown Office side of the Queen's Bench Division see *Practice Note*[2000] 4 All ER 1071, sub nom *Practice Direction (Administrative Court: establishment)* [2000] 1 WLR 1654.

9 See the Crown Proceedings Act 1947 s 17; and **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 119.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(4) PARTICULAR PARTIES/220. The Attorney General.

220. The Attorney General.

In certain proceedings the Attorney General¹ is a necessary party or has a right to be heard². Civil proceedings by or against the Crown are instituted either in his name or, more usually, that of the government department concerned³, and he may be joined as a defendant in any proceedings where the Crown's property rights are affected⁴. As representative of the Crown in its capacity of *parens patriae*, the Attorney General has concern for the proper administration of charities, and in proceedings relating to them he is usually a necessary party⁵. The instances in which the Attorney General is a necessary party to civil proceedings or has a right to be heard are numerous and diverse, for example he can bring proceedings to restrain vexatious proceedings⁶ and he must be made a respondent to any petition for a declaration of legitimacy or legitimation⁷. Other instances are considered elsewhere in this work⁸.

In the absence or incapacity of the Attorney General, his duties devolve upon the Solicitor General⁹.

1 As to the office and status of the Attorney General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 529 et seq. See also **LEGAL PROFESSIONS** vol 66 (2009) PARA 1119. As to his functions in criminal proceedings see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1065, 1071.

2 As to relator actions (which are now rare in practice) see PARAS 236-237.

3 See **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 531; **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 119. The Minister for the Civil Service is required to publish a list of such departments and their addresses for service of proceedings: see the Crown Proceedings Act 1947 s 17 (amended by SI 1968/1656); **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 119; and *Practice Direction--Crown Proceedings* PD 66 Annex 1.

4 See eg *Miller v Warmington* (1820) 1 Jac & W 484.

5 See **CHARITIES** vol 8 (2010) PARA 599 et seq.

6 See the Supreme Court Act 1981 s 42; and PARA 258. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

7 See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 122.

8 See eg **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 910; **NUISANCE** vol 78 (2010) PARAS 189-190; and the titles referred to in notes 1-7.

9 See **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 529.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(4) PARTICULAR PARTIES/221. Foreign and Commonwealth states.

221. Foreign and Commonwealth states.

Subject to extensive restrictions¹, a state² is immune from the jurisdiction of the United Kingdom courts³, and it is the duty of the court to give effect to this immunity even though the state does not appear in the proceedings in question⁴. A state is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the court⁵. A foreign state may sue in the United Kingdom⁶, and if it does so it will be deemed to have submitted to the jurisdiction⁷.

1 See the State Immunity Act 1978 ss 2-11, which provide extensive exceptions from state immunity. In effect these sections considerably restrict the immunity from suit which was formerly enjoyed by foreign states and their organs, including their commercial and banking activities, although these immunities were already being severely curtailed by developing rules of common law: see eg *The Philippine Admiral* [1977] AC 373, [1976] 1 All ER 78, PC; *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, [1977] 1 All ER 881, CA; *The Playa Larga (Owners of Cargo lately laden on board) v I Congreso del Partido (Owners)* [1983] 1 AC 244, [1981] 2 All ER 1064, HL. The exceptions from immunity relate to proceedings in respect of which the state has submitted to the jurisdiction (State Immunity Act 1978 s 2), and proceedings with a United Kingdom flavour relating to commercial transactions (s 3), contracts of employment (s 4 (amended by the British Nationality Act 1981 s 52(6), Sch 7; by virtue of the British Overseas Territories Act 2002 s 2(3); and by SI 1986/948)), death, personal injuries or damage to property (State Immunity Act 1978 s 5), the ownership, possession or use of property (s 6), patents and other intellectual property (s 7), membership of corporate bodies (s 8), arbitrations (other than arbitrations between states) (s 9), ships (including hovercraft) used for commercial purposes (ss 10, 17(1)), or value added tax, customs and excise duties, agricultural levies or rates for commercial property (s 11).

2 The immunities and privileges conferred the State Immunity Act 1978 Pt I (ss 1-17), apply to any foreign or Commonwealth state other than the United Kingdom: s 14(1). References to a state include references to (1) the sovereign or other head of that state in his public capacity (s 14(1)(a)); (2) the government of that state (s 14(1)(b)); and (3) any department of that government (s 14(1)(c)); but not to any entity (called a 'separate entity') which is distinct from the executive organs of the government of the state and capable of suing or being sued (s 14(1)). 'United Kingdom' means Great Britain and Northern Ireland: see the Interpretation Act 1978 s 5, Sch 1; and **STATUTES** vol 44(1) (Reissue) PARA 1383. 'Great Britain' means England, Wales and Scotland: see the Union with Scotland Act 1706, preamble, art I; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. Neither the Channel Islands nor the Isle of Man is within the United Kingdom.

3 State Immunity Act 1978 s 1(1). A separate entity (see note 2) is immune from the jurisdiction of the United Kingdom courts if, and only if, (1) the proceedings relate to anything done by it in the exercise of sovereign authority (s 14(2)(a)); and (2) the circumstances are such that the state (or, in the case of proceedings to which s 10 (see note 1) applies, a state which is not a party to the Brussels Convention) would have been so immune (s 14(2)(b)). 'Brussels Convention' means the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships (Brussels, 10 April 1926; TS 15 (1980); Cmnd 7800): State Immunity Act 1978 s 17(1). Immunities and privileges are also enjoyed by other persons or bodies similar to those enjoyed by foreign states eg under the Diplomatic Privileges Act 1964 (see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 265 et seq), which applies to a sovereign or other head of state, members of the family forming part of his household and his private servants as it applies to the head of a diplomatic mission, members of his family forming part of his household and his private servants (State Immunity Act 1978 s 20(1)). See also eg the International Organisations Act 1968 ss 1, 2, 6, Sch 1; the Consular Relations Act 1968 (consular officers); and see generally **INTERNATIONAL RELATIONS LAW**.

4 State Immunity Act 1978 s 1(2). Certain procedural privileges are accorded to states: see eg s 12 (service of process and default judgments) and s 13 (restrictions on enforcement proceedings).

5 See the State Immunity Act 1978 s 2(1). Such submission may take place after the dispute giving rise to the proceedings or by a prior written agreement, although not if the agreement merely provides that it is to be governed by the law of the United Kingdom: see s 2(2).

6 See *Emperor of Austria v Kossuth and Day* (1861) 2 Giff 628 (affd with variation (1861) 3 De GF & J 217); *United States of America v Wagner* (1867) 2 Ch App 582, CA; *Republic of Peru v Peruvian Guano Co* (1887) 36 ChD 489.

7 State Immunity Act 1978 s 2(3)(a). Subject to exceptions, it will also be deemed to have submitted if it intervenes or takes any step in the proceedings: see s 2(3)(b). The submission will extend to any appeal, but not to any counterclaim unless it arises out of the same legal relationship or facts as the claim: s 2(6). The head of a state's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, is deemed to have authority to submit on behalf of the state in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a state is deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract: s 2(7).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(4) PARTICULAR PARTIES/222. Children and protected parties.

222. Children and protected parties.

A protected party¹ must have a litigation friend to conduct proceedings on his behalf². A child³ must have a litigation friend to conduct proceedings on his behalf unless the court⁴ makes an order permitting the child to conduct proceedings without a litigation friend⁵. An application for such an order may be made by the child⁶. If the child already has a litigation friend, the application must be made on notice to the litigation friend⁷; if the child has no litigation friend, the application may be made without notice⁸. Where the court has made such an order and it subsequently appears to the court that it is desirable for a litigation friend to conduct the proceedings on behalf of the child, the court may appoint a person to be the child's litigation friend⁹.

1 'Protected party' means a party, or intended party, who lacks capacity, within the meaning of the Mental Capacity Act 2005 (see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 402), to conduct the proceedings: CPR 2.3(1), 21.1(2)(a), (c), (d). A party cannot be a protected party until proceedings have commenced: *Bailey (by his litigation friend Ashton) v Warren* [2006] EWCA Civ 51, [2006] WTLR 753.

2 CPR 21.2(1). As to litigation friends see further **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1411 et seq. Where a protected party regains or acquires capacity to conduct the proceedings, the litigation friend's appointment continues until it is ended by court order: see CPR 21.9(2).

3 'Child' means a person under 18: CPR 2.3(1), 21.1(2)(b). When a child who is not a protected party reaches the age of 18, a litigation friend's appointment ceases: see CPR 21.9(1).

4 As to the meaning of 'court' see PARA 22.

5 CPR 21.2(2), (3).

6 CPR 21.2(4)(a).

7 CPR 21.2(4)(b).

8 CPR 21.2(4)(c).

9 CPR 21.2(5). As to legal proceedings involving children see generally **CHILDREN AND YOUNG PERSONS**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(4) PARTICULAR PARTIES/223. Corporations.

223. Corporations.

A corporation, whether incorporated by charter, statute or registration¹, or a company, whether incorporated by special statute or registered under the Companies Acts², must sue and be sued in its corporate title or registered name, as the case may be³. A corporation which has ceased to have any juristic existence cannot sue⁴ or be sued⁵.

The liquidator of a company in liquidation may sue in the name of the company⁶. On the other hand, a claim or proceeding cannot be commenced or continued against a company in respect of which a winding-up order has been made except with the leave of the Companies Court⁷.

1 As to the creation of corporations see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1128 et seq.

2 As to the creation of companies see **COMPANIES** vol 14 (2009) PARAS 2, 131 et seq.

3 See *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189; and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1291; and *Re Hodges* (1873) 8 Ch App 204; and **COMPANIES** vol 14 (2009) PARA 301. For a case where a minority shareholder without voting rights was permitted to continue an action discontinued by a company at the direction of the majority shareholder see *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 All ER 437, [1982] 1 WLR 2. As to derivative claims see PARA 232.

A company may act by an authorised officer and may be represented at hearings and trial by an authorised representative, such as a director or employee, with the permission of the court: see CPR 39.6; *Practice Direction--Miscellaneous Provisions Relating to Hearings* PD 39A paras 5.2.-5.5; and PARA 1126.

If a limited company which is a party changes its name, notice of the change must be filed at the Action Department of the Central Office or at the appropriate district registry and served on all other parties, and the new name must thereafter be substituted in the title of the proceedings, the old name being mentioned in brackets; however, where a company is required to re-register as a public limited company or the Welsh equivalent it is sufficient to substitute the new name at the next hearing in the claim after re-registration. As to re-registration see **COMPANIES** vol 14 (2009) PARA 168 et seq.

4 See *Russian and English Bank v Baring Bros & Co Ltd* [1932] 1 Ch 435; *Bank of Ethiopia v National Bank of Egypt and Liguori* [1937] Ch 513, [1937] 3 All ER 8.

5 See *Lazard Bros & Co v Banque Industrielle de Moscou* [1932] 1 KB 617, CA; affd sub nom *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, HL.

6 See *Westminster Corpn and United Travellers Club Co Ltd v Chapman* [1916] 1 Ch 161. However, the claim form or the particulars of claim should state that the claimant is a limited company in liquidation, and should give the name and address of the liquidator. The receiver for debenture holders is also entitled to bring or continue an action in the name of the company: *Gough's Garages Ltd v Pugsley* [1930] 1 KB 615. As to security for costs see the Companies Act 1985 s 726; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 475. As to security for costs generally see PARA 745 et seq.

7 See the Insolvency Act 1986 s 130; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 896.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(4) PARTICULAR PARTIES/224. Partnerships and firms.

224. Partnerships and firms.

Provision for procedures to be followed when claims are brought by or against a partnership within the jurisdiction is made by a practice direction¹. They apply where claims are brought by or against two or more persons who were partners² and carried on that partnership business within the jurisdiction, at the time when the cause of action accrued³. Where that partnership has a name, unless it is inappropriate to do so, claims must be brought in or against the name under which that partnership carried on business at the time the cause of action accrued⁴. If the partners are requested to provide a copy of a partnership membership statement⁵ by any party to a claim, the partners must do so within 14 days of receipt of the request⁶. In that request the party seeking a copy of a partnership membership statement must specify the date when the relevant cause of action accrued⁷.

Where a claim is brought against an individual who carries on a business within the jurisdiction (but need not himself be within the jurisdiction); and that business is carried on in a name other than his own name (the 'business name'), the claim may be brought against the business name as if it were the name of a partnership⁸.

¹ CPR 7.2A; *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A paras 5A, 5B. See **PARTNERSHIP** vol 79 (2008) PARA 79 et seq.

² For these purposes, 'partners' includes persons claiming to be entitled as partners and persons alleged to be partners: *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 5A.2.

³ *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 5A.1. The business must be carried out within the jurisdiction, ie at a place of business held in the name of the firm where business is carried on by a partner or by a person in the employ of the firm, even though the partners may be out of the jurisdiction, otherwise the firm will not be carrying on business within the jurisdiction: see *Singleton v Roberts, Stocks & Co* (1894) 70 LT 687, DC; and see also *Worcester City and County Banking Co v Firbank, Pauling & Co* [1894] 1 QB 784, CA.

⁴ *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 5A.3. A foreign firm not carrying on business within the jurisdiction may not sue or be sued in the firm name, and therefore the partners of such a firm must sue or be sued individually in their own names. As to signing of the acknowledgment of service in the case of a partnership see *Practice Direction--Acknowledgment of Service* PD 10 para 4.4; and PARA 184 note 9.

⁵ A 'partnership membership statement' is a written statement of the names and last known places of residence of all the persons who were partners in the partnership at the time when the cause of action accrued, being the date specified for this purpose in accordance with *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 5B.3 (see the text to note 7): para 5B.2.

⁶ *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 5B.1.

⁷ *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 5B.3.

⁸ *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A paras 5C.1, 5C.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(4) PARTICULAR PARTIES/225. Trustees and personal representatives.

225. Trustees and personal representatives.

A claim may be brought by or against trustees, executors or administrators in that capacity without adding as parties any persons who have a beneficial interest in the trust or estate (the 'beneficiaries')¹. Any judgment or order given or made in the claim is binding on the beneficiaries unless the court orders otherwise in the same or other proceedings².

¹ CPR 19.7A(1). See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 808; **TRUSTS** (2007 Reissue) PARA 639. As to the position relating to the representation of unascertained interested parties see CPR 19.7; and PARA 230. As to the costs of applications by trustees see *Practice Note (trust proceedings: prospective costs orders)* [2001] 3 All ER 574.

² CPR 19.7A(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(4) PARTICULAR PARTIES/226. Trustees in bankruptcy.

226. Trustees in bankruptcy.

A trustee of a bankrupt may sue and be sued in his official title as 'The Trustee of the property of A B, a Bankrupt'¹.

¹ See the Insolvency Act 1986 s 305; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 326, 437.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(4) PARTICULAR PARTIES/227. Trade unions, employers' associations and other unincorporated associations.

227. Trade unions, employers' associations and other unincorporated associations.

A trade union¹ which is not a special register body² is not and must not be treated as if it were a body corporate, but it may sue and be sued, just as an unincorporated employers' association³ may sue and be sued, in its own name, whether in proceedings relating to property or founded on contract or tort or any other cause of action⁴.

An unincorporated members' club, not being a partnership or legal entity, cannot sue or be sued in the club name, nor can the secretary or any other officer of such a club sue or be sued on behalf of the club, even if the rules purport to give him power to sue and provide for his being sued, unless this is permitted by statute⁵. The trustees may, however, sue or be sued in respect of club property vested in them and are, in any proceedings in regard to the property, considered to represent the members beneficially interested therein⁶.

1 As to the meaning of 'trade union' see the Trade Union and Labour Relations (Consolidation) Act 1992 s 1; and **EMPLOYMENT** vol 40 (2009) PARA 846 et seq

2 As to the meaning of 'special register body' see the Trade Union and Labour Relations (Consolidation) Act 1992 s 117(1); and **EMPLOYMENT** vol 40 (2009) PARA 854.

3 As to the meaning of 'employers' association' see the Trade Union and Labour Relations (Consolidation) Act 1992 s 122; and **EMPLOYMENT** vol 40 (2009) PARA 1028.

4 See the Trade Union and Labour Relations (Consolidation) Act 1992 s 10 (trade unions), s 127 (unincorporated employers' association). In each case this is expressed to be subject to immunity in certain actions in tort: see ss 11, 128; and **EMPLOYMENT** vol 40 (2009) PARAS 853, 1030. In English law an unincorporated body is not a legal entity, and save as specifically provided (eg in the case of partners carrying on business within the jurisdiction under a firm name: see PARA 224), it cannot sue or be sued in its own name: see *Bloom v National Federation of Discharged and Demobilised Sailors and Soldiers* (1918) 35 TLR 50, CA. See also *Grossman v The Granville Club* (1884) 28 Sol Jo 513 (members' club); *Taff Vale Rly Co v Amalgamated Society of Railway Servants* [1901] AC 426, HL; *Ideal Films Ltd v Richards* [1927] 1 KB 374, CA. However, an unincorporated body may sue or be sued in representative proceedings. See also *Huntingdon Life Sciences Group plc v Cass* [2005] EWHC 2233 (QB), [2005] 4 All ER 899. Where the defendant is an unincorporated association and an individual acts as spokesperson for the association, he will be a representative defendant and a defendant in his own right: *Chancellor, Masters and Scholars of the University of Oxford v Broughton* [2006] EWHC 2490 (QB), [2006] All ER (D) 157 (Oct). As to derivative claims see PARA 232.

5 See **CLUBS** vol 13 (2009) PARA 279.

6 See CPR 19.7A; PARA 225; and **CLUBS** vol 13 (2009) PARA 279. As to proprietary and incorporated clubs and working men's clubs see **CLUBS** vol 13 (2009) PARAS 280-281.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(4) PARTICULAR PARTIES/228. Sender or addressee of a postal packet.

228. Sender or addressee of a postal packet.

An application¹ for permission to bring proceedings in the name of the sender or addressee of a postal packet or his personal representative is made in accordance with the alternative procedure². A copy of the application notice must be served on the universal service provider³ and on the person in whose name the applicant seeks to bring the proceedings⁴.

1 Ie under the Postal Services Act 2000 s 92: see **POST OFFICE** vol 36(2) (Reissue) PARA 96.

2 Ie CPR Pt 8: CPR 19.7B(1).

3 As to universal service providers see **POST OFFICE** vol 36(2) (Reissue) PARA 24.

4 CPR 19.7B(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(5) REPRESENTATIVE PARTIES/229. Representative parties with same interest.

(5) REPRESENTATIVE PARTIES

229. Representative parties with same interest.

Where more than one person has the same interest in a claim, the claim may be begun (or the court¹ may order that the claim be continued) by or against one or more of the persons who have the same interest, as representatives of any other persons who have that interest². The court may also direct that a person may not act as a representative³. Unless the court otherwise directs, any judgment or order given in a claim in which a party is acting as a representative under this rule is binding on all persons represented in the claim⁴ but may only be enforced by or against a person who is not a party to the claim with the permission of the court⁵. Different provisions apply to a claim where representation of persons or parties who cannot be ascertained is necessary⁶.

1 As to the meaning of 'court' see PARA 22.

2 CPR 19.6(1). See eg *Russell-Cooke Trust Co v Elliott* [2001] All ER (D) 300 (Mar), where an issue arose as to whether an investment scheme comprised a single, communal investment plan or a number of discrete plans and trusts; the third defendant was joined in the proceedings as the representative party of those investors who contended that the scheme had created one collective investment plan, and the fourth defendant was joined as the representative of those investors who contended that the scheme had created as many independent plans as there were loans made. See also *Independiente Ltd v Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch), [2003] All ER (D) 190 (Mar); *Howells v Dominion Insurance Co Ltd* [2005] EWHC 552 (QB), [2005] All ER (D) 29 (Apr).

3 CPR 19.6(2). Any party may apply to the court for an order under this rule: CPR 19.6(3).

4 CPR 19.6(4)(a).

5 CPR 19.6(4)(b).

6 CPR 19.6(5). See CPR 19.7; and PARA 230.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(5) REPRESENTATIVE PARTIES/230. Representation of interested persons who cannot be ascertained.

230. Representation of interested persons who cannot be ascertained.

Where a claim relates to:

- 334 (1) the estate of a deceased person¹;
- 335 (2) property subject to a trust²; or
- 336 (3) the meaning of a document, including a statute³,

the court⁴ may make an order appointing a person to represent any other person or persons in the claim where the person or persons to be represented:

- 337 (a) are unborn⁵;
- 338 (b) cannot be found⁶;
- 339 (c) cannot easily be ascertained⁷; or
- 340 (d) are a class of persons who have the same interest in a claim and either one or more members of that class are within the categories set out in heads (a) to (c) above⁸, or to appoint a representative would further the overriding objective⁹.

An application for such an order may be made by any person who seeks to be appointed under the order¹⁰, or by any party to the claim¹¹, and may be made at any time before or after the claim has started¹².

The court's approval is required to settle a claim in which a party is acting as a representative under this rule¹³ and the court may approve a settlement where it is satisfied that the settlement is for the benefit of all the represented persons¹⁴.

Unless the court otherwise directs, any judgment or order given in a claim in which a party is acting as a representative under this rule is binding on all persons represented in the claim¹⁵ but may only be enforced by or against a person who is not a party to the claim with the permission of the court¹⁶.

1 CPR 19.7(1)(a).

2 CPR 19.7(1)(b).

3 CPR 19.7(1)(c).

4 As to the meaning of 'court' see PARA 22.

5 CPR 19.7(2)(a).

6 CPR 19.7(2)(b).

7 CPR 19.7(2)(c).

8 CPR 19.7(2)(d)(i).

9 CPR 19.7(2)(d)(ii). As to the overriding objective see PARA 33.

10 CPR 19.7(3)(a)(i).

11 CPR 19.7(3)(a)(ii).

12 CPR 19.7(3)(b). An application notice for such an order must be served on (1) all parties to the claim, if the claim has started; (2) the person sought to be appointed, if that person is not the applicant or a party to the claim; and (3) any other person as directed by the court: CPR 19.7(4). As to the meaning of 'service' see PARA 138 note 2.

13 CPR 19.7(5).

14 CPR 19.7(6).

15 CPR 19.7(7)(a).

16 CPR 19.7(7)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(5) REPRESENTATIVE PARTIES/231. Power to make judgments binding on non-parties.

231. Power to make judgments binding on non-parties.

The High Court may at any time direct that notice of any claim¹, or of any judgment or order given in the claim, relating to the estate of a deceased person or to property subject to a trust or the sale of any property be served on any person who is not a party but who is or may be affected by it². An application under this rule may be made without notice and must be supported by written evidence which includes the reasons why the person to be served should be bound by the judgment in the claim³. If a person served with notice of a claim files an acknowledgment of service within 14 days he will become a party to the claim⁴ and if he does not acknowledge service of the notice he will be bound by any judgment given in the claim as if he were a party⁵. Any person served with a notice of a judgment or order under this rule will be bound by the judgment or order as if he had been a party to the claim⁶ but may, provided he acknowledges service, within 28 days after the notice is served on him, apply to the court to set aside or vary the judgment or order and take part in any proceedings relating to the judgment or order⁷.

If, after service of the notice of the claim on a person, the claim form is amended so as substantially to alter the remedy claimed, the court may direct that a judgment is not to bind that person unless a further notice, together with a copy of the amended claim form, is served on him⁸.

1 Unless the court orders otherwise, a notice of a claim or of a judgment or order under this rule must be (1) in the form required by the relevant practice direction; (2) issued by the court; and (3) accompanied by a form of acknowledgment of service with any necessary modifications: CPR 19.8A(4)(a). A notice of a claim must also be accompanied by a copy of the claim form and such other statements of case, witness statements or affidavits as the court may direct: CPR 19.8A(4)(b). A notice of a judgment or order must also be accompanied by a copy of the judgment or order: CPR 19.8A(4)(c). A notice is issued on the date entered on the notice by the court: CPR 19.8A(10). As to the meaning of 'service' see PARA 138 note 2.

2 CPR 19.8A(1), (2). For an example of a case where such a notice was served see *Tanna v Tanna* [2001] All ER (D) 333 (May).

3 CPR 19.8A(3).

4 CPR 19.8A(5). As to time limits generally see PARA 88 et seq. CPR 10.4, 10.5 (see PARA 184) apply subject to the modification that references in CPR 10.5 to the defendant are to be read as references to the person served with the notice of the claim: CPR 19.8A(9).

5 CPR 19.8A(6).

6 CPR 19.8A(8)(a).

7 CPR 19.8A(8)(b).

8 CPR 19.8A(7).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(6) DERIVATIVE CLAIMS/232. Derivative claims.

(6) DERIVATIVE CLAIMS

232. Derivative claims.

Where a company, other body corporate or trade union is alleged to be entitled to claim a remedy, and a claim is made by a member of it for it to be given that remedy¹, it is termed a 'derivative claim'². A derivative claim must be started by a claim form³. The company, body corporate or trade union for the benefit of which a remedy is sought must be made a defendant⁴ to the claim⁵. After the issue of the claim form, the claimant⁶ must not take any further step in the proceedings without the permission of the court⁷, other than certain specified steps⁸ or making an urgent application for interim relief⁹.

When the claim form for a derivative claim under Chapter 1 of Part 11 of the Companies Act 2006 is issued, the claimant must file an application notice¹⁰ for permission to continue the claim and the written evidence on which the claimant relies in support of the permission application¹¹. The claimant must not make the company a respondent to the permission application¹². The claimant must notify the company of the claim and permission application by sending to the company as soon as reasonably practicable after the claim form is issued (1) a notice in the form set out in the relevant practice direction¹³, and to which is attached a copy of the provisions of the Companies Act 2006 required by that form; (2) copies of the claim form and the particulars of claim; (3) the application notice; and (4) a copy of the evidence filed by the claimant in support of the permission application¹⁴. The claimant must file a witness statement confirming that the claimant has notified the company in accordance with the above requirements¹⁵.

Where notifying the company of the permission application would be likely to frustrate some party of the remedy sought, the court may, on application by the claimant, order that the company need not be notified for such period after the issue of the claim form as the court directs¹⁶. Such an application may be made without notice¹⁷.

Where the court dismisses the claimant's permission application without a hearing, the court will notify the claimant and (unless the court orders otherwise) the company of that decision¹⁸. The claimant may ask for an oral hearing to reconsider the decision to dismiss the permission application, but the claimant must make the request to the court in writing within seven days of being notified of the decision and must notify the company in writing, as soon as reasonably practicable, of that request unless the court orders otherwise¹⁹. Where the court dismisses the permission application at a hearing, it will notify the claimant and the company of its decision²⁰. Where the court does not dismiss the application for permission to continue the derivative action²¹, the court will order that the company and any other appropriate party must be made respondents to the permission application²² and give directions for the service on the company and any other appropriate party of the application notice and the claim form²³.

Slightly different rules apply where (a) either a body corporate to which Chapter 1 of Part 11 of the Companies Act 2006 does not apply or a trade union is alleged to be entitled to a remedy²⁴; and (b) either a claim is made by a member for it to be given that remedy²⁵ or a member of the body corporate or trade union seeks to take over a claim already started by the body corporate or trade union or one or more of its members, for it to be given that remedy²⁶. The member who starts, or seeks to take over, the claim must apply to the court for permission to continue the claim²⁷. The application for permission must be made by an application notice²⁸, and the

procedure for an application to continue a derivative claim in relation to a company²⁹ applies to the permission application as if the body corporate or trade union were a company³⁰.

If a derivative claim (except in pursuance of an order made on a claim by members in respect of unfair prejudice³¹) arises in the course of other proceedings, the procedure differs according to the nature of the claim³².

The court may order the company, body corporate or trade union for the benefit of which a derivative claim is brought to indemnify the claimant against liability for costs incurred in the permission application or in the derivative claim or both³³.

Where the court has given permission to continue a derivative claim, the court may order that the claim may not be discontinued, settled or compromised without the permission of the court³⁴.

1 Whether under the Companies Act 2006 Pt 11 Ch 1 (ss 260-264) or otherwise: CPR 19.9(1)(a); see **COMPANIES** vol 14 (2009) PARA 455 et seq. However, CPR 19.9 does not apply to a claim made pursuant to an order under the Companies Act 2006 s 996 (power of the court to give relief on petition by members in respect of unfair prejudice): CPR 19.9(1)(b). The requirements of CPR 19.9 are not limited to English companies: *Konamaneni v Rolls Royce Industrial Power (India) Ltd*[2002] 1 All ER 979, [2002] 1 WLR 1269. Where alternative remedies are available to a claimant, a court can grant a claimant permission under CPR 19.9 to continue a derivative claim if an independent board would sanction pursuit of the proceedings: *Mumbray v Lapper*[2005] All ER (D) 294 (May), (2005) Times, 31 May.

2 CPR 19.9(1). As to companies and corporations see PARA 223; and as to trade unions see PARA 227.

3 CPR 19.9(2).

4 As to the meaning of 'defendant' see PARA 18.

5 CPR 19.9(3).

6 As to the meaning of 'claimant' see PARA 18.

7 CPR 19.9(4). As to the meaning of 'court' see PARA 22. The rule on bringing proceedings for derivative claims also applies to a beneficiary seeking to do so under a will: *Roberts v Gill & Co*[2008] EWCA Civ 803, [2008] All ER (D) 162 (Jul).

8 Ie a step permitted or required by CPR 19.9A or 19.9C (see the text and notes 11-30): CPR 19.9(4)(a).

9 CPR 19.9(4)(b). As to applications for interim relief see PARA 315 et seq.

10 Ie under CPR Pt 23: see PARA 303 et seq.

11 CPR 19.9A(2).

12 CPR 19.9A(3).

13 Ie *Practice Direction--Derivative Claims* PD 19C.

14 CPR 19.9A(4). The claimant may send the notice and documents required by CPR 19.9A(4) to the company by any method permitted by CPR Pt 6 (see PARA 138 et seq) as if the notice and documents were being served on the company: CPR 19.9A(5). As to the meaning of 'filing' see PARA 1832 note 8.

15 CPR 19.9A(6).

16 CPR 19.9A(7).

17 CPR 19.9A(8).

18 CPR 19.9A(9).

19 CPR 19.9A(10).

20 CPR 19.9A(11).

- 21 Ie under the Companies Act 2006 s 261(2).
- 22 CPR 19.9A(12)(a). As to the meaning of 'service' see PARA 138 note 2.
- 23 CPR 19.9A(12)(b). In relation to proceedings under the Companies Act 2006 s 262(1) or 264(1) (where members of a company take over a claim by the company or other members), the application for permission must be made by an application notice in accordance with CPR Pt 23: CPR 19.9B(1), (2). CPR 19.9A (except for CPR 19.9A(1), (2) and (4)(b) (see text to notes 1-3 and head (4) in the text), and CPR 19.9A(12)(b) so far as it applies to the claim form) applies to an application under CPR 19.9B and references to the claimant in CPR 19.9A are to be read as references to the person who seeks to take over the claim: CPR 19.9B(3).
- 24 CPR 19.9C(1)(a).
- 25 CPR 19.9C(1)(b)(i).
- 26 CPR 19.9C(1)(b)(ii).
- 27 CPR 19.9C(2).
- 28 Ie in accordance with CPR Pt 23: CPR 19.9C(3).
- 29 Ie under the Companies Act 2006 s 261 (application for permission to continue derivative claim, s 262 (application for permission to continue claim as a derivative claim) or s 264 (application for permission to continue derivative claim brought by another member) (as the case requires).
- 30 CPR 19.9C(4). CPR 19.9A (except for CPR 19.9A(1)) and 19.9B apply to the permission application as if the body corporate or trade union were a company: CPR 19.9C(5).
- 31 Ie except such a claim in pursuance of an order under the Companies Act 2006 s 996.
- 32 CPR 19.9D. In the case of a derivative claim under the Companies Act 2006 Pt 11 Ch 1, CPR 19.9A or 19.9B applies, as the case requires; and in any other case, CPR 19.9C applies: CPR 19.9D. See *Roberts v Gill & Co (a firm)*[2008] EWCA Civ 803, (2008) Times, 18 August.
- 33 CPR 19.9E. 'Indemnity' means a right of someone to recover from a third party the whole amount which he himself is liable to pay: see CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31.
- 34 CPR 19.9F.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(7) GROUP LITIGATION/233. Group litigation orders.

(7) GROUP LITIGATION

233. Group litigation orders.

The court¹ may make a group litigation order² (a 'GLO') where there are or are likely to be a number of claims giving rise to common or related issues of fact or law (the 'GLO issues')³. Applications⁴ for a GLO may only be made to certain judges⁵, but the court may make a GLO of its own initiative⁶. In either event a GLO may only be made with the consent of the Lord Chief Justice, if it is to proceed in the Queen's Bench Division, of the Chancellor of the High Court, if it is to proceed in the Chancery Division, or of the Head of Civil Justice, if it is to proceed in a county court⁷.

A GLO must:

- 341 (1) contain directions about the establishment of a register (the 'group register') on which the claims managed under the GLO will be entered⁸;
- 342 (2) specify the GLO issues which will identify the claims to be managed as a group under the GLO⁹; and
- 343 (3) specify a court as the 'management court', which will manage the claims on the group register¹⁰.

A GLO may:

- 344 (a) in relation to claims which raise one or more of the GLO issues direct their transfer to the management court, order their stay¹¹ until further order and direct their entry on the group register¹²;
- 345 (b) direct that from a specified date claims which raise one or more of the GLO issues should be started in the management court and entered on the group register¹³; and
- 346 (c) give directions for publicising the GLO¹⁴.

1 As to the meaning of 'court' see PARA 22.

2 A Group Litigation Order ('GLO') means an order made under CPR 19.11 to provide for the case management of claims which give rise to common or related issues of fact or law (the 'GLO issues'); CPR 19.10. As to the effect of a GLO see PARA 234; and as to case management generally see PARA 246 et seq.

3 CPR 19.11(1). *Practice Direction--Group Litigation* PD 19B deals with group litigation where the multiple parties are claimants. In a case where the multiple parties are defendants, the court will give such directions as are appropriate: para 1.

4 Before applying for a GLO the solicitor acting for the proposed applicant should consult the Law Society's Multi Party Action Information Service in order to obtain information about other cases giving rise to the proposed GLO issues: *Practice Direction--Group Litigation* PD 19B para 2.1. It will often be convenient for the claimants' solicitors to form a Solicitors' Group and to choose one of their number to take the lead in applying for the GLO and in litigating the GLO issues: see para 2.2. The lead solicitor's role and relationship with the other members of the Solicitors' Group should be carefully defined in writing and will be subject to any directions given by the court under CPR 19.13(c) (see PARA 234 note 2 head (3)): *Practice Direction--Group Litigation* PD 19B para 2.2. In considering whether to apply for a GLO, the applicant should consider whether any other order would be more appropriate, in particular whether, in the circumstances of the case, it would be

more appropriate for the claims to be consolidated or for the rules relating to representative parties to be used: see para 2.3.

5 See *Practice Direction--Group Litigation* PD 19B paras 3.5-3.9. Applications to the High Court must be made, in London, to the Senior Master in the Queen's Bench Division, the Chief Chancery Master or the senior judge of the relevant specialist list, and outside London to a presiding judge or a Chancery supervising judge of the circuit in which the district registry which has issued the application notice is situated: paras 3.5, 3.6. In a county court the application should be made to the designated civil judge for the area in which the county court which has issued the application notice is situated: para 3.7. An application for a GLO must be made in accordance with CPR Pt 23 (see PARA 303 et seq), may be made at any time before or after any relevant claims have been issued and may be made either by a claimant or by a defendant: *Practice Direction--Group Litigation* PD 19B para 3.1. As to the contents of the application see para 3.2. As to the meanings of 'claimant' and 'defendant' see PARA 18.

6 See *Practice Direction--Group Litigation* PD 19B para 4. As to the procedure that applies when a court proposes to make an order of its own initiative see CPR 3.3; and PARA 251.

7 See *Practice Direction--Group Litigation* PD 19B para 3.3. The court to which the application for a GLO is made will, if minded to make the GLO, send to the Lord Chief Justice, the Chancellor, or the Head of Civil Justice, as appropriate, a copy of the application notice, a copy of any relevant written evidence, and a written statement as to why a GLO is considered to be desirable. These steps may be taken either before or after a hearing of the application: para 3.4. As to the Head of Civil Justice see PARA 12 note 5.

8 CPR 19.11(2)(a). Once a GLO has been made a group register will be established on which will be entered such details as the management court may direct of the cases which are to be subject to the GLO: *Practice Direction--Group Litigation* PD 19B paras 6.1, 6.7. A claim must be issued before it can be entered on a group register: para 6.1A. An application for details of a case to be entered on a group register may be made by any party to the case, but an order for details to be so entered will not be made unless the case gives rise to at least one of the GLO issues: see paras 6.2, 6.3. The court, if it is not satisfied that a case can be conveniently case managed with the other cases on the group register, or if it is satisfied that the entry of the case on the group register would adversely affect the case management of the other cases, may refuse to allow details of the case to be entered on the group register, or order their removal from the register if already entered, although the case gives rise to one or more of the group issues: para 6.4. The group register will normally be maintained by and kept at the court but the court may direct this to be done by the solicitor for one of the parties to a case entered on the register: para 6.5. CPR 5.4 (supply of documents from court records: see PARA 82) applies where the register is maintained by the court. A party to a claim on the group register may request documents relating to any other claim on the group register in accordance with CPR 5.4(1) as if he were a party to those proceedings: *Practice Direction--Group Litigation* PD 19B para 6.6(1). Where the register is maintained by a solicitor, any person may inspect the group register during normal business hours and upon giving reasonable notice to the solicitor; the solicitor may charge a fee not exceeding the fee prescribed for a search at the court office: para 6.6(2).

A party to a claim entered on the group register may apply to the management court for the claim to be removed from the register (CPR 19.14(1)), and if the court orders the claim to be removed it may give directions about the future management of the claim (CPR 19.14(2)).

9 CPR 19.11(2)(b).

10 CPR 19.11(2)(c).

11 A 'stay' imposes a halt on proceedings, apart from taking any steps allowed by the Civil Procedure Rules or the terms of the stay. Proceedings can be continued if a stay is lifted: CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31.

12 CPR 19.11(3)(a).

13 CPR 19.11(3)(b).

14 CPR 19.11(3)(c). Note that this is an opt-in system rather than an opt-out system.

After a GLO has been made, a copy of the GLO should be supplied (1) to the Law Society, 113 Chancery Lane, London WC2A 1PL; and (2) to the Senior Master, Queen's Bench Division, Royal Courts of Justice, Strand, London WC2A 2LL: *Practice Direction--Group Litigation* PD 19B para 11.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(7) GROUP LITIGATION/234. Effect of the GLO.

234. Effect of the GLO.

The effect of a GLO is to make all claimants or defendants, who are on the group register¹, parties to the claims which are subject to the GLO, so that they are managed by the court as one claim so long as it just and convenient for them to be so managed and dealt with². Where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues³:

- 347 (1) that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless the court⁴ orders otherwise⁵; and
- 348 (2) the court may give directions as to the extent to which that judgment or order is binding on the parties to any claim which is subsequently entered on the group register⁶.

A party to a claim which was entered on the group register after a judgment or order which is binding on him was given or made may not apply for the judgment or order to be set aside⁷, varied or stayed⁸ or appeal the judgment or order, but may apply to the court for an order that the judgment or order is not binding on him⁹. However, any other party who is adversely affected by a judgment or order which is binding on him may seek permission to appeal the order¹⁰.

1 As to the group register see PARA 233 note 8. As to the meaning of 'GLO' see PARA 233 note 2; and as to the meanings of 'claimant' and 'defendant' see PARA 18.

2 Directions that may be given by the management court include directions (1) varying the GLO issues; (2) providing for one or more claims on the group register to proceed as test claims (see PARA 235); (3) appointing the solicitor of one or more parties to be the lead solicitor for the claimants or defendants; (4) specifying the details to be included in a statement of case in order to show that the criteria for entry of the claim on the group register have been met; (5) specifying a date after which no claim may be added to the group register unless the court gives permission; and (6) for the entry of any particular claim which meets one or more of the GLO issues on the group register: see CPR 19.13; and see further *Practice Direction--Group Litigation* PD 19B paras 7-16. As to case management generally see PARA 246 et seq. In litigation on behalf of persons under disability, where some claimants propose to discontinue the claim, the court's permission is not required if discontinuance does not amount to a settlement and the claim form does not name another claimant: *Sayers v Smithkline Beecham plc* (2004) Times, 22 October.

As to subjecting claims outside the GLO to the same management directions see *Taylor v Nugent Care Society* [2004] EWCA Civ 51, [2004] 3 All ER 671.

3 As to the meaning of 'GLO issues' see PARA 233 note 2. Unless the court orders otherwise, disclosure of any document relating to the GLO issues by a party to a claim on the group register is disclosure of that document to all parties to claims on the group register and which are subsequently entered on the group register: CPR 19.12(4). As to disclosure generally see PARA 538 et seq.

4 As to the meaning of 'court' see PARA 22.

5 CPR 19.12(1)(a).

6 CPR 19.12(1)(b).

7 As to the meaning of 'set aside' see PARA 197 note 6.

8 As to the meaning of 'stay' see PARA 233 note 11.

9 CPR 19.12(3).

10 CPR 19.12(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(7) GROUP LITIGATION/235. Test claims.

235. Test claims.

Directions given by the management court¹ may include directions providing for one or more claims on the group register² to proceed as test claims³. Where a direction has been given for a claim on the group register to proceed as a test claim and that claim is settled, the management court may order that another claim on the group register be substituted as the test claim⁴. Where such an order is made, any order made in the test claim before the date of substitution is binding on the substituted claim unless the court orders otherwise⁵.

1 As to the management court see PARA 233 head (3).

2 As to the group register see PARA 233 note 8.

3 See CPR 19.13(b).

4 CPR 19.15(1).

5 CPR 19.15(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(8) RELATOR ACTIONS/236. Relator actions generally.

(8) RELATOR ACTIONS

236. Relator actions generally.

A relator action is one brought to restrain interference with a public right, whether committed or threatened, or to compel the performance of a public duty or to abate a public nuisance, and in such an action the Attorney General is a necessary party¹. The action is brought in the name of the Attorney General at the relation of the person or body seeking to prevent the commission or continuation of the public wrong². Although he is the nominal claimant³, the Attorney General is not deemed to be party to the proceedings, so as to be liable for costs, but the relator is liable for costs⁴.

The Attorney General is a necessary party in a relator action because he is the person recognised by public law as entitled to represent the public in a court of justice and he alone can maintain a suit *ex officio* or *ex relatione* for a declaration as to public rights⁵. In this respect his jurisdiction is absolute⁶ and the court has no power to review his decision⁷.

Any person may act as relator in the proceedings, and the absence of any interest in or injury to the relator affords no answer to them⁸. The right of action of the Attorney General does not depend on the presence of a relator. On receiving information of the infringement of any public right he may proceed *ex officio*⁹.

Relator actions are now rare in practice.

1 *Ware v Regent's Canal Co* (1858) 3 De G & J 212; *Wallasey Local Board v Gracey* (1887) 36 ChD 593; *Tottenham UDC v Williamson & Sons Ltd* [1896] 2 QB 353, CA; *Stoke Parish Council v Price* [1899] 2 Ch 277; *Devonport Corp v Tozer* [1902] 2 Ch 182 (affd [1903] 1 Ch 759, CA); *Watson v Hythe Borough Council* (1906) 70 JP 153; *A-G v Pontypridd Waterworks Co* [1908] 1 Ch 388; *Dover Picture Palace Ltd and Pessers v Dover Corp and Crundall, Wraith, Gurr and Knight* (1913) 11 LGR 971, CA; *A-G v North Eastern Rly Co* [1915] 1 Ch 905, CA; *Hurley v Stepney Borough Council* (1923) 67 Sol Jo 767; *A-G v Sharp* [1931] 1 Ch 121, CA; *A-G (on the relation of Hornchurch UDC) v Bastow* [1957] 1 QB 514, [1957] 1 All ER 497; *Barrs v Bethell* [1982] Ch 294, [1982] 1 All ER 106, CA (ratepayers unable to sue a borough council by themselves), following *Evan v Avon Corp* (1860) 29 Beav 144; *Holden v Bolton Corp* (1887) 3 TLR 676; *Boyce v Paddington Borough Council* [1903] 1 Ch 109. The rights for the protection of which the Attorney General intervenes must be the rights of the community in general, and not the rights of a limited portion of the community, especially when the limited portion in question has representatives who can bring the action: *A-G and Spalding RDC v Garner* [1907] 2 KB 480. See **NUISANCE** vol 78 (2010) PARA 190.

2 Before the action is brought, the leave of the Attorney General must first be obtained, and for this purpose application is made to the Law Officers' Department, Royal Courts of Justice, Strand, London WC2A 2LL. The relator must leave at the department a copy of the proposed claim form and statement of case with a certificate of counsel annexed to it stating that they are proper for the allowance of the Attorney General, and a copy of the claim form and statement of case which, if the action is sanctioned by the Attorney General, will be signed by him and returned to the relator's solicitor, who must himself leave a certificate that the claimant is a proper person or body to be relator and is capable of satisfying any order for costs of the action.

3 The action is entitled 'The Attorney General at the relation of X Y'. The relator is not joined unless he has a separate cause of action arising out of the same facts or there are special circumstances (*A-G v Barker* (1900) 83 LT 245), but if the claims by the Attorney General and by the relator are inconsistent with one another, they cannot be joined (*A-G v Earl of Durham* (1882) 46 LT 16).

4 *A-G and Domes v Basingstoke Corp* (1876) 45 LJ Ch 726; *A-G v Scott* [1905] 2 KB 160, CA; *A-G and Spalding RDC v Garner* [1907] 2 KB 480. See also *Re Cardwell, A-G v Day* [1912] 1 Ch 779.

5 *Gouriet v Union of Office Workers* [1978] AC 435, [1977] 3 All ER 70, HL.

6 *Gouriet v Union of Office Workers*[1978] AC 435, [1977] 3 All ER 70, HL, following *LCC v A-G*[1902] AC 165, HL.

7 *Gouriet v Union of Office Workers*[1978] AC 435, [1977] 3 All ER 70, HL. See also *A-G v Westminster City Council*[1924] 2 Ch 416, CA. The fact that the Attorney General has determined to institute proceedings ex officio or ex relatione does not affect the court's discretion as to the granting of the relief claimed: see *A-G v Harris*[1960] 1 QB 31, [1959] 2 All ER 393 (revsd but not on this point [1961] 1 QB 74, [1960] 3 All ER 207, CA), applying *A-G v Birmingham, Tame and Rea District Drainage Board*[1910] 1 Ch 48, CA; *A-G (on the relation of Hornchurch UDC) v Bastow*[1957] 1 QB 514, [1957] 1 All ER 497. Thus, a right may be enforced by injunction in proceedings by the Attorney General ex officio even when the right was conferred by a statute which prescribed remedies for its infringement: *A-G (on the relation of Hornchurch UDC) v Bastow* [1957] 1 QB 514, [1957] 1 All ER 497.

8 *A-G v Logan*[1891] 2 QB 100, DC. See also *A-G and Dommes v Basingstoke Corpn* (1876) 45 LJ Ch 726; but see *O'Shea v Cork RDC*[1914] 1 IR 16.

9 *A-G v Cockermouth Local Board*(1874) LR 18 Eq 172; *A-G v Logan*[1891] 2 QB 100, DC. There is no difference between a proceeding brought ex officio by the Attorney General and a proceeding by him at the relation of a third person, except as to costs. If there is no relator the Attorney General is responsible for the costs, as opposed to the relator in a relator action: *A-G v Cockermouth Local Board*(1874) LR 18 Eq 172.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(8) RELATOR ACTIONS/237. Exceptions to relator actions.

237. Exceptions to relator actions.

The Attorney General is not a necessary party nor is his leave required to bring an action at his relation to enforce the performance of a public duty or to restrain the interference with a public right in the following circumstances:

- 349 (1) where the interference with the public right is at the same time an interference with some private right¹ or is a breach of some statutory provision for the protection of the claimant²;
- 350 (2) where the special damage suffered by the claimant is over and above that suffered by the general public, even though there is no interference with any special private right³;
- 351 (3) where a local authority considers the bringing of the action to be expedient for the promotion or protection of the interests of the inhabitants of its area⁴.

1 *Holyoake v Shrewsbury and Birmingham Rly Co* (1848) 5 Ry & Can Cas 421; *Prestney v Colchester Corpn and A-G* (1882) 21 ChD 111; *Herron v Rathmines and Rathgar Improvement Comrs* [1892] AC 498, HL; *Boyce v Paddington Borough Council* [1903] 1 Ch 109; *Marriott v East Grinstead Gas and Water Co* [1909] 1 Ch 70; *London Passenger Transport Board v Moscrop* [1942] AC 332, [1942] 1 All ER 97, HL.

2 *Devonport Corpn v Plymouth, Devonport and District Tramways Co* (1884) 52 LT 161, CA.

3 *Iveson v Moore* (1699) 1 Ld Raym 486, 91 ER 1224; *Boyce v Paddington Borough Council* [1903] 1 Ch 109; *Stockwell v Southgate Corpn* [1936] 2 All ER 1343. In *LCC v South Metropolitan Gas Co* [1904] 1 Ch 76, CA, the plaintiffs (claimants) were held to be entitled without joining the Attorney General to sue for an injunction to restrain the defendants from interfering with matters the control and management of which was vested by statute in the plaintiffs.

4 In these circumstances the authority may bring proceedings in its own name: see the Local Government Act 1972 s 222; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 573. See *Solihull Metropolitan Borough Council v Maxfern Ltd* [1977] 2 All ER 177, [1977] 1 WLR 127; *Stafford Borough Council v Elkenford Ltd* [1977] 2 All ER 519, [1977] 1 WLR 324, CA; *Kent County Council v Batchelor* [1978] 3 All ER 980, [1978] 1 WLR 213. Contrast earlier cases where the local authority could not sue except by bringing in the Attorney General, eg *Prestatyn UDC v Prestatyn Raceway Ltd* [1969] 3 All ER 1573, [1970] 1 WLR 33; *Hampshire County Council v Shonleigh Nominees Ltd* [1970] 2 All ER 144, [1970] 1 WLR 865.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(9) DEATH OF A PARTY/238. Death of a person with an interest in a claim.

(9) DEATH OF A PARTY

238. Death of a person with an interest in a claim.

Where a person who had an interest in a claim has died and that person has no personal representative the court¹ may order²:

- 352 (1) the claim to proceed in the absence of a person representing the estate of the deceased³; or
- 353 (2) a person to be appointed to represent the estate of the deceased⁴.

Where an order has been made under head (2) above, any judgment or order made or given in the claim is binding on the estate of the deceased⁵.

1 As to the meaning of 'court' see PARA 22.

2 Before making such an order, the court may direct notice of the application to be given to any other person with an interest in the claim: CPR 19.8(4).

3 CPR 19.8(1)(a).

4 CPR 19.8(1)(b).

5 CPR 19.8(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(9) DEATH OF A PARTY/239. Death of defendant.

239. Death of defendant.

Where a defendant¹ against whom a claim could have been brought has died and a grant of probate or administration has been made, the claim must be brought against the persons who are the personal representatives of the deceased². Where, however, such a grant has not been made, the claim must be brought against 'the estate of' the deceased³ and the claimant⁴ must apply to the court for an order⁵ appointing a person to represent the estate of the deceased in the claim⁶.

Where such an order has been made any judgment or order made or given in the claim is binding on the estate of the deceased⁷.

1 As to the meaning of 'defendant' see PARA 18.

2 CPR 19.8(2)(a).

3 CPR 19.8(2)(b)(i). A claim is treated as having been brought against 'the estate of' the deceased in accordance with CPR 19.8(2)(b)(i) where (1) the claim is brought against the 'personal representatives' of the deceased but a grant of probate or administration has not been made; or (2) the person against whom the claim was brought was dead when the claim was started: CPR 19.8(3).

4 As to the meaning of 'claimant' see PARA 18.

5 Before making such an order, the court may direct notice of the application to be given to any other person with an interest in the claim: CPR 19.8(4). As to the meaning of 'court' see PARA 22.

6 CPR 19.8(2)(b)(ii). Where a claimant fails to apply for an order to appoint a personal representative, the action is not duly constituted and the proceedings may be discontinued: *Piggott v Aulton (deceased)* [2003] EWCA Civ 24, [2003] RTR 540.

7 CPR 19.8(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(10) CHANGE OF SOLICITOR/240. Solicitor acting for a party.

(10) CHANGE OF SOLICITOR

240. Solicitor acting for a party.

Where the address for service of a party is the business address of that party's solicitor¹, the solicitor will be considered to be acting for that party until the provisions of Part 42 of the Civil Procedure Rules² have been complied with³.

A solicitor appointed to represent a party only as an advocate at a hearing will not be considered to be acting for that party within the meaning of Part 42 of the rules⁴.

1 See CPR 6.7; and PARA 142. As to the address for service generally see CPR 6.23, 6.24; and PARA 143 et seq.

2 I.e the provisions of CPR Pt 42: see PARA 241 et seq.

3 CPR 42.1; and see *Practice Direction--Change of Solicitor* PD 42 para 1.1.

4 *Practice Direction--Change of Solicitor* PD 42 para 1.3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(10) CHANGE OF SOLICITOR/241. Duty to give notice of change of solicitor.

241. Duty to give notice of change of solicitor.

Where:

- 354 (1) a party for whom a solicitor is acting¹ wants to change his solicitor;
- 355 (2) a party, after having conducted the claim in person, appoints a solicitor to act on his behalf²; or
- 356 (3) a party, after having conducted the claim by a solicitor, intends to act in person,

the party or his solicitor (where one is acting) must file³ notice⁴ of the change and serve notice of the change on every other party⁵. Where head (1) or head (3) above applies, such notice must also be served on the former solicitor⁶. The notice must state the party's new address for service⁷ and the notice filed at court⁸ must state that notice has been served on the other parties and on the former solicitor as required⁹.

Subject as follows, where a party has changed his solicitor or intends to act in person, the former solicitor will be considered to be the party's solicitor unless and until either notice is filed and served in accordance with the above provisions or the court makes an order¹⁰ that that solicitor has ceased to act and the order is served as required by the relevant rule¹¹.

Where the certificate¹² of a LSC funded client or an assisted person is revoked or discharged the solicitor who acted for that person will cease to be the solicitor acting in the case as soon as his retainer is determined under the relevant regulations¹³. If that person wishes to continue, then where he appoints a solicitor to act on his behalf, he must file and serve notice of the change¹⁴ as if he had previously conducted the claim in person¹⁵ and where he wants to act in person, he must give an address for service¹⁶.

1 As to the circumstances in which a solicitor is not 'acting' for a person for these purposes see PARA 240 text and note 4.

2 le except where the solicitor is appointed only to act as an advocate for a hearing: CPR 42.2(1)(b).

3 As to the meaning of 'filing' see PARA 1832 note 8.

4 For the form of notice see Form N434; and see *The Civil Court Practice*.

5 CPR 42.2(1), (2); and see *Practice Direction--Change of Solicitor* PD 42 para 2.1. Where a party or solicitor changes his address for service, a notice of that change must be filed and served on every party: para 2.3. As to the meaning of 'service' see PARA 138 note 2; and as to address for service see PARA 143.

6 CPR 42.2(2)(b).

7 CPR 42.2(3). A party who, having conducted a claim by a solicitor, intends to act in person must give in the notice an address for service that is within the United Kingdom: *Practice Direction--Change of Solicitor* PD 42 para 2.4. As to the meaning of 'jurisdiction' see PARA 117 note 6.

8 The notice must not be filed until every other party has been served: see *Practice Direction--Change of Solicitor* PD 42 para 1.2. The notice must be filed in the court office in which the claim is proceeding: para 2.5. Where the claim is proceeding in the High Court the notice must be filed either in the appropriate district registry or, if the claim is proceeding in the Royal Courts of Justice, as follows: (1) a claim proceeding in the Queen's Bench Division must be filed in the Action Department of the Central Office; (2) a claim proceeding in the Chancery Division must be filed in Chancery Chambers; (3) a claim proceeding in the Administrative Court

must be filed in the Administrative Court office; (4) a claim proceeding in the Admiralty and Commercial Registry must be filed in the Admiralty and Commercial Registry; and (5) a claim proceeding in the Technology and Construction Court must be filed in the Registry of the Technology and Construction Court: para 2.6. Where the claim is the subject of an appeal to the Court of Appeal, the notice must also be filed in the Civil Appeals Office: para 2.7.

9 CPR 42.2(4).

10 le under CPR 42.3: see PARA 242.

11 See CPR 42.2(5). The rule referred to in the text is CPR 42.3(3): see PARA 242.

12 'Certificate' means (1) in the case of a LSC funded client, a certificate issued under the Funding Code (approved under the Access to Justice Act 1999 s 9); or (2) in the case of an assisted person, a certificate within the meaning of the Civil Legal Aid (General) Regulations 1989, SI 1989/339 (revoked) (see **LEGAL AID**): CPR 42.2(7). 'LSC funded client' means an individual who receives services funded by the Legal Services Commission as part of the Community Legal Service within the meaning of the Access to Justice Act 1999 Pt I (ss 1-26) and 'assisted person' means an assisted person within the statutory provisions relating to legal aid: see CPR 43.2(1)(i), (h) respectively. See further **LEGAL AID**.

13 CPR 42.2(6)(a). The regulations referred to in the text, under which the solicitor's retainer will be determined, are (1) in the case of an LSC funded client, the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 4; or (2) in the case of an assisted person, the Civil Legal Aid (General) Regulations 1989, SI 1989/339, reg 83 (now revoked): CPR 42.6(a).

14 le under CPR 42.2(2): see the text and notes 5-6. The notice must give the last known address of the former assisted person: see *Practice Direction--Change of Solicitor* PD 42 para 2.2.

15 See CPR 42.2(6)(b)(i).

16 CPR 42.2(6)(b)(ii).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(10) CHANGE OF SOLICITOR/242. Order that a solicitor has ceased to act.

242. Order that a solicitor has ceased to act.

A solicitor may apply for an order declaring that he has ceased to be the solicitor acting for a party¹. Where such an application is made, notice of the application must be given to the party for whom the solicitor is acting, unless the court² directs otherwise, and the application must be supported by evidence³.

Where the court makes an order that a solicitor has ceased to act, a copy of the order must be served on every party to the proceedings and if it is served by a party or the solicitor, the party or the solicitor (as the case may be) must file⁴ a certificate of service⁵.

Where the court has made such an order, the party for whom the solicitor was acting must give a new address for service⁶.

1 CPR 42.3(1). As to when a solicitor is acting for a party for these purposes see PARA 240 the text and note 4.

2 As to the meaning of 'court' see PARA 22.

3 CPR 42.3(2); and see *Practice Direction--Change of Solicitor* PD 42 paras 3.1, 3.2. The application must be made in accordance with CPR Pt 23 (see PARA 303 et seq): *Practice Direction--Change of Solicitor* PD 42 para 3.2.

4 As to the meaning of 'filing' see PARA 1832 note 8.

5 CPR 42.3(3). For the form of certificate see Form N215 in *The Civil Court Practice*. As to the meaning of 'service' see PARA 138 note 2.

6 In order to comply with CPR 6.23(1), 6.24: see *Practice Direction--Change of Solicitor* PD 42 para 5.1. As to address for service see PARA 142 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(10) CHANGE OF SOLICITOR/243. Removal of solicitor who has ceased to act on application of another party.

243. Removal of solicitor who has ceased to act on application of another party.

Where a solicitor who has acted¹ for a party has died, has become bankrupt, has ceased to practise or cannot be found, and the party has not given notice of a change of solicitor or notice of intention to act in person², any other party may apply for an order declaring that the solicitor has ceased to be the solicitor acting for the other party in the case³. The application must be supported by evidence⁴.

Where such an application is made, notice of the application must be given to the party to whose solicitor the application relates unless the court⁵ directs otherwise⁶.

Where the court makes an order under these provisions, a copy of the order must be served on every other party to the proceedings and where it is served by a party, that party must file⁷ a certificate of service⁸.

Where the court has made such an order, the party for whom the solicitor was acting must give a new address for service⁹.

1 As to when a solicitor has acted for a party for these purposes see PARA 240.

2 I.e. notice as required by CPR 42.2(2): see PARA 241.

3 CPR 42.4(1); and see *Practice Direction--Change of Solicitor* PD 42 para 4.1. The application must be made in accordance with CPR Pt 23 (see PARA 303 et seq): *Practice Direction--Change of Solicitor* PD 42 para 4.2.

4 *Practice Direction--Change of Solicitor* PD 42 para 4.2.

5 As to the meaning of 'court' see PARA 22.

6 CPR 42.4(2).

7 As to the meaning of 'filing' see PARA 1832 note 8.

8 CPR 42.4(3); and see *Practice Direction--Change of Solicitor* PD 42 para 4.3. For the form of certificate see Form N215 in *The Civil Court Practice*.

9 I.e. to comply with CPR 6.23(1), 6.24: see *Practice Direction--Change of Solicitor* PD 42 para 5.1. As to address for service see PARA 142 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(11) RESTRICTIONS ON PARTIES BRINGING VEXATIOUS PROCEEDINGS OR APPLICATIONS WITHOUT MERIT/244. Civil proceedings order restricting civil proceedings by a vexatious litigant.

(11) RESTRICTIONS ON PARTIES BRINGING VEXATIOUS PROCEEDINGS OR APPLICATIONS WITHOUT MERIT

244. Civil proceedings order restricting civil proceedings by a vexatious litigant.

If, on an application made by the Attorney General¹, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground either instituted vexatious civil proceedings² or made vexatious applications in any civil proceedings, the court may make a civil proceedings order³ which restricts his access to the court for the purpose of instituting or continuing any civil proceedings, or making any application in such proceedings, without first obtaining leave⁴.

1 As to the Attorney General see generally PARA 220.

2 See PARA 258 note 2.

3 See the Supreme Court Act 1981 s 42(1); and PARA 258. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

4 See the Supreme Court Act 1981 s 42(1A); and PARA 258. Where a person has instituted vexatious prosecutions, a criminal proceedings order may be made; and, if appropriate, an all proceedings order, which is an order with the combined effect of a civil proceedings order and a criminal proceedings order, may be made: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 1046.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/8. PARTIES/(11) RESTRICTIONS ON PARTIES BRINGING VEXATIOUS PROCEEDINGS OR APPLICATIONS WITHOUT MERIT/245. Civil restraint order restricting further applications by a person who has made applications which are totally without merit.

245. Civil restraint order restricting further applications by a person who has made applications which are totally without merit.

On an application made by any other party or parties, a civil restraint order¹ may be made against a party to proceedings who has made two or more applications which are totally without merit². An application may be made for a limited civil restraint order³, an extended civil restraint order⁴ or a general civil restraint order⁵.

- 1 As to the meaning of 'civil restraint order' see PARA 259 note 2.
- 2 See CPR 3.11; *Practice Direction--Civil Restraint Orders* PD 3C; and PARA 259.
- 3 As to limited civil restraint orders see PARA 259.
- 4 As to extended civil restraint orders see PARA 259.
- 5 As to general civil restraint orders see PARA 259.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(1) INTRODUCTION/246. In general.

9. CASE MANAGEMENT

(1) INTRODUCTION

246. In general.

The court¹ is required to further the overriding objective² by actively managing cases³. For this purpose active case management includes:

- 357 (1) encouraging the parties to co-operate with each other in the conduct of the proceedings⁴;
- 358 (2) identifying the issues at an early stage⁵;
- 359 (3) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others⁶;
- 360 (4) deciding the order in which issues are to be resolved⁷;
- 361 (5) encouraging the parties to use an alternative dispute resolution⁸ procedure if the court considers that appropriate and facilitating the use of such procedure⁹;
- 362 (6) helping the parties to settle the whole or part of the case¹⁰;
- 363 (7) fixing timetables or otherwise controlling the progress of the case¹¹;
- 364 (8) considering whether the likely benefits of taking a particular step justify the cost of taking it¹²;
- 365 (9) dealing with as many aspects of the case as it can on the same occasion¹³;
- 366 (10) dealing with the case without the parties needing to attend at court¹⁴;
- 367 (11) making use of technology¹⁵; and
- 368 (12) giving directions to ensure that the trial of a case proceeds quickly and efficiently¹⁶.

1 As to the meaning of 'court' see PARA 22.

2 As to the overriding objective see PARA 33.

3 CPR 1.4(1); and see *Re Hoicrest Ltd, Keene v Martin* [2000] 1 WLR 414, [2000] 1 BCLC 194, CA, cited in PARA 35 note 1.

4 CPR 1.4(2)(a); and see PARA 35 text to note 2. As to the procedure where the parties are agreed as to the terms on which proceedings can be disposed of, as to the terms of an interim order, or as to the discontinuance or withdrawal of proceedings see *Practice Statement (Administrative Court: uncontested proceedings)*[2009] 1 All ER 651.

5 CPR 1.4(2)(b); and see PARA 35 text and note 4.

6 CPR 1.4(2)(c). As to summary judgment see CPR Pt 24; and PARA 524 et seq.

7 CPR 1.4(2)(d).

8 As to the meaning of 'alternative dispute resolution' ('ADR') see PARA 35 note 3.

9 CPR 1.4(2)(e).

10 CPR 1.4(2)(f).

11 CPR 1.4(2)(g).

12 CPR 1.4(2)(h).

13 CPR 1.4(2)(i).

14 CPR 1.4(2)(j).

15 CPR 1.4(2)(k).

16 CPR 1.4(2)(l). As to the date of trial and listing for trial see PARA 1113 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(1) INTRODUCTION/247. The court's general powers of management.

247. The court's general powers of management.

The following list of powers is in addition to any powers given to the court¹ by any other rule or practice direction or by any other enactment or any powers it may otherwise have². Except where the Civil Procedure Rules provide otherwise, the court may:

- 369 (1) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)³;
- 370 (2) adjourn or bring forward a hearing⁴;
- 371 (3) require a party or a party's legal representative⁵ to attend the court⁶;
- 372 (4) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication⁷;
- 373 (5) direct that part of any proceedings (such as a counterclaim⁸) be dealt with as separate proceedings⁹;
- 374 (6) stay¹⁰ the whole or part of any proceedings or judgment either generally or until a specified date or event¹¹;
- 375 (7) consolidate proceedings¹²;
- 376 (8) try two or more claims on the same occasion¹³;
- 377 (9) direct a separate trial of any issue¹⁴;
- 378 (10) decide the order in which issues are to be tried¹⁵;
- 379 (11) exclude an issue from consideration¹⁶;
- 380 (12) dismiss or give judgment on a claim after a decision on a preliminary issue¹⁷;
- 381 (13) order any party to file and serve an estimate of costs¹⁸;
- 382 (14) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective¹⁹.

Where the court gives directions it will take into account whether or not a party has complied with Practice Direction (Pre-action Conduct) and any relevant pre-action protocol²⁰.

When the court makes an order, it may make it subject to conditions, including a condition to pay a sum of money into court²¹, and specify the consequence of failure to comply with the order or a condition²². The court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or relevant pre-action protocol²³. Where a party pays money into court following any such an order²⁴, the money is to be security for any sum payable by that party to any other party in the proceedings²⁵.

A power of the court under the rules to make an order includes a power to vary or revoke the order²⁶.

1 As to the meaning of 'court' see PARA 22.

2 CPR 3.1(1). As to powers under other provisions of the Civil Procedure Rules or practice directions see eg CPR 7.6(3) (power to extend time for service); and PARA 121. All such powers are subject to the overriding objective: see PARA 33. The other powers referred to are powers under eg the Supreme Court Act 1981, the County Courts Act 1984 or the inherent powers of the court. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

3 CPR 3.1(2)(a); and see PARA 249. See *Price v Price (t/a Poppyland Headware)* [2003] EWCA Civ 888, [2003] 3 All ER 911.

4 CPR 3.1(2)(b). Where a litigant in person requests an adjournment, the court should be slow to proceed in his absence: see *Fox v Graham Group Ltd* (2001) Times, 3 August.

5 As to the meaning of 'legal representative' see PARA 1833 note 13.

6 CPR 3.1(2)(c). It is objectionable for a court to order a party to attend a hearing with a view to putting pressure on it to drop the proceedings: *Tarajan Overseas Ltd v Kaye* (2002) Times, 22 January, CA.

7 CPR 3.1(2)(d).

8 As to the meaning of 'counterclaim' see PARA 618 note 3.

9 CPR 3.1(2)(e).

10 As to the meaning of 'stay' see PARA 233 note 11.

11 CPR 3.1(2)(f); and see PARA 530. See *Phillips v Symes* [2008] EWHC 2595 (Ch), [2008] BPIR 212.

12 CPR 3.1(2)(g); and see PARA 75.

13 CPR 3.1(2)(h).

14 CPR 3.1(2)(i).

15 CPR 3.1(2)(j).

16 CPR 3.1(2)(k).

17 CPR 3.1(2)(l).

18 CPR 3.1(2)(ll)

19 CPR 3.1(2)(m).

20 CPR 3.1(4). As to the meaning of 'pre-action protocol' see PARA 13; and as to conduct before the commencement of proceedings see PARA 107 et seq.

21 CPR 3.1(3)(a).

22 CPR 3.1(3)(b).

23 CPR 3.1(5). When exercising this power the court must have regard to the amount in dispute and the costs which the parties have incurred or which they may incur: CPR 3.1(6).

24 Ie an order under CPR 3.1(3) or (5): see CPR 3.1(6A).

25 CPR 3.1(6A). This power does not have retrospective effect: *DEG-Deutsche Investitions-Und Entwicklungsgesellschaft mbH v Koshy* [2004] EWHC 2896 (Ch), [2005] 1 WLR 2434, [2004] All ER (D) 176 (Dec).

26 CPR 3.1(7).

UPDATE

247 The court's general powers of management

NOTE 26--However, see *Roult v North West Strategic Health Authority* [2009] EWCA Civ 444, [2010] 1 WLR 487, [2009] All ER (D) 173 (May) (personal injury settlement achieved and approved by the court could not be revoked or varied using CPR 3.1(7)).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(1) INTRODUCTION/248. Variation of time limits by parties.

248. Variation of time limits by parties.

Unless the Civil Procedure Rules or a practice direction provides otherwise or the court¹ orders otherwise, the time specified by a rule or by the court for a person to do any act may be varied by the written agreement of the parties².

¹ As to the meaning of 'court' see PARA 22.

² CPR 2.11. For examples of time limits that cannot be varied by agreement between the parties, see CPR 3.8 (sanctions have effect unless defaulting party obtains relief); and PARA 255; CPR 28.4 (variation of case management timetable in the fast track); and PARA 288; and CPR 29.5 (variation of case management timetable in the multi-track); and PARA 297. While the parties may agree in writing to extend the time for service of a defence they may only extend the period by 28 days: see CPR 15.5; and PARA 201. Similarly, CPR 52.6(2) (appeals) prevents the parties from extending any date or time limit set by an order of the appeal court or the lower court, the rules or the relevant practice direction: see PARA 1665. As to the meanings of 'appeal court' and 'lower court' see PARA 1660 note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(1) INTRODUCTION/249. Court's power to extend or shorten time.

249. Court's power to extend or shorten time.

As part of the court's¹ general powers of case management², except where the Civil Procedure Rules provide otherwise, the court may extend or shorten the time for compliance with any rule, practice direction or court order, even if an application for extension is made after the time for compliance has expired³.

1 As to the meaning of 'court' see PARA 22.

2 As to the court's general powers of case management see PARA 247.

3 See CPR 3.1(2)(a). Where the parties have agreed that a time limit will not be altered the court should be slow to interfere with such a limit: see *Ropac Ltd v Intrepeneur Pub Co* [2000] 26 LS Gaz R 38, (2000) Times, 21 June, CA. See also *Johnson v Coburn* [1999] All ER(D) 1309, CA, where the court approved *Mortgage Corpn Ltd v Sandoes* [1997] 03 LS Gaz R 28, (1996) Times, 27 December, CA, which gave guidance as to the court's approach to failure to adhere to time limits contained in rules or directions. See also *Omega SA v Omega Engineering Inc* [2003] EWHC 1482 (Ch), [2003] All ER (D) 267 (May). The court's power to extend time for compliance retrospectively was not cut down by CPR 3.8: *Keen Phillips (a firm) v Field* [2006] EWCA Civ 1524, [2007] 1 WLR 686. In the Queen's Bench Division, where parties have extended a time limit by agreement, the party for whom time has been extended must advise the Masters' Support Unit in writing of the event in the proceedings for which time has been extended and the new date by which it must be done: see *The Queen's Bench Guide* (2007 Edn) para 2.3.2. As to the status of the guide see PARA 16 text and note 5.

For an example of a time limit set by statute which cannot be extended see *Mucelli v Government of the Republic of Albania* [2007] EWHC 2632 (Admin), [2008] 2 All ER 340 (appeal against extradition).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(1) INTRODUCTION/250. Court officer's power to refer to a judge.

250. Court officer's power to refer to a judge.

Where a procedural step is to be taken by a court officer¹ the court officer may consult a judge² before taking that step³ and the step may be taken by a judge instead of the court officer⁴.

1 As to the meaning of 'court officer' see PARA 49 note 3.

2 As to the meaning of 'judge' see PARA 49.

3 CPR 3.2(a).

4 CPR 3.2(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(1) INTRODUCTION/251. Court's power to make order of its own initiative.

251. Court's power to make order of its own initiative.

Except where a rule or some other enactment provides otherwise, the court¹ may exercise its powers on an application² or of its own initiative³. Where the court proposes to make an order of its own initiative it may give any person likely to be affected by the order an opportunity to make representations⁴ and where it does so the court must specify the time by and the manner in which the representations must be made⁵. Where the court proposes to make an order of its own initiative and to hold a hearing to decide whether to make the order, it must give each party likely to be affected by the order at least three days' notice of the hearing⁶. The court may, however, make an order of its own initiative without hearing the parties or giving them an opportunity to make representations⁷. Where the court has made such an order, a party affected by the order may apply to have it set aside⁸, varied or stayed⁹ and the order must contain a statement of the right to make such an application¹⁰. If the court of its own initiative strikes out a statement of case or dismisses an application (including an application for permission to appeal or for permission to apply for judicial review), and it considers that the claim or application is totally without merit, the court's order must record that fact and the court must at the same time consider whether it is appropriate to make a civil restraint order¹¹.

1 As to the meaning of 'court' see PARA 22.

2 As to the procedure for making an application see CPR Pt 23; and PARA 303 et seq.

3 CPR 3.3(1). For an example of a power which may only be exercised on an application see CPR 6.12(3) (order permitting service of claim form on agent of principal who is overseas); and PARA 147.

4 CPR 3.3(2)(a).

5 CPR 3.3(2)(b).

6 CPR 3.3(3). As to time limits generally see PARA 88 et seq.

7 CPR 3.3(4).

8 As to the meaning of 'set aside' see PARA 197 note 6.

9 CPR 3.3(5)(a). As to the meaning of 'stay' see PARA 233 note 11.

10 CPR 3.3(5)(b). Such an application must be made within such period as may be specified by the court or, if the court does not specify a period, not more than seven days after the date on which the order was served on the party making the application: CPR 3.3(6)(a), (b).

11 CPR 3.3(7). As to civil restraint orders see PARA 259.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(1) INTRODUCTION/252. Power to strike out a statement of case.

252. Power to strike out a statement of case.

The court¹ may strike out² a statement of case (or part of a statement of case)³ where certain conditions are satisfied⁴. When the court strikes out a statement of case it may make any consequential order it considers appropriate⁵.

Where the court makes an order which includes a term that the statement of case of a party is to be struck out if the party does not comply with the order, and the party against whom the order was made does not comply with it, a party may obtain judgment with costs by filing⁶ a request for judgment if certain conditions are satisfied⁷. A party against whom the court has entered judgment under this provision may apply to the court to set the judgment aside⁸.

If the court strikes out a claimant's statement of case and it considers that the claim is totally without merit, the court's order must record that fact and the court must at the same time consider whether it is appropriate to make a civil restraint order⁹.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'striking out' see PARA 218 note 2.

3 In CPR 3.4, 3.5 (see the text and notes 4-7; and PARAS 520-521), reference to a statement of case includes reference to part of a statement of case: CPR 3.4(1). As to the meaning of 'statement of case' see PARA 584.

4 See CPR 3.4(2); and PARA 520. CPR 3.4(2) does not limit any other power of the court to strike out a statement of case: CPR 3.4(5).

5 See CPR 3.4(3); and PARA 520.

6 As to the meaning of 'filing' see PARA 1832 note 8.

7 See CPR 3.5; and PARA 521.

8 See CPR 3.6; and PARA 522.

9 CPR 3.4(6). As to civil restraint orders see PARA 259.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(1) INTRODUCTION/253. Consequences of non-payment of certain fees.

253. Consequences of non-payment of certain fees.

Where:

- 383 (1) an allocation questionnaire or a pre-trial check list (listing questionnaire) is filed¹ without payment of the fee specified by the relevant fees order²; or
- 384 (2) the court³ dispenses with the need for an allocation questionnaire or a pre-trial check list or both⁴; or
- 385 (3) the Civil Procedure Rules do not require an allocation questionnaire or a pre-trial check list to be filed in relation to the claim in question⁵;
- 386 (4) the court has made an order giving permission to proceed with a claim for judicial review⁶; or
- 387 (5) the fee payable for a hearing specified by the relevant fees order is not paid⁷,

the court will serve a notice on the claimant⁸ requiring payment of the fee which the relevant fees order specifies as being due on the filing of the allocation questionnaire or the pre-trial check list if, at the time the fee is due, the claimant has not paid the fee or made an application for full or part remission of the fee⁹. The notice will specify the date by which the claimant must pay the fee¹⁰. If the claimant does not pay the fee or make an application for full or part remission of the fee by the date specified in the notice, the claim will automatically be struck out without further order of the court and the claimant will be liable for the costs which the defendant¹¹ has incurred unless the court orders otherwise¹².

Where an application for full or part remission of a fee is refused, the court will serve notice on the claimant requiring payment of the fee by the date specified in the notice¹³. Where an application for part remission of a fee is granted, the court will serve notice on the claimant requiring payment of the balance of the fee by the date specified in the notice¹⁴. If the claimant does not pay the fee by the date specified in the notice the claim will automatically be struck out without further order of the court¹⁵ and the claimant is liable for the costs which the defendant has incurred unless the court orders otherwise¹⁶. If a claimant applies¹⁷ to have the claim reinstated and the court grants relief, the relief must be conditional on the claimant either paying the fee, or filing evidence of full or part remission of the fee¹⁸, within two days of the date of the order if the order granting relief is made at a hearing at which a claimant is present or represented¹⁹, or seven days from the date of service of the order on the claimant in any other case²⁰.

Where:

- 388 (a) a defendant files a counterclaim²¹ without payment of the fee specified by the relevant fees order or making an application for full or part remission of the fee²²; or
- 389 (b) the proceedings continue on the counterclaim alone and (i) an allocation questionnaire or a pre-trial check list (listing questionnaire) is filed without payment of the fee specified by the relevant fees order; (ii) the court dispenses with the need for an allocation questionnaire or a pre-trial check list or both; (iii) the Civil Procedure Rules do not require an allocation questionnaire or a pre-trial check list to be filed in relation to the claim in question; or (iv) the fee payable for a hearing specified by the relevant fees order is not paid²³,

the court will serve a notice on the defendant requiring payment of the fee specified in the relevant fees order if, at the time the fee is due, the defendant has not paid it or made an application for full or part remission²⁴. The notice will specify the date by which the defendant must pay the fee²⁵. If the defendant does not pay the fee or make an application for full or part remission of the fee, by the date specified in the notice, the counterclaim will automatically be struck out without further order of the court²⁶. Where an application for full or part remission of a fee is refused, the court will serve notice on the defendant requiring payment of the full fee by the date specified in the notice²⁷. Where an application for part remission of a fee is granted, the court will serve notice on the defendant requiring payment of the balance of the fee by the date specified in the notice²⁸. If the defendant does not pay the fee by the date specified in the notice, the counterclaim will automatically be struck out without further order of the court²⁹. If the defendant applies to have the counterclaim reinstated and the court grants relief, the relief will be conditional on the defendant either paying the fee or filing evidence of full or part remission of the fee³⁰, within two days from the date of the order if the order granting relief is made at a hearing at which the defendant is present or represented³¹, or seven days from the date of service of the order on the defendant in any other case³².

1 As to the meaning of 'filing' see PARA 1832 note 8. As to allocation questionnaires and pre-trial check lists see PARAS 263, 290.

2 CPR 3.7(1)(a). The relevant fees order is the Civil Proceedings Fees Order 2008, SI 2008/1053 (amended by SI 2008/2853): see PARA 87.

3 As to the meaning of 'court' see PARA 22.

4 See CPR 3.7(1)(b). As to the court's power to dispense with the need for an allocation questionnaire see CPR 26.3; and PARA 263; and as to the court's power to dispense with the need for a pre-trial check list see CPR 28.5, CPR 29.6; and PARAS 290, 299.

5 See CPR 3.7(1)(c).

6 See CPR 3.7(1)(d). As to claims for judicial review see CPR Pt 54; and PARA 1530.

7 See CPR 3.7(1)(e). As to the relevant fees order see note 2.

8 As to the meaning of 'claimant' see PARA 18.

9 CPR 3.7(1), (2). The notice is in Form N173: see *The Civil Court Practice*.

10 CPR 3.7(3).

11 As to the meaning of 'defendant' see PARA 18.

12 CPR 3.7(4). As to the basis of assessment where a right to costs arises under CPR 3.7 see CPR 44.12; and PARA 1754. The court will send notice to the defendant that the claim has been struck out, which will explain the effect of the order on any interim injunction which has been granted: see *Practice Direction--Sanctions for Non-payment of Fees* PD 3B paras 1, 2. If an interim injunction has been granted before any fee becomes payable, then, when the fee is payable but not paid and the claim is struck out under this rule, the injunction will cease to have effect 14 days after the date when the claim is struck out, unless the claimant applies to reinstate the claim (under CPR 3.7(7): see the text and notes 17-18) before the injunction has ceased to have effect, in which case the injunction will continue until the hearing of the application to reinstate the claim, unless the court orders otherwise: see CPR 25.11; and PARA 329; and see also *Practice Direction--Sanctions for Non-payment of Fees* PD 3B para 2. As to time limits generally see PARA 88 et seq. As to costs generally see also PARA 1729 et seq.

13 CPR 3.7(5)(a).

14 CPR 3.7(5)(b).

15 CPR 3.7(6)(a).

16 CPR 3.7(6)(b); and see note 12.

- 17 le under CPR 3.9: see PARA 256.
- 18 CPR 3.7(7).
- 19 CPR 3.7(8)(a).
- 20 CPR 3.7(8)(b).
- 21 As to counterclaims see PARA 618 et seq.
- 22 CPR 3.7A(1)(a).
- 23 CPR 3.7A(1)(b).
- 24 CPR 3.7A(2).
- 25 CPR 3.7A(3).
- 26 CPR 3.7A(4).
- 27 CPR 3.7A(5)(a).
- 28 CPR 3.7A(5)(b).
- 29 CPR 3.7A(6).
- 30 CPR 3.7A(7).
- 31 CPR 3.7A(8)(a).
- 32 CPR 3.7A(8)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(1) INTRODUCTION/254. Consequences of cheque being dishonoured.

254. Consequences of cheque being dishonoured.

Where any fee¹ is paid by cheque and that cheque is subsequently dishonoured, the court² will serve a notice on the paying party requiring payment of the fee which will specify the date by which the fee must be paid³. If the fee is not paid by the date specified in the notice:

390 (1) where the fee is payable by the claimant⁴, the claim will automatically be struck out without further order of the court⁵;

391 (2) where the fee is payable by the defendant⁶, the defence will automatically be struck out without further order of the court⁷,

and the paying party is liable for the costs which any other party has incurred unless the court orders otherwise⁸.

If the paying party applies to have the claim or defence reinstated and the court grants relief, the relief is conditional on that party paying the fee⁹ within two days from the date of the order if the order granting relief is made at a hearing at which the paying party is present or represented¹⁰, or seven days from the date of service of the order on the paying party in any other case¹¹.

1 As to the payment of fees see PARA 87.

2 As to the meaning of 'court' see PARA 22.

3 CPR 3.7B(1), (2).

4 As to the meaning of 'claimant' see PARA 18. For the purposes of CPR 3.7B, 'claimant' includes a Part 20 claimant and 'claim form' includes a Part 20 claim: CPR 3.7B(6). As to Part 20 claims see CPR Pt 20; and PARA 618 et seq.

5 CPR 3.7B(3)(a).

6 As to the meaning of 'defendant' see PARA 18.

7 CPR 3.7B(3)(b).

8 CPR 3.7B(3). As to the basis of assessment where a right to costs arises under this CPR 3.7B see CPR 44.12; and PARA 1754.

9 CPR 3.7B(4).

10 CPR 3.7B(5)(a).

11 CPR 3.7B(5)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(1) INTRODUCTION/255. Consequences have effect unless defaulting party obtains relief.

255. Consequences have effect unless defaulting party obtains relief.

Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction¹. Where, however, the sanction is the payment of costs, the party in default may only obtain relief by appealing against the order for costs².

Where a rule, practice direction or court order requires a party to do something within a specified time, and specifies the consequence of failure to comply, the time for doing the act in question may not be extended by agreement between the parties³.

1 CPR 3.8(1). See also *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463, [2007] 3 All ER 365. As to the circumstances which the court will consider on an application to grant relief from a sanction see CPR 3.9; and PARA 256. See *Lexi Holdings plc v Luqman* [2007] EWCA Civ 1501, [2007] All ER (D) 35 (Aug).

2 CPR 3.8(2). See *Redcliffe Close (Old Brompton Road) Management Ltd v Kamal* [2005] EWHC 858 (Ch), [2005] All ER (D) 166 (Jan) (no error of law where relief granted subject to condition that defendant pay outstanding costs). Such an appeal requires the permission of the lower court or of the appeal court: see CPR 52.3; and PARA 1660. As to costs generally see also PARA 1729 et seq; and as to the meanings of 'appeal court' and 'lower court' see PARA 1660 note 2.

3 CPR 3.8(3). As to time limits generally see PARA 88 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(1) INTRODUCTION/256. Relief from consequences.

256. Relief from consequences.

On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court¹ will consider all the circumstances including:

- 392 (1) the interests of the administration of justice²;
- 393 (2) whether the application for relief has been made promptly³;
- 394 (3) whether the failure to comply was intentional⁴;
- 395 (4) whether there is a good explanation for the failure⁵;
- 396 (5) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol⁶;
- 397 (6) whether the failure to comply was caused by the party or his legal representative⁷;
- 398 (7) whether the trial date or the likely trial date can still be met if relief is granted⁸;
- 399 (8) the effect which the failure to comply had on each party⁹; and
- 400 (9) the effect which the granting of relief would have on each party¹⁰.

An application for relief must be supported by evidence¹¹.

1 As to the meaning of 'court' see PARA 22.

2 CPR 3.9(1)(a).

3 CPR 3.9(1)(b).

4 CPR 3.9(1)(c).

5 CPR 3.9(1)(d).

6 CPR 3.9(1)(e). As to the meaning of 'pre-action protocol' see PARA 13.

7 CPR 3.9(1)(f). As to the meaning of 'legal representative' see PARA 1833 note 13.

8 CPR 3.9(1)(g).

9 CPR 3.9(1)(h).

10 CPR 3.9(1)(i). As to the court's exercise of its discretion under CPR 3.9 see eg *Hansom v Makin* [2003] EWCA Civ 1801, [2003] All ER (D) 339 (Dec); *Flaxman-Binns v Lincolnshire County Council* [2004] EWCA Civ 424, [2004] All ER (D) 88 (Apr), [2004] 1 WLR 2232; *CIBC Mellon Trust Co v Stolzenberg* [2004] EWCA Civ 827, [2004] All ER (D) 363 (Jun). In exercising his discretion to grant relief from any sanction, a judge must systematically consider each of the matters listed in CPR 3.9(1): see the cases mentioned above; and see also *Woodhouse v Consignia plc*, *Steliou v Compton* [2002] EWCA Civ 275, [2002] 2 All ER 737, [2002] 1 WLR 2558. The principles in CPR 3.9(1) apply also to the Court of Appeal's scheme for an extension of time for filing a notice of appeal: *R (on the application of Awan) v Immigration Appeal Tribunal* [2004] EWCA Civ 922, (2004) Times, 24 June. See also *RC Residuals Ltd v Linton Fuel Oils Ltd* [2002] EWCA Civ 911, [2002] 1 WLR 2782; *Marine Rescue Technologies v Burchill* [2007] EWHC 1976 (Ch), [2007] All ER (D) 88 (Aug); *Southwark London Borough Council v Onayomake* [2007] EWCA Civ 1426, [2007] All ER (D) 287 (Oct), sub nom *Lambeth London Borough Council v Onayomake* (2007) Times, 2 November; *Supperstone v Hurst (No 4)* [2008] EWHC 735 (Ch), [2008] BPIR 1134; and see *Azeez v Momson* [2009] EWCA Civ 202, [2009] All ER (D) 193 (Mar) (where a party was debarred from defending on the basis of failure to comply with an order requiring disclosure of specified documents).

11 CPR 3.9(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(1) INTRODUCTION/257. General power of the court to rectify matters where there has been an error of procedure.

257. General power of the court to rectify matters where there has been an error of procedure.

Where there has been an error of procedure¹ such as a failure to comply with a rule or practice direction, the error does not invalidate any step taken in the proceedings unless the court² so orders³ and the court may make an order to remedy the error⁴.

1 For the interpretation of the term 'error of procedure' see *Steele v Mooney* [2005] EWCA Civ 96, [2005] 2 All ER 256, [2005] All ER (D) 110 (Feb). See also *Olafsson v Gissurarson (No 2)* [2008] EWCA Civ 152, [2008] 1 All ER (Comm) 1106 (proceedings served by invalid method in foreign jurisdiction); and *Firth v Everitt* [2007] EWHC 1979 (Ch), [2007] All ER (D) 133 (Sep) (failure to apply CPR 3.10 constituted procedural irregularity).

2 As to the meaning of 'court' see PARA 22.

3 CPR 3.10(a).

4 CPR 3.10(b). See, however, PARA 121 note 8. The proper application of CPR 3.10 is incompatible with a conclusion that the joinder of a defendant by description rather than by name is for that reason alone impermissible: *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch), [2003] 3 All ER 736, [2003] FSR 842 (injunction; description to be sufficiently certain as to identify both those included and those not included). CPR 3.10 does not empower the court to dispense with requirements imposed by statute: *Bamber v Eaton* [2004] EWHC 2437 (Ch), [2005] 1 All ER 820, [2004] All ER (D) 60 (Oct).

UPDATE

257 General power of the court to rectify matters where there has been an error of procedure

NOTE 4--See *Office of Public Prosecutor of Hamburg, Germany v Hughes* [2009] EWHC 279 (Admin), [2009] All ER (D) 262 (Feb), DC (failure to comply with procedure had not caused any prejudice and could be cured by exercising power pursuant to CPR 3.10).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(1) INTRODUCTION/258. Power to make civil proceedings orders against vexatious litigants.

258. Power to make civil proceedings orders against vexatious litigants.

If, on an application made by the Attorney General¹, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground:

- 401 (1) instituted vexatious civil proceedings², whether in the High Court or any inferior court, and whether against the same person or against different persons; or
- 402 (2) made vexatious applications in any civil proceedings, whether in the High Court or any inferior court, and whether instituted by him or another,

the court may, after hearing that person or giving him an opportunity of being heard, make a civil proceedings order³. Such order is an order that:

- 403 (a) no civil proceedings may without the leave of the High Court be instituted in any court by the person against whom the order is made;
- 404 (b) any civil proceedings instituted by him in any court before the making of the order may not be continued by him without the leave of the High Court; and
- 405 (c) no application (other than one for leave under these provisions) may be made by him⁴, in any civil proceedings instituted in any court by any person, without the leave of the High Court⁵.

An order so made may provide that it is to cease to have effect at the end of a specified period, but otherwise remains in force indefinitely⁶.

Leave for the institution or continuance of, or for the making of an application in, any civil proceedings by a person who is the subject of a civil proceedings order for the time being in force must not be given unless the High Court is satisfied that the proceedings or application are not an abuse of the process of the court in question and that there are reasonable grounds for the proceedings or application⁷. No appeal lies from a decision of the High Court refusing such leave⁸.

Where a civil proceedings order or an all proceedings order⁹ is in force against a person (the 'litigant'), an application by the litigant for permission to begin or continue, or to make any application in, any civil proceedings must be made by application notice issued in the High Court and signed by the litigant¹⁰. The application notice, together with any written evidence, will be placed before a High Court judge who may:

- 406 (i) without the attendance of the applicant make an order giving the permission sought;
- 407 (ii) give directions for further written evidence to be supplied by the litigant before an order is made on the application;
- 408 (iii) make an order dismissing the application without a hearing; or
- 409 (iv) give directions for the hearing of the application¹¹.

A person may apply to set aside the grant of any permission given under these provisions if the permission allowed the litigant to bring or continue proceedings against that person or to make

any application against him, and it was granted other than at a hearing of which that person was given notice¹².

1 As to the Attorney General see generally PARA 220. An application under the Supreme Court Act 1981 s 42 (see the text and notes 2-12) purportedly made on the Attorney General's behalf by the Treasury Solicitor is not to be held to be unauthorised in the absence of evidence to the contrary; rather it is for a person challenging the fact that the solicitor had authority to commence proceedings to lead evidence which lends support to that assertion. In the absence of such evidence there is no need for the Attorney General to lead evidence in rebuttal: *A-G v Foley* [2000] 2 All ER 609, [2000] CPLR 277, CA. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 The scope of this provision includes proceedings in the Court of Appeal on appeal from the High Court or any inferior court but not proceedings originating in the Court of Appeal: see *A-G v Jones* [1990] 2 All ER 636, [1990] 1 WLR 859, CA. In considering whether any proceedings are vexatious, the court must look at the whole history of the matter: see *Re Vernazza* [1959] 2 All ER 200, [1959] 1 WLR 622; affd [1960] 1 QB 197, [1960] 1 All ER 183, CA, revsd in part on other grounds sub nom *A-G v Vernazza* [1960] AC 965, [1960] 3 All ER 97, HL.

3 See the Supreme Court Act 1981 s 42(1) (s 42(1), (3), (4) amended, and s 42(1A) added, by the Prosecution of Offences Act 1985 s 24). A copy of any order so made must be published in the London Gazette: Supreme Court Act 1981 s 42(5). For guidance as to the circumstances in which it is appropriate to make any form of injunction to restrain the future activities of a vexatious litigant see *Bhamjee v Forsdick (No 2)* [2003] EWCA Civ 1113, [2004] 1 WLR 88. See also *A-G v Pepin* [2004] EWHC 1246 (Admin), [2004] ACD 243.

4 As to whether an application made in civil proceedings by two or more partners, against one of whom a civil proceedings order is in force, is an application made by him for these purposes see *Mephistopheles Debt Collection Service (a firm) v Lotay* [1994] 1 WLR 1064, CA.

5 Supreme Court Act 1981 s 42(1A) (as added: see note 3). A general civil proceedings order may be made preventing a litigant from bringing proceedings in the county court: *R (on the application of Mahajan) v Central London County Court* [2004] EWCA Civ 946, (2004) Times, 13 July.

Where a person has instituted vexatious prosecutions, a criminal proceedings order may be made; and, if appropriate, an all proceedings order, which is an order with the combined effect of a civil proceedings order and a criminal proceedings order, may be made: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 1046.

6 Supreme Court Act 1981 s 42(2). It has been held that restrictions for vexatious litigants on the right of access to a court in civil proceedings, which has been read in to the right to a fair trial under the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)) now incorporated into domestic law (see the Human Rights Act 1998 s 1(3), Sch 1 art 6(1)), are legitimate: see Application 11559/85 *H v United Kingdom* 45 DR 281 (1985), ECom HR; *Ebert v Official Receiver* [2001] EWCA Civ 340, [2001] 3 All ER 942, [2002] 1 WLR 320.

7 Supreme Court Act 1981 s 42(3) (as amended: see note 3).

8 Supreme Court Act 1981 s 42(4) (as amended: see note 3).

9 See note 5.

10 *Practice Direction--Striking out a Statement of Case* PD 3A paras 7.1, 7.2. The application notice must state (1) the title and reference number of the proceedings in which the civil proceedings order or the all proceedings order, as the case may be, was made; (2) the full name of the litigant and his address; (3) the order the applicant is seeking; and (4) briefly, why the applicant is seeking the order: para 7.3. The application notice must be filed together with any written evidence on which the litigant relies in support of his application; and either in the application notice or in written evidence filed in support of the application, the previous occasions on which the litigant made an application for permission under the Supreme Court Act 1981 s 42(1A) must be listed: *Practice Direction--Striking out a Statement of Case* PD 3A paras 7.4, 7.5.

11 *Practice Direction--Striking out a Statement of Case* PD 3A para 7.6. Such directions may include an order that the application notice be served on the Attorney General and on any person against whom the litigant desires to bring the proceedings for which permission is being sought: para 7.7. Any order made under para 7.6 or para 7.7 will be served on the litigant at the address given in the application notice, and CPR Pt 6 (provisions for service: see PARA 138 et seq) applies: *Practice Direction--Striking out a Statement of Case* PD 3A para 7.8. As to the meaning of 'service' see PARA 138 note 2. See *R (on the application of Ewing) v Department for Constitutional Affairs* [2006] EWHC 504 (Admin), [2006] 2 All ER 993 (dismissal of application without oral hearing would not necessarily contravene right to fair trial).

12 See *Practice Direction--Striking out a Statement of Case* PD 3A para 7.9. The notice referred to is notice under para 7.7: see note 11. Any such application must be made in accordance with CPR Pt 23 (see PARA 303 et seq): *Practice Direction--Striking out a Statement of Case* PD 3A para 7.10.

UPDATE

258 Power to make civil proceedings orders against vexatious litigants

NOTE 7--See *Ewing v DPP* [2010] EWCA Civ 70, [2010] All ER (D) 143 (Feb) (vexatious litigant subject to civil proceedings order required leave before seeking permission to commence proceedings for judicial review in criminal cause or matter).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(1) INTRODUCTION/259. Power to make civil restraint orders.

259. Power to make civil restraint orders.

A practice direction may set out the circumstances in which the court¹ has the power to make a civil restraint order against a party to proceedings, the procedure where a party applies for a civil restraint order against another party and the consequences of the court making a civil restraint order². Such a practice direction has been made and it applies where the court is considering whether to make a limited civil restraint order, an extended civil restraint order or a general civil restraint order, against a party who has issued claims or made applications which are totally without merit³. By the relevant practice direction, the other party or parties to the proceedings may apply for any civil restraint order, specifying which type of order is sought⁴.

A limited civil restraint order may be made by a judge of any court where a party has made two or more applications which are totally without merit⁵. Where the court makes a limited civil restraint order, the party against whom the order is made (1) will be restrained from making any further applications in the proceedings in which the order is made without first obtaining the permission of a judge identified in the order; (2) may apply for amendment or discharge of the order provided he has first obtained the permission of a judge identified in the order; and (3) may apply for permission to appeal the order and if permission is granted, may appeal the order⁶. Where a party who is subject to a limited civil restraint order makes a further application in the proceedings in which the order is made without first obtaining the permission of a judge identified in the order, such application will automatically be dismissed without the judge having to make any further order and without the need for the other party to respond to it⁷. Where such a party repeatedly makes applications for permission pursuant to that order which are totally without merit, the court may direct that if the party makes any further application for permission which is totally without merit, the decision to dismiss the application will be final and there will be no right of appeal, unless the judge who refused permission grants permission to appeal⁸.

An extended civil restraint order may be made by a judge of the Court of Appeal, a judge of the High Court or a designated civil judge or his appointed deputy in a county court⁹, where a party has persistently issued claims or made applications which are totally without merit¹⁰. Unless the court otherwise orders, where the court makes an extended civil restraint order, the party against whom the order is made (a) will be restrained from issuing claims or making applications in any court if the order has been made by a judge of the Court of Appeal, the High Court or any county court if the order has been made by a judge of the High Court or any county court identified in the order if the order has been made by a designated civil judge or his appointed deputy, concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made without first obtaining the permission of a judge identified in the order¹¹; (b) may apply for amendment or discharge of the order provided he has first obtained the permission of a judge identified in the order¹²; and (c) may apply for permission to appeal the order and if permission is granted, may appeal the order¹³. Where a party who is subject to an extended civil restraint order issues a claim or makes an application in a court identified in the order concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made without first obtaining the permission of a judge identified in the order, the claim or application will automatically be struck out or dismissed without the judge having to make any further order and without the need for the other party to respond to it¹⁴. Where such a party repeatedly makes applications for permission pursuant to that order which are totally without merit, the court may direct that

if the party makes any further application for permission which is totally without merit, the decision to dismiss the application will be final and there will be no right of appeal, unless the judge who refused permission grants permission to appeal¹⁵.

A general civil restraint order may be made by a judge of the Court of Appeal, a judge of the High Court or a designated civil judge or his appointed deputy in a county court¹⁶, where the party against whom the order is made persists in issuing claims or making applications which are totally without merit, in circumstances where an extended civil restraint order would not be sufficient or appropriate¹⁷. Unless the court otherwise orders, where the court makes a general civil restraint order, the party against whom the order is made (i) will be restrained from issuing any claim or making any application in any court if the order has been made by a judge of the Court of Appeal, in the High Court or any county court if the order has been made by a judge of the High Court, or any county court identified in the order if the order has been made by a designated civil judge or his appointed deputy, without first obtaining the permission of a judge identified in the order¹⁸; (ii) may apply for amendment or discharge of the order provided he has first obtained the permission of a judge identified in the order¹⁹; and (iii) may apply for permission to appeal the order and if permission is granted, may appeal the order²⁰. Where a party who is subject to a general civil restraint order issues a claim or makes an application in a court identified in the order without first obtaining the permission of a judge identified in the order, the claim or application will automatically be struck out or dismissed without the judge having to make any further order and without the need for the other party to respond to it²¹. Where such a party repeatedly makes applications for permission pursuant to that order which are totally without merit, the court may direct that if the party makes any further application for permission which is totally without merit, the decision to dismiss that application will be final and there will be no right of appeal, unless the judge who refused permission grants permission to appeal²².

1 As to the meaning of 'court' see PARA 22.

2 CPR 3.11. 'Civil restraint order' means an order restraining a party (1) from making any further applications in current proceedings (a limited civil restraint order); (2) from issuing certain claims or making certain applications in specified courts (an extended civil restraint order); or (3) from issuing any claim or making any application in specified courts (a general civil restraint order): CPR 2.3(1). See *Practice Direction--Civil Restraint Orders* PD 3C (which was the result of the decisions in *Bhamjee v Forsdick* [2003] EWCA Civ 799, [2003] All ER (D) 366 (May) and *Bhamjee v Forsdick (No 2)* [2003] EWCA Civ 1113, [2003] All ER (D) 429 (Jul), [2004] 1 WLR 88).

3 *Practice Direction--Civil Restraint Orders* PD 3C para 1. As to situations in which the court must strike out a claim and consider whether to make a civil restraint order see CPR 3.3(7), 3.4(6) and 23.12 (PARAS 251, 520, 314). See also CPR 52.10(6), which makes similar provision where the appeal court refuses an application for permission to appeal, strikes out an appellant's notice or dismisses an appeal; PARA 1671.

4 *Practice Direction--Civil Restraint Orders* PD 3C paras 5.1, 5.2. Such an application must be made using procedure in CPR Pt 23 (see PARA 303 et seq) unless the court otherwise directs: *Practice Direction--Civil Restraint Orders* PD 3C para 5.2. Examples of the different types of order are annexed to the practice direction; the examples may be modified as appropriate in any particular case: para 5.3.

5 *Practice Direction--Civil Restraint Orders* PD 3C para 2.1. A limited civil restraint order (1) is limited to the particular proceedings in which it is made; (2) will remain in effect for the duration of the proceedings in which it is made, unless the court otherwise orders; and (3) must identify the judge or judges to whom an application for permission under para 2.2(1), 2.2(2) or 2.8 should be made: para 2.9. Where a series of claims have been instituted, a civil restraint order may be made in appropriate circumstances notwithstanding the fact that some of the claims have merit: *Thakerar v Lynch Hall & Hornby* [2005] EWHC 2751 (Ch), [2006] 1 WLR 1511.

6 *Practice Direction--Civil Restraint Orders* PD 3C para 2.2. A party who is subject to a limited civil restraint order may not make an application for permission under paras 2.2(1), 2.2(2) or 2.3(2) without first serving notice of the application on the other party in accordance with para 2.5: para 2.4. A notice under para 2.4 must (1) set out the nature and grounds of the application; and (2) provide the other party with at least seven days within which to respond: para 2.5. An application for permission under para 2.2(1) or 2.2(2) (heads (1), (2) in the text) must be made in writing and must include the other party's written response, if any, to the notice served under para 2.4; and will be determined without a hearing: para 2.6. Where a party makes an application

for permission under para 2.2(1) or 2.2(2) and permission is refused, any application for permission to appeal must be made in writing and will be determined without a hearing: para 2.8.

7 *Practice Direction--Civil Restraint Orders* PD 3C para 2.3(1).

8 *Practice Direction--Civil Restraint Orders* PD 3C para 2.3(2). Such an order may only be made by a Court of Appeal judge, a High Court judge or master or a designated civil judge or his appointed deputy: para 2.7.

9 If he considers that it would be appropriate to make an extended civil restraint order, a master or a district judge in a district registry of the High Court must transfer the proceedings to a High Court judge; and a circuit judge or a district judge in a county court must transfer the proceedings to the designated civil judge: *Practice Direction--Civil Restraint Orders* PD 3C para 3.11.

10 *Practice Direction--Civil Restraint Orders* PD 3C para 3.1. An extended civil restraint order (1) will be made for a specified period not exceeding two years; (2) must identify the courts in which the party against whom the order is made is restrained from issuing claims or making applications; and (3) must identify the judge or judges to whom an application for permission under para 3.2(1), 3.2(2) or 3.8 should be made: para 3.9. The court may extend the duration of an extended civil restraint order, if it considers it appropriate to do so, but it must not be extended for a period greater than two years on any given occasion: para 3.10.

11 *Practice Direction--Civil Restraint Orders* PD 3C para 3.2(1).

12 *Practice Direction--Civil Restraint Orders* PD 3C para 3.2(2). A party who is subject to an extended civil restraint order may not make an application for permission under para 3.2(1) or 3.2(2) without first serving notice of the application on the other party in accordance with para 3.5: para 3.4. Such a notice must (1) set out the nature and grounds of the application; and (2) provide the other party with at least seven days within which to respond: para 3.5. An application for permission under para 3.2(1) or 3.2(2) must be made in writing and must include the other party's written response, if any, to the notice served under para 3.4; and will be determined without a hearing: para 3.6. Where a party makes an application for permission under para 3.2(1) or 3.2(2) and permission is refused, any application for permission to appeal must be made in writing and will be determined without a hearing: para 3.8.

13 *Practice Direction--Civil Restraint Orders* PD 3C para 3.2(3).

14 *Practice Direction--Civil Restraint Orders* PD 3C para 3.3(1).

15 *Practice Direction--Civil Restraint Orders* PD 3C para 3.3(2). Such an order under may only be made by a Court of Appeal judge, a High Court judge or a designated civil judge or his appointed deputy: para 3.7.

16 If he considers that it would be appropriate to make a general civil restraint order, a master or a district judge in a district registry of the High Court must transfer the proceedings to a High Court judge; and a circuit judge or a district judge in a county court must transfer the proceedings to the designated civil judge: *Practice Direction--Civil Restraint Orders* PD 3C para 4.11.

17 *Practice Direction--Civil Restraint Orders* PD 3C para 4.1. A general civil restraint order (1) will be made for a specified period not exceeding two years; (2) must identify the courts in which the party against whom the order is made is restrained from issuing claims or making applications; and (3) must identify the judge or judges to whom an application for permission under para 4.2(1), 4.2(2) or 4.8 should be made: para 4.9. The court may extend the duration of a general civil restraint order, if it considers it appropriate to do so, but it must not be extended for a period greater than two years on any given occasion: para 4.10.

18 *Practice Direction--Civil Restraint Orders* PD 3C para 4.2(1).

19 *Practice Direction--Civil Restraint Orders* PD 3C para 4.2(2). A party who is subject to a general civil restraint order may not make an application for permission under para 4.2(1) or 4.2(2) without first serving notice of the application on the other party in accordance with para 4.5: para 4.4. Such a notice must (1) set out the nature and grounds of the application; and (2) provide the other party with at least seven days within which to respond: para 4.5. An application for permission under para 4.2(1) or 4.2(2) must be made in writing and must include the other party's written response, if any, to the notice served under para 4.4; and will be determined without a hearing: para 4.6. Where a party makes an application for permission under para 4.2(1) or 4.2(2) and permission is refused, any application for permission to appeal must be made in writing and will be determined without a hearing: para 4.8

20 *Practice Direction--Civil Restraint Orders* PD 3C para 4.2(3).

21 *Practice Direction--Civil Restraint Orders* PD 3C para 4.3(1).

22 *Practice Direction--Civil Restraint Orders* PD 3C para 4.3(2). Such an order under may only be made by (1) a Court of Appeal judge; (2) a High Court judge; or (3) a designated civil judge or his appointed deputy: para 4.7.

UPDATE

259 Power to make civil restraint orders

NOTE 10--Three unmeritorious claims or applications is the bare minimum for establishing persistence before making an extended civil restraint order: *Courtman (Trustee in Bankruptcy) v Ludlam* [2009] EWHC 2067 (Ch), [2010] 1 BPIR 98.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(2) THE PRELIMINARY STAGE OF CASE MANAGEMENT/260. Introduction.

(2) THE PRELIMINARY STAGE OF CASE MANAGEMENT

260. Introduction.

Part 26 of the Civil Procedure Rules¹ provides for the automatic transfer of some defended cases between courts² and the allocation of defended cases to case management tracks³. There are three tracks: (1) the small claims track⁴; (2) the fast track⁵; and (3) the multi-track⁶.

1 Ie CPR Pt 26 (see PARA 261 et seq): see CPR 26.1(1).

2 CPR 26.1(1)(a).

3 CPR 26.1(1)(b).

4 CPR 26.1(2)(a).

5 CPR 26.1(2)(b).

6 CPR 26.1(2)(c). See CPR 26.6, which sets out the normal scope of each track; and PARAS 267-269; CPR Pt 27, which makes provision for the small claims track; and PARA 274 et seq; CPR Pt 28, which makes provision for the fast track; and PARA 286 et seq; and CPR Pt 29, which makes provision for the multi-track; and PARA 293 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(2) THE PRELIMINARY STAGE OF CASE MANAGEMENT/261. Automatic transfer.

261. Automatic transfer.

In proceedings where:

- 410 (1) the claim is for a specified amount of money¹;
- 411 (2) the claim was commenced in a court which is not the defendant's home court²;
- 412 (3) the claim has not been transferred to another defendant's home court under the procedure relating to applications to set aside or vary default judgments³ or under the procedure⁴ relating to the determination of payment by the judge on an admission⁵; and
- 413 (4) the defendant is an individual⁶,

the court will transfer the proceedings to the defendant's home court when a defence is filed⁷. Where the defence is that money claimed has been paid⁸ or if the defendant has admitted part of a claim for a specified sum of money⁹ and the claimant notifies the court that he wishes the proceedings to continue¹⁰, the court will, however, transfer the proceedings to the defendant's home court when it receives that notification from the claimant¹¹.

Where the claim is against two or more defendants with different home courts and the defendant whose defence is filed first is an individual, proceedings are transferred to the home court of that defendant¹².

The time when a claim is automatically transferred under this rule may be varied by a practice direction in respect of claims issued by the production centre¹³.

These provisions for automatic transfer do not apply where the claim was commenced in a specialist list¹⁴.

1 See CPR 26.2(1)(a).

2 See CPR 26.2(1)(b). As to the meaning of 'defendant's home court' see PARA 58 note 16; and as to the meaning of 'defendant' see PARA 18.

3 I.e. under CPR 13.4: see PARA 518. As to the meaning of 'set aside' see PARA 197 note 6; and as to the meaning of 'default judgment' see PARA 506.

4 I.e. under CPR 14.12: see PARA 197.

5 See CPR 26.2(1)(c). As to the meaning of 'judge' see PARA 49.

6 See CPR 26.2(1)(d), which thus applies if the defendant is not a registered company or other corporation.

7 CPR 26.2(1), (3).

8 I.e. where CPR 15.10 applies: see PARA 203.

9 I.e. where CPR 14.5 applies: see PARA 192.

10 I.e. under CPR 15.10(1), (2) or CPR 14.5(3), (4): see PARAS 203, 192 respectively.

11 CPR 26.2(3), (4).

12 CPR 26.2(5).

13 CPR 26.2(6). See CPR 7.10, which makes provision for the production centre; and PARA 126. See also *Practice Direction--Production Centre* PD 7C paras 1.2, 1.3(2)(e), 5.2.

14 CPR 26.2(2). As to the meaning of 'specialist list' see PARA 67 note 8; and as to specialist proceedings see PARA 1536 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(2) THE PRELIMINARY STAGE OF CASE MANAGEMENT/262. Allocation generally.

262. Allocation generally.

In order to provide the court with information additional to that which is contained in the statements of case¹ and for the purposes of case management by the court, allocation questionnaires² are served on the parties by the court³. Upon consideration of the allocation questionnaires the court will allocate the case to a track⁴ and give appropriate directions⁵.

1 I.e. the particulars of claim (filed with or after the claim form: see CPR 7.4(1)(a) or CPR 7.4(3); and PARA 123); the defence (filed at court: see CPR 15.2; and PARA 199); and any reply (filed at court when filing the allocation questionnaire: see CPR 15.8; and PARA 604). As to statements of case see CPR Pt 16; and PARA 584 et seq. As to the meaning of 'court' see PARA 22; and as to the meaning of 'filing' see PARA 1832 note 8.

2 See Form N150 in *The Civil Court Practice*.

3 See CPR 26.3; and PARA 263.

4 I.e. the small claims track (see CPR 26.6(1)-(3), CPR Pt 27; and PARAS 267, 274 et seq); the fast track (see CPR 26.6(4), (5), CPR Pt 28; and PARAS 268, 286 et seq); and the multi-track (see CPR 26.6(6), CPR Pt 29; and PARAS 269, 293 et seq.)

5 See CPR 27.4(1) (small claims track); and PARA 277; CPR 28.2(1) (fast track); and PARA 287; and CPR 29.2(1) (multi-track); and PARA 294.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(2) THE PRELIMINARY STAGE OF CASE MANAGEMENT/263. Allocation questionnaire.

263. Allocation questionnaire.

When a defendant¹ files a defence² the court³ will serve⁴ an allocation questionnaire on each party unless the defence is that money claimed has been paid⁵ or the defendant has admitted part of a claim for a specified sum of money⁶ and the relevant rules⁷ apply⁸ or the court dispenses with the need for a questionnaire⁹. Where there are two or more defendants and at least one of them files a defence, the court will serve the allocation questionnaire when all the defendants have filed a defence or when the period for the filing of the last defence has expired, whichever is the sooner¹⁰.

Where proceedings are automatically transferred to the defendant's home court¹¹, the court in which the proceedings have been commenced will serve an allocation questionnaire before the proceedings are transferred¹². Where the defence is that money claimed has been paid or the defendant has admitted part of a claim for a specified sum of money, the relevant rules apply¹³ and the proceedings are not automatically transferred to the defendant's home court¹⁴, the court will serve an allocation questionnaire on each party when the claimant¹⁵ files a notice indicating that he wishes the proceedings to continue¹⁶.

The court may, on the application of the claimant, serve an allocation questionnaire earlier than it would otherwise serve it under these provisions¹⁷. Furthermore, the time when the court serves an allocation questionnaire under these provisions may be varied by a practice direction in respect of claims issued by the production centre¹⁸.

Each party must file the completed allocation questionnaire no later than the date specified in it, which must be at least 14 days after the date when it is deemed to be served on the party in question¹⁹. The date for filing the completed allocation questionnaire may not be varied by agreement between the parties²⁰.

An estimate of costs must be filed and served when an allocation questionnaire is filed by a party to a claim which is outside the limits of the small claims track²¹. A party may also wish to give the court extra information at this stage about matters which he believes may affect its decision about allocation or case management²².

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'filing' see PARA 1832 note 8. As to filing a defence see PARA 199.

3 As to the meaning of 'court' see PARA 22.

4 As to the meaning of 'service' see PARA 138 note 2.

5 See CPR 15.10; and PARA 203.

6 See CPR 14.5; and PARA 192.

7 I.e. CPR 15.10 or CPR 14.5: see CPR 26.3(1)(a).

8 CPR 26.3(1)(a).

9 CPR 26.3(1)(b).

10 CPR 26.3(2). As to the period for filing a defence see CPR 15.4; and PARA 201.

11 le under CPR 26.2: see PARA 261. As to the meaning of 'defendant's home court' see PARA 58 note 16.

12 CPR 26.3(3).

13 le CPR 15.10 or CPR 14.5 applies: see the text and notes 5-7.

14 le under CPR 26.2: see PARA 261.

15 As to the meaning of 'claimant' see PARA 18.

16 CPR 26.3(4). As to such a claimant's notice see CPR 15.10(1), (2); CPR 14.5(3), (4); and PARAS 203, 192 respectively.

17 CPR 26.3(5).

18 CPR 26.3(7). As to the production centre see CPR 7.10; and PARA 126. See also *Practice Direction--Production Centre* PD 7C para 5.2(4).

19 CPR 26.3(6). As to deemed service see CPR 6.14, 6.26; and PARA 151; and as to time limits generally see PARA 88 et seq. The parties should consult one another and co-operate in completing the allocation questionnaires and giving other information to the court, although this process must not delay filing the questionnaires: see *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 2.3.

20 CPR 26.3(6A).

21 See *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 2.1(2)(a)-(d).

22 See *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 2.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(2) THE PRELIMINARY STAGE OF CASE MANAGEMENT/264. Consequences of failure to file an allocation questionnaire.

264. Consequences of failure to file an allocation questionnaire.

If no party files an allocation questionnaire within the time specified by the relevant form¹ the court² will order that unless an allocation questionnaire is filed within seven days from service³ of that order, the claim, defence and any counterclaim⁴ will be struck out⁵ without further order of the court⁶. Where a party files an allocation questionnaire but another party does not, the file will be referred to a judge⁷ for his directions and the court may allocate the claim to a track⁸ if it considers that it has enough information to do so, or order that an allocation hearing⁹ is listed and that all or any parties must attend¹⁰.

If a party fails to file an allocation questionnaire, the court may give any direction it considers appropriate¹¹.

1 See Form N152 in *The Civil Court Practice*.

2 As to the meaning of 'court' see PARA 22.

3 As to the meaning of 'service' see PARA 138 note 2.

4 As to the meaning of 'counterclaim' see PARA 618 note 3.

5 As to the meaning of 'striking out' see PARA 218 note 2.

6 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 2.5(1).

7 As to the meaning of 'judge' see PARA 49.

8 As to allocation to a track (small claims track, fast track or multi-track) see PARA 266 et seq.

9 As to allocation hearings see PARA 266.

10 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 2.5(2).

11 CPR 26.5(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(2) THE PRELIMINARY STAGE OF CASE MANAGEMENT/265. Stay to allow for settlement of the case.

265. Stay to allow for settlement of the case.

When filing¹ the completed allocation questionnaire, a party may make a written request for the proceedings to be stayed² while the parties try to settle the case by alternative dispute resolution³ or other means⁴. Where all parties so request a stay or the court⁵, of its own initiative, considers that such a stay would be appropriate, the court will direct that the proceedings, either in whole or in part, be stayed for one month or for such specified period as it considers appropriate⁶. The court may extend the stay until such date or for such specified period as it considers appropriate⁷.

Any party may apply for a stay to be lifted⁸.

Where the court stays the proceedings under these provisions, the claimant⁹ must tell the court if a settlement is reached¹⁰. If the claimant does not tell the court by the end of the period of the stay that a settlement has been reached, the court will give such directions as to the management of the case as it considers appropriate¹¹.

1 As to the meaning of 'filing' see PARA 1832 note 8.

2 As to the meaning of 'stay' see PARA 233 note 11. The court will generally accept a letter from any party or from the solicitor for any party as an application to extend the stay. The letter should confirm that the application is made with the agreement of all parties and explain the steps being taken and identify any mediator or expert assisting with the process: *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 3.1(1).

3 As to the meaning of 'alternative dispute resolution' ('ADR') see PARA 35 note 3. As to alternative dispute resolution see generally **ARBITRATION** vol 2 (2008) PARA 1201 et seq. *Practice Direction--Pilot Scheme for Mediation in Central London County Court* PD 26B provided for a pilot scheme to operate from 1 April 2004 to 31 March 2005 in relation to claims in the Central London County Court.

4 CPR 26.4(1).

5 As to the meaning of 'court' see PARA 22.

6 CPR 26.4(2).

7 CPR 26.4(3). An order extending the stay must be made by a judge and the extension will generally be for no more than four weeks unless clear reasons are given to justify a longer time: *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 3.1(2). More than one extension of the stay may be granted: para 3.1(3).

8 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 3.3.

9 As to the meaning of 'claimant' see PARA 18.

10 CPR 26.4(4). Where the whole of the proceedings are settled during a stay, the taking of any of the following steps will be treated as an application for the stay to be lifted: (1) an application for a consent order (in any form) to give effect to the settlement; (2) an application for the approval of a settlement where a party is a person under a disability; (3) giving notice of acceptance of money paid into court in satisfaction of the claim or applying for money in court to be paid out: *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 3.4.

11 CPR 26.4(5). At the end of the stay the file will be referred to a judge for his directions. He will consider whether to allocate the claim to a track and what other directions to give, or may require any party to give further information or fix an allocation hearing: *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 3.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(2) THE PRELIMINARY STAGE OF CASE MANAGEMENT/266. Allocation.

266. Allocation.

The court¹ will allocate the claim to a track:

- 414 (1) when every defendant² has filed³ an allocation questionnaire; or
- 415 (2) when the period for filing the allocation questionnaires has expired,

whichever is the sooner, unless it has stayed⁴ the proceedings⁵ or dispensed with the need for allocation questionnaires⁶. If the court has stayed the proceedings⁷, it will allocate the claim to a track at the end of the period of the stay⁸.

Before deciding the track to which to allocate proceedings or deciding whether to give directions for an allocation hearing to be fixed, the court may order a party to provide further information about his case⁹. The court may hold an allocation hearing if it thinks it is necessary¹⁰.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'defendant' see PARA 18.

3 As to the meaning of 'filing' see PARA 1832 note 8.

4 As to the meaning of 'stay' see PARA 233 note 11.

5 Ie under CPR 26.4: see PARA 265.

6 CPR 26.5(1). As to allocating a claim to a track where the claimant obtains default judgment on request see CPR 12.7; and PARA 511; and as to allocating a claim to a track where the defendant obtains judgment on admission for an amount to be decided by the court see CPR 14.8; and PARAS 193-194.

7 See note 5.

8 CPR 26.5(2).

9 CPR 26.5(3).

10 CPR 26.5(4). See further *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 6.1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(2) THE PRELIMINARY STAGE OF CASE MANAGEMENT/267. Claims normally allocated to the small claims track.

267. Claims normally allocated to the small claims track.

The small claims track is the normal track for:

- 416 (1) any claim for personal injuries¹ where:
 - 13 21. (a) the value of the claim is not more than £5,000²; and
 - 22. (b) the value of any claim for damages for personal injuries³ is not more than £1,000⁴;
- 14 417 (2) any claim which includes a claim by a tenant of residential premises against a landlord where:
 - 15 23. (a) the tenant is seeking an order requiring the landlord to carry out repairs or other work to the premises (whether or not the tenant is also seeking some other remedy)⁵;
 - 24. (b) the cost of the repairs or other work to the premises is estimated to be not more than £1,000⁶; and
 - 25. (c) the value of any other claim for damages is not more than £1,000⁷.
- 16

Subject to the above provision, the small claims track is the normal track for any claim which has a value of not more than £5,000⁸. A case involving a disputed allegation of dishonesty will not, however, usually be suitable for the small claims track⁹. Moreover, the court will not allocate a claim to the small claims track if it includes a claim by a tenant of residential premises against his landlord for a remedy in respect of harassment or unlawful eviction¹⁰.

The procedural rules for the preparation of the case and the conduct of the hearing¹¹ are designed to make it possible for a litigant to conduct his own case without legal representation if he wishes¹².

1 As to the meaning of 'claim for personal injuries' see PARA 19.

2 CPR 26.6(1)(a)(i).

3 For the purposes of CPR 26.6(1) 'damages for personal injuries' means damages claimed as compensation for pain, suffering and loss of amenity and does not include any other damages which are claimed: CPR 26.6(2). See also PARA 37 notes 1, 3; and see generally **DAMAGES**.

4 CPR 26.6(1)(a)(ii).

5 CPR 26.6(1)(b)(i).

6 CPR 26.6(1)(b)(ii).

7 CPR 26.6(1)(b)(iii).

8 CPR 26.6(3).

9 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 8.1(1)(d).

10 CPR 26.7(4).

11 *le* CPR Pt 27: see PARA 274 et seq. As to the place of hearing in a small claims track case see PARA 1110 and as to date and listing in the small claims track see PARA 1113.

12 See *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 8.1(1)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(2) THE PRELIMINARY STAGE OF CASE MANAGEMENT/268. Claims normally allocated to the fast track.

268. Claims normally allocated to the fast track.

The fast track is the normal track for any claim:

- 418 (1) for which the small claims track is not the normal track¹; and
- 419 (2) which has a value: (a) for proceedings issued on or after 6 April 2009, of not more than £25,000; and (b) for proceedings issued before 6 April 2009, of not more than £15,000²,

but only if the court considers that the trial is likely to last for no longer than one day³ and oral expert evidence at trial will be limited to: (i) one expert per party in relation to any expert field⁴; and (ii) expert evidence in two expert fields⁵.

A claim may be allocated to the fast track or ordered to remain on that track although there is to be a split trial⁶.

1 CPR 26.6(4)(a). As to claims for which the small claims track is the normal track see PARA 267.

2 CPR 26.6(4)(b).

3 CPR 26.6(5)(a). For these purposes, the court will regard a day as being a period of five hours, and will consider whether that is likely to be sufficient time for the case to be heard: *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 9.1(3)(a). The possibility that a trial might last longer than one day is not necessarily a conclusive reason for the court to allocate or to re-allocate a claim to the multi-track: para 9.1(3)(c). As to the multi-track see PARA 269.

4 CPR 26.6(5)(b)(i). As to expert evidence see PARA 838 et seq.

5 CPR 26.6(5)(b)(ii). As to the fast track see further PARA 286 et seq. As to the place of hearing in the fast track see PARA 1111 and as to date and listing in the fast track see PARA 1114.

6 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 9.1(3)(d). Where, however, the case involves a counterclaim or other Part 20 claim that will be tried with the claim and as a result the trial will last more than a day, the court may not allocate it to the fast track: para 9.1(3)(e). As to the meaning of 'counterclaim' see PARA 618 note 3. As to Part 20 claims see CPR Pt 20; and PARA 618 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(2) THE PRELIMINARY STAGE OF CASE MANAGEMENT/269. Claims normally allocated to the multi-track.

269. Claims normally allocated to the multi-track.

The multi-track is the normal track for any claim for which the small claims track or the fast track is not the normal track¹.

The case management of a claim which is allocated to the multi-track will normally be dealt with at a civil trial centre². Where a claim is issued in or automatically transferred to a court which is not a civil trial centre (a 'feeder court') and a judge³ sitting at a feeder court decides, on the basis of the allocation questionnaires and any other documents filed⁴ by the parties, that the claim should be dealt with on the multi-track he will normally make an order allocating the claim to that track, giving case management directions and transferring the claim to a civil trial centre⁵. These provisions do not apply to a claim for possession of land in the county court, where the defendant⁶ has filed a defence, or to any claim which is being dealt with at the Royal Courts of Justice⁷.

Case management of a claim in specialist proceedings⁸ must be dealt with at a civil trial centre. Such a claim will be allocated to the multi-track irrespective of its value, and must be transferred to a civil trial centre for allocation and case management if not already there⁹.

1 CPR 26.6(6). As to claims for which the small claims track is the normal track see PARA 267; and as to claims for which the fast track is the normal track see PARA 268. As to the multi-track see further PARA 293 et seq.

2 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 10.2(1). As to the multi-track see further PARA 293 et seq. As to the place of hearing in the multi-track see PARA 1112 and as to date and listing in the fast track see PARA 1115.

3 As to the meaning of 'judge' see PARA 49.

4 As to the meaning of 'filing' see PARA 1832 note 8.

5 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 10.2(4), (5).

6 As to the meaning of 'defendant' see PARA 18.

7 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 10.1.

8 I.e. a claim to which any of CPR Pt 49 or Pts 48-62 applies: see PARA 1536 et seq.

9 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 10.2(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(2) THE PRELIMINARY STAGE OF CASE MANAGEMENT/270. General rule for allocation.

270. General rule for allocation.

In considering whether to allocate a claim to the normal track for that claim¹, the court will have regard to the following matters²:

- 420 (1) the financial value, if any, of the claim³;
- 421 (2) the nature of the remedy sought⁴;
- 422 (3) the likely complexity of the facts, law or evidence⁵;
- 423 (4) the number of parties or likely parties⁶;
- 424 (5) the value of any counterclaim⁷ or other Part 20 claim⁸ and the complexity of any matters relating to it⁹;
- 425 (6) the amount of oral evidence which may be required¹⁰;
- 426 (7) the importance of the claim to persons who are not parties to the proceedings¹¹;
- 427 (8) the views expressed by the parties¹²; and
- 428 (9) the circumstances of the parties¹³.

The court will allocate a claim which has no financial value to the track which it considers most suitable having regard to the matters set out above¹⁴.

The court will not allocate proceedings to a track if the financial value of the claim, assessed by the court¹⁵, exceeds the limit for that track unless all the parties consent to the allocation of the claim to that track¹⁶. Where two or more claimants¹⁷ have started a claim against the same defendant using the same claim form and each claimant has a claim against the defendant¹⁸ separate from the other claimants, the court will consider the claim of each claimant separately when it assesses financial value¹⁹.

The court will not allocate a claim to the small claims track if it includes a claim by a tenant of residential premises against his landlord for a remedy in respect of harassment or unlawful eviction²⁰.

1 le under CPR 26.6: see PARAS 267-269.

2 CPR 26.7(1).

3 CPR 26.8(1)(a). As to calculating the value of the claim see PARA 116 note 5.

4 CPR 26.8(1)(b).

5 CPR 26.8(1)(c). As to evidence see further PARA 749 et seq.

6 CPR 26.8(1)(d). As to parties see PARA 207 et seq.

7 As to the meaning of 'counterclaim' see PARA 618 note 3.

8 As to the meaning of 'Part 20 claim' see PARA 618.

9 CPR 26.8(1)(e). Where the case involves more than one money claim (eg where there is a Part 20 claim or there is more than one claimant each making separate claims) the court will not generally aggregate the claims. Instead it will generally regard the largest of them as determining the financial value of the claims: *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 7.7.

10 CPR 26.8(1)(f).

11 CPR 26.8(1)(g).

12 CPR 26.8(1)(h). The court will treat these views as an important factor, but the allocation decision is one for the court, to be taken in the light of all the circumstances, and the court will not be bound by any agreement or common view of the parties: *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 7.5. As to the obligation on the parties to consult see PARA 263 note 19.

13 CPR 26.8(1)(i).

14 CPR 26.7(2).

15 *Id* under CPR 26.8(2): see note 16.

16 CPR 26.7(3). It is for the court to assess the financial value of a claim and in doing so it will disregard any amount not in dispute, any claim for interest, costs and any contributory negligence: CPR 26.8(2). For the principles applied by the court in determining whether an amount is in dispute see *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 7.4.

17 As to the meaning of 'claimant' see PARA 18.

18 As to the meaning of 'defendant' see PARA 18.

19 CPR 26.8(3).

20 CPR 26.7(4). See PARA 267 text and note 10.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(2) THE PRELIMINARY STAGE OF CASE MANAGEMENT/271. Notice of allocation.

271. Notice of allocation.

When it has allocated a claim to a track, the court¹ will serve² notice of allocation on every party³ and, when doing so, it will also serve a copy of the allocation questionnaires filed⁴ by the other parties⁵ and a copy of any further information provided by another party about his case (whether by order or not)⁶.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'service' see PARA 138 note 2.

3 CPR 26.9(1).

4 As to the meaning of 'filing' see PARA 1832 note 8.

5 CPR 26.9(2)(a).

6 CPR 26.9(2)(b). As to the court's power to order a party to provide further information about his case before deciding to which track to allocate proceedings see CPR 26.5(3); and PARA 266.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(2) THE PRELIMINARY STAGE OF CASE MANAGEMENT/272. Re-allocation.

272. Re-allocation.

The court¹ may subsequently re-allocate a claim to a different track². Where a party is dissatisfied with an order made allocating the claim to a track he may appeal or apply to the court to re-allocate the claim³.

Where there has been a change in the circumstances since an order was made allocating the claim to a track the court may re-allocate the claim either on application or on its own initiative⁴.

1 As to the meaning of 'court' see PARA 22.

2 CPR 26.10.

3 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 11.1(1). He should appeal if the order was made at a hearing at which he was present or represented, or of which he was given due notice, and in any other case he should apply to the court to re-allocate the claim: para 11.1(2), (3).

4 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 11.2. Where an application is made to amend a claim, which has been allocated to the fast track and which would exceed the level of damages permitted thereunder, a judge has the discretion to either allow the amendment and proceed with the hearing or reallocate the case to the multi-track: *Maguire v Molin* [2002] EWCA Civ 1083, [2002] 4 All ER 325, [2003] 1 WLR 644.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(2) THE PRELIMINARY STAGE OF CASE MANAGEMENT/273. Allocation and case management of proceedings for the assessment of damages.

273. Allocation and case management of proceedings for the assessment of damages.

Where the court has made an order or given judgment which requires the amount of money to be paid by one party to another to be decided by the court¹, the court will give directions which may include:

- 429 (1) a direction listing the claim for a disposal hearing;
- 430 (2) a direction allocating or re-allocating the claim;
- 431 (3) a direction that allocation questionnaires be filed² by a specified date;
- 432 (4) an order staying the claim while the parties try to settle the case by alternative dispute resolution³ or other means⁴.

If, when the court makes a relevant order, the claim has not been allocated to a track and the financial value of the claim⁵ is such that the claim would, if defended, be allocated to the small claims track, the court will normally allocate it to that track⁶. Otherwise, the court will not normally allocate the claim to a track (other than the small claims track) unless the amount payable appears to be genuinely disputed on substantial grounds or the dispute is not suitable to be dealt with at a disposal hearing⁷.

At a disposal hearing the court may decide the amount payable under or in consequence of the relevant order and give judgment for that amount⁸, or give directions as to the future conduct of the proceedings⁹. If the claim has been allocated to the small claims track, or the court decides at the disposal hearing to allocate it to that track, the court may treat the disposal hearing as a final hearing¹⁰.

1 Such an order or judgment (referred to as a 'relevant order') may have been obtained (1) by a judgment in default under CPR Pt 12 (see PARA 506 et seq); (2) by a judgment on an admission under CPR Pt 14 (see PARA 187 et seq); (3) on the striking out of a statement of case under CPR Pt 3 (see PARA 520 et seq); (4) on a summary judgment application under CPR Pt 24 (see PARA 524 et seq); (5) on the determination of a preliminary issue or on a trial as to liability; or (6) at trial, and includes an order for an amount of a debt, damages or interest to be decided by the court, an order for the taking of an account or the making of an inquiry as to any sum due, and any similar order, but does not include an order for the assessment of costs: *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 12.1(1)-(3). As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 As to the meaning of 'alternative dispute resolution' (ADR) see PARA 35 note 3; and as to alternative dispute resolution see generally **ARBITRATION** vol 2 (2008) PARA 1201 et seq.

4 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 12.2(1). Directions may specify the level or type of judge before whom a hearing or a further hearing will take place and the nature and purpose of that hearing: para 12.2(2). Where the parties apply for a relevant order by consent, they should if possible file with their draft consent order agreed directions for the court's approval: para 12.2(3).

5 Ie determined in accordance with CPR Pt 26: see CPR 26.8(2); and PARA 270.

6 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 12.3(1).

7 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 12.3(2). A disposal hearing is a hearing which will not normally last longer than 30 minutes, and at which the court will not normally hear oral evidence: see para 12.4(1).

8 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 12.4(2) (a). Except where the claim has been allocated to the small claims track, the court will not exercise its power under para 12.4(2)(a) unless any written evidence on which the claimant relies has been served on the defendant at least three days before the disposal hearing: para 12.4(5). CPR 32.6 (see PARA 751) applies to evidence at a disposal hearing unless the court otherwise directs: *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 12.4(4).

Unless the court otherwise directs, a master or a district judge may decide the amount payable under a relevant order irrespective of the financial value of the claim and of the track to which the claim may have been allocated: para 12.6.

9 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 12.4(2) (b). Attention is drawn to (1) *Practice Direction about Costs* PD 43-48 and in particular to the court's power to make a summary assessment of costs; (2) CPR 44.13(1), which provides that if an order makes no mention of costs, none are payable in respect of the proceedings to which it relates (see PARA 1756); and (3) CPR 27.14 (special rules about costs in cases allocated to the small claims track: see PARA 285): *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 12.5(1). CPR Pt 46 (fast track trial costs) will not apply to a case dealt with at a disposal hearing whatever the financial value of the claim; so the costs of a disposal hearing will be in the discretion of the court: *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26 para 12.5(2).

10 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 12.4(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(3) THE SMALL CLAIMS TRACK/274. Scope of the procedural rules for small claims.

(3) THE SMALL CLAIMS TRACK

274. Scope of the procedural rules for small claims.

Part 27 of the Civil Procedure Rules¹ sets out the special procedure for dealing with claims which have been allocated to the small claims track² and limits the amount of costs that can be recovered in respect of a claim which has been allocated to the small claims track³. A claim being dealt with under Part 27 is called a small claim⁴.

1 Ie CPR 27 (see PARA 275 et seq): see CPR 27.1(1).

2 Ie under CPR Pt 26: see PARA 260 et seq.

3 CPR 27.1(1). As to costs on the small claims track see CPR 27.14; and PARA 285. As to the European small claims procedure see PARA 1651 et seq.

4 CPR 27.1(2). As to cases normally allocated to the small claims track see PARA 267.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(3) THE SMALL CLAIMS TRACK/275. Extent to which other Parts of the Civil Procedure Rules apply to small claims.

275. Extent to which other Parts of the Civil Procedure Rules apply to small claims.

Certain specified Parts of the Civil Procedure Rules, dealing with interim remedies¹, disclosure and inspection², evidence³, experts and assessors⁴, further information⁵, offers to settle⁶ and hearings⁷ do not apply to small claims, or apply only in part⁸. The other Parts of the rules apply to small claims except to the extent that a rule limits such application⁹.

1 Ie CPR Pt 25 (see PARA 315 et seq), except as it relates to interim injunctions: CPR 27.2(1)(a). As to the meaning of 'injunction' see PARA 315 note 2.

2 Ie CPR Pt 31 (see PARA 538 et seq): CPR 27.2(1)(b). See, however, CPR 27.4(3)(a)(i), which provides for service of copies of documents on which a party intends to rely; and PARA 277 note 2.

3 Ie CPR Pt 32 (see PARA 749 et seq), except CPR 32.1 (see PARA 791) which gives the court power to control evidence; and CPR Pt 33 (see PARAS 980, 808 et seq): CPR 27.2(1)(c), (d).

4 Ie CPR Pt 35 (see PARA 838 et seq) except CPR 35.1 (see PARA 838) which requires the court to restrict expert evidence; CPR 35.3 (see PARA 848) which imposes an overriding duty on expert witnesses to help the court; CPR 35.7 (see PARA 840) which gives the court power to direct that evidence is to be given by a single joint expert; and CPR 35.8 (see PARA 847) which provides for the giving of instructions to a single joint expert: CPR 27.2(1)(e).

5 Ie CPR Pt 18 (see PARAS 611-612): CPR 27.2(1)(f). However, the court of its own initiative may order a party to provide further information if it considers it appropriate to do so: CPR 27.2(3).

6 Ie CPR Pt 36 (see PARA 729 et seq): CPR 27.2(1)(g).

7 Ie CPR Pt 39 (see PARAS 6, 1117 et seq) except CPR 39.2 (see PARA 6) which provides that the general rule is that hearings are to be in public: CPR 27.2(1)(h).

8 See CPR 27.2(1); and the text and notes 1-7.

9 CPR 27.2(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(3) THE SMALL CLAIMS TRACK/276. Court's power to grant a final remedy.

276. Court's power to grant a final remedy.

The court¹ may grant any final remedy in relation to a small claim which it could grant if the proceedings were on the fast track² or the multi-track³.

1 As to the meaning of 'court' see PARA 22.

2 As to the fast track see CPR Pt 28; and PARA 286 et seq.

3 CPR 27.3. As to the multi-track see CPR Pt 29; and PARA 293 et seq. As to the meaning of 'small claim' see PARA 274.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(3) THE SMALL CLAIMS TRACK/277. Preparation for the small claim hearing.

277. Preparation for the small claim hearing.

After allocation to the small claims track the court¹ will:

- 433 (1) give standard directions² and fix a date for the final hearing³;
- 434 (2) give special directions⁴ and fix a date for the final hearing⁵;
- 435 (3) give special directions and direct that the court will consider what further directions are to be given no later than 28 days after the date the special directions were given⁶;
- 436 (4) fix a date for a preliminary hearing⁷; or
- 437 (5) give notice that it proposes to deal with the small claim⁸ without a hearing⁹ and invite the parties to notify the court by a specified date if they agree with the proposal¹⁰.

The court will give the parties at least 21 days' notice of the date fixed for the final hearing, unless the parties agree to accept less notice¹¹, and inform them of the amount of time allowed for the final hearing¹².

The court may add to, vary or revoke directions¹³.

1 As to the meaning of 'court' see PARA 22.

2 'Standard directions' means (1) a direction that each party must, at least 14 days before the date fixed for the final hearing, file and serve on every other party copies of all documents (including any expert's report) on which he intends to rely at the hearing (CPR 27.4(3)(a)(i)); and (2) any other standard directions set out in the relevant practice direction (CPR 27.4(3)(a)(ii)). See the forms of standard directions set out in *Practice Direction--Small Claims Track* PD 27 Appendix B in *The Civil Court Practice*. Appendix A includes an indication of the information and documentation which the court usually needs in particular types of case, ie road accident cases; building disputes, repairs, goods sold and similar contractual claims; landlord and tenant claims; and breach of duty claims.

3 CPR 27.4(1)(a). As to the date of trial and listing for trial see PARA 1113 et seq.

4 'Special directions' means directions given in addition to or instead of the standard directions: CPR 27.4(3)(b). For specimen special directions see *Practice Direction--Small Claims Track* PD 27 Appendix C in *The Civil Court Practice*.

5 CPR 27.4(1)(b).

6 CPR 27.4(1)(c). As to time limits generally see PARA 88 et seq.

7 Ie a preliminary hearing under CPR 27.6 (see PARA 278): see CPR 27.4(1)(d).

8 As to the meaning of 'small claim' see PARA 274.

9 Ie under CPR 27.10: see PARA 282.

10 CPR 27.4(1)(e).

11 CPR 27.4(2)(a).

12 CPR 27.4(2)(b).

13 CPR 27.7.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(3) THE SMALL CLAIMS TRACK/278. Preliminary small claim hearing.

278. Preliminary small claim hearing.

The court¹ may hold a preliminary hearing for the consideration of the small claim², but only:

- 438 (1) where it considers that special directions³ are needed to ensure a fair hearing⁴ and it appears necessary for a party to attend at court to ensure that he understands what he must do to comply with the special directions⁵; or
- 439 (2) to enable it to dispose of the claim on the basis that one or other of the parties has no real prospect of success at a final hearing⁶; or
- 440 (3) to enable it to strike out⁷ a statement of case⁸ or part of a statement of case on the basis that the statement of case, or the part to be struck out, discloses no reasonable grounds for bringing or defending the claim⁹.

When considering whether or not to hold a preliminary hearing, the court must have regard to the desirability of limiting the expense to the parties of attending court¹⁰. Where the court decides to hold a preliminary hearing, it will give the parties at least 14 days' notice of the date of the hearing¹¹ and may treat the preliminary hearing as the final hearing of the claim if all the parties agree¹².

At or after the preliminary hearing the court will:

- 441 (a) fix the date of the final hearing (if it has not been fixed already) and give the parties at least 21 days' notice of the date fixed unless the parties agree to accept less notice¹³;
- 442 (b) inform them of the amount of time allowed for the final hearing¹⁴; and
- 443 (c) give any appropriate directions¹⁵.

1 As to the meaning of 'court' see PARA 22.

2 See CPR 27.6(1). As to the meaning of 'small claim' see PARA 274.

3 I.e. as defined in CPR 27.4 (see PARA 277): see CPR 27.6(1)(a)(i). As to special directions see PARA 277 note 4.

4 CPR 27.6(1)(a)(i).

5 CPR 27.6(1)(a)(ii).

6 CPR 27.6(1)(b).

7 As to the meaning of 'striking out' see PARA 218 note 2.

8 As to statements of case see PARA 584 et seq.

9 CPR 27.6(1)(c).

10 CPR 27.6(2).

11 CPR 27.6(3). As to time limits generally see PARA 88 et seq.

12 CPR 27.6(4).

13 CPR 27.6(5)(a).

- 14 CPR 27.6(5)(b).
- 15 CPR 27.6(5)(c). As to the power to add to, vary or revoke directions see PARA 277 the text and note 13.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(3) THE SMALL CLAIMS TRACK/279. Conduct of the small claim hearing.

279. Conduct of the small claim hearing.

The court¹ may adopt any method of proceeding at a small claim hearing that it considers to be fair² and the hearing will be informal³. A party may present his own case at a hearing or a lawyer or lay representative⁴ may present it for him⁵. Any of its officers or employees may represent a corporate party⁶.

The general rule is that a small claim hearing will be in public⁷. The judge⁸ may, however, decide to hold it in private if the parties agree or if a specified ground⁹ applies¹⁰. The strict rules of evidence do not apply¹¹ and the court need not take evidence on oath¹² and may limit cross-examination¹³. A hearing that takes place at the court will be tape recorded by the court¹⁴.

The court must give reasons for its decision¹⁵.

1 As to the meaning of 'court' see PARA 22.

2 See CPR 27.8(1). As to the meaning of 'small claim' see PARA 274.

3 CPR 27.8(2).

4 For these purposes, 'lawyer' means a barrister, a solicitor or a legal executive employed by a solicitor, and a lay representative means any other person: *Practice Direction--Small Claims Track* PD 27 para 3.1. The Lay Representatives (Rights of Audience) Order 1999, SI 1999/1225, provides that a lay representative may not exercise any right of audience where his client does not attend the hearing, at any stage after judgment or on any appeal brought against any decision made by the district judge in the proceedings: art 3(1). However the court, exercising its general discretion to hear anybody, may hear a lay representative even in circumstances excluded by the 1999 Order: *Practice Direction--Small Claims Track* PD 27 para 3.2(2), (3).

5 *Practice Direction--Small Claims Track* PD 27 para 3.2(1).

6 *Practice Direction--Small Claims Track* PD 27 para 3.2(4). Paragraph 3.2(4) extends para 3.2(2) with the effect that companies may be represented by lay representatives: *Avinue Ltd v Sunrule Ltd* [2003] EWCA Civ 1942, [2004] 1 WLR 634.

7 *Practice Direction--Small Claims Track* PD 27 para 4.1(1).

8 The functions of the court described in CPR Pt 27 which are to be carried out by a judge will generally be carried out by a district judge but may be carried out by a circuit judge: *Practice Direction--Small Claims Track* PD 27 para 1.

9 I.e a ground mentioned in CPR 39.2(3): see PARA 6.

10 *Practice Direction--Small Claims Track* PD 27 para 4.1(2). A hearing or part of a hearing which takes place other than at the court, eg at the home or business premises of a party, will not be in public: para 4.1(3). A hearing that takes place at the court will generally be in the judge's room but it may take place in a courtroom: para 4.2.

11 CPR 27.8(3). See also PARA 275 text and note 3.

12 CPR 27.8(4).

13 CPR 27.8(5). The judge may in particular (1) ask questions of any witness himself before allowing any other person to do so; (2) ask questions of all or any of the witnesses himself before allowing any other person to ask questions of any witnesses; (3) refuse to allow cross-examination of any witness until all the witnesses have given evidence in chief; (4) limit cross-examination of a witness to a fixed time or to a particular subject or issue, or both: *Practice Direction--Small Claims Track* PD 27 para 4.3. As to the meaning of 'cross-examination' see PARA 50 note 4.

14 *Practice Direction--Small Claims Track* PD 27 para 5.1. A party may obtain a transcript of such a recording on payment of the proper transcriber's charges: para 5.1. As to unauthorised use of tape recorders in court see *Practice Direction* [1981] 3 All ER 848, [1981] 1 WLR 1526.

15 CPR 27.8(6). The judge may give reasons for his judgment as briefly and simply as the nature of the case allows: *Practice Direction--Small Claims Track* PD 27 para 5.3(1). He will normally do so orally at the hearing, but he may give them later either in writing or at a hearing fixed for him to do so: para 5.3(2). Where the judge decides the case without a hearing under CPR 27.10 (see PARA 282) or a party who has given notice under CPR 27.9(1) (see PARA 281) does not attend the hearing, the judge will prepare a note of his reasons and the court will send a copy to each party: *Practice Direction--Small Claims Track* PD 27 para 5.4. Nothing in the relevant practice direction affects the duty of a judge at the request of a party to make a note of the matters referred to in the County Courts Act 1984 s 80: *Practice Direction--Small Claims Track* PD 27 para 5.5. At the hearing of any proceedings in a county court in which there is a right of appeal or from which an appeal may be brought with leave, the judge must, at the request of any party, make a note of any question of law raised at the hearing, of the facts in evidence in relation to any such question and of his decision on any such question and of his determination of the proceedings: County Courts Act 1984 s 80(1). Where such a note has been taken, the judge must (whether notice of appeal has been served or not), on the application of any party to the proceedings, and on payment by that party of such fee as may be prescribed by an order under the Courts Act 2003 s 92 (fees), furnish him with a copy of the note, and must sign the copy, and the copy so signed must be used at the hearing of the appeal: County Courts Act 1984 s 80(2) (amended by the Courts Act 2003 s 109(1), Sch 8 para 271(b)). As to county court fees see PARA 87.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(3) THE SMALL CLAIMS TRACK/280. Experts.

280. Experts.

No expert may give evidence, whether written or oral, at a small claims hearing without the permission of the court¹. The general rules concerning expert evidence² are disapplied in part in relation to small claims³.

1 See CPR 27.5. As to payment of an expert's fees see CPR 27.14(3)(d); and PARA 285. As to the meaning of 'small claim' see PARA 274. As to the meaning of 'court' see PARA 22.

2 Ie CPR Pt 35: see PARA 838 et seq.

3 See PARA 275 note 4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(3) THE SMALL CLAIMS TRACK/281. Non-attendance of parties at a final hearing of a small claim.

281. Non-attendance of parties at a final hearing of a small claim.

If a party who does not attend a final hearing of a small claim¹:

- 444 (1) has given written notice to the court² and the other party at least seven days³ before the hearing date that he will not attend;
- 445 (2) has served on the other party at least seven days before the hearing date any other documents which he has filed with the court; and
- 446 (3) has, in his written notice, requested the court to decide the claim in his absence and has confirmed his compliance with heads (1) and (2) above,

the court will take into account that party's statement of case⁴ and any other documents he has filed⁵ and served when it decides the claim⁶.

If a claimant⁷ does not attend the hearing and does not give such notice that he will not attend, the court may strike out⁸ the claim⁹. If a defendant¹⁰ does not attend the hearing or give the above-mentioned notice of non-attendance and the claimant either does attend the hearing or gives such notice, the court may decide the claim on the basis of the claimant's evidence alone¹¹. If neither party attends or gives such notice, the court may strike out the claim and any defence and counterclaim¹².

Nothing in these provisions affects the general power of the court to adjourn a hearing, for example where a party who wishes to attend a hearing on the date fixed cannot do so for a good reason¹³.

1 As to the meaning of 'small claim' see PARA 274.

2 As to the meaning of 'court' see PARA 22.

3 As to time limits generally see PARA 88 et seq.

4 As to statements of case see PARA 584 et seq.

5 As to the meaning of 'filing' see PARA 1832 note 8.

6 CPR 27.9(1).

7 As to the meaning of 'claimant' see PARA 18.

8 As to the meaning of 'striking out' see PARA 218 note 2.

9 CPR 27.9(2).

10 As to the meaning of 'defendant' see PARA 18.

11 CPR 27.9(3).

12 CPR 27.9(4). As to the meaning of 'counterclaim' see PARA 618 note 3.

13 *Practice Direction--Small Claims Track* PD 27 para 6.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(3) THE SMALL CLAIMS TRACK/282. Disposal of small claim without a hearing.

282. Disposal of small claim without a hearing.

The court¹ may, if all parties agree, deal with the small claim² without a hearing³.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'small claim' see PARA 274.

3 See CPR 27.10.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(3) THE SMALL CLAIMS TRACK/283. Setting judgment aside and re-hearing small claim.

283. Setting judgment aside and re-hearing small claim.

A party who was neither present nor represented at the hearing of the small claim¹ and who has not given written notice of non-attendance to the court² may apply for an order that a judgment³ be set aside⁴ and the claim re-heard⁵. A party may not, however, make such an application if the court, with the parties' agreement, dealt with the claim without a hearing⁶.

A party who applies for an order setting aside a judgment under this provision must make the application not more than 14 days⁷ after the day on which notice of the judgment was served⁸ on him⁹.

The court may grant such an application only if the applicant had a good reason for not attending or being represented at the hearing or giving written notice of non-attendance to the court¹⁰ and if he has a reasonable prospect of success at the hearing¹¹.

If a judgment is set aside the court must fix a new hearing for the claim¹² which may take place immediately after the hearing of the application to set the judgment aside and may be dealt with by the judge¹³ who set aside the judgment¹⁴.

1 As to the meaning of 'small claim' see PARA 274.

2 le under CPR 27.9(1): see PARA 281.

3 le a judgment under CPR Pt 27: see PARA 274 et seq.

4 As to the meaning of 'set aside' see PARA 197 note 6.

5 See CPR 27.11(1). As to setting aside under CPR 39.3 see *Nelson v Clearsprings (Management) Ltd* [2006] EWCA Civ 1252, [2007] 2 All ER 407; and PARA 1129.

6 See CPR 27.11(5). As to dealing with the claim without a hearing see CPR 27.10; and PARA 282.

7 As to time limits generally see PARA 88 et seq.

8 As to the meaning of 'service' see PARA 138 note 2.

9 CPR 27.11(2).

10 See note 2.

11 CPR 27.11(3).

12 CPR 27.11(4)(a).

13 As to the meaning of 'judge' for these purposes see PARA 279 note 8.

14 CPR 27.11(4)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(3) THE SMALL CLAIMS TRACK/284. Appeal where small claim dealt with in a party's absence or without a hearing.

284. Appeal where small claim dealt with in a party's absence or without a hearing.

Rights of appeal and the procedure on appeals are discussed elsewhere in this title¹. Where the court dealt with the claim to which the appellant is a party either without a hearing² or in his absence because he gave notice requesting the court to decide the claim in his absence³, an application for permission to appeal must be made to the appeal court⁴. Where an appeal is allowed the appeal court will, if possible, dispose of the case at the same time without referring the claim to the lower court⁵ or ordering a new hearing and may do so without hearing further evidence⁶.

1 See PARA 1657 et seq.

2 Ie under CPR 27.10: see PARA 282.

3 Ie under CPR 27.9: see PARA 281.

4 *Practice Direction--Small Claims Track* PD 27 para 8.2. As to the meaning of 'appeal court' see PARA 1660 note 2.

5 As to the meaning of 'lower court' see PARA 1660 note 2.

6 *Practice Direction--Small Claims Track* PD 27 para 8.3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(3) THE SMALL CLAIMS TRACK/285. Costs on the small claims track.

285. Costs on the small claims track.

Where the financial value of a claim exceeds the limit for the small claims track¹ but the claim has been allocated² to that track, the small claims track costs provisions will apply unless the parties agree that the fast track³ costs provisions are to apply⁴. Where the parties agree that the fast track costs provisions are to apply, the claim and any appeal will be treated for the purposes of costs as if it were proceeding on the fast track except that trial costs will be in the discretion of the court⁵ and will not exceed the amount set out⁶ for the value of claim⁷.

In any other case which has been allocated to the small claims track⁸, the court may not order a party to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal, except:

- 447 (1) the fixed costs attributable to issuing the claim which are payable⁹ or would be payable¹⁰ if Part 45 of the Civil Procedure Rules applied to the claim¹¹;
- 448 (2) in proceedings which included a claim for an injunction¹² or an order for specific performance a sum not exceeding the amount specified in the relevant practice direction for legal advice and assistance relating to that claim¹³;
- 449 (3) any court fees paid by that other party¹⁴;
- 450 (4) expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing¹⁵;
- 451 (5) a sum not exceeding the amount specified in the relevant practice direction for any loss of earnings or loss of leave by a party or witness due to attending a hearing or to staying away from home for the purposes of attending a hearing¹⁶;
- 452 (6) a sum not exceeding the amount specified in the relevant practice direction for an expert's fees¹⁷; and
- 453 (7) such further costs as the court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably¹⁸.

Where a claim is allocated to the small claims track and subsequently re-allocated to another track, these provisions cease to apply after the claim has been re-allocated and the fast track or multi-track¹⁹ costs rules will apply from the date of re-allocation²⁰.

¹ As to the financial limit for the small claims track see PARA 267. As to the meaning of 'small claim' see PARA 274.

² I.e. in accordance with CPR 26.7(3); see PARA 270.

³ As to the fast track see CPR Pt 28; and PARA 286 et seq.

⁴ CPR 27.14(5). As to costs generally see also PARA 1729 et seq.

⁵ As to the meaning of 'court' see PARA 22.

⁶ I.e. in CPR 46.2 (the amount of fast track trial costs); see CPR 27.14(6).

⁷ CPR 27.14(6).

⁸ CPR 27.14(1).

- 9 le under CPR Pt 45: see CPR 27.14(2)(a)(i).
- 10 le would be payable under CPR Pt 45: see CPR 27.14(2)(a)(ii).
- 11 CPR 27.14(2)(a).
- 12 As to the meaning of 'injunction' see PARA 315 note 2.
- 13 CPR 27.14(2)(b). The amount which a party may be so ordered to pay is a sum not exceeding £260: see *Practice Direction--Small Claims Track* PD 27 para 7.2.
- 14 CPR 27.14(2)(c).
- 15 CPR 27.14(2)(d).
- 16 CPR 27.14(2)(e). The amount which a party may be so ordered to pay is a sum not exceeding £50 per day for each person: see *Practice Direction--Small Claims Track* PD 27 para 7.3(1).
- 17 CPR 27.14(2)(f). The amount which a party may be so ordered to pay is a sum not exceeding £200 for each expert: see *Practice Direction--Small Claims Track* PD 27 para 7.3(2).
- 18 CPR 27.14(2)(g). A party's rejection of an offer in settlement will not of itself constitute unreasonable behaviour under CPR 27.14(2)(g) but the court may take it into consideration when it is applying the unreasonableness test: CPR 27.14(3). The limits on costs imposed by CPR 27.14 also apply to any fee or reward for acting on behalf of a party to the proceedings charged by a person exercising a right of audience by virtue of an order under the Courts and Legal Services Act 1990 s 11 (a lay representative): CPR 27.14(4).
- 19 As to the multi-track see CPR Pt 29; and PARA 293 et seq.
- 20 CPR 27.15.

UPDATE

285 Costs on the small claims track

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(4) THE FAST TRACK/286. Scope of the procedural rules for cases allocated to the fast track.

(4) THE FAST TRACK

286. Scope of the procedural rules for cases allocated to the fast track.

Part 28 of the Civil Procedure Rules¹ contains general provisions about management of cases allocated to the fast track and applies only to cases allocated to that track².

1 Ie CPR Pt 28: see PARA 287 et seq.

2 CPR 28.1. As to claims normally allocated to the fast track see PARA 268.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(4) THE FAST TRACK/287. General provisions; directions for management of cases allocated to the fast track.

287. General provisions; directions for management of cases allocated to the fast track.

Case management of cases allocated to the fast track¹ will generally be by directions given at two stages in the case, first at allocation to the track² and second on the filing of the pre-trial check lists (listing questionnaires)³. The court⁴ will seek whenever possible to give directions at those stages only and to do so without the need for a hearing to take place and it will expect to do so with the co-operation of the parties⁵. The court will, however, hold a hearing to give directions whenever it appears necessary or desirable to do so, and where this happens because of the default of a party or his legal representative⁶ it will usually impose a sanction⁷. The court may give directions at any hearing on the application of a party or on its own initiative⁸.

When it allocates a case to the fast track, the court will give directions for the management of the case and set a timetable⁹ for the steps to be taken between the giving of the directions and the trial¹⁰. When it gives directions, the court will fix the date by which the parties must file their pre-trial check lists (listing questionnaires)¹¹ and the trial date¹² or fix a period, not exceeding three weeks, within which the trial is to take place¹³, which will be specified in the notice of allocation¹⁴. The standard period between the giving of directions and the trial will be not more than 30 weeks¹⁵. The matters to be dealt with by such directions include disclosure¹⁶ of documents¹⁷, service of witness statements¹⁸ and expert evidence¹⁹. If the court decides not to direct standard disclosure²⁰, it may direct that no disclosure take place²¹ or specify the documents or the classes of documents which the parties must disclose²².

The court's power to award trial costs is limited²³.

1 As to cases normally allocated to the fast track see PARA 268.

2 See the text and notes 9-22.

3 *Practice Direction--The Fast Track* PD 28 para 2.1. As to pre-trial check lists see PARA 290. As to the meaning of 'filing' see PARA 1832 note 8.

4 As to the meaning of 'court' see PARA 22.

5 *Practice Direction--The Fast Track* PD 28 para 2.2.

6 As to the meaning of 'legal representative' see PARA 1833 note 13.

7 *Practice Direction--The Fast Track* PD 28 para 2.3. When the court fixes a hearing to give directions it will give the parties at least three days' notice of the hearing: para 2.6. Courts will make arrangements to ensure that applications and other hearings are listed promptly to avoid delay in the conduct of cases: para 2.9. Where the court is proposing on its own initiative to make an order under CPR 35.15 (power to appoint an assessor: see PARA 863) it must list a directions hearing unless the parties have consented in writing to the order: *Practice Direction--The Fast Track* PD 28 para 3.11. As to time limits generally see PARA 88 et seq. As to the court's power to impose sanctions see generally PARA 247.

8 *Practice Direction--The Fast Track* PD 28 para 2.4. When any hearing has been fixed it is the duty of the parties to consider what directions the court should be asked to give and to make any application that may be appropriate to be dealt with at that hearing: para 2.5. When making an order the court will as far as possible base its order on the forms of directions contained in *Practice Direction--The Fast Track* PD 28 Appendix A in *The Civil Court Practice*. Agreed directions which the parties file and invite the court to make should also be based on those forms: *Practice Direction--The Fast Track* PD 28 para 2.7.

9 For a typical timetable which the court may give for the preparation of the case see *Practice Direction--The Fast Track* PD 28 para 3.12. That timetable lays down the following times running from the date of the notice of allocation: (1) disclosure, four weeks; (2) exchange of witness statements, ten weeks; (3) exchange of experts' reports, 14 weeks; (4) sending of pre-trial check lists (listing questionnaires) by the court, 20 weeks; (5) filing of completed pre-trial check lists, 22 weeks; and (6) hearing, 30 weeks: para 3.12. Where it considers that some or all of the steps in that timetable are not necessary the court may omit them and direct an earlier trial, eg where the court is informed that a pre-action protocol has been complied with or that steps which it would otherwise order to be taken have already been taken, or where an application (eg for summary judgment or for an injunction) has been heard before allocation and little or no further preparation is required. In such a case the court may dispense with the need for a pre-trial check list: para 3.13. As to the meaning of 'pre-action protocol' see PARA 13; and as to the meaning of 'injunction' see PARA 315 note 2.

10 CPR 28.2(1). Where a party needs to apply for a direction of a kind not included in the case management timetable which has been set (eg to amend his statement of case or for further information to be given by another party) he must do so as soon as possible so as to minimise the need to change that timetable: *Practice Direction--The Fast Track* PD 28 para 2.8. At this stage the court's first concern will be to ensure that the issues between the parties be identified and that the necessary evidence is prepared and disclosed: para 3.3. It will seek to tailor its directions to the needs of the case and the steps of which it is aware that the parties have already taken to prepare the case. In particular it will have regard to the extent to which any pre-action protocol has or (as the case may be) has not been complied with: para 3.2. As to approval of agreed directions filed by the parties see paras 3.5-3.7. If the court does not approve the agreed directions filed by the parties but decides that it will give directions on its own initiative without a hearing, it will take them into account in deciding what directions to give: para 3.8. As to the court's general approach when giving directions on its own initiative see para 3.9. As to the meaning of 'filing' see PARA 1832 note 8.

11 See CPR 28.5(1); and PARA 290. The pre-trial check lists (in Form N170 in *The Civil Court Practice*) must be sent to the parties with the notice of allocation, which will state the date by which they are to be completed and returned to the court, unless it considers that the claim can proceed to trial without the need for a pre-trial check list: CPR 28.5(1).

12 CPR 28.2(2)(a).

13 CPR 28.2(2)(b).

14 CPR 28.2(3).

15 CPR 28.2(4).

16 Ie under CPR Pt 31: see PARA 538 et seq.

17 CPR 28.3(1)(a).

18 CPR 28.3(1)(b). As to the meaning of 'witness statement' see PARA 751 note 1; and as to the meaning of 'service' see PARA 138 note 2.

19 CPR 28.3(1)(c). As to expert evidence see CPR Pt 35; and PARA 838 et seq. See also CPR 26.6(5), which imposes limitations in relation to expert evidence in fast track cases; and PARA 268.

20 As to the meaning of 'standard disclosure' see PARA 542.

21 CPR 28.3(2)(a).

22 CPR 28.3(2)(b).

23 See CPR 28.2(5); CPR Pt 46; and PARA 292.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(4) THE FAST TRACK/288. Variation of directions.

288. Variation of directions.

A party must apply to the court¹ if he wishes to vary the date which the court has fixed in the notice of allocation for (1) the return of a pre-trial check list (listing questionnaire)²; (2) the trial³; or (3) the trial period⁴. It is essential that any party who wishes to have a direction varied takes steps to do so as soon as possible⁵. Where a party is dissatisfied with a direction given or other order made by the court he may appeal or apply to the court for it to reconsider its decision. He must appeal if the direction was given or the order was made at a hearing at which he was present or represented, or of which he had due notice, and in any other case he must apply to the court to reconsider its decision⁶.

Where the parties agree about changes to be made to the directions given, then unless the changes are to dates set by the court for the return of a pre-trial check list, the trial or the trial period⁷, and if certain other conditions are satisfied⁸, the parties need not file the written agreement⁹. In any other case the parties must apply for an order by consent¹⁰.

Where there has been a change in the circumstances since the order was made the court may set aside or vary any direction it has given, either on application or on its own initiative¹¹.

Any date set by the court or by the Civil Procedure Rules for doing any act may not be varied by the parties if the variation would make it necessary to vary any of the dates fixed for the return of a pre-trial check list, the trial or the trial period¹².

1 As to the meaning of 'court' see PARA 22.

2 I.e. under CPR 28.5 (see PARA 290): see CPR 28.4(1)(a).

3 CPR 28.4(1)(b). Only in exceptional circumstances will the court order a postponement of the trial date or trial period; such an order would be one of last resort: see *Practice Direction--The Fast Track* PD 28 para 5.4(1), (6); and PARA 289.

4 CPR 28.4(1)(c).

5 *Practice Direction--The Fast Track* PD 28 para 4.2(1). The court will assume for the purposes of any later application that a party who did not appeal and who made no application to vary within 14 days of service of the order containing the directions was content that they were correct in the circumstances then existing: para 4.2(2). As to time limits generally see PARA 88 et seq; and as to the meaning of 'service' see PARA 138 note 2.

6 *Practice Direction--The Fast Track* PD 28 para 4.3(1)-(3). If an application is made for the court to reconsider its decision it will usually be heard by the judge who gave the directions or another judge of the same level: para 4.3(4)(a). The court will give all parties at least three days' notice of the hearing and may confirm its decision or make a different order: para 4.3(4)(b), (c).

7 I.e. the dates fixed under CPR 28.4(1): see the text and notes 1-4.

8 I.e. if CPR 2.11 (variation by agreement of a date set by the court for doing any act other than those under, inter alia, CPR 3.8 or CPR 28.4: see PARA 248) applies or if CPR 31.5 (standard disclosure: see PARA 542), CPR 31.10(8) (procedure for standard disclosure: see PARA 544) or CPR 31.13 (disclosure in stages: see PARA 548) applies: see *Practice Direction--The Fast Track* PD 28 para 4.5(1).

9 *Practice Direction--The Fast Track* PD 28 para 4.5(1).

10 *Practice Direction--The Fast Track* PD 28 para 4.5(2)(a). The parties must file a draft of the order sought and an agreed statement of the reasons why the variation is sought and the court may make an order in the

agreed terms or in other terms without a hearing, but it may direct that a hearing is to be listed: para 4.5(2)(b), (c).

11 *Practice Direction--The Fast Track* PD 28 para 4.4.

12 CPR 28.4(2). The dates referred to are those mentioned in CPR 28.4(1): see the text and notes 1-4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(4) THE FAST TRACK/289. Failure to comply with case management directions.

289. Failure to comply with case management directions.

Where a party has failed to comply with a direction given by the court¹ any other party may apply for an order to enforce compliance or for a sanction to be imposed or both of these². The party entitled to apply for such an order must do so without delay but should first warn the other party of his intention to do so³.

The court will not allow a failure to comply with directions to lead to the postponement of the trial unless the circumstances of the case are exceptional⁴. If it is practicable to do so the court will exercise its powers in a manner that enables the case to come on for trial on the date or within the period previously set⁵. Where it appears that one or more issues are or can be made ready for trial at the time fixed while others cannot, the court may direct that the trial will proceed on the issues which are or will then be ready, and order that no costs will be allowed for any later trial of the remaining issues or that those costs will be paid by the party in default⁶.

Where the court has no option but to postpone the trial it will do so for the shortest possible time and will give directions for the taking of the necessary steps in the meantime as rapidly as possible⁷.

1 As to the meaning of 'court' see PARA 22.

2 *Practice Direction--The Fast Track* PD 28 para 5.1.

3 *Practice Direction--The Fast Track* PD 28 para 5.2. The court may take any such delay into account when it decides whether to make an order imposing a sanction or whether to grant relief from a sanction imposed by the Civil Procedure Rules or any practice direction: para 5.3. As to sanctions generally see PARA 247 et seq.

4 *Practice Direction--The Fast Track* PD 28 para 5.4(1). Litigants and lawyers must be in no doubt that the court will regard the postponement of a trial as an order of last resort. The court may exercise its power to require a party as well as his legal representative to attend court at a hearing where such an order is to be sought: para 5.4(6). As to the meaning of 'legal representative' see PARA 1833 note 13.

5 *Practice Direction--The Fast Track* PD 28 para 5.4(2). In particular the court will assess what steps each party should take to prepare the case for trial, direct that those steps are taken in the shortest possible time and impose a sanction for non-compliance. Such a sanction may, eg, deprive a party of the right to raise or contest an issue or to rely on evidence to which the direction relates: para 5.4(3).

6 *Practice Direction--The Fast Track* PD 28 para 5.4(4).

7 *Practice Direction--The Fast Track* PD 28 para 5.4(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(4) THE FAST TRACK/290. Pre-trial check lists.

290. Pre-trial check lists.

The court will send the parties a pre-trial check list (listing questionnaire)¹ for completion and return by the date specified in the notice of allocation unless it considers that the claim can proceed to trial without the need for such a pre-trial check list². The date specified for filing³ a pre-trial check list will not be more than eight weeks before the trial date or the beginning of the trial period⁴. If no party files the completed pre-trial check list by the date specified, the court will order that unless a completed pre-trial check list is filed within seven days from service of that order, the claim, defence and any counterclaim will be struck out without further order of the court⁵. If:

- 454 (1) a party files a completed pre-trial check list but another party does not;
- 455 (2) a party has failed to give all the information requested by the pre-trial check list; or
- 456 (3) the court considers that a hearing is necessary to enable it to decide what directions to give in order to complete preparation of the case for trial,

the court may give such directions as it thinks appropriate⁶.

1 See Form N170 in *The Civil Court Practice*. The pre-trial check list seeks information about the extent to which the parties have complied with the directions given by the court on allocation or otherwise, details of any expert witnesses whom the court has authorised to be called and details of other witnesses and the dates of availability of all witnesses.

2 CPR 28.5(1); and see *Practice Direction--The Fast Track* PD 28 para 6. Although the rules do not require the parties to exchange copies of the check lists before they are filed they are encouraged to do so to avoid the court being given conflicting or incomplete information; see para 6.1(4).

3 As to the meaning of 'filing' see PARA 1832 note 8.

4 CPR 28.5(2).

5 CPR 28.5(3).

6 CPR 28.5(4). Where the judge decides to hold a listing hearing the court will fix a date which is as early as possible and the parties will be given at least three days' notice of the date. The notice of a listing hearing will be in Form N153 in *The Civil Court Practice: Practice Direction--The Fast Track* PD 28 para 6.3. The court's general approach will be as follows, but the court may decide to make other orders, and in particular the court will take into account the steps, if any, which the parties have taken to prepare the case for trial: para 6.4. Where no party files a pre-trial check list the court will order that unless a completed pre-trial check list is filed within seven days from service of that order, the claim, defence and any counterclaim will be struck out without further order of the court: para 6.5(1). Where a party files a pre-trial check list but another party does not do so, the court normally will give directions. These will usually fix or confirm the trial date and provide for steps to be taken to prepare the case for trial: *Practice Direction--The Fast Track* PD 28 para 6.5(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(4) THE FAST TRACK/291. The trial date and giving directions; conduct of fast track trial.

291. The trial date and giving directions; conduct of fast track trial.

As soon as practicable after the date specified for filing¹ a completed pre-trial check list (listing questionnaire) the court² will fix the date for the trial or, if it has already done so, confirm that date³. The court will also give any directions for the trial, including a trial timetable, which it considers appropriate⁴ and specify any further steps that need to be taken before trial⁵. The court will give the parties at least three weeks' notice of the date of the trial unless, in exceptional circumstances, the court directs that shorter notice be given⁶.

Unless the trial judge⁷ otherwise directs, the trial will be conducted in accordance with any order previously made⁸. The trial will normally take place at the court where the case is being managed, but it may be at another court if it is appropriate having regard to the needs of the parties and the availability of court resources⁹.

Where a trial is not finished on the day for which it is listed the judge will normally sit on the next court day to complete it¹⁰.

1 As to the meaning of 'filing' see PARA 1832 note 8.

2 As to the meaning of 'court' see PARA 22.

3 CPR 28.6(1)(a).

4 CPR 28.6(1)(b). In deciding which cases should be allocated to the fast track, the trial length is limited to one day, which, for this purpose, is a period of five hours: see CPR 26.6(4), (5); *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 9.1(3)(a); and PARA 268.

5 CPR 28.6(1)(c). The following are directions on listing which the court must give: (1) the court must confirm or fix the trial date, specify the place of trial and give a time estimate; the trial date must be fixed and the case listed on the footing that the hearing will end on the same calendar day as that on which it commenced; (2) the court will serve a notice of hearing on the parties at least three weeks before the hearing unless they agree to accept shorter notice or the court authorises shorter service under CPR 28.6(2) (see the text and note 6); and (3) the notice of hearing will be in Form N172: see *Practice Direction--the Fast Track* PD 28 para 7.1. Other directions which the court may give are as follows: (a) the parties should seek to agree directions and may file the proposed order; the court may make an order in those terms or it may make a different order; (b) agreed directions should include provision about evidence, a trial timetable and time estimate, the preparation of a trial bundle and any other matter needed to prepare the case for trial; (c) the court will include such of these provisions as are appropriate in any order that it may make, whether or not the parties have filed agreed directions; (d) a direction giving permission to use expert evidence will say whether it gives permission for oral evidence or reports or both and will name the experts concerned; but the court will not make a direction giving permission for an expert to give oral evidence unless it believes it is necessary in the interests of justice to do so and where no 'without prejudice' meeting or other discussion between experts has taken place the court may grant that permission conditionally on such a discussion taking place and a report being filed before the trial: para 7.2. The principles set out in para 4 about the variation of directions (see PARA 288) apply also to directions given at this stage: para 7.3. As to the meaning of 'without prejudice' see PARA 804 note 4.

6 CPR 28.6(2). The notice of hearing will be in Form N172 in *The Civil Court Practice*.

7 As to the meaning of 'judge' see PARA 49.

8 CPR 28.7. Such order will have been made eg as to the timetable for the trial (see PARA 287 text and note 9) or as to the method of receiving evidence (see eg CPR 32.1, CPR 32.5; and PARA 791 et seq). As to trials and their conduct generally see CPR Pt 39; and PARA 1117 et seq.

9 *Practice Direction--The Fast Track* PD 28 para 8.1. The judge will generally have read the papers in the trial bundle and may dispense with an opening address. He may confirm or vary any timetable given previously, or if none has been given set his own: paras 8.2, 8.3.

10 *Practice Direction--The Fast Track* PD 28 para 8.6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(4) THE FAST TRACK/292. Fast track trial costs.

292. Fast track trial costs.

The costs recoverable in respect of the preparation for and attendance at trial¹ by an advocate² are limited³ by the value of the claim, as follows:

- 457 (1) to £485, where the value of the claim is no more than £3,000;
- 458 (2) to £690, where the value of the claim is more than £3,000 but not more than £10,000;
- 459 (3) to £1,035, where the value of the claim is more than £10,000 but not more than £15,000; and
- 460 (4) to £1,650, for proceedings issued on or after 6 April 2009 where the value of the claim is more than £15,000⁴.

The court⁵ may not award more or less than the above amounts except where it decides not to award any trial costs at all or where the power to award more or less than that amount applies⁶, but it may apportion the amount awarded between the parties to reflect their respective degrees of success on the issues at trial⁷.

If, in addition to the advocate, a party's legal representative⁸ attends the trial and the court considers that it was necessary for such legal representative to attend to assist the advocate and the court awards trial costs to that party, the court may award an additional £345 in respect of the legal representative's attendance at the trial⁹.

Where the only claim is for the payment of money, then for the purpose of quantifying trial costs to be awarded to a claimant¹⁰, the value of the claim is the total amount of the judgment excluding interest and costs¹¹ and excluding any reduction made for contributory negligence¹², while for the purpose of quantifying trial costs awarded to a defendant¹³, the value of the claim is:

- 461 (a) the amount specified in the claim form (excluding interest and costs)¹⁴;
- 462 (b) if no amount is specified, the maximum amount which the claimant reasonably expected to recover according to the statement of value¹⁵ included in the claim form¹⁶; or
- 463 (c) more than £15,000, if the claim form states that the claimant cannot reasonably say how much is likely to be recovered¹⁷.

Where the claim is only for a remedy other than the payment of money the value of the claim is deemed to be more than £3,000 but not more than £10,000, unless the court orders otherwise¹⁸.

Where a defendant has made a counterclaim¹⁹ against the claimant, the counterclaim has a higher value than the claim and the claimant succeeds at trial both on the claim and the counterclaim, then for the purpose of quantifying fast track trial costs awarded to the claimant, the value of the claim is the value of the defendant's counterclaim calculated in accordance with the rules set out above²⁰.

Where the court considers that the party to whom fast track trial costs are to be awarded has behaved unreasonably or improperly during the trial, it may award that party an amount less than would otherwise be payable for that claim, as it considers appropriate²¹; and where it

considers that the party who is to pay the fast track trial costs has behaved improperly during the trial the court may award such additional amount to the other party as it considers appropriate²².

1 For this purpose 'trial' includes a hearing where the court decides an amount of money or the value of goods following a judgment under CPR Pt 12 (default judgment: see PARA 506 et seq) or CPR Pt 14 (admissions: see PARA 187 et seq) but does not include the hearing of an application for summary judgment under CPR Pt 24 (see PARA 524 et seq) or the court's approval of a settlement or other compromise under CPR 21.10 (see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1422): CPR 46.1(2)(c).

2 For these purposes, 'advocate' means a person exercising a right of audience as a representative of, or on behalf of, a party: CPR 46.1(2)(a). As to rights of audience see **COURTS** vol 10 (Reissue) PARAS 331, 706; and **LEGAL PROFESSIONS** vol 65 (2008) PARA 495 et seq.

3 See CPR Pt 46; and see further *The Civil Court Practice*. As to costs generally see also PARA 1729 et seq.

4 CPR 46.2(1).

5 As to the meaning of 'court' see PARA 22.

6 CPR 46.2(2)(b). The power referred to is the power under CPR 46.3: see the text and note 9. As to the power to award additional costs in respect of an attending solicitor see CPR 46.3(2); and the text and note 9.

7 CPR 46.2(2).

8 As to the meaning of 'legal representative' see PARA 1833 note 13.

9 CPR 46.3(2).

10 As to the meaning of 'claimant' see PARA 18.

11 CPR 46.2(3)(a)(i).

12 CPR 46.2(3)(a)(ii).

13 As to the meaning of 'defendant' see PARA 18.

14 CPR 46.2(3)(b)(i).

15 'Statement of value' is to be interpreted in accordance with CPR 16.3 (see PARA 586): see CPR 2.3(1).

16 Ie under CPR 16.3 (see PARA 586): see CPR 46.2(3)(b)(ii).

17 CPR 46.2(3)(b)(iii).

18 CPR 46.2(4). Where the claim includes both a claim for the payment of money and for a remedy other than the payment of money, the value of the claim is deemed to be the higher of the value of the money claim decided in accordance with CPR 46.2(3) or the deemed value of the other remedy decided in accordance with CPR 46.2(4), unless the court orders otherwise: CPR 46.2(5).

19 As to the meaning of 'counterclaim' see PARA 618 note 3.

20 CPR 46.2(6).

21 CPR 46.3(7).

22 CPR 46.3(8).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(5) THE MULTI-TRACK/293. Scope of the procedural rules for cases allocated to the multi-track.

(5) THE MULTI-TRACK

293. Scope of the procedural rules for cases allocated to the multi-track.

Part 29 of the Civil Procedure Rules¹ contains general provisions about management of cases allocated to the multi-track and applies only to cases allocated to that track². The hallmarks of the multi-track are the ability of the court³ to deal with cases of widely differing values and complexity and the flexibility given to the court in the way that it will manage a case in a way appropriate to its particular needs⁴.

1 Ie CPR 29; see PARA 294 et seq.

2 CPR 29.1. As to cases normally allocated to the multi-track see PARA 269. It would not be wrong or disproportionate to allocate what would ordinarily be a fast track claim, by reason of its low value, into the multi-track where the criteria for the admission of oral expert evidence are satisfied and the trial is therefore likely to last more than one day: *Kearsley v Klarfeld*[2005] EWCA Civ 1510, [2006] 2 All ER 303.

3 As to the meaning of 'court' see PARA 22.

4 *Practice Direction--The Multi-track* PD 29 para 3.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(5) THE MULTI-TRACK/294. Case management in the multi-track.

294. Case management in the multi-track.

Case management of a claim which is proceeding at the Royal Courts of Justice will be undertaken there¹. Case management of any other claim which has been allocated to the multi-track will normally be undertaken at a civil trial centre². Case management will generally be dealt with by a master in cases proceeding in the Royal Courts of Justice, a district judge in cases proceeding in a district registry of the High Court, and a district judge or a circuit judge in cases proceeding in a county court³.

When it allocates a case to the multi-track, the court⁴ will:

- 464 (1) give directions for the management of the case and set a timetable for the steps to be taken between the giving of directions and the trial; or
- 465 (2) fix a case management conference or a pre-trial review,

or both, and give such other directions relating to the management of the case as it sees fit⁵.

The court will fix the trial date or the period in which the trial is to take place as soon as practicable⁶. When the court fixes the trial date or the trial period under this provision, it will give notice to the parties of the date or period⁷ and specify the date by which the parties must file⁸ a pre-trial check list⁹.

1 *Practice Direction--The Multi-track* PD 29 para 3.1(1). A claim with an estimated value of less than £50,000 begun by claim form issued in the Central Office or Chancery Chambers in the Royal Courts of Justice will normally be transferred to a county court: see paras 2.1, 2.2. Exceptions include professional negligence claims, claims under the Fatal Accidents Act 1976, fraud or undue influence claims, defamation claims, claims for malicious prosecution or false imprisonment, claims against the police and contentious probate claims: *Practice Direction--The Multi-track* PD 29 para 2.6.

2 *Practice Direction--The Multi-track* PD 29 para 3.1(2)(a). As to civil trial centres see PARA 269. It is essential that best practice is followed throughout the country in relation to case management directions in the multi-track in the clinical negligence field: *Wardlaw v Farrar* [2003] EWCA Civ 1719, [2003] 4 All ER 1358n.

3 *Practice Direction--The Multi-track* PD 29 para 3.10(1). A master or a district judge may consult and seek the directions of a judge of a higher level about any aspect of case management: para 3.10(2).

4 As to the meaning of 'court' see PARA 22.

5 CPR 29.2(1). As to the guidelines concerning the grant of permission to adduce expert evidence on questions of causation in respect of personal injury claims where it is alleged that soft tissue injuries had been caused by a low velocity impact in a road traffic accident, see *Casey v Cartwright* [2006] EWCA Civ 1280, [2007] 2 All ER 78, [2007] PIQR P65. As to case management conferences and pre-trial reviews see PARA 295.

6 CPR 29.2(2).

7 CPR 29.2(3)(a).

8 As to the meaning of 'filing' see PARA 1832 note 8.

9 CPR 29.2(3)(b). See Form N170 in *The Civil Court Practice*.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(5) THE MULTI-TRACK/295. Case management conference and pre-trial review.

295. Case management conference and pre-trial review.

The court¹ may fix a case management conference or a pre-trial review at any time after the claim has been allocated². If a party wishes to make an application for an interim order³ or seeks a direction not routinely made at a case management conference, then he must issue an application notice⁴ for such an order or direction for hearing at the case management conference⁵. If a party has a legal representative⁶, a representative familiar with the case and with sufficient authority to deal with any issues that are likely to arise must attend case management conferences and pre-trial reviews⁷.

The topics the court will consider at a case management conference are likely to include:

- 466 (1) whether the claimant⁸ has made clear the claim he is bringing, in particular the amount he is claiming, so that the other party can understand the case he has to meet;
- 467 (2) whether any amendments are required to the claim, a statement of case or any other document;
- 468 (3) what disclosure⁹ of documents, if any, is necessary;
- 469 (4) what expert evidence is reasonably required¹⁰ and how and when that evidence should be obtained and disclosed;
- 470 (5) what factual evidence should be disclosed;
- 471 (6) what arrangements should be made about the giving of clarification or further information and the putting of questions to experts; and
- 472 (7) whether it will be just and will save costs to order a split trial or the trial of one or more preliminary issues¹¹.

At a case management conference the court may also consider whether the case ought to be tried by a High Court judge or by a judge who specialises in that type of claim and how that question will be decided. In that case the claim may need to be transferred to another court¹².

1 As to the meaning of 'court' see PARA 22.

2 CPR 29.3(1). As to claims normally allocated to the multi-track see PARA 269.

3 Ie under CPR Pt 25: see PARA 315 et seq.

4 Ie under CPR Pt 23: see PARA 303 et seq.

5 See CPR 1.4(2)(i); and *Practice Direction--The Multi-track* PD 29 paras 3.5, 5.8(1), (2). A costs sanction may be imposed on a party who fails to comply with para 5.8(1) or (2): para 5.8(3).

6 As to the meaning of 'legal representative' see PARA 1833 note 13.

7 CPR 29.3(2); and see *Practice Direction--The Multi-track* PD 29 para 5.2. Where the inadequacy of the person attending or of his instructions leads to the adjournment of a hearing, the court will expect to make a wasted costs order: para 5.2(3). See also CPR 3.1(2)(c), which provides that the court may require a party to attend court for a hearing; and PARA 247. The wasted costs jurisdiction is concerned not only with providing a sanction in costs against those whose conduct has been shown to be improper, negligent or unreasonable, but also with compensating those who in consequence have been put to unnecessary expense: see *Medcalf v Mardell (No 2)* [2000] All ER (D) 1969, [2001] CPLR 140, CA. As to wasted costs orders see **LEGAL PROFESSIONS** vol 66 (2009) PARA 879 et seq.

8 As to the meaning of 'claimant' see PARA 18.

9 As to the meaning of 'disclosure' see PARA 538.

10 le in accordance with CPR 35.1: see PARA 838. The court will not at this stage give permission to use expert evidence unless it can identify each expert by name or field in its order and say whether his evidence is to be given orally or by the use of his report. A party who obtains expert evidence before obtaining a direction about it does so at his own risk as to costs, except where he obtained the evidence in compliance with a pre-action protocol: *Practice Direction--The Multi-track* PD 29 para 5.5. As to the meaning of 'pre-action protocol' see PARA 13.

11 *Practice Direction--The Multi-track* PD 29 para 5.3. Where an issue has been resolved by a case management conference and a subsequent case management conference is fixed, it is inappropriate for a party to re-open the issue at the subsequent case management conference: *Jameson v Personal Representatives of Smith (deceased)* [2001] EWCA Civ 1264, [2001] 6 CPLR 489. As to the use of video conferencing in relation to the holding of case management conferences and pre-trial reviews see *Practice Direction--Written Evidence* PD 32 para 29.1, Annex 3; and PARAS 1033-1035.

12 *Practice Direction--The Multi-track* PD 29 para 5.9.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(5) THE MULTI-TRACK/296. Directions proposed by the parties.

296. Directions proposed by the parties.

If the parties agree proposals for the management of the proceedings, including a proposed trial date or period in which the trial is to take place, and the court¹ considers that the proposals are suitable, it may approve them without a hearing and give directions in the terms proposed². To obtain the court's approval the agreed directions must:

- 473 (1) set out a timetable by reference to calendar dates for the taking of steps for the preparation of the case³;
- 474 (2) include a date or a period (the trial period) when it is proposed that the trial will take place;
- 475 (3) include provision about disclosure of documents⁴; and
- 476 (4) include provision about both factual and expert evidence⁵.

Directions agreed by the parties should also where appropriate contain provisions about:

- 477 (a) the filing⁶ of any reply or amended statement of case that may be required;
- 478 (b) dates for the service of requests for further information⁷ and of questions to experts⁸ and by when they are to be dealt with;
- 479 (c) the disclosure of evidence;
- 480 (d) the use of a single joint expert, or in cases where it is not agreed, the exchange of expert evidence⁹ and without prejudice discussions between experts¹⁰.

If the court does not approve the agreed directions filed by the parties but decides that it will give directions of its own initiative without fixing a case management conference, it will take them into account in deciding what directions to give¹¹.

1 As to the meaning of 'court' see PARA 22.

2 CPR 29.4. The parties and their advisers are encouraged to try to agree directions: see *Practice Direction--The Multi-track* PD 29 para 4.6.

3 The court will scrutinise the timetable carefully and in particular will be concerned to see that any proposed date or period for the trial and (if provided for) for a case management conference is no later than is reasonably necessary: *Practice Direction--The Multi-track* PD 29 para 4.7(2).

4 The provision may limit disclosure to standard disclosure or less than that, and/or direct that disclosure will take place by the supply of copy documents without a list, but it must in that case say either that the parties must serve a disclosure statement with the copies or that they have agreed to disclose in that way without such a statement: *Practice Direction--The Multi-track* PD 29 para 4.7(3). As to the meaning of 'standard disclosure' see PARA 542.

5 *Practice Direction--The Multi-track* PD 29 para 4.7(1). The provision about expert evidence may be to the effect that none is required: para 4.7(4).

6 As to the meaning of 'filing' see PARA 1832 note 8.

7 *Ie* under *Practice Direction--Further Information* PD 18: see PARAS 611-612. As to the meaning of 'service' see PARA 138 note 2.

8 *Ie* under CPR 35.6: see PARA 857.

9 le including whether exchange is to be simultaneous or sequential: see *Practice Direction--The Multi-track* PD 29 para 4.8(4).

10 *Practice Direction--The Multi-track* PD 29 para 4.8.

11 *Practice Direction--The Multi-track* PD 29 para 4.9. Where the court is to give directions on its own initiative without holding a case management conference and it is not aware of any steps taken by the parties other than the exchange of statements of case, its general approach will be (1) to give directions for the filing and service of any further information required to clarify either party's case; (2) to direct standard disclosure between the parties; (3) to direct the disclosure of witness statements by way of simultaneous exchange; (4) to give directions for a single joint expert on any appropriate issue unless there is a good reason not to do so; (5) unless para 4.11 applies, to direct disclosure of experts' reports by way of simultaneous exchange on those issues where a single joint expert is not directed; (6) if experts' reports are not agreed, to direct a discussion between experts for the purpose set out in CPR 35.12(1) and the preparation of a statement under CPR 35.12(3) (see PARA 860); (7) to list a case management conference to take place after the date for compliance with those directions; (8) to specify a trial period; and (9) in such cases as the court thinks appropriate, to give directions requiring the parties to consider alternative dispute resolution ('ADR'): *Practice Direction--The Multi-track* PD 29 para 4.10. If it appears that expert evidence will be required both on issues of liability and on the amount of damages, the court may direct that the exchange of those reports that relate to liability will be simultaneous but that those relating to the amount of damages will be sequential: para 4.11. If it appears to the court that it cannot properly give directions on its own initiative and no agreed directions have been filed which it can approve, the court will direct a case management conference to be listed and the conference will be listed as promptly as possible: para 4.12. Where the court is proposing on its own initiative to make an order under CPR 35.7 (which gives the court power to direct that evidence on a particular issue is to be given by a single expert: see PARA 840) or under CPR 35.15 (which gives the court power to appoint an assessor: see PARA 863), the court must, unless the parties have consented in writing to the order, list a case management conference: *Practice Direction--The Multi-track* PD 29 para 4.13. As to case management conferences see PARA 295.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(5) THE MULTI-TRACK/297. Variation of directions.

297. Variation of directions.

A party must apply to the court¹ if he wishes to vary the date which the court has fixed for (1) a case management conference²; (2) a pre-trial review³; (3) the return of a pre-trial check list⁴; (4) the trial⁵; or (5) the trial period⁶. It is essential that any party who wishes to have a direction varied takes steps to do so as soon as possible⁷.

Where a party is dissatisfied with a direction given or other order made by the court he may appeal or apply to the court for it to reconsider its decision⁸. A party should seek permission to appeal if the direction was given or the order was made at a hearing at which he was present, or of which he had due notice, and in any other case he should apply to the court to reconsider its decision⁹.

Where the parties agree about changes to be made to the directions given, then unless the changes are to dates set by the court for a case management conference, a pre-trial review, the return of a pre-trial check list, the trial or the trial period¹⁰, and if certain other conditions are satisfied¹¹, the parties need not file the written agreement¹². In any other case the parties must apply for an order by consent¹³.

Where there has been a change in the circumstances since the order was made the court may set aside or vary any direction it has given, either on application or on its own initiative¹⁴.

Any date set by the court or by the Civil Procedure Rules for doing any act may not be varied by the parties if the variation would make it necessary to vary any of the dates fixed for a case management conference, a pre-trial review, the return of a pre-trial check list, the trial or the trial period¹⁵.

1 As to the meaning of 'court' see PARA 22.

2 CPR 29.5(1)(a). A case management conference will only be postponed for a very good reason, which will not include a failure to comply with a direction already given: see *Practice Direction--The Multi-track* PD 29 para 7.4(7).

3 CPR 29.5(1)(b). A pre-trial review will only be postponed for a very good reason, which will not include a failure to comply with a direction already given: see *Practice Direction--The Multi-track* PD 29 para 7.4(7).

4 I.e. under CPR 29.6 (see PARA 299): see CPR 29.5(1)(c).

5 CPR 29.5(1)(d). Only in exceptional circumstances will the court order a postponement of the trial date or trial period; such an order would be one of last resort: see *Practice Direction--The Multi-track* PD 29 para 7.4(1), (6).

6 CPR 29.5(1)(e).

7 *Practice Direction--The Multi-track* PD 29 para 6.2(1). The court will assume for the purposes of any later application that a party who did not appeal, and who made no application to vary within 14 days of service of the order containing the directions, was content that they were correct in the circumstances then existing: para 6.2(2). As to time limits generally see PARA 88 et seq; and as to the meaning of 'service' see PARA 138 note 2.

8 *Practice Direction--The Multi-track* PD 29 para 6.3(1).

9 *Practice Direction--The Multi-track* PD 29 para 6.3(2), (3). If an application is made for the court to reconsider its decision it will usually be heard by the judge who gave the directions or another judge of the same level. The court will give all parties at least three days' notice of the hearing and may confirm its

directions or make a different order: para 6.3(4). As to permission to appeal case management decisions see *Practice Direction--Appeals* PD 52 paras 4.4, 4.5; and PARA 1661.

10 See the text and notes 1-6.

11 Ie if CPR 2.11 (variation by agreement of a date set by the court for doing any act other than those under, inter alia, CPR 3.8 or CPR 29.5: see PARA 248) applies or if CPR 31.5, CPR 31.10(8) or CPR 31.13 (agreements about disclosure: see PARAS 542, 544, 548) applies: see *Practice Direction--The Multi-track* PD 29 para 6.5(1).

12 *Practice Direction--The Multi-track* PD 29 para 6.5(1).

13 *Practice Direction--The Multi-track* PD 29 para 6.5(2)(a). The parties must file a draft of the order sought and an agreed statement of the reasons why the variation is sought and the court may make an order in the agreed terms or in other terms without a hearing, but it may direct that a hearing is to be listed: para 6.5(2)(b), (c).

14 *Practice Direction--The Multi-track* PD 29 para 6.4.

15 CPR 29.5(2). The dates referred to are those mentioned in CPR 29.5(1) (see the text and notes 1-6): see CPR 29.5(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(5) THE MULTI-TRACK/298. Failure to comply with case management directions.

298. Failure to comply with case management directions.

Where a party fails to comply with a direction given by the court¹ any other party may apply for an order that he must do so, or for a sanction to be imposed, or both of these². The party entitled to apply for such an order must do so without delay³ but must first warn the other party of his intention to do so⁴.

The court will not allow a failure to comply with directions to lead to the postponement of the trial unless the circumstances are exceptional⁵. If it is practical to do so the court will exercise its powers in a manner that enables the case to come on for trial on the date or within the period previously set⁶. Where it appears that one or more issues are or can be made ready for trial at the time fixed while others cannot, the court may direct that the trial will proceed on the issues which are then ready, and direct that no costs will be allowed for any later trial of the remaining issues or that those costs will be paid by the party in default⁷.

Where the court has no option but to postpone the trial it will do so for the shortest possible time and will give directions for the taking of the necessary steps in the meantime as rapidly as possible⁸.

The court will not postpone any other hearing without a very good reason, and for that purpose the failure of a party to comply on time with directions previously given will not be treated as a good reason⁹.

1 As to the meaning of 'court' see PARA 22.

2 *Practice Direction--The Multi-track* PD 29 para 7.1. See *Watford Petroleum Ltd v Interoil Trading SA* [2005] All ER (D) 323 (Feb). As to the court's power to impose sanctions generally see PARA 247 et seq.

3 The court may take any such delay into account when it decides whether to make an order imposing a sanction or to grant relief from a sanction imposed by the Civil Procedure Rules or any other practice direction: *Practice Direction--The Multi-track* PD 29 para 7.3.

4 *Practice Direction--The Multi-track* PD 29 para 7.2.

5 *Practice Direction--The Multi-track* PD 29 para 7.4(1). See also *Calden (Administrator of the Estate of Amanda Calden) v Dr Nunn & Partners* [2003] EWCA Civ 200, [2003] All ER (D) 265 (Feb). Litigants and lawyers must be in no doubt that the court will regard the postponement of a trial as an order of last resort. Where it appears inevitable the court may exercise its power to require a party as well as his legal representative to attend court at the hearing where such an order is to be sought: *Practice Direction--The Multi-track* PD 29 para 7.4(6). As to the meaning of 'legal representative' see PARA 1833 note 13.

6 *Practice Direction--The Multi-track* PD 29 para 7.4(2). In particular the court will assess what steps each party should take to prepare the case for trial, direct that those steps are taken in the shortest possible time and impose a sanction for non-compliance. Such a sanction may, for example, deprive a party of the right to raise or contest an issue or to rely on evidence to which the direction relates: para 7.4(3).

7 *Practice Direction--The Multi-track* PD 29 para 7.4(4).

8 *Practice Direction--The Multi-track* PD 29 para 7.4(5).

9 *Practice Direction--The Multi-track* PD 29 para 7.4(7).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(5) THE MULTI-TRACK/299. Pre-trial check list.

299. Pre-trial check list.

The court will send the parties a pre-trial check list (listing questionnaire)¹ for completion and return by the date specified in directions² unless it considers that the claim can proceed to trial³ without the need for a pre-trial check list⁴. Each party must file⁵ the completed pre-trial check list by the date specified by the court⁶. If no party files the completed pre-trial check list by the date specified, the court will order that unless a completed pre-trial check list is filed within seven days from service of that order, the claim, defence and any counterclaim will be struck out without further order of the court⁷.

If:

- 481 (1) a party files a completed pre-trial check list but another party does not;
- 482 (2) a party has failed to give all the information requested by the pre-trial check list; or
- 483 (3) the court considers that a hearing is necessary to enable it to decide what directions to give in order to complete preparation of the case for trial,

the court may give such directions as it thinks appropriate⁸.

1 See Form N170 in *The Civil Court Practice*. The pre-trial check list seeks information about the extent to which the parties have complied with the directions given by the court on allocation or otherwise, details of any expert witnesses whom the court has authorised to be called and details of other witnesses and the dates of availability of all witnesses. Although the rules do not require the parties to exchange copies of the questionnaires before they are filed they are encouraged to do so to avoid the court being given conflicting or incomplete information. The file will be placed before a judge for his directions when all the check lists have been filed or when the time for filing them has expired and where a party has filed a check list but another party has not done so: see *Practice Direction--The Multi-track* PD 29 para 8.1(1), (5), (6). *Practice Direction--The Multi-track* PD 29 paras 8, 9 do not apply in the Technology and Construction Court: see PARA 1546.

2 As given under CPR 29.2(3) (see PARA 294): see CPR 29.6(1).

3 As to directions on listing see *Practice Direction--The Multi-track* PD 29 para 9. On listing, the court must fix the trial date or week, give a time estimate and fix the place of trial: para 9.1. The parties should seek to agree directions and may file an agreed order. The court may make an order in those terms or it may make a different order: para 9.2(1). Agreed directions should include provision about: (1) evidence especially expert evidence; (2) a trial timetable and time estimate; (3) the preparation of a trial bundle; and (4) any other matter needed to prepare the case for trial: para 9.2(2). The court will include such of these provisions as are appropriate in any order that it may make, whether or not the parties have filed agreed directions: para 9.2(3). Unless a direction doing so has been given before, a direction giving permission to use expert evidence will say whether it gives permission to use oral evidence or reports or both and will name the experts concerned: para 9.2(4). The principles set out in para 6 (see PARA 297) about variation of directions apply equally to directions given at this stage: para 9.3.

4 CPR 29.6(1).

5 As to the meaning of 'filing' see PARA 1832 note 8.

6 CPR 29.6(2).

7 CPR 29.6(3).

8 CPR 29.6(4). The court's general approach will be as set out below; the court may, however, decide to make other orders, and in particular the court will take into account the steps, if any, of which it is aware which

the parties have taken to prepare the case for trial: *Practice Direction--The Multi-track* PD 29 para 8.2. Where no party files a pre-trial check list the court will order that unless a completed pre-trial check list is filed within seven days from service of that order, the claim, defence and any counterclaim will be struck out without further order of the court: para 8.3(1). Where a party files a pre-trial check list but another party (the defaulting party) does not do so, the court will fix a listing hearing. Whether or not the defaulting party attends the hearing, the court will normally fix or confirm the trial date and make other orders about the steps to be taken to prepare the case for trial: para 8.3(2). Where the court decides to hold a listing hearing the court will fix a date which is as early as possible and the parties will be given at least three days' notice of the date: para 8.4. Where the court decides to hold a pre-trial review (whether or not this is in addition to a listing hearing) the court will give the parties at least seven days' notice of the date: para 8.5.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(5) THE MULTI-TRACK/300. Pre-trial review.

300. Pre-trial review.

If, on receipt of the parties' pre-trial check lists, the court¹ decides to hold a pre-trial review or to cancel a pre-trial review which has already been fixed, it will serve² notice of its decision at least seven days before the date fixed for the hearing or, as the case may be, the cancelled hearing³.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'service' see PARA 138 note 2.

3 CPR 29.7. A pre-trial review will generally only be held where the trial is expected to last more than 10 days: see *The Queen's Bench Guide* (2007 Edn) para 7.6.1; *The Chancery Guide* (2005 Edn) para 3.17; and see *The Civil Court Practice*. As to the use of video conferencing in relation to the holding of pre-trial reviews see *Practice Direction--Written Evidence* PD 32 para 29.1, Annex 3; and PARAS 1033-1035.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(5) THE MULTI-TRACK/301. Setting a trial timetable and fixing or confirming the trial date or week; conduct of trial.

301. Setting a trial timetable and fixing or confirming the trial date or week; conduct of trial.

As soon as practicable after each party has filed¹ a completed pre-trial check list, the court² has held a listing hearing³ or the court has held a pre-trial review⁴, the court will:

- 484 (1) set a timetable for the trial unless a timetable has already been fixed, or the court considers that it would be inappropriate to do so;
- 485 (2) fix the date for the trial or the week within which the trial is to begin (or, if it has already done so, confirm that date); and
- 486 (3) notify the parties of the trial timetable (where one is fixed under this provision) and the date or trial period⁵.

Unless the trial judge⁶ otherwise directs, the trial will be conducted in accordance with any order previously made⁷. The trial will normally take place at a civil trial centre but it may be at another court if it is appropriate having regard to the needs of the parties and the availability of court resources⁸. The judge will generally have read the papers in the trial bundle and may dispense with an opening address⁹. Once the trial of a multi-track claim has begun, the judge will normally sit on consecutive court days until it has been concluded¹⁰.

1 As to the meaning of 'filing' see PARA 1832 note 8.

2 As to the meaning of 'court' see PARA 22.

3 Ie under CPR 29.6(3): see PARA 299.

4 Ie under CPR 29.7: see PARA 300.

5 CPR 29.8.

6 As to the meaning of 'judge' see PARA 49.

7 CPR 29.9. Such an order will have been made eg as to a timetable for the trial or as to the method of receiving evidence: see eg CPR 32.1, CPR 32.5; and PARAS 791, 983. CPR 29.9 does not confer an unfettered discretion on a trial judge to depart from earlier orders: *Re Damage Control plc, Secretary of State for Business, Enterprise and Regulatory Reform v Benson* [2008] EWHC 2336 (Ch), [2008] All ER (D) 157 (Mar). As to trials and their conduct see also CPR Pt 39; and PARA 1117 et seq.

8 *Practice Direction--The Multi-track* PD 29 para 10.1.

9 *Practice Direction--The Multi-track* PD 29 para 10.2.

10 *Practice Direction--The Multi-track* PD 29 para 10.6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/9. CASE MANAGEMENT/(5) THE MULTI-TRACK/302. Trial costs on the multi-track.

302. Trial costs on the multi-track.

In an appropriate case, the judge¹ may summarily assess costs in a multi-track case². There is no specified limitation on the recovery of costs on the multi-track³ and the general rules about costs apply⁴.

1 As to the meaning of 'judge' see PARA 49.

2 See *Practice Direction--The Multi-track* PD 29 para 10.5. Summary assessment of such costs is under CPR 44.7.

3 Cf CPR Pt 27 (small claims track); and PARA 285; CPR Pt 46 (fast track); and PARA 292.

4 See CPR Pts 43, 44, 45, 47, 48; and PARA 1729 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/10. APPLICATIONS/303. Applications in general.

10. APPLICATIONS

303. Applications in general.

Where a party, or a non-party, needs to seek a decision, a remedy or permission from the court in connection with proceedings, the process is called an application, although this is not a technical term¹. There are a great variety of circumstances in which an application may be made, and the general procedure for applications is contained in Part 23 of the Civil Procedure Rules². In many cases the rules themselves specifically require that an application must be made³, or may be made⁴, under Part 23, or a practice direction may so specify⁵. If no procedure is prescribed, then the application will also generally be governed by Part 23; for example, applications for extension of time, for permission to take steps, or for case management directions⁶.

Some applications are not governed by Part 23⁷, while others specify modifications of the general procedure⁸.

1 An application is made by an application notice, which is defined as a document in which the applicant states his intention to seek a court order: CPR 23.1.

2 As to CPR Pt 23 see PARA 304 et seq.

3 Eg an application for judgment without trial after striking out in certain instances (see CPR 3.5(5); and PARA 521), an application in relation to the supply of court documents (see CPR 5.4C(5), 5.4D(1); and PARA 82), an application to withdraw a pre-action admission or to enter judgment on such an admission (see CPR 14.1A(5); and PARA 188), an application for permission to continue a derivative claim (see CPR 19.9A(2); and PARA 232), an application for a warrant of arrest under the Housing Act 1996 s 155(3) or the Protection from Harassment Act 1997 s 3(3) (see CPR 65.5(1), 65.29(1); and **TORT** vol 45(2) (Reissue) PARA 457).

4 Eg an application for an order under the Crown Proceedings Act 1947 s 27 in respect of money due from the Crown (see CPR 66.7(3); and PARA 1429), an order of reference to the European Court (see CPR 68.2(1)(b); and PARA 1725).

5 Eg all applications made before a claim is commenced should be made under CPR Pt 23 (see *Practice Direction--Applications* PD 23A para 5); an application by a receiver for directions may be made by filing an application notice in accordance with CPR Pt 23 (see *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 8.1; and **RECEIVERS**); an application to set aside an order for transfer must be made in accordance with CPR Pt 23 (see *Practice Direction--Transfer* PD 30 para 6.2; and PARA 70).

6 See eg CPR 3.3(1); and PARA 35.

7 Eg CPR Pt 23 does not apply to applications relating to derogating control orders under the Prevention of Terrorism Act 2005: CPR 76.3(2); see PARA 1533; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 506 et seq.

8 Eg CPR 12.4(2) (requirement to provide defendant's date of birth on application for default judgment in certain cases: see PARA 508); CPR 77.3 (applications by third parties to make representations and applications to vary or discharge a serious crime prevention order must be made in accordance with Pt 23 as modified by *Practice Direction--Applications for and Relating to Serious Crime Prevention Orders* PD 77; see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARAS 350-359); *Practice Direction--Interim Injunctions* PD 25A para 2 specifying requirements for the application notice for an interim injunction. See also *Practice Direction--Applications under Particular Statutes* PD 23B, dealing with applications under the Family Law Reform Act 1969 Pt III (ss 20-25) for the use of scientific tests to determine parentage (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 113 et seq), and applications in proceedings under the National Debt Act 1870 s 55 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1346).

UPDATE

303 Applications in general

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/10. APPLICATIONS/304. Where to make an application.

304. Where to make an application.

The general rule is that an application must be made to the court¹ where the claim was started². If a claim has been transferred to another court since it was started, an application must be made to the court to which the claim has been transferred³. If the parties have been notified of a fixed date for the trial, an application must be made to the court where the trial is to take place⁴, while if an application is made before a claim has been started, it must be made to the court where it is likely that the claim to which the application relates will be started unless there is good reason to make the application to a different court⁵.

If an application is made after proceedings to enforce judgment have begun, it must be made to any court which is dealing with the enforcement of the judgment unless any rule or practice direction provides otherwise⁶.

1 As to the meaning of 'court' see PARA 22. As to the appropriate court in which to commence proceedings see PARA 116.

2 CPR 23.2(1).

3 CPR 23.2(2). If, however, the application is for an order setting aside the order for transfer, it must be made to the court which ordered the transfer: *Practice Direction--Transfer* PD 30 para 6.1. As to the transfer of proceedings see PARA 66 et seq.

4 CPR 23.2(3). The court may specify the place (eg, a particular county court) where the trial or some other hearing in any proceedings is to be held and may do so without ordering the proceedings to be transferred: see CPR 30.6; and PARA 71.

5 CPR 23.2(4).

6 CPR 23.2(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/10. APPLICATIONS/305. Time for making an application.

305. Time for making an application.

Every application must be made as soon as it becomes apparent that it is necessary or desirable to make it¹. As part of the court's duty to further the overriding objective² by actively managing cases, the court will deal with as many aspects of a case as it can on the same occasion³. Accordingly, wherever possible, applications must be made so that they can be considered at any other hearing for which a date has already been or is about to be fixed, particularly where the hearing is to be a case management conference, allocation or listing hearing or a pre-trial review⁴. Where a date for a hearing has been fixed and a party wishes to make an application at that hearing, but there is insufficient time for service of the application notice⁵, he should inform the other party and the court, if possible in writing, as soon as he can of the nature of the application and the reason for it. He should then make the application orally at the hearing⁶.

Where an application is required to be made within a specified time, it is so made if the application notice is received by the court within that time⁷.

1 *Practice Direction--Applications* PD 23A para 2.7.

2 As to the overriding objective see PARA 33. As to the meaning of 'court' see PARA 22.

3 See CPR 1.4(2)(i); and PARA 246. Moreover, at the hearing of any application, in discharge of this duty, the court may wish to review the conduct of the case as a whole and give any necessary case management directions. The parties are therefore required to be ready to assist the court in doing so and to answer questions the court may ask for this purpose: see *Practice Direction--Applications* PD 23A para 2.9.

4 See *Practice Direction--Applications* PD 23A para 2.8. As to case management conferences and pre-trial reviews see PARAS 294-295; and as to allocation and listing hearings see PARAS 266, 299. As to the limited application of para 2.8 in the Commercial Court see PARA 1541 note 3.

5 As to service of the application notice see PARA 307; and as to the contents of the application notice see PARA 306. As to the meaning of 'application notice' see PARA 303 note 1.

6 *Practice Direction--Applications* PD 23A para 2.10. As to the limited application of para 2.10 in the Commercial Court see PARA 1541 note 3.

7 CPR 23.5. As to time limits generally see PARA 88 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/10. APPLICATIONS/306. The application notice; in general.

306. The application notice; in general.

The general rule is that an applicant must file¹ an application notice². An applicant may, however, make an application without filing an application notice if this is permitted by a rule or practice direction³ or the court⁴ dispenses with the requirement for an application notice⁵.

An application notice must state what order the applicant is seeking⁶ and, briefly, why the applicant is seeking the order⁷.

If the applicant wishes to rely on matters set out in his application notice as evidence, the notice must be verified by a statement of truth⁸.

On receipt of an application notice containing a request for a hearing the court will notify the applicant of the time and date for the hearing of the application⁹. If the notice contains a request that the application be dealt with without a hearing, it will be sent to a master or district judge so that he may decide whether the application is suitable for consideration without a hearing¹⁰. Where the master or district judge agrees that the application is suitable for such consideration, the court will so inform the applicant and the respondent¹¹ and may give directions for the filing of evidence¹². Where, however, the master or district judge does not agree that the application is suitable for such consideration, the court will notify the applicant and the respondent of the time, date and place for the hearing of the application and may at the same time give directions as to the filing of evidence¹³.

1 As to the meaning of 'filing' see PARA 1832 note 8.

2 CPR 23.3(1). As to the meaning of 'application notice' see PARA 303 note 1.

3 CPR 23.3(2)(a).

4 As to the meaning of 'court' see PARA 22.

5 CPR 23.3(2)(b). In either event he is required to pay the appropriate fee under the Civil Proceedings Fees Order 2008, SI 2008/1053 (amended by SI 2008/2853): see PARA 87.

6 CPR 23.6(a). Forms N244 and PF244 in *The Civil Court Practice* for application notices (the latter for use in the Royal Courts of Justice) contemplate that the applicant will provide a draft of the order sought (since the forms state that the applicant 'intends to apply for an order (a draft of which is attached)'); see also CPR 23.7(3) (b) (copy of any draft to be served with the notice and evidence); and PARA 307. Except in the most simple application, the applicant must bring a draft of the order to the hearing: see *Practice Direction--Applications* PD 23A para 12.1. If the case is proceeding in the Royal Courts of Justice and the order is unusually long or complex it must also be supplied on disk for use by the court office: para 12.1.

7 CPR 23.6(b). The notice must be signed and must include (1) the title of the claim; (2) the reference number of the claim; (3) the full name of the applicant; (4) where the applicant is not already a party, his address for service, including a postcode; and (5) either a request for a hearing or a request that the application be dealt with without a hearing: *Practice Direction--Applications* PD 23A para 2.1. If the application is intended to be made to a judge, the application notice must so state: para 2.6.

8 See CPR Pt 22; and PARA 613 et seq.

9 *Practice Direction--Applications* PD 23A para 2.2. *Practice Direction--Applications* PD 23A paras 2.2-2.6 do not apply in the Commercial Court: see PARA 1541 note 3.

10 *Practice Direction--Applications* PD 23A para 2.3. As to applications without a hearing see PARA 308. A master or district judge may refer to a judge any matter which he thinks should properly be decided by a judge,

and the judge may either dispose of the matter or refer it back to the master or district judge: para 1. If the application notice states that the application is intended to be made to a judge, paras 2.3-2.5 apply as though references to the master or district judge were references to a judge: para 2.6. As to the meaning of 'judge' see PARA 49. *Practice Direction--Applications* PD 23A para 1 does not apply in the Commercial Court: see PARA 1541 note 3. See also note 9.

11 For these purposes, 'respondent' means the person against whom the order is sought and such other person as the court may direct: CPR 23.1.

12 *Practice Direction--Applications* PD 23A para 2.4. This does not apply in the Commercial Court: see note 9.

13 *Practice Direction--Applications* PD 23A para 2.5. This does not apply in the Commercial Court: see note 9. As to hearings generally see PARAS 6, 1117 et seq; and as to evidence see PARA 749 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/10. APPLICATIONS/307. Giving notice of an application.

307. Giving notice of an application.

The general rule is that a copy of the application notice¹ must be served² on each respondent³. An application may, however, be made without serving a copy of the application notice if this is permitted by a rule⁴, a practice direction⁵ or a court order⁶. Such circumstances include:

- 487 (1) where there is exceptional urgency;
- 488 (2) where the overriding objective⁷ is best furthered by doing so;
- 489 (3) by consent of all parties;
- 490 (4) with the permission of the court⁸;
- 491 (5) where a date for a hearing has been fixed and a party wishes to make an application at that hearing, but there is insufficient time for service of the notice; or
- 492 (6) where a court order, rule or practice direction permits⁹.

A copy of the application notice must be served as soon as practicable after it is filed¹⁰ and, except where another time limit is specified in the Civil Procedure Rules or in a practice direction, must in any event be served at least three days before the court is to deal with the application¹¹. If a copy of the application notice is to be served by the court, the applicant must, when he files the application notice, file a copy of any written evidence in support¹².

When a copy of an application notice is served it must be accompanied by a copy of any written evidence in support¹³ and a copy of any draft order which the applicant has attached to his application¹⁴.

If an application notice is served but the period of notice is shorter than the period required by the rules or a practice direction, the court may direct that, in the circumstances of the case, sufficient notice has been given and hear the application¹⁵.

1 As to the meaning of 'application notice' see PARA 303 note 1.

2 As to the meaning of 'service' see PARA 138 note 2.

3 CPR 23.4(1). As to the meaning of 'respondent' see PARA 306 note 11.

4 CPR 23.4(2)(a); eg where the application is for an interim remedy and there are good reasons for not giving notice (see CPR 25.3; and PARA 321) or where the application is for a charging order (see CPR Pt 73; and PARA 1467 et seq).

5 CPR 23.4(2)(b); and see heads (1)-(5) in the text. See also *Practice Direction--Interim Injunctions* PD 25A para 4 (procedure to be followed for making applications for interim injunctions without notice in cases of urgency); and PARA 321.

6 CPR 23.4(2)(c).

7 As to the overriding objective see PARA 33.

8 As to the meaning of 'court' see PARA 22.

9 *Practice Direction--Applications* PD 23A para 3(1)-(6). The circumstances set out in head (5) in the text are those where para 2.10 applies: see PARA 305 text and note 6. As to the application of para 3 in the Commercial Court see PARA 1541 note 3.

10 CPR 23.7(1)(a). Where a notice must be served, but there is insufficient time to do so, informal notification should be given unless the circumstances of the application require secrecy: *Practice Direction--Applications* PD 23A para 4.2. As to the meaning of 'filing' see PARA 1832 note 8.

11 CPR 23.7(1)(b); and see *Practice Direction--Applications* PD 23A para 4.1. This time period does not apply in the Commercial Court: see PARA 1541 note 3. As to time limits generally see PARA 88 et seq.

12 CPR 23.7(2). CPR 23.7 does not, however, require written evidence to be filed if it has already been filed or to be served on a party on whom it has already been served: CPR 23.7(5). Form N244 Pts B, C and Form PF244 Pts B, C (forms for application notices: see PARA 306 note 6) provide for the applicant to give details of the documents containing the evidence upon which he intends to rely: see *The Civil Court Practice*. The requirement for evidence in certain types of applications is set out in some of the rules and practice directions. Where there is no specific requirement to provide evidence it should be borne in mind that, as a practical matter, the court will often need to be satisfied by evidence of the facts that are relied on in support of or for opposing the application: *Practice Direction--Applications* PD 23A para 9.1. The court may give directions for the filing of evidence in support of or opposing a particular application. The court may also give directions for the filing of evidence in relation to any hearing that it fixes on its own initiative. The directions may specify the form that evidence is to take and when it is to be served: para 9.2. Where it is intended to rely on evidence which is not contained in the application itself, the evidence, if it has not already been served, should be served with the application: para 9.3. Evidence should be filed with the court as well as served on the parties. Exhibits should not be filed unless the court otherwise directs: para 9.6. The contents of an application notice may be used as evidence (otherwise than at trial) provided the contents have been verified by a statement of truth: para 9.7. As to statements of truth see CPR Pt 22; and PARA 613 et seq. As to the application of *Practice Direction--Applications* PD 23A in the Commercial Court see PARA 1541.

Where a respondent to an application wishes to rely on evidence which has not yet been served he should serve it as soon as possible and in any event in accordance with any directions the court may have given: *Practice Direction--Applications* PD 23A para 9.4. If it is necessary for the applicant to serve any evidence in reply it should be served as soon as possible and in any event in accordance with any directions the court may have given: para 9.5.

13 CPR 23.7(3)(a); and see note 12.

14 CPR 23.7(3)(b).

15 CPR 23.7(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/10. APPLICATIONS/308. Applications which may be dealt with without a hearing.

308. Applications which may be dealt with without a hearing.

The court¹ may deal with an application without a hearing if:

- 493 (1) the parties agree as to the terms of the order sought²;
- 494 (2) the parties agree that the court is to dispose of the application without a hearing³; or
- 495 (3) the court does not consider that a hearing would be appropriate⁴.

1 As to the meaning of 'court' see PARA 22.

2 CPR 23.8(a). As to the circumstances where an agreed judgment or order may be entered and sealed see CPR 40.6; and PARA 1141. Where all parties affected by an order have written to the court consenting to the making of the order a draft of which has been filed with the court, the court will treat the draft as having been signed in accordance with CPR 40.6(7): *Practice Direction--Applications* PD 23A para 10.2. Where a consent order must be made by a judge (ie where CPR 40.6(2) does not apply: see PARA 1141) the order must be drawn so that the judge's name and judicial title can be inserted: *Practice Direction--Applications* PD 23A para 10.3. The parties to an application for a consent order must ensure that they provide the court with any material it needs to be satisfied that it is appropriate to make the order. Subject to any rule or practice direction a letter will generally be acceptable for this purpose: para 10.4. Where a judgment or order has been agreed in respect of an application or claim where a hearing date has been fixed, the parties must inform the court immediately: para 10.5. The case management timetable cannot be varied by written agreement of the parties: see CPR 28.4, CPR 29.5; and PARAS 288, 297.

3 CPR 23.8(b). The parties should inform the court in writing that they agree that the court is to dispose of the application without a hearing and confirm that all the evidence and other material on which they rely has been disclosed to the other parties: *Practice Direction--Applications* PD 23A para 11.1. As to evidence see PARA 307 notes 12, 13.

4 CPR 23.8(c). In furthering the overriding objective by actively managing cases the court may deal with the case without the parties needing to attend at court: see CPR 1.4(2)(j); and PARA 246. In these circumstances the court will treat the application as if it were proposing to make an order of its own initiative (ie under CPR 3.3, with the consequences set out in that rule: see PARA 251): see *Practice Direction--Applications* PD 23A para 11.2. As to the overriding objective see PARA 33.

As to the power of the court to set aside or vary an order where an application has been disposed of without a hearing under CPR 23.8 see *Collier v Williams* [2006] EWCA Civ 20, [2007] 1 All ER 991.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/10. APPLICATIONS/309. Telephone hearings.

309. Telephone hearings.

With certain exceptions, at a telephone conference enabled court¹ allocation hearings, listing hearings and interim applications, case management conferences and pre-trial reviews with a time estimate of no more than one hour, will be conducted by telephone unless the court otherwise orders². This will not apply where the hearing is of an application made without notice to the other party, all the parties are unrepresented or more than four parties³ wish to make representations at the hearing⁴. A request for a direction that such a hearing should not be conducted by telephone must be made at least seven days before the hearing or such shorter time as the court may permit and may be made by letter, and the court must determine such request without requiring the attendance of the parties⁵.

The court may order that an application or part of an application other than one falling within the categories above be dealt with by a telephone hearing⁶. The applicant should indicate on his application notice if he seeks such a court order and where he has not done so but nevertheless wishes to seek an order the request should be made as early as possible⁷. An order for a telephone hearing will not normally be made unless every party entitled to be given notice of the application⁸ and to be heard at the hearing has consented to the order⁹.

No party, or representative of a party, to an application being heard by telephone may attend the judge in person while the application is being heard unless every other party to the application has agreed that he may do so¹⁰.

1 'Telephone conference enabled court' means a district registry of the High Court or a county court, in which telephone conferencing facilities are available: *Practice Direction--Applications* PD 23A para 6.1(b).

2 *Practice Direction--Applications* PD 23A para 6.2. As to the meaning of 'court' see PARA 22.

3 For this purpose where two or more parties are represented by the same person, they are to be treated as one party: *Practice Direction--Applications* PD 23A para 6.3(c).

4 *Practice Direction--Applications* PD 23A para 6.3.

5 *Practice Direction--Applications* PD 23A para 6.4.

6 *Practice Direction--Applications* PD 23A para 6.5. If the court makes an order under para 6.1 it will give any directions necessary for the telephone hearing: para 6.8. As to the directions which will apply to such a hearing, subject to any direction to the contrary, see para 6.10. As to video conferencing see para 7; and PARA 6 note 16. As to the use of video conferencing in relation to interim proceedings see *Practice Direction--Written Evidence* PD 32 para 29.1, Annex 3; and PARAS 1033-1035.

7 *Practice Direction--Applications* PD 23A para 6.6.

8 As to notice of the application see PARA 306.

9 *Practice Direction--Applications* PD 23A para 6.7.

10 *Practice Direction--Applications* PD 23A para 6.9.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/10. APPLICATIONS/310. Application to stay claim where there are related criminal proceedings.

310. Application to stay claim where there are related criminal proceedings.

An application for the stay¹ of civil proceedings pending the determination of related criminal proceedings may be made by any party to the civil proceedings or by the prosecutor or any defendant in the criminal proceedings². In order to make such an application, it is not necessary for the prosecutor or defendant in the criminal proceedings to be joined as a party to the civil proceedings³. However, every party to the civil proceedings must, unless he is the applicant, be made a respondent to the application⁴.

The evidence in support of the application⁵ must contain an estimate of the expected duration of the stay and must identify the respects in which the continuance of the civil proceedings may prejudice the criminal trial⁶.

1 As to the meaning of 'stay' see PARA 233 note 11. As to the stay of proceedings see further PARA 529 et seq.

2 *Practice Direction--Applications* PD 23A para 11A.1. See *Secretary of State for Health v Norton Healthcare Ltd* [2003] EWHC 1905 (Ch), [2003] All ER (D) 419 (Jul) (witnesses refusing to co-operate in defendant's case preparation until criminal investigation into their activities resolved; stay refused).

3 *Practice Direction--Applications* PD 23A para 11A.4.

4 *Practice Direction--Applications* PD 23A para 11A.2. As to joinder of parties see generally PARA 210.

5 As to evidence in support of an application see PARA 307 notes 12, 13.

6 *Practice Direction--Applications* PD 23A para 11A.3. As to the matters to be taken into account by the court in considering whether to stay civil proceedings where there are related criminal proceedings see *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108, [1979] 1 WLR 898, CA (applied in *VTFL v Clough* [2001] EWCA Civ 1509, [2001] All ER (D) 209 (Oct)); *Re DPR Futures Ltd* [1989] 1 WLR 778, [1989] BCLC 634.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/10. APPLICATIONS/311. Service of application where application made without notice.

311. Service of application where application made without notice.

Where the court¹ has disposed of an application which it permitted to be made without service² of a copy of the application notice³, and the court makes an order either granting or dismissing the application, a copy of the application notice and any evidence in support⁴ must, unless the court orders otherwise, be served, with the order, on any party or other person against whom the order was made and against whom the order was sought⁵. The order must contain a statement of the right to make an application to set aside⁶ or vary the order⁷.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'application notice' see PARA 303 note 1; as to the contents of such notice see CPR 23.6; and PARA 306; and as to the circumstances in which an application may be made without service of such notice see PARA 307.

4 As to evidence in support see PARA 307 notes 12-13.

5 CPR 23.9(1), (2).

6 Ie under CPR 23.10: see PARA 312. As to the meaning of 'set aside' see PARA 197 note 6.

7 CPR 23.9(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/10. APPLICATIONS/312. Application to set aside or vary order made without notice.

312. Application to set aside or vary order made without notice.

A person who was not served¹ with a copy of the application notice² before an order was made without notice³ may apply to have the order set aside⁴ or varied⁵ and notice of his right to do so must be contained in the order⁶. Such an application must be made within seven days after the date on which the order was served on the person making the application⁷.

1 As to the meaning of 'service' see PARA 138 note 2.

2 As to the meaning of 'application notice' see PARA 303 note 1.

3 Ie under CPR 23.9: see PARA 311.

4 As to the meaning of 'set aside' see PARA 197 note 6.

5 CPR 23.10(1). As to the exercise of this power see eg *Elf Oil UK Ltd v Besiktas Denizcilik Ve Tasimacilik Sanayive Ticaret AS* [2000] All ER (D) 2401.

6 See CPR 23.9(3); and PARA 311. As to the power of the court to set aside or vary an order where an application has been disposed of without a hearing under CPR 23.8 see *Collier v Williams* [2006] EWCA Civ 20, [2007] 1 All ER 991.

7 CPR 23.10(2). As to time limits generally see PARA 88 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/10. APPLICATIONS/313. Court's power to proceed in the absence of a party.

313. Court's power to proceed in the absence of a party.

Where the applicant or any respondent¹ fails to attend the hearing of an application, the court² may proceed in his absence³. Where the applicant or any respondent fails to attend the hearing of an application and the court makes an order at the hearing, the court may, on application or of its own initiative, re-list the application⁴. This power to re-list the application is in addition to any other powers of the court with regard to the order⁵.

1 As to the meaning of 'respondent' see PARA 306 note 11.

2 As to the meaning of 'court' see PARA 22.

3 CPR 23.11(1).

4 CPR 23.11(2). As to service of orders see CPR 40.4, CPR 40.5; and PARA 1140. Where the court makes an order which does not mention costs, the general rule is that no party is entitled to costs or to seek an order under the Legal Services Act 2007 s 194(3) (see PARA 1824) in relation to that order, but this does not affect any entitlement of a party to recover costs out of a fund held by that party as trustee or personal representative, or pursuant to any lease, mortgage or other security: CPR 44.13(1). Where the court makes (1) an order granting permission to appeal; (2) an order granting permission to apply for judicial review; or (3) any other order or direction sought by a party on an application without notice, and its order does not mention costs, it will be deemed to include an order for applicant's costs in the case: CPR 44.13(1A). Any party affected by a deemed order for costs under CPR 44.13(1A) may apply at any time to vary the order: CPR 44.13(1B). See PARA 1756. As to costs generally see PARA 1729 et seq.

5 *Practice Direction--Applications* PD 23A para 12.2. The other powers referred to are the powers eg to set aside, vary, discharge or suspend the order. As to the meaning of 'set aside' see PARA 197 note 6. The court has a very flexible power under CPR 23.11 to set aside an order and order a re-hearing where the order was made in the absence of a party. There is no fetter on the court's discretion. It would, however, be very rare for the court to exercise the power if it was satisfied that there was no real prospect of a different order being made: *Riverpath Ltd v Brammell* [2000] All ER (D) 99 per Neuberger J.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/10. APPLICATIONS/314. Dismissal of applications totally without merit.

314. Dismissal of applications totally without merit.

If the court¹ dismisses an application (including an application for permission to appeal or for permission to apply for judicial review) and it considers that the application is totally without merit, the court's order must record that fact and the court must at the same time consider whether it is appropriate to make a civil restraint order².

¹ As to the meaning of 'court' see PARA 22.

² CPR 23.12. As to civil restraint orders see PARA 259. Where a series of claims have been instituted, a civil restraint order may be made in appropriate circumstances notwithstanding the fact that some of the claims have merit: *Thakerar v Lynch Hall & Hornby* [2005] EWHC 2751 (Ch), [2006] 1 WLR 1511.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/11. INTERIM REMEDIES/315. Orders for interim remedies.

11. INTERIM REMEDIES

315. Orders for interim remedies.

The court¹ may grant the following interim remedies:

- 496 (1) an interim injunction²;
- 497 (2) an interim declaration³;
- 498 (3) an order:

62

- 1. (a) for the detention, custody or preservation of relevant property⁴;
- 2. (b) for the inspection of relevant property⁵;
- 3. (c) for the taking of a sample of relevant property⁶;
- 4. (d) for the carrying out of an experiment on or with relevant property⁷;
- 5. (e) for the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly⁸; and
- 6. (f) for the payment of income from relevant property until a claim is decided⁹;

63

- 499 (4) an order authorising a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out an order under head (3) above¹⁰;
- 500 (5) an order under the Torts (Interference with Goods) Act 1977¹¹ to deliver up goods¹²;
- 501 (6) an order (a freezing injunction) restraining a party from removing from the jurisdiction¹³ assets located there¹⁴ or restraining a party from dealing with any assets whether located within the jurisdiction or not¹⁵;
- 502 (7) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction¹⁶;
- 503 (8) an order (a search order) under the Civil Procedure Act 1997¹⁷ requiring a party to admit another party to premises for the purpose of securing or preserving relevant property or evidence¹⁸;
- 504 (9) an order for disclosure of documents or inspection of property before a claim has been made¹⁹;
- 505 (10) an order for disclosure of documents or inspection of property against a non-party²⁰;
- 506 (11) an order (an order for interim payment²¹) for payment by a defendant²² on account of any damages²³, debt or other sum (except costs) which the court may hold the defendant liable to pay²⁴;
- 507 (12) an order for a specified fund to be paid into court or otherwise secured, where there is a dispute over a party's right to the fund²⁵;
- 508 (13) an order permitting a party seeking to recover personal property to pay money into court pending the outcome of the proceedings and directing that, if he does so, the property must be given up to him²⁶;
- 509 (14) an order directing a party to prepare and file²⁷ accounts relating to the dispute²⁸;
- 510 (15) an order directing any account to be taken or inquiry to be made by the court²⁹; and

511 (16) an order³⁰ in intellectual property proceedings making the continuation of an alleged infringement subject to the lodging of guarantees³¹.

The fact that a particular kind of interim remedy is not listed above does not affect any power that the court may have to grant that remedy³². The court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind³³.

1 As to the meaning of 'court' see PARA 22.

2 CPR 25.1(1)(a); and see PARA 316. An 'injunction' is a court order prohibiting a person from doing something or requiring a person to do something: CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31.

3 CPR 25.1(1)(b).

4 CPR 25.1(1)(c)(i). In CPR 25.1(1)(c), (g) (see heads (3), (7) in the text) 'relevant property' means property (including land) which is the subject of a claim or as to which any question may arise on a claim: CPR 25.1(2).

5 CPR 25.1(1)(c)(ii).

6 CPR 25.1(1)(c)(iii).

7 CPR 25.1(1)(c)(iv).

8 CPR 25.1(1)(c)(v).

9 CPR 25.1(1)(c)(vi).

10 CPR 25.1(1)(d).

11 Ie under the Torts (Interference with Goods) Act 1977 s 4 (interlocutory relief where goods are detained): see **TORT** vol 45(2) (Reissue) PARAS 654, 673.

12 CPR 25.1(1)(e). In deciding whether to grant an interim order for the delivery up of goods the court has an unfettered discretion and will take into account the adequacy of damages as an alternative remedy and will balance the needs of the parties: *Howard E Perry & Co Ltd v British Railways Board* [1980] 2 All ER 579, [1980] 1 WLR 1375. The factors to be taken into account by the court before making an interim order for the delivery up of goods include clear evidence that the defendant is likely to dispose of the goods unless restrained by the court and some evidence of wrongdoing by the defendant: *CBS United Kingdom Ltd v Lambert* [1983] Ch 37, [1982] 3 All ER 237, CA. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

13 As to the meaning of 'jurisdiction' see PARA 117 note 6.

14 CPR 25.1(1)(f)(i). For examples of forms for a freezing injunction see *Practice Direction--Interim Injunctions* PD 25A para 6, Annex. These orders were formerly called 'Mareva injunctions', following *Mareva Cia Naviera SA v International Bulkcarriers SA, The Mareva* [1980] 1 All ER 213n, CA. See further PARA 396 et seq; and see PARA 318.

As to the form of a freezing order see also *Bank of China v NBM LLC* [2001] 4 All ER 954; affd [2001] EWCA Civ 1933, [2002] 1 All ER 717, [2002] 1 WLR 844 (as a matter of general principle, it is important that a freezing order should be clear and unequivocal so that both the parties to it and any third party know exactly where they stand; in particular, a bank domiciled or otherwise present within the jurisdiction should not be required to decide whether to act in conflict with the terms of the freezing order or in conflict with its duties to its customer under local law. . . . a proviso that such bank be permitted to comply with obligations, contractual or otherwise, under laws or court orders of the state in which assets are situated should be included in a freezing injunction in respect of assets outside the jurisdiction of the English courts unless inappropriate, rather than only included if appropriate).

The words 'his assets and/or funds' in the standard form of freezing order are not apt to cover assets and funds which belong, or are assumed to belong, beneficially to someone other than the person restrained. Rather, they are confined to assets and funds belonging to the defendant, and which are and should remain available to satisfy the claim against him. Such a construction is consistent both with everyday usage of the term 'his assets' and with the purpose of a freezing order. However, the court can make an appropriately worded order to cover assets and funds which might not belong beneficially to the defendant; eg, the order could refer to bank accounts 'in the name of' the person restrained or preferably to bank accounts identified by number and

branch. Such accounts will then be caught by the order, even if it is discovered after fuller inquiry on notice that the assets belong beneficially to a third party and that the order therefore has to be modified or discharged: see *Federal Bank of the Middle East Ltd v Hadkinson* [2000] 2 All ER 395, [2000] CPLR 295, CA.

Counsel has a duty to inform the court if a freezing order is not drawn up in the standard form: see *Memory Corp'n plc v Sidhu* [2000] All ER (D) 46, [2000] CPLR 171, CA.

15 CPR 25.1(1)(f)(ii); and see note 14.

16 CPR 25.1(1)(g). As to the meaning of 'relevant property' for these purposes see note 4. See also note 14. CPR 25(1)(g) does not give rise to disclosure of information which could be relevant in a future possible application: *Parker v CS Structured Credit Fund Ltd* [2003] All ER (D) 159 (Feb). In an application under CPR 25.1(1)(g), the applicant must show only that there is a reasonable possibility that an application for a freezing injunction will be made: *Litcher & Schwarz (a partnership) v Rubin* (2008) Times, 18 April.

17 Ie under the Civil Procedure Act 1997 s 7: see PARA 319. For a form for a search order see *Practice Direction--Interim Injunctions* PD 25A para 7.11, Annex. These orders were formerly called 'Anton Piller orders', following *Piller (Anton) KG v Manufacturing Processors Ltd* [1976] Ch 55, [1976] 1 All ER 779, CA. See also PARA 402 et seq.

18 CPR 25.1(1)(h); and see note 17.

19 CPR 25.1(1)(i). The orders referred to are orders under the Supreme Court Act 1981 s 33 or the County Courts Act 1984 s 52: see PARA 111. CPR 25.1(1)(i) is amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2), to substitute a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981. At the date at which this title states the law, no such day had been appointed.

20 CPR 25.1(1)(j). The orders referred to are orders under the Supreme Court Act 1981 s 34 or the County Courts Act 1984 s 53: see PARA 550 (disclosure), PARA 317 (inspection). CPR 25.1(1)(j) is amended, as from a day to be appointed, by virtue of the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2), to substitute a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981. At the date at which this title states the law, no such day had been appointed.

21 Ie under CPR 25.6: see PARA 324.

22 As to the meaning of 'defendant' see PARA 18.

23 As to the meaning of 'damages' see PARA 37 note 1.

24 CPR 25.1(1)(k). In the High Court power to make an order for an interim payment is derived from the Supreme Court Act 1981 s 32, and in a county court, from the County Courts Act 1984 s 50: see PARA 324. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. For guidance as to the correct approach to the making of an interim payment order see *Eeles v Cobham Hire Services Ltd* [2009] EWCA Civ 204, [2009] All ER (D) 144 (Mar).

25 CPR 25.1(1)(l).

26 CPR 25.1(1)(m).

27 As to the meaning of 'filing' see PARA 1832 note 8.

28 CPR 25.1(1)(n). Where the court orders any account to be taken or any inquiry to be made, it may, by the same or a subsequent order, give directions as to the manner in which the account is to be taken and verified or the inquiry is to be conducted: *Practice Direction--Accounts and Inquiries* PD 40 para 1.1. Every direction for the taking of an account or the making of an inquiry must be numbered in the order so that, as far as possible, each distinct account and inquiry is given its own separate number: para 1.4. An application for an order for accounts and inquiries may also be made under CPR Pt 24 (summary judgment: see PARA 524 et seq): see *Practice Direction--the Summary Disposal of Claims* PD 24 para 6. As to accounts and inquiries see further PARA 1524 et seq. See also CPR 34.2 (court's power to issue a witness summons requiring a witness to produce documents to the court at the hearing or on such date as the court may direct); and PARA 1004.

29 CPR 25.1(1)(o).

30 Ie under EC Parliament and Council Directive 2004/48 on the enforcement of intellectual property rights (OJ L157, 30.4.2004, p 45) art 9.

31 CPR 25.1(1)(p).

32 CPR 25.1(3).

33 CPR 25.1(4).

UPDATE

315 Orders for interim remedies

NOTES 19, 20--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 24--*Ee/es*, cited, reported at [2010] 1 WLR 409.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/11. INTERIM REMEDIES/316. Interim injunctions; in general.

316. Interim injunctions; in general.

Interim injunctions¹ are generally granted only when the applicant has established a serious issue to be tried, damages will not be an adequate remedy, and the balance of convenience² lies in favour of granting the injunction in that it will do more good than harm and the applicant is and will be able to compensate the respondent for any loss which the order may cause him in the event that it is later adjudged that the injunction should not have been granted³. Unless the court otherwise orders, the applicant will be required to give an undertaking to the court that he will compensate the respondent for any such loss⁴.

An interim injunction is an order made for the duration of the litigation, or part of it, at the request of a litigant (whether claimant or defendant) in order to protect that party's rights until the court can finally adjudicate the dispute. It is not intended to provide a final resolution of the issues. However, where there is no arguable defence⁵, or no dispute as to the facts⁶, or the grant of the injunction will dispose of the claim⁷, the decision on an interim injunction application is not merely provisional and the question of the balance of convenience or justice does not arise.

High Court judges and any other judge duly authorised may grant search orders⁸ and freezing injunctions⁹. In a case in the High Court, masters and district judges have the power to grant injunctions by consent, injunctions in connection with charging orders and appointments of receivers, and injunctions in aid of execution of judgments¹⁰. In any other case any judge who has jurisdiction to conduct the trial of the claim has the power to grant an injunction in that claim¹¹. A master or district judge has the power to vary or discharge an injunction granted by any judge with the consent of all the parties¹².

An order for an injunction made in the presence of all parties to be bound by it, or made at a hearing of which they have had notice, may state that it is effective until trial or further order¹³.

Any order for an injunction must set out clearly what the respondent must do or not do¹⁴.

1 As to the power to grant interim injunctions see CPR 25.1(1)(a); and PARA 315 head (1). The power to grant an injunction, whether interim or final, is derived, in the High Court, from the Supreme Court Act 1981 s 37(1) and, probably, from its inherent jurisdiction, and, in a county court, from the County Courts Act 1984 s 38; and from the County Court Remedies Regulations 1991, SI 1991/1222. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. See further PARA 383 et seq. As to the jurisdiction to grant interim injunctions see the text and notes 8-12.

2 The 'balance of convenience' might more properly be termed the 'balance of justice'; *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 at 413, [1984] 1 WLR 892 at 898, CA, per Sir John Donaldson MR.

3 The factors listed are those prescribed in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL. Note that a party's inability to compensate for irreparable harm is merely a factor in the balance of convenience (see *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL), and an impecunious applicant may be able to obtain an interim injunction (see *Allen v Jambo Holdings Ltd* [1980] 2 All ER 502, [1980] 1 WLR 1252). As to the offer of an undertaking not to rely on, or allege infringement of, any claim wider than the original application, and the lapsing of such an undertaking, see *Zipher Ltd v Markem Systems Ltd* [2009] EWCA Civ 44, [2009] All ER (D) 83 (Feb).

4 See *Practice Direction--Interim Injunctions* PD 25A para 5.1. Any order for an injunction, unless the court orders otherwise, must contain (1) an undertaking by the applicant to the court to pay any damages which the respondent(s) (or any other party served with or notified of the order) sustain which the court considers the applicant should pay; (2) if made without notice to any other party, an undertaking by the applicant to the court to serve on the respondent the application notice, evidence in support and any order made as soon as

practicable; (3) if made without notice to any other party, a return date for a further hearing at which the other party can be present; (4) if made before filing the application notice, an undertaking to file and pay the appropriate fee on the same or next working day; and (5) if made before issue of a claim form, either an undertaking to issue and pay the appropriate fee on the same or next working day, or directions for the commencement of the claim: para 5.1. When the court makes an order for an injunction, it should consider whether to require an undertaking by the applicant to pay any damages sustained by a person other than the respondent, including another party to the proceedings or any other person who may suffer loss as a consequence of the order: para 5.1A. As to service of the application notice and evidence in support see PARA 321. As to the meaning of 'filing' see PARA 1832 note 8; and as to the meaning of 'service' see PARA 138 note 2. As to court fees see PARA 87.

5 See eg *Official Custodian for Charities v Mackey* [1985] Ch 168, [1984] 3 All ER 689.

6 See eg *Bradford City Metropolitan Council v Brown* (1986) 84 LGR 731, CA.

7 See eg *NWL Ltd v Woods* [1979] 3 All ER 614, [1979] 1 WLR 1294, HL.

8 As to the meaning of 'search order' see PARA 315 head (8). As to search orders see further PARAS 319, 402 et seq.

9 *Practice Direction--Interim Injunctions* PD 25A para 1.1. As to the meaning of 'freezing injunctions' see PARA 315 head (6). As to such injunctions see further PARAS 318, 396 et seq.

10 *Practice Direction--Interim Injunctions* PD 25A para 1.2.

11 See *Practice Direction--Interim Injunctions* PD 25A para 1.3.

12 *Practice Direction--Interim Injunctions* PD 25A para 1.4.

13 *Practice Direction--Interim Injunctions* PD 25A para 5.2.

14 *Practice Direction--Interim Injunctions* PD 25A para 5.3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/11. INTERIM REMEDIES/317. Order for inspection, preservation etc of property of non-party.

317. Order for inspection, preservation etc of property of non-party.

On the application, in accordance with rules of court, of a party to any proceedings, the High Court and a county court have power, in such circumstances as may be prescribed¹, to make an order providing for any one or more of the following matters, that is to say:

512 (1) the inspection, photographing, preservation, custody and detention of property² which is not the property of, or in the possession of, any party to the proceedings but which is subject-matter of the proceedings or as to which any question arises in the proceedings; and

513 (2) the taking of samples of any such property as is mentioned in head (1) above and the carrying out of any experiment on or with any such property³.

The court may not make such an order if it considers that compliance with the order, if made, would be likely to be injurious to the public interest⁴.

1 See CPR 25.5; and PARA 323.

2 As to the meaning of 'property' for these purposes see PARA 114 note 2.

3 Supreme Court Act 1981 s 34(3) (amended by SI 1998/2940); County Courts Act 1984 s 53(3) (amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(1), (2); and SI 1998/2940). As to the procedure on such applications see PARA 323. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

4 Supreme Court Act 1981 s 35(1); County Courts Act 1984 s 54(1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/11. INTERIM REMEDIES/318. Freezing injunctions.

318. Freezing injunctions.

The court has wide powers to grant interim injunctions¹, which include the power to grant an injunction (a 'freezing injunction') preventing a defendant from disposing of assets in order to defeat a judgment². Freezing injunctions are discussed elsewhere in this title³.

1 See the Supreme Court Act 1981 s 37; and PARA 347. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 See CPR 25.1(1)(f); and PARAS 315 head (6), 396 et seq.

3 See PARA 396 et seq. See also PARA 315 head (6).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/11. INTERIM REMEDIES/319. Search orders.

319. Search orders.

The court¹ may make an order for the purpose of securing, in the case of any existing or proposed proceedings in the court, the preservation of evidence which is or may be relevant, or the preservation of property which is or may be the subject-matter of the proceedings or as to which any question arises or may arise in the proceedings². A person who is, or appears to the court likely to be, a party to proceedings in the court may make an application for such an order³.

Such an order may direct any person to permit any person described in the order, or secure that any person so described, is permitted to enter premises⁴ in England and Wales, and while on the premises, to take in accordance with the terms of the order any of the following steps⁵:

- 514 (1) to carry out a search for or inspection of anything described in the order; and
- 515 (2) to make or obtain a copy, photograph, sample or other record of anything so described⁶.

The order may also direct the person concerned to provide any person described in the order, or secure that any person so described is provided, with any information or article described⁷ in the order, and to allow any person described in the order, or secure that any person so described is allowed, to retain for safe keeping anything described in the order⁸.

An order so made is to have effect subject to such conditions as are specified in the order⁹.

These provisions do not affect any right of a person to refuse to do anything on the ground that to do so might tend to expose him or his spouse or civil partner to proceedings for an offence or for the recovery of a penalty¹⁰.

The order must be served personally by the supervising solicitor¹¹ unless the court otherwise orders, and must be accompanied by the evidence in support and any documents capable of being copied¹². It may only be served between 9.30 am and 5.30 pm Monday to Friday unless the court otherwise orders¹³ and must not be carried out at the same time as a police search warrant¹⁴.

The supervising solicitor may be accompanied only by the persons mentioned in the order¹⁵ and he must explain the terms and effect of the order to the respondent in everyday language and advise him of his right to legal advice and of his right to apply to vary or discharge the order and that he may be entitled to avail himself of legal professional privilege and the privilege against self-incrimination¹⁶.

No material must be removed unless clearly covered by the terms of the order¹⁷ and the premises must not be searched and no items may be removed from them except in the presence of the respondent or a person who appears to be a responsible employee of the respondent¹⁸.

Where material in dispute is removed pending trial, the applicant's solicitors should place it in the custody of the respondent's solicitors on their undertaking to retain it in safekeeping and to produce it to the court when required¹⁹.

The supervising solicitor must make a list of all material removed from the premises and supply a copy of the list to the respondent²⁰ and no material may be removed from the premises until the respondent has had reasonable time to check the list²¹.

The supervising solicitor must provide a report on the carrying out of the order to the applicant's solicitors²². As soon as the report is received the applicant's solicitors must serve a copy of it on the respondent and file a copy of it with the court²³.

1 For these purposes, 'court' means the High Court: Civil Procedure Act 1997 s 7(8).

2 Civil Procedure Act 1997 s 7(1). See also PARAS 315 head (8), 402 et seq. See further *Elvee Ltd v Taylor* [2001] EWCA Civ 1943, [2002] FSR 738 (application to set aside a search and seizure order, which had been executed, refused because respondent would have been able to seek an order for specific disclosure of any potentially relevant material which it had thereby discovered).

3 Civil Procedure Act 1997 s 7(2).

4 For these purposes, 'premises' includes any vehicle: Civil Procedure Act 1997 s 7(8).

5 Civil Procedure Act 1997 s 7(3).

6 Civil Procedure Act 1997 s 7(4).

7 An order under the Civil Procedure Act 1997 s 7 may describe anything generally, whether by reference to a class or otherwise: s 7(8).

8 Civil Procedure Act 1997 s 7(5).

9 Civil Procedure Act 1997 s 7(6).

10 Civil Procedure Act 1997 s 7(7) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 154). However, there is no privilege against self incrimination in intellectual property cases: see the Supreme Court Act 1981 s 72 (amended by virtue of the Patents, Designs and Marks Act 1986 s 2(3), Sch 2 para 1(2)(h); and by the Copyright, Designs and Patents Act 1988 s 303(1), Sch 7 para 28(1), (2); and the Civil Partnership Act 2004 Sch 27 para 69), proceedings for the recovery or administration of any property, for the execution of any trust or for an account of any property or dealings with property in relation to offences under the Theft Act 1968 (see s 31 (amended by the Civil Partnership Act 2004 Sch 27 para 28)); or proceedings in which a court is hearing an application for an order under the Children Act 1989 Pt IV (ss 31-42) or Pt V (ss 43-52) (see s 98 (amended by the Civil Partnership Act 2004 Sch 27 para 132)); however, the privilege may still be claimed in relation to material or information required to be disclosed by an order, as regards potential criminal proceedings outside those statutory provisions: see *Practice Direction--Interim Injunctions* PD 25A para 7.9. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. See also the Fraud Act 2006 s 13(1), under which a person is not to be excused from answering any question put to him in proceedings relating to property or complying with any order made in proceedings relating to property, on the ground that doing so may incriminate him or his spouse or civil partner of an offence under that Act or a related offence; and see *Kensington International Ltd v Republic of Congo* [2007] EWCA Civ 1128, [2008] 1 All ER (Comm) 934, [2008] 1 WLR 1144. The privilege against self incrimination does not extend to documents and things that have an independent existence: *C plc v P* [2007] EWCA Civ 493, [2007] 3 All ER 1034. As to privilege against self incrimination in the context of disclosure and production for inspection of documents see PARA 580.

11 The supervising solicitor must be experienced in the operation of search orders. A supervising solicitor may be contacted either through the Law Society or, for the London area, through the London Solicitors Litigation Association: *Practice Direction--Interim Injunctions* PD 25A para 7.2. The supervising solicitor must not be an employee or member of the applicant's firm of solicitors: para 7.6.

12 *Practice Direction--Interim Injunctions* PD 25A para 7.4(1). As to evidence in support see para 7.3. Confidential exhibits need not be served but must be made available for inspection subject to certain conditions: see para 7.4(2).

13 *Practice Direction--Interim Injunctions* PD 25A para 7.4(6).

14 *Practice Direction--Interim Injunctions* PD 25A para 7.8.

15 *Practice Direction--Interim Injunctions* PD 25A para 7.4(3). Where the supervising solicitor is a man and the respondent is likely to be an unaccompanied woman, at least one other person named in the order must be a woman and must accompany the supervising solicitor: para 7.4(5).

16 *Practice Direction--Interim Injunctions* PD 25A para 7.4(4). As to legal professional privilege see PARA 558 et seq.

17 *Practice Direction--Interim Injunctions* PD 25A para 7.5(1).

18 *Practice Direction--Interim Injunctions* PD 25A para 7.5(2). Where copies of documents are sought, the documents should be retained for no more than two days before return to the owner: para 7.5(3).

19 *Practice Direction--Interim Injunctions* PD 25A para 7.5(4). In appropriate cases the applicant should insure the material retained in the respondent's solicitors' custody: para 7.5(5).

20 *Practice Direction--Interim Injunctions* PD 25A para 7.5(6).

21 *Practice Direction--Interim Injunctions* PD 25A para 7.5(7). If any of the listed items exists only in computer readable form, the respondent must immediately give the applicant's solicitors effective access to the computers, with all necessary passwords, to enable them to be searched, and cause the listed items to be printed out: para 7.5(8). Where, however, the supervising solicitor is satisfied that full compliance with para 7.5(7), (8) is impracticable, he may permit the search to proceed and items to be removed without compliance with the impracticable requirements: para 7.5(13). The applicant must take all reasonable steps to ensure that no damage is done to any computer or data; and the applicant and his representatives may not themselves search the respondent's computers unless they have sufficient expertise to do so without damaging the respondent's system: para 7.5(9), (10).

22 *Practice Direction--Interim Injunctions* PD 25A para 7.5(11).

23 *Practice Direction--Interim Injunctions* PD 25A para 7.5(12). For an example of a case where such an order was discharged on the grounds that the application had not generally been presented in accordance with the highest standard of fairness expected of applicants for such orders see *Gadget Shop Ltd v Bug.Com Ltd* [2000] IP & T 1193.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/11. INTERIM REMEDIES/320. Time when an order for an interim remedy may be made.

320. Time when an order for an interim remedy may be made.

An order for an interim remedy may be made at any time, including before proceedings are started¹ and after judgment has been given². This is, however, subject to any rule, practice direction or other enactment which provides otherwise³. Moreover, the court may grant an interim remedy before a claim has been made⁴ only if the matter is urgent or it is otherwise desirable to do so in the interests of justice⁵. Unless the court otherwise orders, a defendant⁶ may not apply for any of the specified orders for interim remedies⁷ before he has filed⁸ either an acknowledgment of service⁹ or a defence¹⁰.

Where it grants an interim remedy before a claim has been commenced, the court should give directions requiring a claim to be commenced¹¹ but need not do so, in particular, where the application is made for an order for disclosure of documents or inspection of property before commencement of a claim¹².

1 CPR 25.2(1)(a). Proceedings are started when the court issues a claim form: see CPR 7.2; and PARA 118.

2 CPR 25.2(1)(b). As to judgment see PARA 1136 et seq.

3 CPR 25.2(2)(a).

4 As to pre-action remedies see PARA 111 et seq.

5 CPR 25.2(2)(b).

6 As to the meaning of 'defendant' see PARA 18.

7 I.e. the remedies listed in CPR 25.1(1): see PARA 315.

8 As to the meaning of 'filing' see PARA 1832 note 8.

9 As to filing an acknowledgment of service see CPR Pt 10; and PARAS 184, 186.

10 CPR 25.2(2)(c). As to filing a defence see CPR Pt 15; and PARA 199 et seq.

11 CPR 25.2(3).

12 CPR 25.2(4). The orders referred to in the text are orders under the Supreme Court Act 1981 s 33 or the County Courts Act 1984 s 52: see PARAS 111, 114. As to the procedure on an application for such an order see CPR 25.5; and PARA 323. CPR 25.2(4) is amended, as from a day to be appointed, by virtue of the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2), to substitute a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981. At the date at which this title states the law, no such day had been appointed.

UPDATE

320 Time when an order for an interim remedy may be made

NOTE 12--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/11. INTERIM REMEDIES/321. How to apply for an interim remedy.

321. How to apply for an interim remedy.

The court¹ may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice². Such applications for interim injunctions may be made whether or not the claim form has been issued³ and in cases of extreme urgency may be dealt with by telephone⁴.

An application for an interim remedy must be supported by evidence, unless the court orders otherwise⁵. If the applicant makes an application without giving notice, the evidence in support of the application must state the reasons why notice has not been given⁶.

1 As to the meaning of 'court' see PARA 22.

2 CPR 25.3(1). The application notice for an interim injunction must state the order sought and the date, time and place of the hearing: *Practice Direction--Interim Injunctions* PD 25A para 2.1. The application notice and evidence in support must be served as soon as practicable after issue and in any event not less than three days before the court is due to hear the application: para 2.2; and see CPR 23.7(1), (2), (4); and PARA 307. Where the court is to serve, sufficient copies of the application notice and evidence in support for the court and for each respondent should be filed for issue and service: *Practice Direction--Interim Injunctions* PD 25A para 2.3. Whenever possible a draft of the order sought is to be filed with the application notice and a disk containing the draft should also be available to the court. This will enable the court officer to arrange for any amendments to be incorporated and for the speedy preparation and sealing of the order: para 2.4. For general rules about making applications see CPR Pt 23; and PARA 303 et seq. See in particular CPR 23.4 (notice of applications); CPR 23.7 (service of the application notice); CPR 23.4(2) (circumstances in which an application may be made without notice); and PARA 307. As to the meaning of 'injunction' see PARA 315 note 2; as to the meaning of 'service' see PARA 138 note 2; as to the meaning of 'filing' see PARA 1832 note 8; as to the meaning of 'seal' see PARA 81 note 2; and as to time limits generally see PARA 88 et seq.

As to the procedure where the parties are agreed as to the terms of an interim order see *Practice Statement (Administrative Court: uncontested proceedings)* [2009] 1 All ER 651.

3 *Practice Direction--Interim Injunctions* PD 25A para 4.1. As to applications dealt with at a court hearing after issue of a claim form see para 4.3; as to those dealt with at a hearing before such issue see para 4.4.

4 See *Practice Direction--Interim Injunctions* PD 25A para 4.2. As to applications dealt with by telephone see para 4.5.

5 CPR 25.3(2). Applications for search orders and freezing injunctions must be supported by affidavit evidence, ie evidence on oath: see *Practice Direction--Interim Injunctions* PD 25A para 3.1. Applications for other interim injunctions must be supported by evidence set out in either a witness statement, or a statement of case provided that it is verified by a statement of truth, or the application provided that it is verified by a statement of truth, unless the court, an Act, a rule or a practice direction requires evidence by affidavit: para 3.2. The evidence must set out the facts on which the applicant relies for the claim being made against the respondent, including all material facts of which the court should be made aware: para 3.3. As to the meaning of 'search order' see PARA 315 head (8) in the text; as to the meaning of 'freezing injunction' see PARA 315 head (6) in the text; and as to statements of truth see CPR Pt 22; and PARA 613 et seq. As to freezing injunctions see further PARAS 318, 396 et seq. As to disclosure of material facts see PARA 399 note 3, and as to evidence generally see CPR Pt 32; and PARA 749 et seq.

6 CPR 25.3(3). See also *Practice Direction--Interim Injunctions* PD 25A para 3.4. Where the respondent is not present at the hearing it is the responsibility of counsel and solicitors to take a full note of what is said, and it is wrong as a matter of principle to expect that a transcript of the application will be available: *Cinpres Gas Injection Ltd v Melea Ltd* [2005] EWHC 3180 (Pat), (2005) Times, 21 December.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/11. INTERIM REMEDIES/322. Application for an interim remedy where there is no related claim.

322. Application for an interim remedy where there is no related claim.

Where a party wishes to apply for an interim remedy in relation to proceedings which are taking place, or will take place, outside the jurisdiction¹, or for an order for disclosure of documents or inspection of property before a claim has been commenced², the application must be made in accordance with the general rules³ about applications⁴.

¹ CPR 25.4(1)(a). The power to grant such interim remedies is contained in the Civil Jurisdiction and Judgments Act 1982 s 25 in relation to proceedings in the courts of countries parties to the Brussels and Lugano Conventions (as defined in the Civil Jurisdiction and Judgments Act 1982 s 1(1) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65); and by virtue of the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997, SI 1997/302, in relation to proceedings in the courts of other countries (see art 2).

² CPR 25.4(1)(b). As to pre-action disclosure or inspection of property see the Supreme Court Act 1981 s 33; the County Courts Act 1984 s 52; CPR 25.5; CPR 31.16; and PARAS 111-112, 114, 323. As to the meaning of 'disclosure' see PARA 538. CPR 25.4(1)(b) is amended, as from a day to be appointed, by virtue of the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2), to substitute a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981. At the date at which this title states the law, no such day had been appointed.

³ ie in accordance with CPR Pt 23: see PARA 303 et seq.

⁴ CPR 25.4(1), (2). See also CPR 31.17 (disclosure against non-parties); and PARA 550.

UPDATE

322 Application for an interim remedy where there is no related claim

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/11. INTERIM REMEDIES/323. Procedure for inspection of property before commencement or against a non-party.

323. Procedure for inspection of property before commencement or against a non-party.

Where a person makes an application for the inspection, photographing, preservation, custody or detention of property either before the commencement of proceedings¹ or against a non-party², the evidence in support must show, if practicable by reference to any statement of case³ prepared in relation to the proceedings or anticipated proceedings, that the property is or may become the subject matter of such proceedings⁴ or is relevant to the issues that will arise in relation to such proceedings⁵.

A copy of the application notice and a copy of the evidence in support must be served⁶ on the person against whom the order is sought⁷ and, in relation to applications against a non-party⁸, on every party to the proceedings other than the applicant⁹.

1 le under the Supreme Court Act 1981 s 33(1) or the County Courts Act 1984 s 52(1): see PARA 114. CPR 25.5 is amended, as from a day to be appointed, by virtue of the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2), to substitute a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981. At the date at which this title states the law, no such day had been appointed.

2 le under the Supreme Court Act 1981 s 34(3) or the County Courts Act 1984 s 53(3): see PARA 317. CPR 25.5 is amended, as from a day to be appointed, by virtue of the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2), to substitute a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981. At the date at which this title states the law, no such day had been appointed.

3 As to the meaning of 'statement of case' see PARA 584.

4 CPR 25.5(1), (2)(a).

5 CPR 25.5(1), (2)(b).

6 As to the meaning of 'service' see PARA 138 note 2.

7 CPR 25.5(3)(a).

8 See note 2.

9 CPR 25.5(3)(b).

UPDATE

323 Procedure for inspection of property before commencement or against a non-party

NOTES 1, 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/11. INTERIM REMEDIES/324. Interim payments; in general.

324. Interim payments; in general.

Provision has been made by the Civil Procedure Rules under the relevant powers set out in the Supreme Court Act 1981¹ and the County Courts Act 1984² for enabling the High Court or a county court to make an order requiring a party to the proceedings to make an interim payment³ of such amount as may be specified in the order⁴.

The claimant⁵ may not apply for an order for an interim payment before the end of the period for filing an acknowledgment of service⁶ applicable to the defendant⁷ against whom the application is made⁸. He may, however, make more than one application for such an order⁹.

A copy of an application notice for an order for an interim payment must be served at least 14 days before the hearing of the application¹⁰ and must be supported by evidence¹¹. If the respondent to an application for such an order wishes to rely on written evidence at the hearing, he must file the written evidence and serve copies on every other party to the application, at least seven days before the hearing of the application¹². If the applicant wishes to rely on written evidence in reply, he must file the written evidence and serve a copy on the respondent, at least three days before the hearing of the application¹³.

The court¹⁴ may order an interim payment in one sum or in instalments¹⁵.

1 See the Supreme Court Act 1981 s 32. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 See the County Courts Act 1984 s 50 (amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(1)-(3)).

3 For these purposes, 'interim payment', in relation to a party to any proceedings, means a payment on account of any damages, debt or other sum (excluding any costs) which that party may be held liable to pay to or for the benefit of another party to the proceedings if a final judgment or order of the court in the proceedings is given or made in favour of that other party: see the Supreme Court Act 1981 s 32(5); the County Courts Act 1984 s 50(5). See also CPR 25.1(1)(k); and PARA 315 head (11) in the text.

4 See the Supreme Court Act 1981 s 32(1); the County Courts Act 1984 s 50 (as amended: see note 2); CPR 25.6-25.9; the text and notes 5-15; and PARAS 325-328. Rules of court so made may include provision for enabling a party to any proceedings who, in pursuance of such an order, has made an interim payment, to recover the whole or part of the amount of the payment in such circumstances, and from such other party to the proceedings, as may be determined in accordance with the rules: Supreme Court Act 1981 s 32(2); County Courts Act 1984 s 50(2) (as amended: see note 2). Any rules so made may include such incidental, supplementary and consequential provisions as the Civil Procedure Rule Committee may consider necessary or expedient: Supreme Court Act 1981 s 32(3); County Courts Act 1984 s 50(3) (as amended: see note 2). Nothing in the relevant provisions, however, is to be construed as affecting the exercise of any power relating to costs, including any power to make rules of court relating thereto: Supreme Court Act 1981 s 32(4); County Courts Act 1984 s 50(4) (as amended: see note 2). As to the Civil Procedure Rule Committee see PARA 25.

5 As to the meaning of 'claimant' see PARA 18.

6 As to the period for filing an acknowledgment of service see CPR 10.3; and PARA 186. As to the meaning of 'filing' see PARA 1832 note 8; and as to the meaning of 'service' see PARA 138 note 2.

7 As to the meaning of 'defendant' see PARA 18.

8 CPR 25.6(1).

9 CPR 25.6(2).

10 CPR 25.6(3)(a).

11 CPR 25.6(3)(b). An application for an interim payment of damages must be supported by evidence dealing with the following: (1) the sum of money sought by way of an interim payment; (2) the items or matters in respect of which the interim payment is sought; (3) the sum of money for which final judgment is likely to be given; (4) the reasons for believing that the conditions set out in CPR 25.7 (see PARA 325) are satisfied; (5) any other relevant matters; (6) in claims for personal injuries, details of special damages and past and future loss; and (7) in a claim under the Fatal Accidents Act 1976 (see **DAMAGES** vol 12(1) (Reissue) PARA 932 et seq), details of the person(s) on whose behalf the claim is made and the nature of the claim: *Practice Direction--Interim Payments* PD 25B para 2.1. Any documents in support of the application must be exhibited, including, in personal injuries claims, the medical report(s): para 2.2. As to the meaning of 'claim for personal injuries' see PARA 19; and as to the meaning of 'damages' see PARA 37 note 1.

12 CPR 25.6(4); *Practice Direction--Interim Payments* PD 25B para 2.3. CPR 25.6 does not, however, require written evidence to be filed if it has already been filed or to be served on a party on whom it has already been served: CPR 25.6(6). See also CPR 23.7(5)(a); and PARA 307. Form N244 Pts B, C and Form PF244 Pts B, C in *The Civil Court Practice* (forms for application notices: see PARA 306 note 6) provide for the applicant to give details of the documents containing the evidence upon which he intends to rely.

13 CPR 25.6(5); *Practice Direction--Interim Payments* PD 25B para 2.4; and see note 12.

14 As to the meaning of 'court' see PARA 22.

15 CPR 25.6(7). Where an interim payment is to be paid in instalments the order must set out (1) the total amount of the payment; (2) the amount of each instalment; (3) the number of instalments and the date on which each is to be paid; and (4) to whom the payment should be made: *Practice Direction--Interim Payments* PD 25B para 3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/11. INTERIM REMEDIES/325. Interim payments; conditions to be satisfied and matters to be taken into account.

325. Interim payments; conditions to be satisfied and matters to be taken into account.

The court¹ may only make an order for an interim payment² where any of the following conditions are satisfied:

- 516 (1) the defendant³ against whom the order is sought has admitted liability to pay damages⁴ or some other sum of money to the claimant⁵;
- 517 (2) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (other than costs) to be assessed⁶;
- 518 (3) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for an interim payment whether or not that defendant is the only defendant or one of a number of defendants to the claim⁷;
- 519 (4) the following conditions are satisfied⁸:
64
 - 7. (a) the claimant is seeking an order for possession of land (whether or not any other order is also sought)⁹; and
 - 8. (b) the court is satisfied that, if the case went to trial, the defendant would be held liable (even if the claim for possession fails) to pay the claimant a sum of money for the defendant's occupation and use of the land while the claim for possession was pending¹⁰;
- 65 520 (5) in a claim in which there are two or more defendants and the order is sought against any one or more of those defendants, the following conditions are satisfied¹¹:
66
 - 9. (a) the court is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against at least one of the defendants (but the court cannot determine which)¹²; and
 - 10. (b) all the defendants are either a defendant that is insured in respect of the claim, a defendant whose liability will be met by an insurer under the statutory provisions relating to third party risks¹³ or an insurer acting under the Motor Insurers Bureau Agreement, or the Motor Insurers Bureau where it is acting itself, or a defendant that is a public body¹⁴.
- 67

The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment¹⁵. In considering the amount of an interim payment the court must take into account contributory negligence¹⁶ and any relevant set-off or counterclaim¹⁷.

The court's permission must be obtained before making a voluntary interim payment in respect of a claim by a child¹⁸ or protected party¹⁹.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'interim payment' see PARA 324 note 3.

3 As to the meaning of 'defendant' see PARA 18.

4 As to the meaning of 'damages' see PARA 37 note 1.

5 CPR 25.7(1)(a). As to the meaning of 'claimant' see PARA 18. The court will only make an order for interim payment of a disputed sum in exceptional circumstances: *Capital One Developments Ltd v Customs and Excise Comrs* [2002] EWHC 197 (Ch), [2002] STC 479 (no order where taxpayer sought interim payment of disputed sum on basis that it would be repaid if appeal was lost). See also *R (on the application of Teleos plc) v Customs and Excise Comrs* [2005] EWCA Civ 200, [2005] 1 WLR 3007.

6 CPR 25.7(1)(b).

7 CPR 25.7(1)(c).

8 CPR 25.7(1)(d).

9 CPR 25.7(1)(d)(i).

10 CPR 25.7(1)(d)(ii).

11 CPR 25.7(1)(e).

12 CPR 25.7(1)(e)(i).

13 le under the Road Traffic Act 1988 s 151: see **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 951.

14 CPR 25.7(1)(e)(ii).

15 CPR 25.7(4).

16 CPR 25.7(5)(a).

17 CPR 25.7(5)(b). As to the meaning of 'counterclaim' see PARA 618 note 3. As to interim payments where the court has ordered an account to be taken see *Practice Direction--Interim Payments* PD 25B para 2A. The fact that a sum paid out may be irrecoverable by reason of the applicant's insolvency does not preclude the making of an interim payment under CPR 25.7: *Harmon CFEM Façades (UK) Ltd v Corporate Officer of the House of Commons* (2000) 72 Con LR 21, [2000] All ER (D) 1046.

18 As to the meaning of 'child' see PARA 222 note 3.

19 *Practice Direction--Interim Payments* PD 25B para 1.2. As to the meaning of 'protected party' see PARA 222 note 1.

UPDATE

325 Interim payments; conditions to be satisfied and matters to be taken into account

NOTE 7--See *Heidelberg Graphic Equipment Ltd v Revenue and Customs Comrs* [2009] EWHC 870 (Ch), [2009] STC 2334.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/11. INTERIM REMEDIES/326. Compensation recovery payments.

326. Compensation recovery payments.

Where in a claim for personal injuries¹ there is an application for an interim payment of damages² which is other than by consent and which either (1) falls under the relevant heads of damage set out in the Social Security (Recovery of Benefits) Act 1997³ in respect of recoverable benefits⁴ received by the claimant⁵; or (2) includes damages in respect of a disease for which a lump sum payment⁶ has been, or is likely to be made, and where the defendant⁷ is liable to pay a recoverable amount⁸ to the Secretary of State, the defendant should obtain from the Secretary of State a certificate⁹. A copy of the certificate should be filed¹⁰ at the hearing of the application for an interim payment¹¹.

The order will set out the deductible amount¹² and the payment made to the claimant will be the net amount¹³.

1 As to the meaning of 'claim for personal injuries' see PARA 19.

2 As to the meaning of 'interim payment' see PARA 324 note 3; and as to the meaning of 'damages' see PARA 37 note 1.

3 The set out in the Social Security (Recovery of Benefits) Act 1997 s 8(1), Sch 2 col 1: see **DAMAGES** vol 12(1) (Reissue) PARA 919.

4 The recoverable benefits as set out in the Social Security (Recovery of Benefits) Act 1997 Sch 2 col 2: see **DAMAGES** vol 12(1) (Reissue) PARA 919.

5 As to the meaning of 'claimant' see PARA 18.

6 The within the definition in the Social Security (Recovery of Benefits) Act 1997 s 1A(2): see **DAMAGES**.

7 As to the meaning of 'defendant' see PARA 18.

8 The as defined in CPR 36.15(1)(c): see PARA 741 note 5.

9 The a certificate as defined in CPR 36.15(1)(e) (see PARA 741 note 9): *Practice Direction--Interim Payments* PD 25B para 4.1. As to certificates of recoverable benefits and recoverable lump sum payments see **DAMAGES** vol 12(1) (Reissue) PARA 906 et seq.

10 As to the meaning of 'filing' see PARA 1832 note 8.

11 *Practice Direction--Interim Payments* PD 25B para 4.2.

12 *Practice Direction--Interim Payments* PD 25B para 4.3.

13 *Practice Direction--Interim Payments* PD 25B para 4.4. The interim payment for the purposes of para 5 (see PARA 327 note 8) will, however, be the gross amount: para 4.4. See further *Practice Direction--Judgments and Orders* PD 40B paras 5.1, 5.1A, 5.2; and PARA 1151.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/11. INTERIM REMEDIES/327. Powers of court where it has made an order for interim payment.

327. Powers of court where it has made an order for interim payment.

Where a defendant¹ has been ordered to make an interim payment², or has in fact made an interim payment (whether voluntarily³ or under an order), the court⁴ may make an order to adjust the interim payment⁵. The court may in particular order all or part of the interim payment to be repaid⁶, vary or discharge the order for the interim payment⁷ or order a defendant to reimburse, either wholly or partly, another defendant who has made an interim payment⁸. The court may make an order ordering such reimbursement, however, only if the defendant to be reimbursed made the interim payment in relation to a claim in respect of which he has made a claim against the other defendant for a contribution⁹, indemnity¹⁰ or other remedy¹¹ and, where the claim or part to which the interim payment relates has not been discontinued or disposed of, the circumstances are such that the court could make an order¹² for interim payment¹³.

The court may make an order under these provisions without an application by any party if it makes the order when it disposes of the claim or any part of it¹⁴. Where a defendant has made an interim payment and the amount of the payment is more than his total liability under the final judgment or order, the court may award him interest on the overpaid amount from the date when he made the interim payment¹⁵.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'interim payment' see PARA 324 note 3.

3 As to voluntary payments in respect of a claim by a child or a protected party see PARA 325 text and notes 18-19. As to the meanings of 'child' and 'protected party' see PARA 222 notes 3, 1 respectively.

4 As to the meaning of 'court' see PARA 22.

5 CPR 25.8(1).

6 CPR 25.8(2)(a).

7 CPR 25.8(2)(b).

8 CPR 25.8(2)(c). This provision allows final adjustment of amounts paid by way of interim payments by one or more of a number of defendants under CPR 25.7(1)(e): see PARA 325 text and notes 11-14. In a final judgment where an interim payment has previously been made which is less than the total amount awarded by the judge, the order should set out in a preamble the total amount awarded by the judge and the amounts and dates of the interim payment(s): *Practice Direction--Interim Payments* PD 25B para 5.2. The total amount awarded by the judge should then be reduced by the total amount of any interim payments, and an order made for entry of judgment and payment of the balance: para 5.3. In a final judgment where an interim payment has previously been made which is more than the total amount awarded by the judge, the order should set out in a preamble the total amount awarded by the judge and the amounts and dates of the interim payment(s): para 5.4. An order should then be made for repayment, reimbursement, variation or discharge under CPR 25.8(2) and for interest on an overpayment under CPR 25.8(5) (see the text and note 15): *Practice Direction--Interim Payments* PD 25B para 5.5. For these purposes, 'judgment' means any order to pay a sum of money, a final award of damages and an assessment of damages: para 5.1. For further information concerning adjustment of the final judgment sum see *Practice Direction--Judgments and Orders* PD 40B para 6; and PARA 1151.

9 As to the meaning of 'contribution' see PARA 618 note 5.

10 As to the meaning of 'indemnity' see PARA 232 note 33.

11 CPR 25.8(3)(a).

12 le under CPR 25.7: see PARA 325.

13 CPR 25.8(3)(b).

14 CPR 25.8(4).

15 CPR 25.8(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/11. INTERIM REMEDIES/328. Restriction on disclosure of an interim payment.

328. Restriction on disclosure of an interim payment.

The fact that a defendant¹ has made an interim payment², whether voluntarily³ or by court order, must not be disclosed to the trial judge⁴ until all questions of liability and the amount of money to be awarded have been decided, unless the defendant agrees⁵.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'interim payment' see PARA 324 note 3.

3 As to voluntary interim payments in respect of a claim by a child or protected party see PARA 325 text and notes 18-19. As to the meanings of 'child' and 'protected party' see PARA 222 notes 3, 1 respectively.

4 As to the meaning of 'judge' see PARA 49.

5 CPR 25.9.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/11. INTERIM REMEDIES/329. Interim injunction ceasing if claim stayed or struck out.

329. Interim injunction ceasing if claim stayed or struck out.

If the court¹ has granted an interim injunction² other than a freezing injunction³ and the claim is stayed⁴ other than by agreement between the parties, the interim injunction must be set aside⁵ unless the court orders that it is to continue to have effect even though the claim is stayed⁶.

If the court has granted an interim injunction and the claim is struck out for non-payment of certain fees⁷, the interim injunction ceases to have effect 14 days after the date that the claim is struck out unless the claimant⁸ applies to reinstate the claim before the end of that period⁹. If he does so, the interim injunction continues until the hearing of the application unless the court orders otherwise¹⁰.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'injunction' see PARA 315 note 2.

3 As to the meaning of 'freezing injunctions' see PARA 315 head (6).

4 As to the meaning of 'stay' see PARA 233 note 11.

5 As to the meaning of 'set aside' see PARA 197 note 6.

6 CPR 25.10.

7 I.e. under CPR 3.7 (sanctions for non-payment of certain fees): see PARA 253. As to the meaning of 'striking out' see PARA 218 note 2.

8 As to the meaning of 'claimant' see PARA 18.

9 CPR 25.11(1), (2). As to time limits generally see PARA 88 et seq.

10 CPR 25.11(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/11. INTERIM REMEDIES/330. Order that solicitor has ceased to act or for removal of solicitor who has ceased to act.

330. Order that solicitor has ceased to act or for removal of solicitor who has ceased to act.

A solicitor may apply for an order declaring that he has ceased to be the solicitor acting for a party¹.

Where a solicitor who has acted for a party has died, has become bankrupt, has ceased to practise or cannot be found, and the party has not given notice of a change of solicitor or notice of intention to act in person², any other party may apply for an order declaring that the solicitor has ceased to be the solicitor acting for the other party in the case³.

The procedure on such applications is discussed elsewhere in this title⁴.

1 See CPR 42.3; and PARA 242. As to when a solicitor is acting for a party for these purposes see PARA 240 the text and note 4.

2 Ie notice as required by CPR 42.2(2): see PARA 241.

3 See CPR 42.4; and PARA 243.

4 See PARAS 242-243.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(i) The Nature of the Relief/A. TYPES OF INJUNCTION/331. Meaning of 'injunction'.

12. INJUNCTIONS

(1) THE REMEDY AND THE JURISDICTION

(i) The Nature of the Relief

A. TYPES OF INJUNCTION

331. Meaning of 'injunction'.

An injunction is a judicial remedy by which a person is ordered to refrain from doing or ordered to do a particular act or thing. In the former case it is called a prohibitory or restrictive injunction¹, and in the latter a mandatory injunction². Either type of injunction may be interim³ or perpetual. An injunction is a remedy of an equitable nature⁴, and therefore acts in personam⁵. Accordingly, an injunction affecting land does not run with the land⁶.

1 See PARA 356 et seq.

2 See PARA 376 et seq. As to the meaning of 'injunction' in the Civil Procedure Rules see PARA 315 note 2.

3 See PARA 383 et seq. As to mandatory injunctions on interim applications see PARAS 316, 378.

4 As to the nature and extent of the equitable remedy by way of injunction see **EQUITY**. As to the discretionary nature of an injunction see PARA 346.

5 *Eastern Trust Co v McKenzie, Mann & Co Ltd*[1915] AC 750, PC.

6 *A-G v Birmingham, Tame and Rea Drainage Board*(1881) 17 ChD 685, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(i) The Nature of the Relief/A. TYPES OF INJUNCTION/332. Mandatory injunctions.

332. Mandatory injunctions.

Formerly the Court of Chancery would not direct the performance of a positive act, but by restraining a defendant from allowing things to remain as they were, as, for example, from allowing buildings to remain on land, indirectly accomplished the same result. An order so framed was called a mandatory order; but now all mandatory injunctions should be in the direct mandatory form, as, for example, by directing buildings to be pulled down and removed¹.

¹ See PARA 417. A mandatory order (formerly an order of mandamus) is similar in many respects to a mandatory injunction as a means of obtaining relief: see **JUDICIAL REVIEW** vol 61 (2010) PARA 703.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(i) The Nature of the Relief/A. TYPES OF INJUNCTION/333. Perpetual injunctions.

333. Perpetual injunctions.

A perpetual injunction is granted after a final determination of the rights of the parties. It obviates the necessity of bringing action after action in respect of every infringement of the rights so determined¹.

¹ See *Directors of Imperial Gas Light and Coke Co v Broadbent* (1859) 7 HL Cas 600.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(i) The Nature of the Relief/A. TYPES OF INJUNCTION/334. Interim injunctions.

334. Interim injunctions.

The object of an interim injunction is to preserve matters pending the trial of matters in dispute¹, and an interim injunction may be granted without notice in an emergency². With limited exceptions the person applying for an interim injunction must always give an undertaking to pay damages in case it should turn out at the hearing that he is in the wrong³. Such an injunction is usually so framed as to continue in force only until the hearing of the cause or until further order⁴. It cannot be considered in argument as affecting the ultimate decision of a cause⁵. It does not assume finally to dispose of the question of the legal right⁶, and will only impose such restraint as may suffice to stop the mischief complained of, or, where the object is to stay further injury, to keep things as they are at the moment⁷. Such an injunction is in effect a substitute for the damages which might be assessed for the period between the issuing of the writ and the trial⁸.

1 *Plimpton v Spiller* (1876) 4 ChD 286, CA; *Black Point Syndicate Ltd v Eastern Concessions Ltd* (1898) 79 LT 658. See PARA 383 et seq.

2 *Beese v Woodhouse* [1970] 1 All ER 769, [1970] 1 WLR 586, CA. There is jurisdiction to grant an injunction without notice where the judge concludes on a prima facie view that otherwise irreparable damage may be done to the claimant before an application for an interim injunction can be heard, after notice given to the other party: see *Beese v Woodhouse* [1970] 1 All ER 769, [1970] 1 WLR 586, CA; and PARA 321. Where an application is made without notice to the respondent, the evidence must also set out why notice was not given: see *Practice Direction--Interim Injunctions* PD 25A para 3.4. As to interim injunctions see further PARA 316. A person who seeks an injunction without notice is under a duty to make full and frank disclosure of all the material facts; if he fails in that duty he is at risk of being denied interim relief although the court retains a discretion to grant relief even if there has been non-disclosure or worse: *W v H (Family Division: without notice orders)* [2001] 1 All ER 300.

3 As to undertakings in damages see PARA 419.

4 As to the form of interim order see PARA 414.

5 *Drew v Harman* (1818) 5 Price 319.

6 *Harman v Jones* (1841) Cr & Ph 299; *Preston v Luck* (1884) 27 ChD 497, CA.

7 *Blakemore v Glamorganshire Canal Navigation* (1832) 1 My & K 154; *Harman v Jones* (1841) Cr & Ph 299.

8 *Read v Wotton* [1893] 2 Ch 171; but see *Wheeler v Keeble (1914) Ltd* [1920] 1 Ch 57, where an injunction against breaches of covenant in a lease was claimed as ancillary to an action for possession. It was held that since the issue of the writ operated to determine the lease an interim injunction could not be granted on the footing that the lease was subsisting. Where, however, the claim for an injunction is an alternative claim and not ancillary to a claim for possession, then the lease is not determined by the claim for possession: *Calabar Properties Ltd v Seagull Autos Ltd* [1969] 1 Ch 451, [1968] 1 All ER 1, following *Moore v Ullcoats Mining Co Ltd* [1908] 1 Ch 575. See **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 609.

UPDATE

334 Interim injunctions

NOTE 1--See *Ericsson AB v EADS Defence and Security Systems Ltd* [2009] EWHC 2598 (TCC), (2010) 127 ConLR 168, DC (no breach of contract by defendant to exercise right

of termination while dispute under contract referred to adjudication and claimant allowed to pursue remedies in adjudication in relation to delay and termination; injunctions refused).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(i) The Nature of the Relief/B. ANCILLARY AND ALTERNATIVE RELIEF/335. Accounts.

B. ANCILLARY AND ALTERNATIVE RELIEF

335. Accounts.

Where a person establishes his right to a perpetual injunction, the court will also, where the case so requires, grant him an account, so that his remedy may be complete¹; but before the Judicature Acts, if for any reason the injunction was refused, there could be no account, for there was nothing to which the jurisdiction of equity could attach, the right to an account being dependent on the right to the injunction², except in the case of mines³. The right to an account may be lost by delay⁴, even though an injunction is granted⁵. The account is limited to the actual profits made by the wrong-doer, and cannot be extended so as to cover the damage sustained by reason of merely tortious acts unaccompanied by profit⁶. At common law, the account was limited to a period of six years before the date of the commencement of the proceedings⁷, except in cases of fraud⁸, but the period is now the time limit applicable to the claim which is the basis of the duty to account⁹.

1 *Baily v Taylor* (1829) 1 Russ & M 73; *Smith v London and South Western Rly Co* (1854) Kay 408; *Price's Patent Candle Co Ltd v Bauven's Patent Candle Co Ltd* (1858) 4 K & J 727. As to undertaking to keep an account as a condition of withholding an injunction see PARA 395. As to the remedy of account see **EQUITY**.

2 See the cases cited in note 1. Damages cannot be given as well as an account: see PARA 337 text to note 2. See also **EQUITY**.

3 *Parrott v Palmer* (1834) 3 My & K 632.

4 *Parrott v Palmer* (1834) 3 My & K 632.

5 *Harrison v Taylor* (1865) 11 Jur NS 408.

6 *Colburn v Simms* (1843) 2 Hare 543; *Powell v Aiken* (1858) 4 K & J 343 at 351; *Muddock v Blackwood* [1898] 1 Ch 58.

7 *Dean v Thwaite* (1855) 21 Beav 621. Difficulties sometimes arise in working out an order for an account, and as a result an arrangement or compromise is often reached: see *Crosley v Derby Gas-Light Co* (1838) 3 My & Cr 428.

8 *Dean v Thwaite* (1855) 21 Beav 621; *Bulli Coal Mining Co v Osborne* [1899] AC 351, PC; and see **LIMITATION PERIODS** vol 68 (2008) PARA 1224 et seq.

9 Limitation Act 1980 s 23; and see **LIMITATION PERIODS** vol 68 (2008) PARA 1008.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(i) The Nature of the Relief/B. ANCILLARY AND ALTERNATIVE RELIEF/336. Where interim injunction refused.

336. Where interim injunction refused.

Where a doubt exists as to the right, and especially when an injunction might be a great hardship on the defendant, an interim injunction will be refused on the defendant undertaking to keep an account¹, in which case the claimant is entitled to a formal undertaking².

An account may also be ordered to be kept in any case where an interim injunction is refused³, or when an injunction is stayed pending an appeal⁴.

1 *Bramwell v Halcomb* (1836) 3 My & Cr 737 at 739; *Spottiswoode v Clark* (1846) 2 Ph 154; *Morgan v Seaward* (1835) 1 Web Pat Cas 167; *Neilson v Thompson and Forman* (1840) 1 Web Pat Cas 275 at 286 per Lord Cottenham LC; *Elwes v Payne* (1879) 12 ChD 468, CA; *Mitchell v Henry* (1880) 15 ChD 181, CA; *Clarke v Nichols* (1895) 12 RPC 310; *Holophane Ltd, O'Clery and Davis v O Berend & Co Ltd* (1897) 15 RPC 18.

2 *Thomson v Hughes* (1890) 7 RPC 71 at 76 per North J.

3 See PARA 395.

4 *Kaye v Chubb & Sons* (1886) 4 RPC 23.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(i) The Nature of the Relief/B. ANCILLARY AND ALTERNATIVE RELIEF/337. Damages as additional or alternative relief.

337. Damages as additional or alternative relief.

The court has power to award damages either in addition to or in substitution for an injunction¹. However, in no case will an inquiry as to damages in addition to an account be ordered; the party who has obtained a decree must elect which of the two forms of relief he will adopt².

1 See *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, HL; and PARA 364.

2 *De Vitre v Betts* (1873) LR 6 HL 319.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(i) The Nature of the Relief/B. ANCILLARY AND ALTERNATIVE RELIEF/338. Injunction in aid or in lieu of other remedies.

338. Injunction in aid or in lieu of other remedies.

Although the court cannot compel the Treasury to pay to sequestrators a pension granted to the defendant, the defendant can be prevented from receiving it and the sequestrators can be authorised to receive it¹. Where defendants were in breach of an undertaking given in lieu of the injunction sought, and the claimants then moved to sequester the defendants' property, the court, while holding that the facts strictly enabled it to make a sequestration order, granted an injunction in the terms of the undertaking and penalised the defendants in costs².

An injunction may be granted in aid of or in lieu of equitable execution³. An injunction can also be granted in support of a charging order on land, securities or money in court⁴.

A freezing injunction may be granted or continued after judgment in aid of execution⁵.

1 *Willcock v Terrell* (1878) 3 ExD 323, CA, per Cotton LJ.

2 *Charles Marsden & Sons Ltd v Old Silkstone Collieries Ltd and Old Silkstone Chemical Works Ltd* (1914) 13 LGR 342.

3 *Archer v Archer* [1886] WN 66; *Bullus v Bullus* (1910) 102 LT 399. In both these cases an injunction was granted to restrain payment of a legacy to a husband.

4 See PARA 339.

5 See PARA 396. See also PARA 402 note 7 (search orders in aid of execution).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(i) The Nature of the Relief/B. ANCILLARY AND ALTERNATIVE RELIEF/339. Relief akin to injunction.

339. Relief akin to injunction.

The dealing with stocks, shares and dividends may be temporarily prevented by means of a stop notice¹, or, when the subject matter is in court, by means of a charging order² or stop order³.

The appointment of a receiver⁴ operates, in effect, as an injunction⁵, because the court will not allow its officer to be interfered with⁶ and can grant an injunction to restrain such interference⁷. Sometimes an injunction as well as the appointment of a receiver will be granted for the purpose of marking the court's sense of the conduct of the parties who have misconducted themselves⁸.

In relation to the confiscation of the proceeds of drug trafficking⁹ or to the forfeiture of terrorist funds¹⁰, the High Court may by a restraint order prohibit any person from dealing with such proceeds or such funds subject to such conditions and exceptions as may be specified in the order¹¹.

1 See CPR Pt 73 s III (CPR 73.16-73.21); and PARA 1492 et seq.

2 See CPR Pt 73 s I (CPR 73.2-73.10); and PARA 1467 et seq. A master, the Admiralty Registrar and a district judge of the Family Division have power to grant an injunction if it is ancillary or incidental to a charging order: see *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B paras 2.2, 2.3(b); and PARA 50.

3 See CPR Pt 73 s II (CPR 73.11-73.15); and PARA 1488 et seq.

4 See CPR Pt 69; PARA 1501 et seq; and **RECEIVERS** vol 39(2) (Reissue) PARA 373 et seq.

5 *Evans v Coventry* (1854) 5 De GM & G 911. See *Taylor v Eckersley* (1876) 2 ChD 302 and *Hart v Emelkirk Ltd* [1983] 3 All ER 15, [1983] 1 WLR 1289 (receiver appointed instead of grant of mandatory injunction).

6 *Helmore v Smith (No 2)* (1886) 35 ChD 449, CA (contempt of court).

7 *Dixon v Dixon* [1904] 1 Ch 161.

8 *Evans v Coventry* (1854) 3 Drew 75; on appeal 5 De G M & G 911.

9 See the Proceeds of Crime Act 2002; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 390 et seq.

10 See the Terrorism Act 2000 s 23; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 482 et seq.

11 Proceeds of Crime Act 2002 ss 40-47; *Re Peters* [1988] QB 871, [1988] 3 All ER 46, CA; Terrorism Act 2000 ss 22, 23, Sch 4 paras 5, 6; and see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARAS 423 et seq, 484.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(ii) Jurisdiction/A. COURTS HAVING JURISDICTION/340. Concurrent jurisdiction.

(ii) Jurisdiction

A. COURTS HAVING JURISDICTION

340. Concurrent jurisdiction.

The jurisdiction to grant relief by way of injunction was formerly only exercisable by the Court of Chancery and by the Court of Exchequer in equity¹, but courts of common law were empowered by statute to grant injunctions in certain cases², and the jurisdiction of the Court of Chancery and the common law courts having been transferred³ to the High Court of Justice, every branch of the High Court has now, therefore, jurisdiction to grant injunctions in all cases in which courts of equity or common law could formerly grant that relief⁴.

1 The equitable jurisdiction of the Court of Exchequer was abolished by the Court of Chancery Act 1841 s 1 (repealed). For the cases in which the Court of Chancery exercised jurisdiction in respect of injunctions before 1875 see **EQUITY** vol 16(2) (Reissue) PARA 408 et seq.

2 The power was conferred by the Common Law Procedure Act 1854 ss 79-82 (repealed, subject to savings by the Statute Law Revision and Civil Procedure Act 1883 ss 3, 5-7, Schedule (repealed)). The courts of common law could grant injunctions in the case of patents under the Patent Law Amendment Act 1852 (repealed). See now the Patents Act 1977; and CPR Pt 63 (which assigns proceedings under that Act to the Chancery Division), and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARAS 538, 543-544.

3 Replaced by the Supreme Court of Judicature Act 1873 s 16 (repealed), replaced by the Supreme Court of Judicature (Consolidation) Act 1925 s 18 (2) (repealed): see now the Supreme Court Act 1981 s 19(2). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

4 *Beddow v Beddow* (1878) 9 ChD 89. As to the statutory jurisdiction to grant injunctions see the Supreme Court Act 1981 s 37(1); and PARA 347.

There is now included, as a branch of the High Court, the Family Division: see s 5; and **COURTS** vol 10 (Reissue) PARA 603. The High Court of Admiralty (now part of the Queen's Bench Division: see **COURTS** vol 10 (Reissue) PARAS 601, 603) always had jurisdiction in respect of injurious acts done on the high seas, and the High Court therefore has jurisdiction to restrain such acts: see *The Tubantia* [1924] P 78, where interference with the salvors' possession of a wreck on the high seas was restrained. This jurisdiction of the High Court is practically unlimited, except for the fact that it can only be exercised where it is right or just to do so; but what is right or just must be decided not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles: *Beddow v Beddow* (1878) 9 ChD 89. See also PARA 349.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(ii) Jurisdiction/A. COURTS HAVING JURISDICTION/341. Effect of membership of the European Union.

341. Effect of membership of the European Union.

An injunction may be granted for the purpose of enforcing European Community law¹. In a case where the claimants applied for an interlocutory (interim) injunction to restrain the passing off of beer, the defendants set up a defence based on European Community law which, had it been *prima facie* a good defence, would probably have prevented the court from granting an interim injunction². The court has power in advance of any decision by the European Court of Justice to suspend on a temporary basis the operation of an Act of Parliament which is alleged to infringe Community law and to issue an interim injunction to that effect against the Secretary of State³ so as to protect the rights claimed by a party under provisions of Community law which are directly enforceable⁴.

1 For example, the EC Treaty (Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) art 82 (formerly art 86) states that the abuse of a dominant market position is prohibited. Since prohibited conduct in England is sanctioned by injunction it follows that an action lies at the instance of a private person for an injunction to restrain the conduct. See *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130, [1983] 2 All ER 770, HL. For a more recent example see the Financial Services and Markets Act 2000 s 410(3), which makes a direction by the Treasury to implement European Community obligations or other international obligations of the United Kingdom enforceable by injunction; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 780.

2 *Löwenbräu München v Grunhalls Lager International Ltd* [1974] 1 CMLR 1, [1974] RPC 492 (interlocutory (interim) injunction granted, reference to the European Court being considered unnecessary in the circumstances); cf *H P Bulmer Ltd v J Bollinger SA* [1974] Ch 401, [1974] 2 All ER 1226, CA.

3 As to proceedings against the Crown see PARA 354.

4 Case C-213/89 *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603, sub nom *Factortame Ltd v Secretary of State for Transport (No 2)* [1991] 1 All ER 70, ECJ and HL; cf Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, [1978] 3 CMLR 263, ECJ.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(ii) Jurisdiction/A. COURTS HAVING JURISDICTION/342. The court acts in personam.

342. The court acts in personam.

In granting an injunction, the court acts in personam¹, meaning that its jurisdiction is grounded on the fact that the party on whom the order is made is within the power of the court². It will not suffer anyone within its reach to do what is contrary to its notions of equity merely because the act to be done may be, in point of locality, outside the jurisdiction³. However, the court will not normally adjudicate on questions relating to the title to or the right to possession of immovable property out of the jurisdiction⁴; nor will it entertain actions against foreign sovereigns⁵ or make a decree to give effect to contractual rights relating to immovables which the law of the place where the goods are situated treats as incapable of creation⁶.

1 *Hope v Carnegie* (1868) LR 7 Eq 254; *Ewing v Orr Ewing* (1883) 9 App Cas 34, HL; *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 3 All ER 164, [1978] 1 WLR 966, [1978] 1 Lloyd's Rep 425, CA (Mareva (freezing) injunction). The court has inherent jurisdiction to restrain the making public of allegations advanced in court proceedings where repetition of such allegations might adversely affect the welfare of a child subject to the proceedings: *A v M (Family Proceedings: Publicity)* [2000] 1 FCR 1. See **EQUITY**.

2 *Lord Portarlington v Soulby* (1834) 3 My & K 104. Because the party on whom the order is made must be amenable to the court's jurisdiction, an injunction ought not to be granted against a person incapable within the M'Naughten Rules of understanding what he was doing or that what he was doing was wrong, because he would not be capable of complying with it so that the injunction could not have the desired deterrent effect or operate on his mind so as to regulate his conduct: *Wookey v Wookey* [1991] Fam 121, [1991] 3 All ER 365, CA. As to the M'Naughten Rules see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11 (1) (2006 Reissue) PARAS 31-33. An injunction against a company can be enforced by sequestration of any assets it may have within the jurisdiction, and it is not a good ground for refusing to grant an injunction that the defendant is a company incorporated abroad: *Board of Governors of Hospital for Sick Children v Walt Disney Productions Inc* [1968] Ch 52, [1967] 1 All ER 1005, CA (onus on defendant of proving absence of assets within the jurisdiction). As to the restraint of foreign proceedings see PARAS 500-501.

3 *Carron Iron Co v Maclaren* (1855) 5 HL Cas 416. See also *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1894] AC 535, HL; but see *Morocco bound Syndicate Ltd v Harris* [1895] 1 Ch 534. As to the court's power to make an order against a person abroad to bring wards of court within the jurisdiction see *Re Liddell's Settlement Trust* [1936] Ch 365, [1936] 1 All ER 239, CA; and **CHILDREN AND YOUNG PERSONS**.

4 *Deschamps v Miller* [1908] 1 Ch 856. See also **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 88-89; and cf *M'Ilwraith v Smiley* (1892) 8 TLR 690, CA, where the court refused an application for an interim injunction to restrain the defendant from asserting in this country that he had certain rights and powers in connection with some mines in Mexico.

5 *Mighell v Sultan of Johore* [1894] 1 QB 149, CA; and see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARAS 243-245. As to proceedings by foreign sovereigns cf PARA 352.

6 *Bank of Africa Ltd v Cohen* [1909] 2 Ch 129, CA. As to rights contrary to a fundamental policy of English law see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 31.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(ii) Jurisdiction/A. COURTS HAVING JURISDICTION/343. Other aspects of the High Court's jurisdiction.

343. Other aspects of the High Court's jurisdiction.

The jurisdiction of the High Court to grant an injunction may be used to protect a wide variety of rights¹, but an individual cannot obtain an injunction to restrain an unlawful or illegal act if the act does not threaten to infringe any of his rights: the High Court has no jurisdiction to prevent the commission of acts merely because they are criminal or illegal². However, if the act is of a public nature, the Attorney General may apply to the court for an injunction, and the court may interfere if it is established that the act is an illegal act and it affects the public generally, even though no evidence of actual injury is given³. The court has power to grant an injunction against interference with trade where an illegal act has been committed; thus if a person, without just cause or excuse, deliberately interferes with the trade or business of another by unlawful means, then he is acting unlawfully, and in a proper case an injunction can be granted against him⁴.

1 For example, the High Court's power extends to intervention in disputes between members of a family. As regards disputes between husband and wife, the court will interfere to protect the property and other rights of a spouse and may, for instance, in certain circumstances grant an injunction restraining one spouse from molesting the other: see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 444; **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARAS 716, 974; and PARA 345 text to notes 9-10. In the case of the children of a marriage the court will, in a proper case, grant an injunction for the purpose of partially or completely restraining a parent from exercising any control over or having any association with his or her children: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 218; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARAS 974, 988. An injunction may also be granted restraining the marriage of a ward of court who is a minor, and all communication and association with the ward: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 218. In very grave circumstances a parent can obtain an injunction excluding an adult child from the parent's home: *Egan v Egan* [1975] Ch 218, [1975] 2 All ER 167. However, a husband cannot obtain an injunction to prevent his wife from having a lawful abortion: *Paton v British Pregnancy Advisory Services Trustees* [1979] QB 276, [1978] 2 All ER 987, CA; cf *C v S* [1988] QB 135, [1987] 1 All ER 1230, CA (putative father).

2 An injunction may be granted where criminal activity infringes a property right of a person: see PARA 351. As to the restraint of criminal proceedings see PARA 497.

3 *A-G v Oxford, Worcester and Wolverhampton Rly Co* (1854) 2 WR 330; *A-G v Shrewsbury (Kingsland) Bridge Co* (1882) 21 ChD 752; *A-G v Ashbourne Recreation Ground Co* [1903] 1 Ch 101; *A-G v Sharp* [1931] 1 Ch 121, CA. In *Bradbury v London Borough of Enfield* [1967] 3 All ER 434, [1967] 1 WLR 1311, CA, the local authority had committed a statutory offence and an injunction was granted against it in an action by ratepayers without the Attorney General's intervention; cf *Thorne v BBC* [1967] 2 All ER 1225, [1967] 1 WLR 1104, CA, where an injunction was refused, the claimant having failed to establish a legal right. As to the Attorney General being a necessary party to proceedings see *Gouriet v Union of Office Workers* [1978] AC 435, [1977] 3 All ER 70, HL; and PARAS 491-492, 409.

4 *Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 3 All ER 1175, [1971] 1 WLR 1676, CA, where an injunction was granted. Cf *Esso Petroleum Co Ltd v Kingswood Motors (Addlestone) Ltd* [1974] QB 142, [1973] 3 All ER 1057 (mandatory injunction granted after procurement of breach of solus agreement).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(ii) Jurisdiction/A. COURTS HAVING JURISDICTION/344. Absence of jurisdiction to restrain proceedings.

344. Absence of jurisdiction to restrain proceedings.

The jurisdiction of the High Court to grant an injunction does not extend to restraining causes or proceedings pending in the High Court or before the Court of Appeal¹. Thus, a person who is prejudiced by the conduct of a receiver appointed in an action ought not to begin, without the leave of the court, an action to restrain the proceedings of the receiver, even though the act complained of is beyond the receiver's authority. His proper course is to apply for such relief as he may be entitled to in the action in which the receiver was appointed².

A statute may prohibit the granting of an injunction in particular cases as, for instance, to compel an employee to attend at any place for the doing of any work³.

1 Supreme Court of Judicature (Consolidation) Act 1925 s 41 (repealed). The provision was not re-enacted in the Supreme Court Act 1981. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to power to stay proceedings see PARA 494, where there is also considered the power to restrain proceedings in inferior courts.

2 *Searle v Choat* (1884) 25 ChD 723, CA; see also *Re Potter, ex p Day* (1883) 48 LT 912, DC; and **RECEIVERS**.

3 See the Trade Union and Labour Relations (Consolidation) Act 1992 s 236; and see also PARA 379.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(ii) Jurisdiction/A. COURTS HAVING JURISDICTION/345. Injunctions granted by county courts.

345. Injunctions granted by county courts.

In the exercise of its powers to grant ancillary relief¹, a county court may grant injunctions, both final² and interim³, provided that there are between the parties proceedings within the court's jurisdiction to which the claim to an injunction is ancillary⁴. It may not, however, grant a search order⁵ or a freezing injunction⁶ except in defined circumstances⁷.

A party does not need leave to appeal to the Court of Appeal where the determination sought to be appealed from includes or preserves an injunction⁸.

A county court has jurisdiction to grant a non-molestation order under the Family Law Act 1996, containing either or both (1) provision prohibiting a person (the 'respondent') from molesting another person who is associated with the respondent; (2) provision prohibiting the respondent from molesting a relevant child⁹. A county court also has jurisdiction to grant an occupation order in relation to a dwelling house¹⁰.

¹ See the County Courts Act 1984 s 38 (substituted by the Courts and Legal Services Act 1990 s 3).

² See the County Courts Act 1984 s 38(2)(b) (as substituted: see note 1); and *Martin v Bannister* (1879) 4 QBD 491, CA.

³ See the County Courts Act 1984 s 38(2)(b) (as substituted: see note 1); and *Richards v Cullerne* (1881) 7 QBD 623, CA. Except in relation to search orders and freezing injunctions, a county court has the same power to grant interim injunctions as the High Court: *Burris v Azadani* [1995] 4 All ER 802, [1995] 1 WLR 1372, CA.

⁴ County Courts Act 1984 s 38(1), (2) (as substituted: see note 1). An injunction will only be granted to a defendant or respondent if it is ancillary to or comprised within the scope of the substantive relief sought in the main proceedings: *Des Salles d'Epinoix v Des Salles d'Epinoix* [1967] 2 All ER 539, [1967] 1 WLR 553, CA. See also eg *Simpson v Crowle* [1921] 3 KB 243. 'Ancillary' means 'subservient to': *Kenny v Preen* [1963] 1 QB 499 at 516, [1962] 3 All ER 814 at 822, CA, per Donovan LJ. An injunction may be granted even if the claim is limited to £1: *Hatt & Co (Bath) Ltd v Pearce* [1978] 2 All ER 474, [1978] 1 WLR 885. Since the High Court can commit for past disobedience of its injunctions, so too can the county court: *Jennison v Baker* [1972] 2 QB 52, [1972] 1 All ER 997, CA (breach of interim injunction). As to the county court's jurisdiction generally see PARA 58; as to enforcement see PARA 1249.

⁵ County Court Remedies Regulations 1991, SI 1991/1222, regs 2(a), 3(1). The order was made under the County Courts Act 1984 s 38(3)(b), (4)-(7). As to search orders see PARA 402 et seq.

⁶ County Court Remedies Regulations 1991, SI 1991/1222, regs 2(b), 3(1). As to freezing injunctions see PARAS 318, 396 et seq.

⁷ A county court held by a judge of the Court of Appeal or of the High Court sitting as the judge for any county court district, or a patents county court, may grant either type of relief: County Court Remedies Regulations 1991, SI 1991/1222, reg 3(2). A county court may grant a freezing injunction (1) when exercising jurisdiction in family proceedings; (2) for the purpose of making an order for the preservation, custody or detention of property which forms or may form the subject matter of the proceedings; (3) in aid of execution of a judgment or order made in proceedings in a county court to preserve assets until execution can be levied upon them; or (4) where the proceedings are to be or are included in the Central London County Court Mercantile List and the application is made to a circuit judge nominated by the Senior Presiding Judge (reg 3(3) (amended by SI 1995/206 and SI 2002/439)). 'Central London County Court Mercantile List' means the mercantile court established at the Central London County Court pursuant to CPR Pt 59 (see PARA 1545): County Court Remedies Regulations 1991, SI 1991/1222, reg 3(3A) (added by SI 1995/206; and amended by SI 2002/439).

8 County Courts Appeals Order 1991, SI 1991/1877, art 3(a). As to appeals from the county court see the County Courts Act 1984 s 77; and PARA 1679 et seq.

9 See the Family Law Act 1996 ss 42, 57(1), 63(1); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 716.

10 See the Family Law Act 1996 ss 33-40; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 293.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(ii) Jurisdiction/B. INHERENT JURISDICTION AND THE EFFECT OF STATUTE/346. Original jurisdiction.

B. INHERENT JURISDICTION AND THE EFFECT OF STATUTE

346. Original jurisdiction.

The power to grant an injunction does not depend upon the existence of property¹. Independently of any question as to the right at law, the Court of Chancery had an original and independent jurisdiction to prevent what it considered an injury, whether arising from a violation of an unquestionable right or from a breach of contract or confidence².

The granting of an injunction in any particular case is dependent upon the court's discretion³.

1 As to interference with unincorporated bodies see PARA 434.

2 *Prince Albert v Strange* (1849) 1 Mac & G 25; *Pollard v Photographic Co* (1888) 40 ChD 345 at 354. The origin and extent of the jurisdiction was considered in *Goodeson v Gallatin* (1771) 2 Dick 455: see also PARA 475.

3 Cf the Supreme Court Act 1981 s 37(1); and PARA 347. See eg *Doherty v Allman* (1878) 3 App Cas 709, HL. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

In exercising its discretion the court has regard to a wide range of possible consequences: see eg *Brent v Brent* [1975] Fam 1, [1974] 2 All ER 1211, where the court took into consideration that to grant an injunction might influence a local authority's housing priorities, which was one of the reasons why an injunction was refused. Although the court may declare that trade restrictions are contrary to the public interest, it will exercise its discretion and will not grant an injunction as of course: *Re Chemists' Federation's Agreement* [1958] 3 All ER 448, [1958] 1 WLR 1192. The court will take into account the public interest: see eg *Femis-Bank (Anguilla) Ltd v Lazar* [1991] Ch 391, [1991] 2 All ER 865. It appears that the court has power to grant injunctive relief to exclude a stranger from property in which he has a proprietary interest where his behaviour interferes with the rights of a person with parental responsibility for a child to exercise that responsibility appropriately, albeit that the power will be exercised cautiously and probably only as a last resort: see *C v K (Ouster Order: Non-Parent)* [1996] 3 FCR 488. A court has power to grant an injunction restraining a vexatious litigant whose conduct poses a serious threat to the proper administration of justice: *A-G v Ebert* [2001] EWHC Admin 695, [2002] 2 All ER 789, DC.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(ii) Jurisdiction/B. INHERENT JURISDICTION AND THE EFFECT OF STATUTE/347. Statutory jurisdiction.

347. Statutory jurisdiction.

An injunction (whether interim¹ or final) may be granted in all cases in which it appears to the court² to be just and convenient³ to do so⁴; and any such order may be made unconditionally or upon such terms and conditions as the court thinks just⁵. The power to grant an interim injunction restraining a party to any proceedings from removing from the jurisdiction or otherwise dealing with assets located within that jurisdiction is available in cases where that party is, as well as in cases where he is not, domiciled, resident or present within the jurisdiction⁶.

1 These words are not confined in their meaning to an order made between writ and final judgment, but mean an order other than final judgment in an action, whether made before judgment or after: *Smith v Cowell* (1880) 6 QBD 75, CA; *Nanda v Nanda* [1968] P 351, [1967] 3 All ER 401. See *Faith Panton Property Plan Ltd v Hodgetts* [1981] 2 All ER 877, [1981] 1 WLR 927, CA (injunction granted after order for costs but before taxation) and see PARA 315 et seq.

2 As to the jurisdiction of the county court see PARA 345.

3 As to the meaning of 'just and convenient' see PARA 349.

4 Supreme Court Act 1981 s 37(1). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. See *B v B (Injunction: Restraint on Leaving Jurisdiction)* [1997] 3 All ER 258 (although the court has jurisdiction under the Supreme Court Act 1981 s 37(1) to restrain a party from leaving the jurisdiction, the statutory provision does not entitle a court to restrain a debtor from leaving the jurisdiction indefinitely until a debt is paid). Concurrent proceedings before the court and before an arbitrator would not lead to the grant of an injunction: *J Jarvis and Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] EWHC 1262 (TCC), [2007] BLR 439.

5 Supreme Court Act 1981 s 37(2).

6 Supreme Court Act 1981 s 37(3). This subsection deals with the court's power to prevent dissipation of assets by means of a freezing injunction: see PARAS 318, 396 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(ii) Jurisdiction/B. INHERENT JURISDICTION AND THE EFFECT OF STATUTE/348. Effect of statutory provision.

348. Effect of statutory provision.

The statutory provision¹ did not alter the principles upon which the court acted in granting injunctions², but was intended only to do away with certain technical difficulties with respect to injunctions³. It did not enlarge the jurisdiction of the court so as to enable it to grant an injunction in a case in which, before the provision came into force, there was no right on the one side or no liability on the other at law or in equity⁴. However, it gave to the court power, when dealing with rights which were under its jurisdiction independently of this provision, to add to what would previously have been the remedy, a remedy by way of injunction, if it should think it just and convenient⁵. Therefore, whenever a right which can be asserted either at law or in equity does exist⁶, whatever the previous practice may have been, the court is now enabled by virtue of this provision, in a proper case, to grant an injunction to protect that right⁷.

¹ The Supreme Court Act 1981 s 37 (see PARA 347), which replaced the Supreme Court of Judicature (Consolidation) Act 1925 s 45 (repealed), which in turn replaced the Supreme Court of Judicature Act 1873 s 25(8) (repealed). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

² *Fletcher v Rodgers* (1878) 27 WR 97, CA; *Day v Brownrigg* (1878) 10 ChD 294, CA; *Beddow v Beddow* (1878) 9 ChD 89; *Gaskin v Balls* (1879) 13 ChD 324, CA.

³ *Fletcher v Rodgers* (1878) 27 WR 97, CA.

⁴ *North London Ry Co v Great Northern Ry Co* (1883) 11 QBD 30, CA; *Kitts v Moore* [1895] 1 QB 253, CA; *Associated Newspapers Group plc v Insert Media Ltd* [1988] 2 All ER 420, [1988] 1 WLR 509; and see *Colls v Home and Colonial Stores Ltd* [1904] AC 179, HL; *Dicks v Brooks* (1879) 15 ChD 22; but see to the contrary *Thomas v Williams* (1880) 14 Ch D 864; and see *Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) (Government of the Republic of Indonesia intervening)* [1978] QB 644, [1977] 3 All ER 324, CA. The statutory provision dealt only with the procedure and not with jurisdiction at all: *North London Ry Co v Great Northern Ry Co* (1883) 11 QBD 30 at 36, CA, per Brett LJ; and see *Gouriet v Union of Office Workers* [1978] AC 435 at 516, [1977] 3 All ER 70 at 112, HL, per Lord Edmund-Davies. It enables such orders as could be made before to be made in any proceedings, without commencing special proceedings such as were necessary before the statutory provision was made: *Morgan v Hart* [1914] 2 KB 183 at 186, CA, per Buckley LJ. This statutory jurisdiction is wide enough to enable the court to grant an injunction requiring a judgment debtor to disclose his assets: *MacLaine Watson & Co Ltd v International Tin Council (No 2)* [1989] Ch 286, [1988] 3 All ER 257, CA. See also *Gidrxslme Shipping Co Ltd v Tantomar-Transportes Maritimos Lda* [1994] 4 All ER 507 (court's jurisdiction to grant worldwide disclosure orders).

⁵ *North London Ry Co v Great Northern Ry Co* (1883) 11 QBD 30, CA; *Cummins v Perkins* [1899] 1 Ch 16, CA.

⁶ See *South Carolina Insurance Co v Assurantie Maatschappij 'De Zeven Provinciën' NV* [1987] AC 24, [1986] 3 All ER 487, HL.

⁷ *Cork Corpn v Rooney* (1881) 7 LR Ir 191; *North London Ry Co v Great Northern Ry Co* (1883) 11 QBD 30, CA; *Richardson v Methley School Board* [1893] 3 Ch 510; *Cummins v Perkins* [1899] 1 Ch 16, CA; *Mareva Compania Naviera SA of Panama v International Bulkcarriers SA, The Mareva* [1980] 1 All ER 213n at 214, [1975] 2 Lloyd's Rep 509 at 510, CA, per Lord Denning MR, where the principle as stated in the text was approved. See also *Hedley v Bates* (1880) 13 ChD 498; *Smith v Cowell* (1880) 6 QBD 75, CA; *Aslatt v Southampton Corpn* (1880) 16 ChD 143; *Stannard v St Giles, Camberwell, Vestry* (1882) 20 ChD 190, CA. If circumstances justify such a course a court has jurisdiction under the Supreme Court Act 1981 s 37 to make at an interim stage an order which would not be appropriate at the final trial: *Fresh Fruit Wales Ltd v Halbert* (1991) Times, 29 January, CA. As to interim injunctions see PARAS 315 et seq, 383 et seq. The court has the power, which is in part statutory, to award damages in addition to or in substitution for an injunction: see PARA 364.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(ii) Jurisdiction/B. INHERENT JURISDICTION AND THE EFFECT OF STATUTE/349. Meaning of 'just and convenient'.

349. Meaning of 'just and convenient'.

The words 'just and convenient'¹ in the statutory provision² do not mean that the court can grant an injunction simply because it thinks it convenient, but mean that it should grant an injunction for the protection of rights or the prevention of injury according to legal principles³. They confer neither arbitrary nor unregulated discretion on the court, and do not authorise it to invent new modes of enforcing judgments in substitution for the ordinary modes⁴.

1 That which was unjust would not be convenient, but in ascertaining what is just, regard must be had to what is convenient: see *Beddow v Beddow* (1878) 9 ChD 89 at 93, CA, per Jessel MR.

2 See the Supreme Court Act 1981 s 37(1); and PARAS 347-348. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

3 *Beddow v Beddow* (1878) 9 ChD 89; *Aslatt v Southampton Corpn* (1880) 16 ChD 143.

4 *Harris v Beauchamp Bros* [1894] 1 QB 801, CA; *Morgan v Hart* [1914] 2 KB 183, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(ii) Jurisdiction/B. INHERENT JURISDICTION AND THE EFFECT OF STATUTE/350. Particular statutory powers to grant injunction.

350. Particular statutory powers to grant injunction.

In certain circumstances the court has specific statutory power to grant an injunction. It may, for example, grant an injunction restraining a person who has acted in an office in which he is not entitled to act from so acting¹. An injunction may be granted on the application of the Financial Services Authority or the Secretary of State for contravention or likely contravention of requirements under the Financial Services and Markets Act 2000², or on the application of the Financial Services Authority or the Secretary of State to restrain market abuse³. An injunction may be granted in respect of certain overseas insurance companies, restraining them from disposing of or otherwise dealing with any of their assets, on application by the Financial Services Authority⁴. Other statutory powers to grant injunctions are conferred, for example in respect of patents⁵. In county court proceedings in respect of discrimination (other than in the field of employment) on the ground of sex or race, the court may grant all remedies which the High Court could grant if it had jurisdiction⁶, and thus may grant an injunction. Other powers of granting injunctions are conferred on the county court by the County Courts Act 1984⁷.

1 Supreme Court Act 1981 s 30: see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 182. The application is by way of judicial review: Supreme Court Act 1981 s 31(1)(c); CPR 54.2. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 See the Financial Services and Markets Act 2000 s 380; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 470. See *Securities and Investments Board v Pantell SA* [1990] Ch 426, [1989] 2 All ER 673 (Mareva (freezing) injunction granted to the Securities and Investments Board, predecessor of the Financial Services Authority).

3 See the Financial Services and Markets Act 2000 s 381; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 471.

4 See the Financial Services and Markets Act 2000 s 198; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 459.

5 See the Patents Act 1977 s 61; and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARAS 523, 538, 543,

6 See the Sex Discrimination Act 1975 s 66(2); the Race Relations Act 1976 ss 57(2), 79(4), Sch 4 para 5(1). See **DISCRIMINATION** vol 13 (2007 Reissue) PARA 415.

7 See PARA 345.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(ii) Jurisdiction/B. INHERENT JURISDICTION AND THE EFFECT OF STATUTE/351. Where statute provides a particular remedy.

351. Where statute provides a particular remedy.

Where a statute provides a particular remedy for the infringement of a right created by it¹ or existing at common law², the court's jurisdiction to protect the right by injunction is not excluded unless the statute expressly or by necessary implication so provides³. Moreover, notwithstanding that a statute provides a remedy in an inferior court for breach of its provisions, the High Court has power to enforce obedience to the law as enacted by way of injunction whenever it is just and convenient to do so⁴. Where a statute merely creates an offence, without creating a right of property, and provides a remedy, a person aggrieved by commission of the offence is confined to that remedy, and cannot claim an injunction⁵, although proceedings may be brought by the Attorney General if the public interest is affected⁶. If the criminal activity does infringe a property right of a person, he has standing to enlist the civil court's aid in preventing that infringement. In assisting such a person the court is not compelling the observance of the criminal law as such; it is giving effect to a cause of action, at law or in equity, possessed by that person as owner of the property right⁷.

The High Court, however, has jurisdiction to grant a declaration⁸ and ancillary injunction⁹, notwithstanding that its effect is to establish the existence or nonexistence of a liability which could be enforced only in a court of summary jurisdiction.

1 *Cooper v Whittingham* (1880) 15 ChD 501.

2 *Stevens v Chown, Stevens v Clark* [1901] 1 Ch 894.

3 See the cases cited in notes 1-2; and *A-G v Ashbourne Recreation Ground Co* [1903] 1 Ch 101; *Yorkshire Miners' Association v Howden* [1905] AC 256, HL; *A-G Wimbledon House Estate Co Ltd* [1904] 2 Ch 34; *Carlton Illustrators v Coleman & Co Ltd* [1911] 1 KB 771 (penalty for past breaches and injunction against future breaches); *A-G v Lewes Corp* [1911] 2 Ch 495, and see *Bradbury v London Borough of Enfield* [1967] 3 All ER 434, [1967] 1 WLR 1311, CA. As to ouster of the court's jurisdiction see **COURTS** vol 10 (Reissue) PARAS 318-319.

4 *A-G v Chaudry* [1971] 3 All ER 938, [1971] 1 WLR 1614, CA. Where a defendant is committing breaches of a statute the High Court has a reserve power to enforce the statute by injunction, even though the claimant body responsible for enforcing the statute has not exhausted the possibility of restraining the breaches by the exercise of remedies provided by the statute: *Stafford Borough Council v Elkenford Ltd* [1977] 2 All ER 519, [1977] 1 WLR 324, CA. However, the High Court cannot entertain an application for ancillary or non-substantive relief where it does not have jurisdiction in respect of the substantive claim: *Department of Social Security v Butler* [1995] 4 All ER 193, [1995] 1 WLR 1528, CA.

5 *Patent Agents Institute v Lockwood* [1894] AC 347, HL; *Devonport Corp v Tozer* [1903] 1 Ch 759, CA; *Thorne v BBC* [1967] 2 All ER 1225, [1967] 1 WLR 1104, CA; cf *Lockwood v Chartered Institute of Patent Agents* (1912) 30 RPC 108. See also *Fraser v Fear* (1914) 137 LT Jo 314, HL.

6 *A-G v Ashbourne Recreation Ground Co* [1903] 1 Ch 101. See PARAS 491-492.

7 *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] Ch 61, [1987] 3 All ER 151, CA; affd [1988] AC 1013, [1988] 2 All ER 484, HL.

8 *Barwick v South Eastern and Chatham Rly Co* [1921] 1 KB 187, CA.

9 *Llangollen Parish Council v Denbighshire County Council* [1921] 3 KB 313.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(ii) Jurisdiction/C. INJUNCTIONS AND SOVEREIGNTY/352. Refusal of court to interfere in political matters.

C. INJUNCTIONS AND SOVEREIGNTY

352. Refusal of court to interfere in political matters.

A suit instituted to support political power and a foreign prerogative will not be entertained, but a foreign sovereign may sue and can obtain an injunction for a wrong done to him by a British subject, unauthorised by the United Kingdom government, in respect of property belonging to him, either in his individual or corporate capacity¹.

¹ *Emperor of Austria v Day and Kossuth* (1861) 3 De G F & J 217; *King of Italy and Italian Government v de Medici Tornaquinci* (1918) 34 TLR 623 (interim injunction granted to restrain the sale of Italian state papers). See *Kingdom of Spain v Christie, Manson & Woods Ltd* [1986] 3 All ER 28, [1986] 1 WLR 1120 (Spanish government entitled to bring action for declaration that Spanish export documents forged).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(ii) Jurisdiction/C. INJUNCTIONS AND SOVEREIGNTY/353. Foreign states.

353. Foreign states.

Subject to exceptions¹ a foreign state² is immune from the jurisdiction of the courts of the United Kingdom³. Relief cannot be given against a state by way of injunction⁴ except in two circumstances. The first is where the foreign state gives written consent⁵. The second is in relation to property which is for the time being in use or intended for use for commercial purposes⁶.

1 See the State Immunity Act 1978 ss 2-11.

2 State Immunity Act 1978 s 14.

3 State Immunity Act 1978 s 1: see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 244 et seq. The basic principle at common law was that the courts would not implead a foreign sovereign: see *Compania Naviera Vascongado v SS Christina* [1938] AC 485 at 490, HL, per Lord Atkin; but cf *I Congreso del Partido, Playa Larga (Cargo owners) v I Congreso del Partido (Owners)* [1983] 1 AC 244, [1981] 2 All ER 1064, HL, where immunity was restricted.

4 State Immunity Act 1978 s 13(2)(a).

5 See the State Immunity Act 1978 s 13(3). Submitting to the jurisdiction is not to be regarded as consent.

6 See the State Immunity Act 1978 s 13(4). This exception does not apply, other than in Admiralty actions in rem, to the property of a state party to the European Convention on State Immunity (Basle, 16 May 1972; Cmnd 5081) unless the process is for enforcing a judgment which is no longer subject to appeal or if given in default of appearance is not liable to be set aside and the state has made a declaration under art 24 of the convention, or the process is for enforcing an arbitration award: State Immunity Act 1978 s 13(4). Article 24 of the convention provides that a contracting state may declare that its courts shall be entitled to entertain proceedings against contracting states to the extent that its courts are entitled to entertain proceedings against non contracting states. A certificate by or on behalf of the Secretary of State is conclusive evidence as to whether a state is a party to the convention or whether it has made a declaration under art 24: State Immunity Act 1978 s 21(c). Reference to judgment in default of appearance includes reference to any corresponding procedure (eg judgment in default of giving notice of intention to defend): s 22(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(ii) Jurisdiction/C. INJUNCTIONS AND SOVEREIGNTY/354. Proceedings against the Crown.

354. Proceedings against the Crown.

In proceedings against the Crown, including proceedings for judicial review¹, the court has no power to issue an injunction, but may make an order declaratory of the parties' rights². In any civil proceedings the court has no power to grant an injunction or make an order against an officer of the Crown, if the effect would be to give relief against the Crown which could not have been obtained in proceedings against the Crown³.

¹ *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] 2 AC 85, sub nom *Factortame Ltd v Secretary of State for Transport* [1989] 2 All ER 692, HL.

² Crown Proceedings Act 1947 s 21(1) proviso (a). The court has power to make a final declaration only and not an interim declaration. See **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 134. As to court's power under the Supreme Court Act 1981 s 31 to grant an injunction in judicial review proceedings against a minister of the Crown acting in his official capacity, and under what is now CPR 54.3(1) to grant an injunction against a minister, see *Re M* [1994] 1 AC 377, sub nom *M v Home Office* [1993] 3 All ER 537, HL. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

³ Crown Proceedings Act 1947 s 21(2); see **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 134; and *Merricks v Heathcoat-Amory* [1955] Ch 567, [1955] 2 All ER 453. The court has, however, power to grant an injunction to restrain a person acting in a public office in which he is not entitled to act: see PARA 446. In *Ellis v Earl Grey* (1833) 6 Sim 214, an injunction was granted to restrain Lords of the Treasury from paying compensation awarded under a statute; it is not clear whether that decision can still be supported. See also *Harper v Secretary of State for the Home Department* [1955] Ch 238, [1955] 1 All ER 331, CA, where an injunction without notice to restrain the presentation of a draft order to Her Majesty in Council was discharged.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(ii) Jurisdiction/C. INJUNCTIONS AND SOVEREIGNTY/355. Application to Parliament may be restrained.

355. Application to Parliament may be restrained.

On the principle that the court in granting an injunction acts in personam¹, an application to Parliament could be restrained in a proper case²; but a proper case for the purpose hardly ever occurs³, especially if broad questions of public policy are involved⁴.

1 As to this principle see PARA 342.

2 *Stockton and Hartlepool Rly Co v Leeds and Thirsk and Clarence Rly Co* (1848) 2 Ph 666; *Heathcote v North Staffordshire Rly Co* (1856) 2 Mac & G 100; *Lancaster and Carlisle Rly Co v North Western Rly Co* (1856) 2 K & J 293; and see *Ware v Grand Junction Water Works Co* (1831) 2 Russ & M 470; *A-G v Manchester and Leeds Rly Co* (1838) 1 Ry & Can Cas 436.

3 *Heathcote v North Staffordshire Rly Co* (1850) 2 Mac & G 100; *Steele v North Metropolitan Rly Co* (1867) 2 Ch App 237; *Re London, Chatham and Dover Railway Arrangement Act 1867, ex p London, Chatham and Dover Rly Co* (1869) 20 LT 718.

4 *Bilston Corpn v Wolverhampton Corpn* [1942] Ch 391, [1942] 2 All ER 447. In *Harper v Secretary of State for the Home Department* [1955] Ch 238, [1955] 1 All ER 331, CA, an injunction without notice to restrain the presentation of a draft order to Her Majesty in Council was discharged. Where such injunctions have been granted the legislature concerned has had limited legislative functions: see *A-G for New South Wales v Trethowan* [1932] AC 526, PC; *Rediffusion (Hong Kong) Ltd v A-G for Hong Kong* [1970] AC 1136, PC. As to challenge of subordinate legislation by way of judicial review see *R v Electricity Comrs, ex p London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171; *R v HM Treasury, ex p Smedley* [1985] QB 657, [1985] 1 All ER 589, CA; and see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/A. GRANTING PERPETUAL RESTRICTIVE INJUNCTIONS/356. Injury must be continuous or irreparable.

(iii) Perpetual Restrictive Injunctions

A. GRANTING PERPETUAL RESTRICTIVE INJUNCTIONS

356. Injury must be continuous or irreparable.

Prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are an adequate remedy¹. Where the court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy², it does so upon either of two distinct grounds³: first, that the injury is continuous⁴ and second, that it is irreparable⁵. By 'continuous injury' is meant injury which would necessitate the bringing of a series of actions in order to obtain the damages to which such continual annoyance would entitle a claimant⁶. If it is a continuing injury the court will not refuse an injunction because the actual damage arising from it is slight⁷. By 'irreparable injury' is meant injury which is substantial and could never be adequately remedied or atoned for by damages or any other decree which the court may pronounce⁸. The fact that the claimant may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages⁹. Even where the injury is capable of compensation in damages an injunction may be granted if the act in respect of which relief is sought is likely to destroy the subject matter in question¹⁰, and the mere fact that, in order to avoid litigation, a party has offered to take a sum of money as the price of his rights does not preclude him from asserting that he will suffer irreparable damage from the continuance of the act complained of¹¹. However, if the claimant has himself shown, by his conduct on a previous occasion, that the injury complained of is one which may in some way be compensated by money, the court may decline to grant an injunction¹².

1 *London and Blackwall Rly Co v Cross*(1886) 31 ChD 354, CA. In *Hodgson v Duce* (1856) 4 WR 576, the defendant was a pauper and the claimant was granted an injunction to restrain him from trespassing, on the ground that, as against a pauper, damages did not constitute an adequate remedy. See also *Dent v Auction Mart Co*(1866) LR 2 Eq 238; *Cooke v Forbes*(1867) LR 5 Eq 166; *A-G v Sheffield Gas Consumers Co* (1853) 3 De G M & G 304; *Smith v Smith*(1875) LR 20 Eq 500. As to the original jurisdiction of the Chancery Court see **EQUITY**.

2 The right at law must be established: see PARA 357. 'It is an old mistake to suppose that, because there is no effectual remedy at law, there must be one in equity': *Holmes v Millage*[1893] 1 QB 551 at 555, CA, per Lindley LJ.

3 *A-G v Cambridge Consumers Gas Co*(1868) 4 Ch App 71. See also *Vere v Minter* (1914) 49 LJo 129 and *Colls v Home and Colonial Stores Ltd*[1904] AC 179, HL.

4 *Soltau v De Held* (1851) 2 Sim NS 133; cf *Desk Advertising Co Ltd v Societe Civile de Participations du Groupe ST Dupont* (1973) 117 Sol Jo 483, CA. See also PARA 437 and **NUISANCE** vol 78 (2010) PARA 231.

5 *A-G v Hallett* (1847) 16 M & W 569; *Earl of Ripon v Hobart* (1834) 3 My & K 169; *Earl of Southampton v London and Birmingham Rly Co* (1838) 2 Jur 1012; *Hilton v Earl of Granville* (1841) Cr & Ph 283; *North Union Rly Co v Bolton and Preston Rly Co* (1843) 3 Ry & Can Cas 345; *Shrewsbury and Birmingham Rly Co v London and North Western Rly Co* (1850) 3 Mac & G 70; *A-G v Sheffield Gas Consumers Co* (1853) 3 De G M & G 304; *Johnson v Shrewsbury and Birmingham Rly Co* (1853) 3 De G M & G 914; *Dyke v Taylor* (1861) 3 De G F & J 467; cf *Orr-Lewis v Orr-Lewis*[1949] P 347, [1949] 1 All ER 504 at 506 (grounds for exercise of jurisdiction to restrain foreign proceedings).

6 *A-G v Birmingham Borough Council* (1858) 4 K & J 528.

7 *A-G v Sheffield Gas Consumers Co* (1853) 3 De G M & G 304 (nuisance); and see *Patel v W H Smith (Eziot) Ltd*[1987] 2 All ER 569, [1987] 1 WLR 253, CA (trespass).

8 *A-G v Hallett* (1847) 16 M & W 569; *East Lancashire Rly Co v Hattersley* (1849) 8 Hare 72; and see *Cory v Yarmouth and Norwich Rly Co* (1844) 3 Hare 593; *Wood v Sutcliffe* (1851) 2 Sim NS 163; *A-G v Sheffield Gas Consumers Co* (1853) 3 De G M & G 304; *Pinchin v London and Blackwall Rly Co* (1854) 5 De G M & G 851; *Bloxam v Metropolitan Rly Co*(1868) 3 Ch App 337. See also *American Cyanamid Co v Ethicon Ltd*[1975] AC 396 at 406, [1975] 1 All ER 504 at 509, HL, per Lord Diplock ('The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial'). See further *Litchfield-Speer v Queen Anne's Gate Syndicate (No 2) Ltd*[1919] 1 Ch 407.

9 *Lumley v Wagner* (1852) 1 De G M & G 604; *Jordeson v Sutton, Southcoates and Drypool Gas Co*[1899] 2 Ch 217, CA; *Luganda v Service Hotels Ltd*[1969] 2 Ch 209, [1969] 2 All ER 692, CA.

10 *Hilton v Earl of Granville* (1841) Cr & Ph 283 (interim injunction refused on facts); *Jones v Pacaya Rubber and Produce Co Ltd*[1911] 1 KB 455, CA.

11 *Ainsworth v Bentley* (1866) 14 WR 630; cf *Earl of Mexborough v Bower* (1843) 7 Beav 127; affd 2 LTOS 205.

12 *Wood v Sutcliffe* (1851) 2 Sim NS 163; *Paris Chocolate Co v Crystal Palace Co* (1855) 3 Sm & G 119 (specific performance refused); *Dowling v Betjemann* (1862) 2 John & H 544; *Viscountess Gort v Clark* (1868) 18 LT 343; *Ormerod v Todmorden Mill Co*(1883) 11 QBD 155, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/A. GRANTING PERPETUAL RESTRICTIVE INJUNCTIONS/357. Right at law must be established.

357. Right at law must be established.

The general rule is that if a claimant applies for an injunction in respect of a violation of a common law right, and the existence of that right or the fact of its violation is denied, he must establish his right at law¹. Having done that, he is, except in special circumstances², entitled to an injunction to prevent a recurrence of that violation³. In certain cases the court may not require the claimant to establish his right at law, for instance where his title is not denied⁴, where the question of law should be decided on application⁵ or where there could be no possible defence or conflict of evidence⁶. It is not necessary to apply in the first instance for an interim injunction⁷. On the other hand, the court cannot grant an injunction before a right is acquired, even where it must be acquired within a short period⁸.

1 *Spottiswoode v Clark* (1846) 2 Ph 154; *Directors of Imperial Gas Light and Coke Co v Broadbent* (1859) 7 HL Cas 600. In *Corelli v Wall* (1906) 22 TLR 532, and *Sports and General Press Agency Ltd v 'Our Dogs' Publishing Co Ltd* [1917] 2 KB 125, CA, the claimants were unable to establish any legal rights. See also *Re V (a Minor) (Injunction: Jurisdiction)* [1996] 2 FCR 382 (in order to claim declaratory or injunctive relief it is not necessary to establish a cause of action, but nonetheless the plaintiff must be able to assert a legal right). The question whether an injunction should be granted has to be determined by reference to the state of the law at the date when the question falls to be decided and not at the date of the issue of the claim form: *Application des Gaz SA v Falks Veritas Ltd* [1974] Ch 381, [1974] 3 All ER 51, CA.

2 See *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651; CA; and *Bacon v Jones* (1839) 4 My & Cr 433; and see PARA 495 note 4. Cf *A v B Bank (Governor and Company of the Bank of England intervening)* (1991) Times, 16 May (a notice issued by the Bank of England under the Banking Act 1987 s 39(3) (a) (repealed) requiring production of documents overrode an injunction granted against the disclosure of documents to any third party).

3 *Directors of Imperial Gas Light and Coke Co v Broadbent* (1859) 7 HL Cas 600; *Fullwood v Fullwood* (1878) 9 ChD 176; *Martin v Price* [1894] 1 Ch 276, CA; *Wood v Conway Corp* [1914] 2 Ch 47, CA; and see *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149, [1953] 1 All ER 179, CA. For this purpose the award of an arbitrator is equivalent to a verdict: *Directors of Imperial Gas Light and Coke Co v Broadbent* (1859) 7 HL Cas 600.

4 *Potts v Levy* (1854) 2 Drew 272.

5 *Gravelly v Barnard* (1874) LR 18 Eq 518.

6 *Eaden v Firth* (1863) 1 Hem & M 573 at 574.

7 *Davies v Marshall (No 1)* (1861) 1 Drew & Sm 557 at 560 (explaining *Bacon v Jones* (1839) 4 My & Cr 433); *Gale v Abbott* (1862) 8 Jur NS 987; but cf *Blue Town Investments Ltd v Higgs and Hill plc* [1990] 2 All ER 897, [1990] 1 WLR 696; distinguished in *Oxy Electric Ltd v Zainuddin* [1990] 2 All ER 902, [1991] 1 WLR 115. As to interim injunctions see PARA 383 et seq.

8 Eg where the claimant has enjoyed light for his windows for more than 19 but less than 20 years, notwithstanding that by the Prescription Act 1832 ss 3, 4 no obstruction is to count unless acquiesced in for one year: *Lord Battersea v London City Sewers Comrs* [1895] 2 Ch 708; *Barff v Mann, Crossman and Paulin Ltd* (1905) 49 Sol Jo 794. As to the Prescription Act 1832 ss 3, 4 see **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 99 et seq. A freezing injunction has been granted prior to the establishment of a right at law: see PARA 396.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/A. GRANTING PERPETUAL RESTRICTIVE INJUNCTIONS/358. Equitable owners.

358. Equitable owners.

Where the claimant is merely the equitable owner, and not the legal owner of property which is the subject matter of the proceedings, he may obtain interim protection for the property in the form of an interim injunction¹. However, before a perpetual injunction can be granted the legal owner must usually be joined as a claimant or, in the case of his refusal to be so joined, as a defendant².

1 See *Merchant-Adventurers Ltd v M Grew & Co Ltd* [1972] Ch 242, [1971] 2 All ER 657.

2 *E M Bowden's Patents Syndicate Ltd v H Smith & Co* [1904] 2 Ch 86; *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601; *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1, HL; *Barnes v Allen* [1927] WN 217. The rule does not apply in the case of a mortgagor in possession: see PARA 473.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/A. GRANTING PERPETUAL RESTRICTIVE INJUNCTIONS/359. Extent of damage and injury.

359. Extent of damage and injury.

An injunction may be granted even where no actual damage has been caused¹, and where the injury complained of has ceased after action brought, but before trial². However, where the alleged injury has ceased, the court, in the exercise of its discretion, may refuse to interfere³. Mere interference with a legal right does not by itself entitle a claimant to an injunction⁴, nor does mere inconvenience⁵. There must be violation of an enforceable right⁶, and the violation must be of a substantial character⁷. An injunction will not be granted where the claimant has a remedy in his own power⁸. Where special damage is essential to the particular cause of action, the claimant cannot obtain an injunction unless he proves that special damage has been or will necessarily be occasioned to him by the act complained of⁹. Moreover, the court will not order a party to do an act unless it is satisfied that he is able to do it¹⁰, and sometimes, where the granting of the injunction would place the defendant in a position of extreme difficulty and might prove unnecessarily oppressive, instead of granting an injunction the court will make a declaration establishing the claimant's right to relief, and give the defendant a reasonable time to do what is necessary to cure the mischief, with liberty to the claimant to apply at the end of that time for an injunction¹¹.

1 *Jones v Llanrwst UDC* [1911] 1 Ch 393 (property right not infringed by water pollution); but as to the position where nominal damages have been recovered see PARA 360. It should be noted that, in the absence of any covenant not to do an act, an injunction will be refused where the act complained of is found not to have resulted in damage: *Ingram v Morecraft* (1863) 33 Beav 49. As to enforcement of covenants see PARA 448 et seq.

2 *Dean and Chapter of Chester v Smelting Corp Ltd* (1901) 85 LT 67.

3 *Dunning v Grosvenor Dairies Ltd* (1900) 45 Sol Jo 101; *Carr & Co v Bath Gas Light and Coke Co* [1899] WN 265n; *Batcheller v Tunbridge Wells Gas Co* (1901) 84 LT 765; *Barber v Penley* [1893] 2 Ch 447; *Dean and Chapter of Chester v Smelting Corp Ltd* (1901) 85 LT 67; see also *A-G v P Y A Quarries Ltd* [1957] 2 QB 169, [1957] 1 All ER 894, CA, where, however, the nuisance in question was held not to have wholly ceased at the time of the trial. See also **NUISANCE** vol 78 (2010) PARA 231.

4 *Robson v Whittingham* (1866) 1 Ch App 442; *National Provincial Plate Glass Insurance Co v Prudential Assurance Co* (1877) 6 ChD 757.

5 *Dyke v Taylor* (1861) 3 De G F & J 467; *Street v Union Bank of Spain and England* (1885) 30 ChD 156. As to the court taking into account the balance of convenience in the case of perpetual injunctions see eg *A-G v Dorking Union Guardians* (1882) 20 ChD 595, CA. See also PARA 386.

6 *Day v Brownrigg* (1878) 10 ChD 294, CA; *Street v Union Bank of Spain and England* (1885) 30 ChD 156. An injunction will not be granted to prevent annoyances by a mere stranger: *Best v Drake* (1853) 1 WR 229. The first principle which applies to every case is that the claimant must show some property, right or interest in the subject matter of his complaint: *Maxwell v Hogg, Hogg v Maxwell* (1867) 2 Ch App 307.

7 *Llandudno UDC v Woods* [1899] 2 Ch 705; *Behrens v Richards* [1905] 2 Ch 614; and see *Martin v Douglas* (1867) 16 WR 268; *Leahy, Kelly and Leahy v Glover* (1893) 10 RPC 141; *Rutter & Co v Smith* (1900) 18 RPC 49; cf *Steiner Products Ltd v Stevens* [1957] RPC 439.

8 *Elliman Sons & Co v Carrington & Son Ltd* [1901] 2 Ch 275.

9 *White v Mellin* [1895] AC 154, HL (slander of goods of a rival trader).

10 *A-G v Colney Hatch Lunatic Asylum* (1868) 4 Ch App 146; *Glossop v Heston and Isleworth Local Board* (1879) 12 ChD 102, CA; *A-G v Dorking Union Guardians* (1882) 20 ChD 595, CA; *Evans v Manchester, Sheffield and Lincolnshire Rly Co* (1887) 36 ChD 626; *A-G v Clerkenwell Vestry* [1891] 3 Ch 527; *Barnes v Allen* [1927] WN 217; and see *Charles v Finchley Local Board* (1883) 23 ChD 767.

11 *St Mary, Islington, Vestry v Hornsey UDC* [1900] 1 Ch 695, CA; and see *Stollmeyer v Trinidad Lake Petroleum Co* [1918] AC 485, PC; and see the other cases cited in PARA 362 note 11.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/A. GRANTING PERPETUAL RESTRICTIVE INJUNCTIONS/360. When damage is small.

360. When damage is small.

The fact that only very small or nominal damages have been recovered in the action is not, of itself, a sufficient ground for refusing an injunction¹, but it will be taken into consideration, for the court has regard to all the surrounding circumstances in considering whether or not it should grant an injunction, and does not confine itself to the strict rights of the parties². The mere fact that the injury suffered is small is not decisive in determining whether the court should grant damages or an injunction³.

However, the court will not interfere if the violation is so small, slight and formal that the claimant has no ground in conscience to complain of it⁴, but it requires a very clear case before the court will decline to interfere on the sole ground that the damage to arise from the breach would be inappreciable⁵. Interference with privacy is not a trivial matter⁶.

Proof of damage in an application to enforce a negative covenant by injunction is normally unnecessary⁷.

1 *Rochdale Canal Co v King* (1851) 2 Sim NS 78; *Wood v Sutcliffe* (1851) 2 Sim NS 163.

2 *Wood v Sutcliffe* (1851) 2 Sim NS 163; *National Provincial Plate Glass Insurance Co v Prudential Assurance Co* (1877) 6 ChD 757; *Goodson v Richardson* (1874) 9 Ch App 221.

3 As to smallness of damages see PARA 368. Trifling damage may, however, be the very reason why an injunction should be granted: *John Trenberth Ltd v National Westminster Bank Ltd* (1979) 123 Sol Jo 388, 39 P & CR 104 (trespass); and see *Woollerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483, [1970] 1 WLR 411; and *Patel v W H Smith (Eziot) Ltd v Richard Costain Ltd* [1987] 2 All ER 569, [1987] 1 WLR 853, CA.

4 *Harrison v Good* (1871) LR 11 Eq 338.

5 *Lloyd v London, Chatham and Dover Rly Co* (1865) 2 De G J & Sm 568; *Great Northern Rly Co v Bradford Corpn* (1918) 88 LJ Ch 101. The wrongful deprivation of a right to vote even at a meeting of a mere private association is no trivial matter: *Woodford v Smith* [1970] 1 All ER 1091n, [1970] 1 WLR 806 (interim injunction).

6 *Lady Andover v Robertson* (1855) 26 LTOS 23; cf *Lord Manners v Johnson* (1875) 1 ChD 673.

7 As to proof of damage see PARA 453.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/A. GRANTING PERPETUAL RESTRICTIVE INJUNCTIONS/361. Negative and affirmative covenants and stipulations.

361. Negative and affirmative covenants and stipulations.

In the case of a negative covenant or stipulation the court will usually enforce compliance by injunction without regard to the question of convenience or the amount of damage caused¹. Where a covenant is affirmative and of a kind which the court will enforce by a decree for specific performance, that is normally the appropriate remedy. The court will, therefore, refuse an injunction unless the affirmative covenant is in substance negative or forms part of an indivisible contract containing another covenant which is negative².

1 See PARA 453 et seq. However, as to the position where the damage is inappreciable, see PARA 360.

2 As to positive and negative covenants see PARA 448 et seq. As to the origin of the remedy of injunction see **EQUITY** vol 16(2) (Reissue) PARA 477 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/A. GRANTING PERPETUAL RESTRICTIVE INJUNCTIONS/362. Threatened invasion of legal right.

362. Threatened invasion of legal right.

Where a claimant has established that he has a right which has been infringed and that further infringement is threatened to a material extent, he is entitled to an injunction to restrain the threatened infringement upon the ordinary principles upon which the court acts in granting injunctions¹. If the claimant's right to relief rests mainly on damage which has not been actually suffered but is likely to accrue within a reasonable time, the court will take that into consideration and grant an injunction². Therefore, although the claimant's legal right is not disputed, an injunction may be granted to restrain the commission of an apprehended or threatened act, on the ground that if the act is done it will violate the claimant's legal right, if he can show strong probability³ that the apprehended mischief will in fact arise⁴. However, no one can obtain a quia timet order by merely saying 'timeo'; he must aver and prove that what is going on is calculated to infringe his rights⁵. The mere fact that the defendant denies any intention of committing the act complained of is not of itself a sufficient ground for refusing relief⁶, but it is not sufficient ground for granting an injunction that, if there is no such intention, the injunction will do the defendant no harm⁷. An injunction will not be granted if the defendant, even though he asserts his right to do the act, not only says that he has no present intention of doing it but undertakes to give reasonable and sufficient notice before attempting to do it⁸. An injunction may also be refused where, on the defendant being served with the writ, the claimant is offered and may obtain all the relief that he seeks, and the offer is one which he ought to have accepted⁹. The court will not restrain future acts of a wrongdoer unless it is plain that they will be of a wrongful nature¹⁰. Where there seems to be no probability that the act complained of will be repeated, the court will sometimes make a declaration only, with liberty to apply for an injunction if necessary¹¹.

However, if the defendant claims and insists upon his right¹² or gives distinct notice of his intention¹³ or threatens¹⁴ or intends¹⁵ to commit an act which, if committed, would, in the court's opinion, violate the claimant's right, an injunction will be granted.

1 *Martin v Price* [1894] 1 Ch 276, CA; *Jordeson v Sutton, Southcoates and Drypool Gas Co* [1899] 2 Ch 217, CA; *Stollmeyer v Petroleum Development Co Ltd* [1918] AC 498n, PC; *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106, [1969] 1 All ER 522, CA; *Phonographic Performance Ltd v Maitra* [1998] 2 All ER 638, [1998] 1 WLR 870, CA; and PARA 484. See also *British Telecommunications plc v One in a Million Ltd* [1998] 4 All ER 476, [1999] 1 WLR 903, CA (defendant's registration of Internet domain names which incorporated claimant companies' names amounted to (1) both actual and threatened passing off; (2) threatened infringement of trade marks; and (3) the creation of instruments of fraud, all of which entitled the claimants to a final injunction to restrain the use of the names by the defendant). As to damages in lieu of injunction in quia timet actions see PARA 365; and as to quia timet actions see **EQUITY** vol 16(2) (Reissue) PARA 484.

2 *Dicker v Popham, Radford & Co* (1890) 63 LT 379. The possible future application of the claimant's premises is an element to be taken into consideration in an action to restrain the obstruction of ancient lights: *Dicker v Popham, Radford & Co* (1890) 63 LT 379; *Cowper v Laidler* [1903] 2 Ch 337. See also *Hodges v London Trans Omnibus Co* (1883) 12 QBD 105, where the claimant who, as manager of the defendant company, had become under the statutes and rules for the regulation of stage carriages the licensee of its vehicles, on ceasing to be a manager was granted an injunction restraining the company from using his name on the number plates on its carriages.

3 The degree of probability is not an absolute standard. What is to be aimed at is justice between the parties, having regard to all the relevant circumstances: *Hooper v Rogers* [1975] Ch 43, [1974] 3 All ER 417, CA; and see *Royal Insurance Co Ltd v Midland Insurance Co Ltd* (1908) 26 RPC 95. See also *Papamichael v National*

Westminster Bank plc [2002] 2 All ER (Comm) 60 (claimant required to show good arguable case that threatened event would occur).

4 *Crowder v Tinkler* (1816) 19 Ves 617; *Earl of Ripon v Hobart* (1834) 3 My & K 169; *Haines v Taylor* (1846) 10 Beav 75; *Hertz v Union Bank of London* (1854) 24 LTOS 186; *Hepburn v Lordan* (1865) 2 Hem & M 345; *A-G v Kingston-on-Thames Corpn* (1865) 34 LJ Ch 481; *Dunn v Bryan* (1872) IR 7 Eq 143; *Pattisson v Gilford* (1874) LR 18 Eq 259; *Siddons v Short* (1877) 2 CPD 572; *Goodhart v Hyett* (1883) 25 ChD 182; *Fletcher v Bealy* (1885) 28 ChD 688; *Phillips v Thomas* (1890) 62 LT 793; *A-G v Manchester Corpn* [1893] 2 Ch 87; *A-G v Rathmines and Pembroke Joint Hospital Board* [1904] 1 IR 161; *A-G v Nottingham Corpn* [1904] 1 Ch 673; *A-G v Long Eaton UDC* [1915] 1 Ch 124, CA.

5 *A-G for Dominion of Canada v Ritchie (Contracting and Supply) Co* [1919] AC 999, PC; cf *Draper v British Optical Association* [1938] 1 All ER 115, where the application was held to be premature. See *British Data Management plc v Boxer Commercial Removals plc* [1996] 3 All ER 707, CA (no injunction to restrain publication of threatened libel where no reasonable certainty as to actual words prospectively complained of). As to the need to establish a prima facie case see PARA 385.

6 *Jackson v Cator* (1800) 5 Ves 688; and see *Potts v Levy* (1854) 2 Drew 272; *A-G v Long Eaton UDC* [1915] 1 Ch 124, CA.

7 *Coffin v Coffin* (1821) Jac 70; *Dunn v Bryan* (1872) IR 7 Eq 143.

8 *Lord Cowley v Byas* (1877) 5 ChD 944, CA. Similarly, having regard to the facts of the case, it may be wrong in quia timet proceedings to grant relief by way of injunction to compel the defendant to do something which he appears to be willing to do without the imposition of a court order: see *Bridlington Relay Ltd v Yorkshire Electricity Board* [1965] Ch 436, [1965] 1 All ER 264.

9 *Jenkins v Hope* [1896] 1 Ch 278; cf *Winkle & Co Ltd v Gent & Son* (1914) 31 RPC 473 (undertaking offered in the defence); and see *Proctor v Bayley* (1889) 42 ChD 390, CA. But the claimant has a right to have the undertaking given in court: *Jenkins v Hope* [1896] 1 Ch 278.

10 *Aldebert v Leaf* (1864) 3 New Rep 455.

11 *Wilcox v Steel* [1904] 1 Ch 212, CA; see also *Smith v Baxter* [1900] 2 Ch 138, where the defendant's object had been to ascertain the claimant's rights rather than to infringe them; *Stollmeyer v Trinidad Lake Petroleum Co* [1918] AC 485, PC, where because the damage was insignificant and local industry would be affected, a declaration was made, with liberty to apply for injunction to the court of first instance after a period of two years; *Great Northern Rly Co v Bradford Corpn* (1918) 88 LJ Ch 101, where a declaration was considered sufficient having regard to the parties to the action; *Litchfield-Speer v Queen Anne's Gate Syndicate (No 2) Ltd* [1919] 1 Ch 407, where, the claimants not objecting, this course was followed in an action for threatened obstruction of ancient lights.

12 *Tipping v Eckersley* (1855) 2 K & J 264; *A-G v Acton Local Board* (1882) 22 ChD 221; *Phillips v Thomas* (1890) 62 LT 793.

13 *A-G v Forbes* (1836) 2 My & Cr 123.

14 *Potts v Levy* (1854) 2 Drew 272; *Cooper v Whittingham* (1880) 15 ChD 501.

15 *Hext v Gill* (1872) 7 Ch App 699; *Adair v Young* (1879) 12 ChD 13, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/A. GRANTING PERPETUAL RESTRICTIVE INJUNCTIONS/363. Effect of appeal pending.

363. Effect of appeal pending.

The fact that an appeal¹ is pending is no bar to the granting of a perpetual injunction², at any rate where the court does not feel any doubt as to the justice of the decision under appeal³, nor is it, of itself, a sufficient ground for postponing the operation of the injunction⁴, although, if irreparable damage⁵ will be done to the appellant in the meantime, the operation of the injunction may be stayed on terms⁶. Mere inconvenience or annoyance is not enough to induce the court to take away from a successful party the benefit of his order⁷.

In an action to determine the rights of claimants to a fund there a jurisdiction to grant an injunction to restrain all dealings with the fund pending an appeal⁸. However, this jurisdiction⁹ ought to be very carefully exercised so as not to encourage anyone to present an appeal for the purposes of delay¹⁰.

1 An appeal does not generally operate as a stay of execution: see CPR 52.7; and PARA 1669.

2 *A-G v Properties of Bradford Canal* (1866) LR 2 Eq 71; *Penn v Bibby*, *Penn v Jack*, *Penn v Fernie* (1866) LR 3 Eq 308.

3 *A-G v Properties of Bradford Canal* (1866) LR 2 Eq 71.

4 *A-G v Properties of Bradford Canal* (1866) LR 2 Eq 71.

5 As to irreparable damage see PARA 356.

6 *Walford v Walford* (1868) 3 Ch App 812; and see *Bradford v Young* (1885) 18 ChD 18, CA. As to the suspension of injunction pending appeal in patent cases see eg *Samuel Parkes & Co Ltd v Cocker Bros Ltd* (1929) 46 PRC 241, CA; *Minnesota Mining and Manufacturing Co v Johnson and Johnson Ltd* [1976] RPC 671, CA; *American Cyanamid Co v Ethicon Ltd* [1979] RPC 215; and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 544.

7 *Walford v Walford* (1868) 3 Ch App 812.

8 *Wilson v Church* (1879) 11 ChD 576, CA; *Polini v Gray*, *Sturla v Freccia* (1879) 12 ChD 438, CA. A court of first instance has been held to have jurisdiction to grant such an injunction: *Orion Property Trust Ltd v Du Cane Court Ltd* [1962] 3 All ER 466, [1962] 1 WLR 1085, not following *Wilson v Church* (1879) 11 ChD 576, CA. See further *Erinford Properties Ltd v Cheshire County Council* [1974] Ch 261, [1974] 2 All ER 448; PARAS 315, 363. Cf *Galloway v London Corpn (No 2)* (1865) 3 De G J & Sm 59: the claimant must see that the decree is framed so as to keep the jurisdiction alive pending the appeal. As to powers restraining dealing with funds see PARAS 339, 477.

9 It is based upon the principle which underlies all orders for the preservation of property pending litigation, namely that the ultimately successful party is to reap the fruits of the litigation and not merely to obtain a barren success: *Polini v Gray*, *Sturla v Freccia* (1879) 12 ChD 438 at 443, CA, per Jessel MR.

10 *Polini v Gray*, *Sturla v Freccia* (1879) 12 ChD 438, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/B. DAMAGES IN LIEU OF INJUNCTION/364. Damages as additional or alternative relief.

B. DAMAGES IN LIEU OF INJUNCTION

364. Damages as additional or alternative relief.

Originally damages could only be obtained in a court of common law¹. Subsequently the Court of Chancery was empowered by statute in all cases in which it had jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act or an application for performance², to award damages to the party injured, either in addition to or in substitution for an injunction or specific performance³. By virtue of those statutory provisions the High Court has power to award damages in lieu of an injunction where the injury is merely threatened and no wrongful act has been committed⁴. It also has power⁵, under its general jurisdiction, to award damages to a party who has been injured, either in addition to or in substitution for an injunction⁶.

1 As to damages see generally **DAMAGES**.

2 See generally **SPECIFIC PERFORMANCE**.

3 Chancery Amendment Act 1858 s 2. This Act, commonly known as Lord Cairns' Act, remained in force notwithstanding the passing of the Supreme Court of Judicature Act 1873: see *Fritz v Hobson*(1880) 14 ChD 542. The Chancery Amendment Act 1858 s 2 was repealed by the Statute Law Revision and Civil Procedure Act 1883 s 3, Schedule (repealed), but the repeal did not affect the jurisdiction established by the repealed enactment: s 5. A similar saving was contained in the Statute Law Revision Act 1898, which by s 1, Sch 1 Pt I repealed the Statute Law Revision and Civil Procedure Act 1883 s 5. By the combined effect of the above savings and of the Supreme Court of Judicature Act 1873 s 16 (repealed and replaced by the Supreme Court of Judicature (Consolidation) Act 1925 s 18 (repealed); replaced by the Supreme Court Act 1981 s 19), which vested the jurisdiction of the Court of Chancery in the High Court, the jurisdiction conferred by the Chancery Amendment Act 1858 s 2 remains in force: *Sayers v Collyer* (188) 28 ChD 103, CA (considered in *Re R*[1906] 1 Ch 730, CA); *Dreyfus v Peruvian Guano Co*(1889) 42 ChD 66; *Leeds Industrial Co-operative Society Ltd v Slack*[1924] AC 851, HL; see also *Holland v Worley*(1884) 26 ChD 578; *Serrao v Noel*(1885) 15 QBD 549, CA; *Greenwood v Hornsey*(1886) 33 ChD 471; *Chapman, Morsons & Co v Auckland Union Guardians*(1889) 23 QBD 294, CA; *Dicker v Popham, Radford & Co* (1890) 63 LT 379; *Shelfer v City of London Electric Lighting Co, Meux's Brewery Co v City of London Electric Lighting Co*[1895] 1 Ch 287, CA; *Cowper v Laidler*[1903] 2 Ch 337. See now the Supreme Court Act 1981 s 50. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. The court has power under s 50 to grant a restricted injunction and to award damages as compensation for the restriction: *Chiron Corp v Organon Teknika Ltd (No 10)*, *Chiron Corp v Murex Diagnostics Ltd (No 10)* [1995] FSR 325. As to the date of assessment of damages in lieu of an injunction see *Lunn Poly Ltd v Liverpool and Lancashire Properties Ltd*[2006] EWCA Civ 430, [2006] 25 EG 210, sub nom *Liverpool and Lancashire Properties Ltd v Lunn Poly Ltd*(2006) Times, 18 April.

4 *Leeds Industrial Co-operative Society Ltd v Slack*[1924] AC 851, HL. A court of common law could not award damages for prospective injury: see *Leeds Industrial Co-operative Society Ltd v Slack*[1924] AC 851 at 856, HL, per Viscount Finlay.

5 See the Supreme Court Act 1981 s 49, re-enacting the Supreme Court of Judicature (Consolidation) Act 1925 s 43 (repealed).

6 It is therefore no longer necessary in such a case to resort to the Chancery Amendment Act 1858 s 2: *Sayers v Collyer*(1884) 28 ChD 103, CA; *Serrao v Noel*(1885) 15 QBD 549, CA. The court's powers are now larger than those possessed under the Act of 1858 in so far as it is no longer necessary for the claimant to make out that he is entitled to an equitable remedy before he can obtain damages: see *Elmore v Pirrie* (1887) 57 LT 333 at 335 per Kay J. In a purely equitable claim damages may be recoverable even though the right to equitable relief has been lost by acquiescence: *Landau v Curton* (1962) 184 Estates Gazette 13.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/B. DAMAGES IN LIEU OF INJUNCTION/365. Damages in quia timet actions.

365. Damages in quia timet actions.

The court has jurisdiction to grant damages in lieu of an injunction not only where the act complained of has been done and there is an intention to continue it¹ but also in a quia timet action, where the injury is merely threatened and no wrongful act has yet been committed². As a good working rule, damages in lieu of an injunction may be given (1) where the injury to the claimant's legal rights is small; (2) where that injury is capable of being estimated in money; (3) where that injury can be adequately compensated by a small money payment; and (4) where the case is one in which it would be oppressive to the defendant to grant an injunction³. However, the rule is not a universal one⁴, and it does not follow that damages must be given in all cases in which the above conditions are fulfilled⁵. In the case of a continuing actionable nuisance, the jurisdiction to award damages in lieu of an injunction ought to be exercised only in very exceptional circumstances⁶.

1 *Shelfer v City of London Electric Lighting Co, Meux's Brewery Co v City of London Electric Lighting Co* [1895] 1 Ch 287, CA; *Cowper v Laidle* [1903] 2 Ch 337; *Kine v Jolly* [1905] 1 Ch 480, CA; affd sub nom *Jolly v Kine* [1907] AC 1, HL.

2 *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, HL, where the opinions to the contrary in *Dreyfus v Peruvian Guano Co* (1889) 43 ChD 316, CA, were disapproved; *Hooper v Rogers* [1975] Ch 43, [1974] 3 All ER 417, CA, where damages were awarded in lieu of mandatory injunction. The damages will in such a case be solely in respect of the damage to be sustained in the future by the injuries which the injunction, if granted, would have prevented: *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, HL. For the principle on which a quia timet action lies see **EQUITY** vol 16(2) (Reissue) PARA 484.

3 *Shelfer v City of London Electric Lighting Co, Meux's Brewery Co v City of London Electric Lighting Co* [1895] 1 Ch 287, CA, per A L Smith LJ. See *Redland Bricks Ltd v Morris* [1970] AC 652, [1969] 2 All ER 576, HL, where the award of both damages and injunction was considered; and *Daniells v Mendonca* (1999) 78 P & CR 401, CA.

4 The rule is not even a sound rule in all cases of injury to light: see *Fishenden v Higgs and Hill Ltd* (1935) 153 LT 128, CA; cf *Colls v Home and Colonial Stores Ltd* [1904] AC 179, HL; *Slack v Leeds industrial Co-operative Society* [1924] 2 Ch 475, CA. As to rights to light see generally **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 222 et seq.

5 *Fishenden v Higgs and Hill Ltd* (1935) 153 LT 128; cf *Shelfer v City of London Electric Lighting Co, Meux's Brewery Co v City of London Electric Lighting Co* [1895] 1 Ch 287, CA. The latter case seems the high water mark of what might be called definitive rules: see *Fishenden v Higgs and Hill Ltd* (1935) 153 LT 128, CA.

6 *Shelfer v City of London Electric Lighting Co, Meux's Brewery Co v City of London Electric Lighting Co* [1895] 1 Ch 287, CA; and see *Pennington v Brinsop Hall Coal Co* (1877) 5 ChD 769; *Morrow v Stepney Corp'n* (1920) 18 LGR 458. See also *Watson v Croft Promo-Sport Ltd* [2009] EWCA Civ 15, [2009] All ER (D) 197 (Jan). In cases of obstruction of light, if there is really a question whether the obstruction is a legal one or not, and if the defendant has acted fairly and not in an unneighbourly spirit, the court ought to incline to damages rather than to grant an injunction: see *Colls v Home and Colonial Stores Ltd* [1904] AC 179, HL.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/B. DAMAGES IN LIEU OF INJUNCTION/366. Damages in lieu are discretionary.

366. Damages in lieu are discretionary.

The power of awarding damages in lieu of an injunction is discretionary¹ and must be exercised with an intimate knowledge of the facts² and so as to prevent people being compelled to sell property against their will at a valuation³. Moreover, a defendant must not be encouraged to believe that he may do a wrongful act on the payment of a given sum in terms of money⁴. Where a breach of an express covenant is committed, either by the original covenantor or by an assignee who is bound by it, and causes substantial damage, the court has no discretion to award damages in lieu of an injunction⁵. The question whether the defendant knew that he was wrong is of importance⁶. His conduct may be a determining factor in deciding whether to grant an injunction or damages⁷.

The court may exercise its discretion to award damages either in addition to or in substitution for an injunction, whether or not damages have also been specifically claimed⁸.

1 *Durell v Pritchard* (1865) 1 Ch App 244; *Smith v Smith* (1875) LR 20 Eq 500; *Holland v Worley* (1884) 26 ChD 578; *Greenwood v Hornsey* (1886) 33 ChD 471.

2 *Greenwood v Hornsey* (1886) 33 ChD 471.

3 *Dent v Auction Mart Co*, *Pilgrim v Auction Mart Co*, *Mercers' Co v Auction Mart Co* (1866) LR 2 Eq 238; *Aynsley v Glover* (1874) LR 18 Eq 544; *Krehl v Burrell* (1878) 7 ChD 551; affd (1879) 11 ChD 140, CA; *Holland v Worley* (1884) 26 ChD 578; *Greenwood v Hornsey* (1886) 33 ChD 471; *Cowper v Laidler* [1903] 2 Ch 337; *Martin v Price* [1894] 1 Ch 276, CA. *Wood v Conway Corpn* [1914] 2 Ch 47, CA; *Slack v Leeds Industrial Co-operative Society Ltd* [1924] 2 Ch 475, CA; and see *Gilling v Gray* (1910) 27 TLR 39; *Woodhouse v Newry Navigation Co* [1898] 1 IR 161, CA.

4 *Leeds Industrial Co-operative Society Ltd v Slade* [1924] AC 851, HL; *Smith Industrial Co-operative Society Ltd v Smith* (1875) LR 20 Eq 500; *Holland v Worley* (1884) 26 ChD 578; *Krehl v Burrell* (1879) 11 ChD 146, CA; *Shelfer v City of London Electric Lighting Co*, *Meux's Brewery Co v City of London Electric Lighting Co* [1895] 1 Ch 287, CA; and see *Woollerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483, [1970] 1 WLR 41, where, on the particular facts, an injunction was granted but postponed.

5 *Achilli v Tovell* [1927] 2 Ch 243; but cf *Wakeham v Wood* (1981) 125 Sol Jo 608, (1982) 43 P & CR 40, CA. Where substantial damage will not be caused by withholding a mandatory injunction, damages may be awarded in lieu: see *Sharp v Harrison* [1922] 1 Ch 502 and also *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798, where a mandatory injunction for breach of covenant, which would have meant demolition of much-needed houses, was refused.

6 *Smith v Smith* (1875) LR 20 Eq 500.

7 *Price v Hilditch* [1930] 1 Ch 500; *Pugh v Howells* (1984) 48 P & CR 298; cf *Colls v Home and Colonial Stores Ltd* [1904] AC 179, HL.

8 *Catton v Wyld* (1863) 32 Beav 266; *Betts v Neilson* (1868) 3 Ch App 429; on appeal sub nom *Neilson v Betts* (1870) LR 5 HL 1; *Lady Stanley of Alderley v Earl of Shrewsbury* (1875) LR 19 Eq 616; *Crawford v Hornsea Steam Brick and Tile Co Ltd* (1876) 45 LJ Ch 432, CA, where a memorandum of the decree was directed to be indorsed on the claimant's title; and see *Bowen v Hall* (1881) 6 QBD 333, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/B. DAMAGES IN LIEU OF INJUNCTION/367. Damages must cover same area as injunction.

367. Damages must cover same area as injunction.

Where damages are awarded in substitution for an injunction, then in order to be an adequate substitute, they must cover the whole area which would be covered by the injunction¹, and must therefore comprise damage accruing after, as well as before, the issue of the claim form², even as before the trial³, while in a purely quia timet action the damages will be solely in respect of injuries to be sustained at some future time⁴. Where an injunction is granted and the claimant also claims general damages merely as ancillary to the real remedy of injunction he is not entitled to substantial damages, but is entitled to recover something as an acknowledgment of the wrong he has suffered⁵.

In an action for an injunction and compensation in damages, if the substantial relief claimed is obtained before the action comes on for hearing, the claimant will not be deprived of his right to damages in respect of the claim by the defendant's delay in rectifying the injury⁶.

1 *Fritz v Hobson* (1880) 14 ChD 542; see *Molt v Wheatcroft* (1860) 30 LJ Ch 598.

2 *Fritz v Hobson* (1880) 14 ChD 542; *Chapman, Morsons & Co v Auckland Union Guardians* (1889) 23 QBD 294, CA; *Warwick and Birmingham Canal Navigation Co v Burman* (1890) 63 LT 670.

3 *Davenport v Rylands* (1865) LR 1 Eq 302; *Friz v Hobson* (1880) 14 ChD 542.

4 *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, HL; and see PARA 365 text and note 2.

5 *Lipman v George Pulman & Sons Ltd* (1904) 91 LT 132; and cf *Sharp v Harrison* [1922] 1 Ch 502.

6 *Cory v Thames Ironworks and Shipbuilding Co Ltd* (1863) 11 WR 589 (specific performance).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/B. DAMAGES IN LIEU OF INJUNCTION/368. Smallness of damage not decisive.

368. Smallness of damage not decisive.

The mere fact that the damage is small is not decisive¹, but if the court is of opinion that the claimant's property will remain substantially as useful to him as before the act complained of, and that, without taking his property away from him, the injury can be compensated by money, an injunction need not be granted².

1 *Marriott v East Grinstead Gas and Water Co* [1909] 1 Ch 70; *Goodson v Richardson* (1874) 9 Ch App 221. See also PARA 360.

2 *Holland v Worley* (1884) 26 ChD 578; *Shelfer v City of London Electric Lighting Co, Meux's Brewery Co v City of London Electric Lighting Co* [1895] 1 Ch 287, CA; *Rileys v Halifax Corp'n* (1907) 97 LT 278. See also *Slack v Leeds Industrial Co-operative Society Ltd* [1924] 2 Ch 475, CA; *Price v Hilditch* [1930] 1 Ch 500.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/B. DAMAGES IN LIEU OF INJUNCTION/369. Effect of resulting benefit.

369. Effect of resulting benefit.

Whilst the court may not regard an injury as compensated for by a benefit which results from it, the fact that a benefit does result to the claimant from the act complained of is an element to be considered in deciding whether an injunction should be granted or whether damages should be awarded¹.

¹ *National Provincial Plate Glass Insurance Co v Purdential Assurance Co* (1877) 6 ChD 757.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/B. DAMAGES IN LIEU OF INJUNCTION/370. When damages may be refused.

370. When damages may be refused.

Where an injunction is asked for on the ground that damages do not afford an adequate remedy, damages in respect of past injury may be given in addition to the injunction¹, but an inquiry as to damages will not be ordered if the claimant has opened a case of substantial injury, entitling him to an injunction and damages, and has failed to prove any substantial damage².

1 *Pennington v Brinsop Hall Coal Co* (1877) 5 ChD 769; cf *Martin v Price* [1894] 1 Ch 276, CA, where damages were given in respect of injury actually caused, and an injunction granted to prevent further injury.

2 *Kino v Rudkin* (1877) 6 ChD 160.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/B. DAMAGES IN LIEU OF INJUNCTION/371. Measure of damages.

371. Measure of damages.

No money awarded in substitution for an injunction can be justly awarded unless it is at any rate designed to be a preferable equivalent to an injunction and therefore an adequate substitute for it¹. The general principles governing the measure of damages are discussed elsewhere in this work², and a few examples here will suffice. For instance, where a claimant was entitled to damages for breach of confidence in respect of confidential information used by the defendant, the court directed that the damages should be assessed on the market value of the information as between a willing buyer and a willing seller³.

In a case of breach of a restrictive covenant, the court ordered that the damages should be such a sum as might reasonably have been demanded as a quid pro quo for relaxing the covenant⁴. Where a defendant extended a right of way unlawfully, he was held liable to pay an amount of damages which, so far as could be estimated, was equivalent to a proper and fair price which would be payable for the acquisition of the right of way in question⁵.

1 *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, HL.

2 As to the measure of damages generally see **DAMAGES** vol 12(1) (Reissue) PARA 1127 et seq.

3 *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718, [1969] 1 WLR 809, CA.

4 *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 789, where the damages awarded were 5% of the developer's profit.

5 *Bracewell v Appleby* [1975] Ch 408, [1975] 1 All ER 993.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/B. DAMAGES IN LIEU OF INJUNCTION/372. Assessment of quantum of damages.

372. Assessment of quantum of damages.

In a proper case damages may be assessed in court without an inquiry¹. No appeal lies against such an assessment unless it can be shown that the court acted on a wrong principle in arriving at the amount².

1 *Crawford v Hornsea Steam Brick and Tile Co*, as reported in [1876] WN 28; and see *Holland v Worley* (1884) 26 ChD 578. As to the assessment of damages generally see **DAMAGES** vol 12(1) (Reissue) PARA 1123 et seq.

2 *Ball v Ray* (1873) 30 LT 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/C. ACQUIESCENCE AND DELAY/373. Acquiescence.

C. ACQUIESCENCE AND DELAY

373. Acquiescence.

An injunction may be refused on ground of the claimant's acquiescence in the defendant's infringement of his right¹. The principles on which the court will refuse interim or final relief on this ground are the same², but a stronger case is required to support a refusal to grant final relief at the hearing³. The fact that a person did not interfere to prevent a small and limited breach does not preclude him for all time in respect of a wider and more important breach⁴. If a person stands by and knowingly, but passively, encourages another to expend money under an erroneous belief as to his rights, and then comes to the court for relief by way of a perpetual injunction, it will be refused and he will be left to his remedy, if any, in damages⁵.

Acquiescence will be taken into account in considering whether an injunction or damages should be granted⁶, and an amount of acquiescence, not sufficient to bar the action, may be sufficient to induce the court to give damages instead of an injunction⁷. A claimant may preclude himself by his acquiescence from recovering more than nominal damages⁸.

A person may so encourage that which he afterwards complains of as a nuisance as not only to preclude himself from complaining of it, but to give the adverse party a right to protection in the event of complaint⁹.

1 See PARAS 382 (mandatory injunction) and 388 et seq (interim injunction). The real test is whether on the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the claimant to continue to seek to enforce the right: *Shaw v Applegate*[1978] 1 All ER 123, [1977] 1 WLR 970, CA. It seems that the test as to acquiescence is the same in respect of legal and equitable rights: *Habib Bank Ltd v Habib Bank AG Zurich*[1981] 2 All ER 650, [1981] 1 WLR 1265, CA; but cf *Shaw v Applegate*[1978] 1 All ER 123, [1977] 1 WLR 970, CA; and see *Clegg v Edmondson* (1857) 8 De G M & G 787.

2 *Re Brittain, ex p White* (1835) 4 LJ Bcy 50, See also eg *Gaunt v Fynney*(1872) 8 Ch App 8, CA; *Rogers v Great Northern Rly Co*(1889) 53 JP 484.

3 *Patching v Dubbins* (1835) Kay 1; *Child v Douglas* (1854) 5 De G M & G 739; *Johnson v Wyatt* (1863) 2 De G J & Sm 18; *Price v Bala and Festiniog Rly Co* (1884) 50 LT 787. The reason is that at the hearing of the cause it is the court's duty to decide upon the rights of the parties, and the dismissal of the action on the ground of acquiescence amounts to a decision that a right which once existed is absolutely and forever lost: *Johnson v Wyatt* (1863) 2 De G J & Sm 18; and see *Gordon v Cheltenham and Great Western Union Rly Co* (1842) 5 Beav 229. Cf *Blue Town Investments Ltd v Higgs and Hill plc*[1990] 2 All ER 897, [1990] 1 WLR 696.

4 *Richard v Revitt*(1877) 7 ChD 224. See also PARA 390 note 9.

5 *Dann v Spurrier* (1802) 7 Ves 231; *Parrott v Palmer* (1834) 3 My & K 632; *Duke of Leeds v Earl of Amherst* (1846) 2 Ph 117; *Wood v Sutcliffe* (1851) 2 Sim NS 163; *Cotching v Bassett* (1862) 32 Beav 101; *Davies v Sear*(1869) LR 7 Eq 427; *Hogg v Scott*(1874) LR 18 Eq 444.

6 *Lockwood v London and North-Western Rly Co* (1868) 19 LT 68; *Sayers v Collyer*(1884) 28 ChD 103, CA; *Shaw v Applegate*[1978] 1 All ER 123, [1977] 1 WLR 970, CA; and see *Shelfer v City of London Electric Lighting Co, Meux's Brewery Co v City of London Electric Lighting Co*[1895] 1 Ch 287, CA.

7 *Sayers v Collyer*(1884) 28 ChD 103, CA.

8 *Kelsey v Dod* (1881) 52 LJ Ch 34; *Sayers v Collyer*(1884) 28 ChD 103, CA.

9 *Williams v Earl of Jersey* (1841) Cr & Ph 91.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/C. ACQUIESCENCE AND DELAY/374. Delay.

374. Delay.

Although delay in applying to the court excites the court's diligence to ascertain whether the claimant has stood by and voluntarily allowed his right to be infringed, it is not sufficient to deprive the claimant of his right if it can be satisfactorily explained¹ and the right is not statute-barred². The court will not lightly act so as to deprive a claimant of an established right. There must be fraud or such acquiescence as, in the court's view, would make it a fraud afterwards to insist on the right³, but long abstention from the assertion of his right, coupled with an alteration of the condition of other parties, may render it unconscientious on the claimant's part to enforce it⁴.

1 *Crossley v Derby Gas Ligh Co* (1834) 4 LJ Ch 25; *Morrow v Stepney Corpn Rly Co v Bull* (1920) 18 LGR 458.

2 *Fullwood v Fullwood* (1878) 9 ChD 176; *London, Chatham and Dover Rly Co v Bull* (1882) 47 LT 413; *Duke of Northumberland v Bowman* (1887) 56 LT 773; *Rowland v Michell* (1896) 75 LT 65, CA; and see *Hogg v Scott* (1874) LR 18 Eq 444; **EQUITY** vol 16(2) (Reissue) PARA 910; and **LIMITATION PERIODS** vol 68 (2008) PARA 906.

3 *Macher v Foundling Hospital* (1813) 1 Ves & B 188; *Gerrard v O'Reilly* (1843) 3 Dr & War 414; *Bankart v Houghton* (1860) 27 Beav 425; *A-G v Leeds Corpn* (1870) 5 Ch App 583; *Hogg v Scott* (1874) LR 18 Eq 444; *Smith v Smith* (1875) LR 20 Eq 500; *Willmott v Barber* (1880) 15 ChD 96; *Russell v Watts* (1883) 25 ChD 559, CA; revsd (1885) 10 App Cas 590, HL; *Proctor v Beanies* (1887) 36 ChD 740, CA; and see *Rundell v Murray* (1821) Jac 311.

4 *Archbold v Scully* (1861) 9 HL Cas 360; *Gale v Abbott* (1862) 8 Jur NS 987.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iii) Perpetual Restrictive Injunctions/C. ACQUIESCENCE AND DELAY/375. Delay where Attorney General is claimant.

375. Delay where Attorney General is claimant.

Where the Attorney General is suing on behalf of the public¹, the court as in other cases has a discretion², and, although delay will not affect the Attorney General as much as a private individual, it is a circumstance to be considered in determining whether the court should interfere³. Delay on the relator's part is not necessarily to be attributed to the Attorney General⁴, and where the defendant is shown to have acted outside a statutory power, an injunction will be granted notwithstanding lapse of time where the effect of refusing would be that the defendants would have acquired a statutory right by lapse of time, which the statute had not given them⁵.

1 As to proceedings by the Attorney General see generally PARAS 236, 491-492.

2 *A-G v Wimbledon House Estate Co Ltd* [1904] 2 Ch 34; and see PARA 491.

3 *A-G v Johnson* (1819) 2 Wils Ch 87; *A-G v Sheffield Gas Consumers Co* (1853) 3 De GM & G 304; *A-G v Proprietors of Bradford Canal* (1866) LR 2 Eq 71; *A-G Grand Junction Canal Co* [1909] 2 Ch 505; *A-G v Kerr and Ball* (1914) 79 JP 51; *A-G and Down County Council v Newry No 1 RDC* [1933] NI 50; *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538, [1975] 2 WLR 81, PC; but see *A-G Scott* [1905] 2 KB 160, CA, where it was suggested that the maxim *nullum tempus occurrit regi* would prevent laches by itself being set up against the Attorney General; *A-G v Metcalf and Greig* [1907] 2 Ch 23, where it was suggested that laches was not the proper term to apply in the case of the Attorney General (although there was no decision on the matter on appeal [1908] 1 Ch 327, CA).

4 *A-G and Down County Council v Newry No 1 RDC* [1933] NI 50.

5 *A-G v South Staffordshire Waterworks Co* (1909) 25 TLR 408; but see *A-G Grand Junction Canal Co* [1909] 2 Ch 505 (mandatory injunction).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iv) Mandatory Injunctions/376. Power to grant mandatory injunctions.

(iv) Mandatory Injunctions

376. Power to grant mandatory injunctions.

It has been said that the power of granting mandatory injunctions must be exercised with the greatest possible care¹, but every injunction, whether restrictive or mandatory, ought to be granted with care and caution, and no more care or caution is required in the case of a mandatory injunction than a restrictive injunction². The court has no more hesitation in granting a mandatory injunction in a proper case than any other injunction³, and has frequently granted one in order, for instance, to remove obstructions to light⁴. The court may grant a mandatory injunction upon the trial of the action⁵, or in certain circumstances upon an interim application⁶.

1 *Isenberg v East House Estate Co Ltd* (1863) 3 De G J & Sm 263 at 272 per Lord Westbury LC. Cf *Kilbey v Haviland* [1871] WN 47 per Bacon V-C.

2 *Smith v Smith* (1875) LR 20 Eq 500.

3 *Smith v Smith* (1875) LR 20 Eq 500; *Shiel v Godfrey & Co* [1893] WN 115; *Charrington v Simons & Co Ltd* [1971] 2 All ER 588, [1971] 1 WLR 598, CA. The protection of contractual rights by a mandatory order (formerly mandamus) does not oust the equitable by injunction: see *A-G v Mid-Kent Rly Co and South Eastern Rly Co* (1867) 3 Ch App 100. As to mandatory orders see **JUDICIAL REVIEW** vol 61 (2010) PARA 703 et seq.

4 *Jackson v Normanby Brick Co* [1899] 1 Ch 438, CA; see **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 154 note 10.

5 See **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 154.

6 See PARA 378. As to the form of a mandatory injunction see PARA 417.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iv) Mandatory Injunctions/377. Circumstances in which mandatory injunctions will be granted.

377. Circumstances in which mandatory injunctions will be granted.

Where the injury done to the claimant cannot be estimated and sufficiently compensated for by damages¹, or is so serious and material that the restoration of things to their former condition is the only method whereby justice can be adequately done², or where the injury complained of is in breach of an express agreement³, the court will exercise its jurisdiction and grant a mandatory injunction⁴, even though the expense and trouble of obeying the injunction will be far in excess of any sum which could reasonably be awarded by way of damages⁵. However, a defendant cannot by means of a mandatory injunction be ordered to take legal proceedings against a third person⁶. If, on the other hand, no substantial damage is proved, or the injury admits of estimation and can be compensated for by damages, a mandatory injunction will not be granted but the court will assess damages or an inquiry will be ordered to ascertain the amount of the damages sustained⁷.

1 *Isenberg v East India House Estate Co Ltd* (1863) 3 De G J & Sm 263. In *Kennard v Cory Bros & Co Ltd* [1922] 2 Ch 1, CA, the defendants had tipped refuse so as to give rise to a landslide damaging the claimant's property, and an order had been made directing an inquiry as to damages with liberty to apply for a mandatory injunction to compel the defendants to keep open certain remedial works which had been executed by consent in the course of the action. On a subsequent application for a mandatory injunction it was held that as the costs of maintaining the remedial works were not recoverable under the inquiry as to damages, the claimant was entitled to a mandatory injunction to remedy the existing defects in the remedial works.

2 *Kelk v Pearson* (1871) 6 Ch App 809; *Smith v Smith* (1875) LR 20 Eq 500. However, in the case of trespass the mere fact that the damage suffered is small is immaterial: *Goodson v Richardson* (1874) 9 Ch App 221, applied in *Marriott v East Grinstead Gas and Water Co* [1909] 1 Ch 70; and see PARA 442.

3 *Morris v Grant* (1875) 24 WR 55; *McManus v Cooke* (1887) 35 ChD 681; *Lord Manners v Johnson* (1875) 1 ChD 673; *Great Northern Ry Co v Bradford Corpn* (1918) 88 LJ Ch 101; *Achilli v Tovell* [1927] 2 Ch 243; and see PARA 458.

4 See *Krehl v Burrell* (1878) 7 ChD 551; affd (1879) 11 ChD 146, CA; *Home and Colonial Stores Ltd v Colls* [1902] 1 Ch 302, CA; revsd sub nom *Colls v Home and Colonial Stores Ltd* [1904] AC 179, HL, on the ground that the diminution of light complained of was insufficient to constitute an actionable obstruction; *Charrington v Simons & Co Ltd* [1971] 2 All ER 588, [1971] 1 WLR 598, CA, where the judicial discretion is discussed; *Daniells v Mendonca* (1999) 78 P & CR 401, CA.

5 *Woodhouse v Newry Navigation Co* [1898] 1 IR 161, CA; *Redland Bricks Ltd v Morris* [1970] AC 652, [1969] 2 All ER 576, HL. See also *Love and Herrity* [1991] 2 EGLR 44, [1991] 32 EG 55, CA (injunction requiring landlord to readmit tenants). For the contrary view see *Jordan v Norfolk County Council* [1994] 4 All ER 218, [1994] 1 WLR 1353 (where the cost of complying with a mandatory injunction far exceeds what could have been in the court's contemplation, the court may review its decision in order to achieve the original object of the order without imposing an unjust burden on the party against whom the order is made).

6 *West Riding of Yorkshire Rivers Board v Linthwaite UDC (No 2)* (1915) 84 LJB 1610.

7 *Isenberg v East India House Estate Co Ltd* (1863) 3 De G J & Sm 263; *Edleston v Crossley & Sons Ltd* (1868) 18 LT 15; *Lady Stanley of Aderley v Earl of Shrewsbury* (1875) LR 19 Eq 616; *National Provincial Plate Glass Insurance Co v Prudential Assurance Co* (1877) 6 ChD 757; *Allen v Seckham* (1879) 11 ChD 790, CA; *Martin v Price* [1894] 1 Ch 276, CA; *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798; see also *Petty v Parsons* [1914] 1 Ch 704 (£5 damages awarded in lieu of mandatory injunction); revsd on a question of construction [1914] 2 Ch 653, CA; *Sharp v Harrison* [1922] 1 Ch 502 (declaration made and £2 nominal damages awarded). As part of the compensation, the court may order any works to be done by the defendant for the claimant's benefit: *Isenberg v East India House Estate Co Ltd* (1863) 3 De G J & Sm 263.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iv) Mandatory Injunctions/378. Mandatory injunctions on interlocutory applications.

378. Mandatory injunctions on interlocutory applications.

A mandatory injunction can be granted on an interlocutory application¹ as well as at the hearing², but, in the absence of special circumstances, it will not normally be granted³. However, if the case is clear and one which the court thinks ought to be decided at once⁴, or if the act done is a simple and summary one which can be easily remedied⁵, or if the defendant attempts to steal a march on the claimant⁶, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed⁷, a mandatory injunction will be granted on an interlocutory application⁸.

1 *Luganda v Service Hotels Ltd* [1969] 2 Ch 209, [1969] 2 All ER 692, CA. Such an injunction may even be granted without notice: see *A-G v Nichol* (1809) 3 Mer 687; cf *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55, [1976] 1 All ER 779, CA (order akin to mandatory injunction); and see PARA 402 et seq.

2 *Robinson v Lord Byron* (1785) 1 Bro CC 588; *Lane v Newdigate* (1804) 10 Ves 192; *Coles v Sims* (1854) 5 De G M & G 1; *Hervey v Smith* (1855) 1 K & J 389; *Bonner v Great Western Rly Co* (1883) 24 ChD 1, CA; *Cohen v Poland* [1887] WN 159; and see *A-G Metropolitan Board of Works* (1863) 1 Hem & M 298.

3 *Ryder v Bentham* (1750) 1 Ves Sen 543; *Blakemore v Glamorganshire Canal Navigation* (1832) 1 My & K 154; *Gale v Abbott* (1862) 8 Jur NS 987; *Johnstone v Royal Courts of Justice Chambers Co* [1883] WN 5, CA; *Dover Picture Palace Ltd and Pessers v Dover Corp and Crundall, Wraith, Gurr and Knight* (1913) 11 LGR 971, CA; *Shepherd Homes Ltd Sandham* [1971] Ch 340, [1970] 3 All ER 402 (interim injunction refused); and see *Anon* (1790) 1 Ves 140. See also *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, [1970] 3 All ER 326, where an injunction which was in part mandatory in its substance and effect was refused. Mandatory injunctions were granted on motion in *Lond v Murray* (1851) 17 LTOS 248; *Hervey v Smith* (1856) 22 Beav 299; *Hepburn v Lordan* (1865) 2 Hem & M 345; *Westminster Brymbo Coal and Coke Co v Clayton* (1867) 36 LJ Ch 476; *Younge v Shaper* (1872) 27 LT 643; *Morris v Grant* (1875) 24 WR 55; *Parker v Camden London Borough Council* [1986] Ch 162, [1985] 2 All ER 141, CA (a real risk to the health of local authority tenants may amount to special circumstances in which injunction may be granted). Cf the cases cited in note 7.

4 *Allport v Securities Corp* (1895) 64 LJ Ch 491.

5 *Hervey v Smith* (1855) 1 K & J 389; *Ghani v Jones* [1970] 1 QB 693, [1969] 3 All ER 720; affd [1970] 1 QB 693, [1969] 3 All ER 1700, CA (police seizure of passports without justification). Cf *Films Rover International Ltd v Cannon Film Sales Ltd* [1986] 3 All ER 772, [1987] 1 WLR 670 (injunction granted even though the court did not feel a high degree of assurance that the claimant would succeed at trial because withholding the injunction carried with it a greater risk of injustice than granting it).

6 *Esso Petroleum Co Ltd v Kingswood Motors (Addlestone) Ltd* [1974] QB 142, [1973] 3 All ER 1057, where a mandatory injunction was granted to remedy the consequences of a conspiracy to induce a breach of contract. A mandatory injunction may be granted for breach of covenant (*Morris v Grant* (1875) 24 WR 55), but the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation (*Shepherd Homes Ltd v Sandham* [1971] Ch 340, [1970] 3 All ER 402). See *Zockoll Group Ltd v Mercury Communications Ltd* [1998] FSR 354, CA (although defendant stole a march on plaintiff before an appeal hearing, an injunction was refused as plaintiff would not suffer any real damage before trial).

7 *Daniel v Ferguson* [1891] 2 Ch 27, CA, followed in *Von Joel v Hornsey* [1895] 2 Ch 774, CA, where the defendant, knowing that the claimant was endeavouring to serve a writ, evaded service for some days and in the meantime hurried on his buildings. The court has granted an injunction which is mandatory in effect on an application founded on the provisions of the Resale Price Act 1964 (repealed): *Comet Radiovision Services Ltd v Farnell-Tandberg Ltd* [1971] 3 All ER 230, [1971] 1 WLR 1287. See now the Competition Act 1998.

8 This paragraph was approved in *Locabail International Finance Ltd v Agroexport, The Sea Hawk* [1986] 1 All ER 901 at 906, [1986] 1 WLR 657 at 663, CA, per Mustill LJ. See also *Zockoll Group Ltd v Mercury Communications Ltd* [1998] FSR 354, CA. In deciding whether to grant an injunction, the court has to determine which course of action, if it turns out to be wrong, presents the least risk of injustice: *Nikitenko v Leboeuf Lamb Greene & Macrae (a firm)* (1999) Times, 26 January, applying *Zockoll Group Ltd v Mercury Communications Ltd* [1998] FSR 354, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iv) Mandatory Injunctions/379. Performance of work.

379. Performance of work.

The court will not grant an injunction requiring a defendant (1) to perform personal services¹; (2) to do repairs²; (3) to do an act which requires the continuous employment of people³; or (4) to carry on a business⁴, except in special circumstances⁵. It will not impose an obligation to do something which is impossible, or which cannot be enforced, or which is unlawful⁶.

It is provided by statute that no court may by injunction restraining a breach or threatened breach of a contract of employment, compel an employee to do any work or attend at any place for the doing of any work⁷.

1 *Lumley v Wagner* (1852) 1 De G M & G 604; *Page One Records Ltd v Britton (t/a The Troggs)* [1967] 3 All ER 822, [1968] 1 WLR 157; *Warren v Mendy* [1989] 3 All ER 103, [1989] 1 WLR 853, CA; and see PARA 460 text and note 5 and **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 808.

2 *A-G v Staffordshire County Council* [1905] 1 Ch 336; but see *Kennard v Cory Bros & Co Ltd* [1922] 2 Ch 1, CA. In granting a mandatory injunction the court must ensure that the defendant knows exactly what, as a matter of fact, he has to do, so that (if necessary) he can give his contractors the proper instructions: *Redland Bricks Ltd v Morris* [1970] AC 652, [1969] 2 All ER 576, HL. See now *Practice Direction--Interim Injunctions* PD 25A para 5.3.

3 *Powell Duffryn Steam Co v Taff Vale Rly Co* (1874) 9 Ch App 331.

4 *A-G v Colchester Corp* [1955] 2 QB 207, [1955] 2 All ER 124; *Dowty Boulton Paul Ltd v Wolverhampton Corp* [1971] 2 All ER 277, [1971] 1 WLR 204.

5 See eg *Greene v West Cheshire Rly Co* (1871) LR 13 Eq 44, explained in *A-G v Colchester Corp* [1955] 2 QB 207 at 216, [1955] 2 All ER 124 at 128 per Lord Goddard CJ. See also *Kennard v Cory Bros & Co Ltd* [1922] 2 Ch 1, CA.

6 *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149, [1953] 1 All ER 179, CA.

7 Trade Union and Labour Relations (Consolidation) Act 1992 s 236: see PARA 448.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iv) Mandatory Injunctions/380. Grant of injunction although act completed.

380. Grant of injunction although act completed.

A mandatory injunction may be granted even though the act sought to be restrained has been nearly or entirely completed before the action is begun¹, but it will only be granted in such cases to prevent very serious damage². Where a building is the subject of the litigation it is material to consider, among other circumstances of the case, the condition in which the building was when complaint was first made³. The court may even order a building to be pulled down even though it has been erected and completed and works carried on within it for some months without complaint⁴, but it will not readily do so⁵.

1 *Holmes v Upton* (1840) 9 Ch App 214n; *Goodson v Richardson* (1874) 9 Ch App 221; *Smith v Smith* (1875) LR 20 Eq 500; *Morris v Grant* (1875) 24 WR 55 (interlocutory application); *Lawrence v Horton* (1890) 59 LJ Ch 440; *Shiel v Godfrey & Co* [1893] WN 115; *Achilli v Tovell* [1927] 2 Ch 243; *Truckell v Stock* [1957] 1 All ER 74, [1957] 1 WLR 161, CA; *Charrington v Simons & Co Ltd* [1971] 2 All ER 588, [1971] 1 WLR 598, CA, where injunctions were granted; *Durell v Pritchard* (1865) 1 Ch App 244; *Edleston v Crossley & Sons* (1868) 18 LT 15; *Sparling v Clarkson* (1869) 17 WR 518; *City of London Brewery Co v Tennant* (1873) 9 Ch App 212; *Lady Stanley of Alderley v Earl of Shrewsbury* (1875) LR 19 Eq 616, where injunctions were refused; and see *Dunball v Walters* (1865) 35 Beav 565; *Dingle v Millar* (1955) 165 Estates Gazette 385, CA, where a mandatory injunction was granted against the obstruction of a right of way by building a wall, but the order for demolition was suspended.

2 See the cases cited in note 1, except *Morris v Grant* (1875) 24 WR 55 and *Achilli v Tovell* [1927] 2 Ch 243, which were cases of express contract. But see *A-G v Parish* [1913] 2 Ch 444, CA, where, although the case was trivial, a mandatory injunction was granted because the defendant had deliberately built in defiance of a building line settled by the local authority.

3 *Lawrence v Horton* (1890) 59 LJ Ch 440. Even where the injury sustained is not such as would justify a mandatory injunction, the mere fact that the building has been completed before action brought does not prevent the court from giving damages: *City of London Brewery Co v Tennant* (1873) 9 Ch App 212; *Lady Stanley of Alderley v Earl of Shrewsbury* (1875) LR 19 Eq 616; and see *Cooper v Hubbuck* (1860) 7 Jur NS 457.

4 *Baxter v Bower* (1875) 44 LJ Ch 625.

5 *Curriers' Co v Corbett* (1865) 13 LT 154; *Gaskin v Balls* (1879) 13 ChD 324, CA, where the building had been up for five years.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iv) Mandatory Injunctions/381. Effect of notice of objection.

381. Effect of notice of objection.

If distinct notice of objection is given before the completion of the act complained of, but it is nevertheless persisted in¹, or if the defendant on an interlocutory application gives an undertaking to undo what he has done if so ordered at the trial², the court is more disposed to grant a mandatory injunction than where no complaint is made until after the completion. However, every case depends upon its own peculiar circumstances, and the mere fact that the act complained of was persisted in after notice of objection was given is not of itself sufficient to justify the granting of a mandatory injunction if, in all the circumstances, damages would be an adequate remedy³.

1 *Coles v Sims* (1854) 5 De G M & G 1 (interim); *Jacomb v Knight* (1863) 8 LT 621; *Hepburn v Lordan* (1865) 2 Hem & M 345; *Grand Junction Canal Co v Shugar* (1871) 6 Ch App 483; *Lord Manners v Johnson* (1875) 1 ChD 673; *Krehl v Burrell* (1877) 7 ChD 551; affd (1879) 11 ChD 146, CA; *Smith v Day* (1880) 13 ChD 651, CA; and see *Woodhouse v Newry Navigation Co* [1898] 1 IR 161, CA; *Black v Scottish Temperance Life Assurance Co* [1908] 1 IR 541, HL; *A-G v Parish* [1913] 2 Ch 444, CA. Arguments of hardship and loss of value will not be listened to in cases of this sort: *Lord Manners v Johnson* (1875) 1 ChD 673.

2 *Greenwood v Hornsey* (1886) 33 ChD 471; *Smith v Day* (1880) 13 ChD 651.

3 *Isenberg v East India House Estate Co Ltd* (1863) 3 De G J & Sm 263; *Senior v Pawson* (1866) LR 3 Eq 330.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(iv) Mandatory Injunctions/382. Acquiescence and delay.

382. Acquiescence and delay.

A person seeking a mandatory injunction should apply promptly, but mere delay is not a bar if it can be satisfactorily accounted for¹, nor will a claimant be deemed to have acquiesced if, knowing that the defendant has a right to do a thing, he assumes that he is not going to use his right for an unlawful purpose². However, a mandatory injunction will not be granted where the claimant is guilty of unreasonable delay in applying for it and granting it would cause the defendant serious damage³.

1 *Gale v Abbott* (1862) 8 Jur NS 987; *A-G v Colney Hatch Lunatic Asylum* (1868) 4 Ch App 146; *Hogg v Scott* (1874) LR 18 EQ 444; *Woodhouse v Newry Navigation Co* [1898] 1 IR 161, CA.

2 *A-G v Leeds Corpn* (1870) 5 Ch App 583; *Smith v Smith* (1875) LR 20 Eq 500.

3 *Illingworth v Manchester and Leeds Rly Co* (1840) 2 Ry & Can Cas 187; *Senior v Pawson* (1866) LR 3 Eq 330; *Gaunt v Fynney* (1872) 8 Ch App 8, CA; *Rogers v Great Northern Rly Co* (1889) 53 JP 484. See PARA 374.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(v) Interim Injunctions/A. GRANTING INTERIM INJUNCTIONS/383. Principles upon which the court acts.

(v) Interim Injunctions

A. GRANTING INTERIM INJUNCTIONS

383. Principles upon which the court acts.

On application for an injunction in aid of a claimant's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established¹. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated²; but in no case will the court grant an interim injunction as of course³.

The tendency is to avoid trying the same question twice and to grant injunctions only in clear cases. However, where there is no doubt as to the legal rights an interim injunction will be granted, and it is no objection that the relief so granted is substantially the same as the whole relief claimed in the action except that it is only to endure until the hearing of the action⁴. It is not necessary that the court should find a case which would entitle the claimant to relief at all events⁵; it is quite sufficient for it to find a case which shows that there is a substantial question to be investigated⁶, that interim interference on a balance of convenience and inconvenience to the one party and to the other is expedient⁷ and that the status quo⁸ should be preserved until that question can be finally disposed of⁹.

1 *Saunders v Smith* (1838) 3 My & Cr 711; *Mawman v Tegg* (1836) 2 Russ 385; *Hilton v Earl of Granville* (1841) Cr & Ph 283; *Eastern Trust Co v McKenzie, Mann & Co Ltd* [1915] AC 750, PC.

An interim injunction is intended to be temporary in its character, and any person at whose suit such an injunction is obtained is under an obligation to limit, so far as possible, the time during which it is operative: *Portway Press Ltd v Hague* [1957] RPC 426. As to the power of the court to grant an interim injunction to the defendant before service of a counterclaim see *Marcus Publishing plc v Hutton-Wild Communications Ltd* [1990] RPC 576, CA.

2 *Saunders v Smith* (1838) 3 My & Cr 711; and see *Dalglisch v Jarvie* (1850) 2 Mac & G 231. Each case must be decided on a basis of fairness, justice and common sense in relation to the whole of the issues of fact and law which are relevant in the particular case: *Hubbard v Vosper* [1972] 2 QB 84, [1972] 1 All ER 1023, CA. Doubt as to whether a permanent injunction will be granted at the trial does not, as a matter of law, preclude the issue of an interim injunction: *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 All ER 992, [1973] 1 WLR 349, CA. If circumstances justify such a course, a court will make at an interim stage an order which will not be appropriate at the final trial: *Fresh Fruit Wales Ltd v Halbert* (1991) Times, 29 January, CA. The grant of interim injunctions in actions for infringement of patents is governed by the same principles as in other actions: *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL; *Carroll v Tomado Ltd* [1971] RPC 401. As to mandatory injunctions on interim applications see PARA 378.

3 *Potter v Chapman* (1750) Amb 98. The minority of the claimant may in some circumstances be a factor in deciding whether relief should be given: see *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71; revsd on appeal [1966] Ch 71, [1965] 3 All ER 764, CA. A plaintiff in whose favour an interim injunction has been made is not entitled to rest upon that injunction and assume that in the absence of complaint the defendant is prepared to treat it as permanent without any further steps being taken: *Newsgroup Newspapers Ltd v Mirror Group Newspapers (1986) Ltd* [1991] FSR 487. An interim injunction may be granted on a claim for a declaration: *Newport Association Football Club Ltd v Football Association of Wales Ltd* [1995] 2 All ER 87. An interim injunction can be granted where it is unlikely that the relevant issue will come to trial given that the injunction itself provides final relief: *Choudhry v Treisman* [2003] EWHC 1203 (Ch), [2003] 22 LS Gaz R 29, (2003) Times, 2 May (injunction to require nomination for local government election). Where a judge dismisses an application

for an interim injunction he nevertheless has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal; it is not necessary for the applicant to apply to the Court of Appeal: *Erinford Properties Ltd v Cheshire County Council*[1974] Ch 261, [1975] 2 All ER 448; and see PARA 363.

4 *A-G v Stockton-on-Tees Corpn*(1927) 91 JP 172, CA; *Woodford v Smith*[1970] 1 All ER 1091n, [1970] 1 WLR 806; and see *Manchester Corpn v Connolly*[1970] Ch 420, [1970] 1 All ER 961, CA.

5 *Powell v Lloyd* (1827) 1 Y & J 427; *Glascott v Lang* (1838) 3 My & Cr 451; *De Mattos v Gibson* (1859) 4 De G & J 276; *Walker v Jones*(1866) LR 1 PC 50.

6 The court must be satisfied that there is a serious question to be tried. The material available to the court at the hearing of the interlocutory application must disclose that there are real prospects of success in the claim for the permanent injunction at the trial: *American Cyanamid Co v Ethicon Ltd*[1975] AC 396, [1975] 1 All ER 504, HL. As to the proper approach of the court to an application for an interim injunction that might affect the exercise of the right to freedom of expression see *Imutran Ltd v Uncaged Campaigns Ltd*[2001] 2 All ER 385.

7 *Shrewsbury and Chester Rly Co v Shrewsbury and Birmingham Rly Co* (1851) 1 Sim NS 410; *American Cyanamid Co v Ethicon Ltd*[1975] AC 396, [1975] 1 All ER 504, HL; and see PARA 386.

8 Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo: *American Cyanamid Co v Ethicon Ltd*[1975] AC 396, [1975] 1 All ER 504, HL. As to the meaning of 'status quo' see *Garden Cottage Foods Ltd v Milk Marketing Board*[1984] AC 130, [1983] 2 All ER 770, HL.

9 *Donnell v Church and Clark* (1842) 4 I Eq R 630; *Great Western Rly Co v Birmingham and Oxford Junction Rly Co* (1848) 2 Ph 597; *Bradbury v Manchester, Sheffield and Lincolnshire Rly Co and Bowler* (1851) 15 Jur 1167; *Greenslade v Dare* (1853) 17 Beav 502; *Preston v Luck*(1884) 27 ChD 497, CA; *Shrewsbury and Chester Rly Co v Shrewsbury and Birmingham Rly Co* (1851) 1 Sim NS 410; *Jones v Pacaya Rubber and Produce Co Ltd*[1911] 1 KB 455, CA; *Eastern Trust Co v McKenzie, Mann & Co Ltd*[1915] AC 750, PC; *Donmar Productions Ltd v Bart*[1967] 2 All ER 338n, [1967] 1 WLR 740n; *Harman Pictures NV v Osborne*[1967] 2 All ER 324, [1967] 1 WLR 723; *Texaco Ltd v Mulberry Filling Station Ltd*[1972] 1 All ER 513, [1972] 1 WLR 814; *Eldan Services Ltd v Chandag Motors Ltd*[1990] 3 All ER 459. See also *Hilton v Earl of Granville* (1841) Cr & Ph 283. Probability of right is sufficient: see *Tonson v Walker* (1752) 3 Swan 672. As to preservation of the status quo see *American Cyanamid Co v Ethicon Ltd*[1975] AC 396, [1975] 1 All ER 504, HL.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(v) Interim Injunctions/A. GRANTING INTERIM INJUNCTIONS/384. Threatened injury.

384. Threatened injury.

An interim injunction will be granted to restrain an apprehended or threatened injury¹ where the injury is certain or very imminent, or where mischief of an overwhelming nature is likely to be done², especially destructive operations³. The court will interfere if the thing sought to be prohibited is in itself a nuisance⁴ or, although not in itself a nuisance, will manifestly end in such a nuisance as the court normally restrains⁵. Where the mischief sought to be restrained is not in itself noxious, but only something which may prove to be so, an interim injunction will not be granted⁶.

1 An injunction will be granted on the application of a wife to exclude a mistress from the matrimonial home where the welfare of the children is endangered: see *Adams v Adams* (1965) 109 Sol Jo 899. See also PARAS 362, 365.

2 *Earl of Ripon v Hobart* (1834) 3 My & K 169; *Hepburn v Lordan* (1865) 2 Hem & M 345; and see *Crosse v Duckers* (1873) 27 LT 816.

3 *A-G v Great Eastern Rly Co* (1872) 25 LT 867.

4 *Earl of Ripon v Hobart* (1834) 3 My & K 169; and see *Hepburn v Lordon* (1865) 2 Hem & M 345. See also PARA 437.

5 *Haines v Taylor* (1846) 10 Beav 75; on appeal (1847) 2 Ph 209, LC; and see *Crowder v Tinkler* (1816) 19 Ves 617.

6 *Earl of Ripon v Hobart* (1834) 3 My & K 169; *Haines v Taylor* (1846) 10 Beav 75; on appeal (1847) 2 Ph 209, LC.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(v) Interim Injunctions/A. GRANTING INTERIM INJUNCTIONS/385. Serious question to be tried.

385. Serious question to be tried.

On an application for an interim injunction the court must be satisfied that there is a serious question to be tried¹. The material available to the court at the hearing of the application must disclose that the claimant has real prospects for succeeding in his claim for a permanent injunction at the trial². The former requirement that the claimant should establish a strong prima facie case³ for a permanent injunction before the court would grant an interim injunction has been removed⁴.

Where the application is to restrain the exercise of an alleged right, the claimant should show that there are substantial grounds for doubting the existence of the right⁵. It requires a very strong case indeed to induce the court to interfere with an admitted right upon an alleged equity⁶.

The claimant must also be able to show that an injunction until the hearing is necessary to protect him against irreparable injury⁷; mere inconvenience is not enough⁸.

¹ The court must be satisfied that the claim is not frivolous or vexatious: *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL; *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 All ER 751, [1984] 1 WLR 427, HL; *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130, [1983] 2 All ER 770, HL. See also *United Pan-Europe Communications NV v Deutsche Bank AG* [2000] 2 BCLC 461, CA.

² See *Re Lord Cable, Garrett v Waters* [1976] 3 All ER 417, [1977] 1 WLR 7; *Smith v Inner London Education Authority* [1978] 1 All ER 411, CA; *Mercury Communications Ltd v Scott-Garner* [1984] Ch 37, [1984] 1 All ER 179, CA; *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 All ER 117, [1984] 1 WLR 67, CA; affd [1984] 1 All ER 751, [1984] 1 WLR 427, HL; *Lansing Linde Ltd v Kerr* [1991] 1 All ER 418, [1991] 1 WLR 251, CA. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and mature consideration: *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL. As to evidence required on an application see PARA 321 et seq.

³ As to this requirement see *Tonson v Walker* (1752) 3 Swan 672; *Potts v Potts* (1825) 3 LJOS Ch 176; *Hilton v Earl of Granville* (1841) Cr & Ph 283; affg 4 Beav 130; *Preston v Luck* (1884) 27 ChD 497, CA; *Peru Republic v Dreyfus Bros & Co* (1888) 38 ChD 348; *Smith v Grigg Ltd* [1924] 1 KB 655, CA; *D C Thomson & Co Ltd v Deakin* [1952] Ch 646, [1952] 2 All ER 361, CA; *J T Stratford & Son Ltd v Lindley* [1965] AC 269, [1964] 3 All ER 102, HL; *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, [1974] 2 All ER 1128, HL.

⁴ *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130, [1983] 2 All ER 770, HL; but cf *Fellowes & Son v Fisher* [1976] QB 122, [1975] 2 All ER 829, CA; *Camellia Tanker Ltd SA v International Transport Workers' Federation, The Camellia* [1976] 2 Lloyd's Rep 546.

⁵ *Sparrow v Oxford, Worcester and Wolverhampton Rly Co* (1851) 9 Hare 436; affd (1852) 2 De G M & G 94; and see *Re Lord Cable, Garrett v Waters* [1976] 3 All ER 417, [1977] 1 WLR 7.

⁶ *Playfair v Birmingham, Bristol and Thames Junction Rly Co* (1840) 9 LJ Ch 253.

⁷ The very point which forms the ground of relief is the preventing of irreparable mischief; but cf *Earl of Ripon v Hobart* (1834) 3 My & K 169. As to what is irreparable injury see PARA 356. See *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130, [1983] 2 All ER 770, HL.

⁸ See PARA 359.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(v) Interim Injunctions/A. GRANTING INTERIM INJUNCTIONS/386. Balance of convenience.

386. Balance of convenience.

Unless the material available to the court at the hearing of the application for an interim injunction fails to disclose that the claimant has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interim relief that is sought¹.

In order to determine where the balance of convenience² lies the court must weigh two matters. The first is to protect the claimant against injury by violation of his rights for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The second matter is the defendant's need to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the claimant's undertaking in damages³ if the uncertainty were resolved in the defendant's favour at the trial⁴.

Where there is a clear breach the question of the balance of convenience does not arise⁵. Where the grant or refusal of an interim injunction will have the practical effect of putting an end to the action the degree of likelihood that the claimant would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other⁶.

1 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL.

2 *Earl of Ripon v Hobart* (1834) 3 My & K 169; *Bramwell v Halcomb* (1836) 3 My & Cr 737; *Saunders v Smith* (1838) 3 My & Cr 711; *Sweet v Shaw* (1839) 8 LJ Ch 216; *Dickens v Lee* (1844) 8 Jur 183; *Hilton v Earl of Granville* (1841) Cr & Ph 283; *Clowes v Beck* (1851) 13 Beav 347; *Hodgson v Earl of Powis* (1851) 1 De G M & G 6; *Child v Douglas* (1854) 5 De G M & G 739; *Norman v Mitchell* (1854) 5 De G M & G 648; *Munro v Wivenhoe and Brightlingsea Rly Co* (1865) 4 De G J & Sm 723; *Elmhirst v Spencer* (1849) 2 Mac & G 45; *Cork Corpn v Rooney* (1881) 7 LR Ir 191; *Lee v Gibbings* (1892) 67 LT 263; *The Association and The Romney* [1970] 2 Lloyd's Rep 59. On this principle injunctions were refused in *Greenhalgh v Manchester and Birmingham Rly Co* (1838) 3 My & Cr 784; *Hilton v Earl of Granville* (1841) Cr & Ph 283; *Cory v Yarmouth and Norwich Rly Co* (1844) 3 Hare 593; *M'Neill v Williams* (1847) 11 Jur 344; *William v Heath* (1859) 1 LT 267; *Salisbury v Metropolitan Rly* (1870) 39 LJ Ch 429; *Wells v Attenborough* (1871) 24 LT 312; *Elwes v Payne* (1879) 12 ChD 468, CA; *Fielden v Lancashire and Yorkshire Rly Co* (1848) 2 De G & Sm 531; *Mitchell v Henry* (1880) 15 ChD 181, CA; *A-G v Acton Local Board* (1882) 22 ChD 221; *Arnott v Whitby UDC* (1909) 101 LT 14; and granted in *Plimpton v Spiller* (1876) 4 ChD 286, CA; *Cork Corpn v Rooney* (1881) 7 LR Ir 191; *Newson v Pender* (1884) 27 ChD 43, CA; *Dodson, Mollé & Co v Ellerman Wilson Line Ltd and Grein* (1920) 150 LT Jo 244 (application to discharge interim injunction dismissed); *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169, [1946] 1 All ER 350, CA; *Birmingham Corpn v Perry Barr Stadium Ltd* [1972] 1 All ER 725 (where an injunction was granted to prevent the disturbance of a monopoly right to hold a market). See also *Gaskell v Somersetshire County Council* (1920) 18 LGR 245, CA (where an interim injunction was dissolved on appeal on the balance of convenience); *Budget Rent a Car International Inc v Mamos Slough Ltd* (1977) 121 Sol Jo 374, CA.

3 See PARA 419 et seq.

4 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL; followed in *Fellowes & Son v Fisher* [1976] QB 122, [1975] 2 All ER 829, CA (injunction refused); *Hubbard v Pitt* [1976] QB 142, [1975] 3 All ER 1, CA (injunction granted); *Kwik Lok Corpn v WBW Engineers Ltd* [1975] FSR 237, CA (injunction to preserve the status quo refused); *Catnic Components v Stressline Ltd* [1976] FSR 157, CA (injunction discharged on appeal); *Oxford University v Pergamon Press Ltd* (1977) Times, 19 October, (1977) 121 Sol Jo 758, CA (injunction granted on appeal). See *Child v Douglas* (1854) 5 De G M & G 739; *Donmar Productions Ltd v Bart* [1967] 2 All ER 338n, [1967] 1 WLR 740n; *The Association and The Romney* [1970] 2 Lloyd's Rep 59; *Cambridge Nutrition Ltd v British Broadcasting Corpn* [1990] 3 All ER 523, CA.

5 *Hampstead and Suburban Properties Ltd v Diomedous* [1969] 1 Ch 248, [1968] 3 All ER 545, which was a case of a restrictive covenant. See also *Doherty v Allman* (1878) 3 App Cas 709, HL.

6 *NWL Ltd v Woods* [1979] 3 All ER 614, [1979] 1 WLR 1294, HL. Cf *Cayne v Global Natural Resources plc* [1984] 1 All ER 225, CA; *Lansing Linde Ltd v Kerr* [1991] 1 All ER 418, [1991] 1 WLR 251, CA; and cf *Fielden v Lancashire and Yorkshire Rly Co* (1848) 2 De G & Sm 531.

UPDATE

386 Balance of convenience

NOTE 2--The balance of convenience is likely to lie with the police where the injunction would hinder an ongoing criminal investigation: *Faisaltex Ltd v Chief Constable of Lancashire Constabulary* [2009] EWHC 1884 (QB), [2009] 1 WLR 1687, [2009] All ER (D) 151 (Aug) (injunction to extend protocol concerning inspection of seized material refused).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(v) Interim Injunctions/A. GRANTING INTERIM INJUNCTIONS/387. Conduct of parties.

387. Conduct of parties.

In considering whether an interim injunction should be granted, the court has regard to the conduct and dealings of the parties before application was made by the claimant to preserve and protect his right¹, since the jurisdiction to interfere, being purely equitable, is governed by equitable principles².

1 *Blackemore v Glamorganshire Canal Navigation* (1832) 1 My & K 154; and see *Williams v Roberts* (1850) 8 Hare 315; *Ward v Higgs* (1864) 12 WR 1074.

2 *Great Western Rly Co v Oxford, Worcester and Wolverhampton Rly Co* (1853) 3 De G M & G 341; and see *Jarvis v Islington Borough Council and Lane* (1909) 73 JP Jo 323; and **EQUITY**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(v) Interim Injunctions/A. GRANTING INTERIM INJUNCTIONS/388. Acquiescence.

388. Acquiescence.

Acquiescence¹ by the claimant in the defendant's conduct may prevent the grant of an injunction², especially when the defendant has incurred expenditure in the meantime³. The weight to be attached to the length of time which has elapsed must in a great degree depend upon the amount of expenditure⁴.

1 As to acquiescence by a claimant applying for perpetual injunction see PARA 373. As to the effect of acquiescence and delay in cases of breach of restrictive covenant see PARA 468.

2 See *Clover v Royden* (1873) LR 17 Eq 190.

3 *Birmingham Canal Co v Lloyd* (1812) 18 Ves 515; *Crook v Wilson* (1855) 3 WR 378; *Crossley v Derby Gas Light Co* (1834) 1 Web Pat Cas 119; *Great Western Rly Co v Oxford, Worcester and Wolverhampton Rly Co* (1853) 3 De G M & G 341; *Rochdale Canal Co v King* (1851) 2 Sim NS 78; see also *Greenhalgh v Manchester and Birmingham Rly Co* (1838) 3 My & Cr 784; *Ernest v Vivian* (1863) 33 LJ Ch 513; and *Clegg v Edmondson* (1857) 8 De G M & G 787. Cf *Ward v Kirkland* [1966] Ch 194, [1966] 1 All ER 609.

4 *Great Western Rly Co v Oxford, Worcester and Wolverhampton Rly Co* (1853) 3 De G M & G 341.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(v) Interim Injunctions/A. GRANTING INTERIM INJUNCTIONS/389. Assertion of claim.

389. Assertion of claim.

The mere notice¹, or even the continual assertion of a claim², unaccompanied by any act to enforce it, will not keep alive a right which would otherwise be precluded by acquiescence; but if a defendant has acted with full knowledge of the claimant's rights³, or has incurred expenditure under full notice that the work was objected to and that steps would be taken to put a stop to it⁴, he will not be entitled to rely upon the claimant's acquiescence.

1 *Wicks v Hunt* (1859) John 372; *Ernest v Vivian* (1863) 33 LJ Ch 513.

2 *Clegg v Edmondson* (1857) 8 De G M & G 787; *Lehmann v McArthur* (1868) 3 Ch App 496.

3 *Ramsden v Dyson* (1866) LR 1 HL 129; *Proctor v Bennis* (1887) 36 ChD 740, CA. See also *Russell v Watts* (1883) 25 ChD 559; revsd (1885) 10 App Cas 590, HL, without affecting this point.

4 *A-G v Sheffield Gas Consumers Co* (1853) 3 De G M & G 304; *Rochdale Canal Co v King* (1853) 16 Beav 630; *Lord Manners v Johnson* (1875) 1 ChD 673.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(v) Interim Injunctions/A. GRANTING INTERIM INJUNCTIONS/390. When acquiescence is no bar.

390. When acquiescence is no bar.

Acquiescence is no bar to an injunction if it can be satisfactorily accounted for¹, as for example where the claimant has assumed that the defendant, having a right, would not use it so as to injure the claimant and his assumption is justifiable², or has acquiesced in what he has been led to consider was merely a temporary violation of his right³, or has endeavoured to come to an amicable arrangement with the defendant⁴, or where the defendant has falsely represented to the claimant that the injury complained of would not result from his operations⁵, or has led the claimant to believe that the evil would be remedied⁶. The claimant will not be deemed to have acquiesced in the claims of others unless he was fully cognisant of his right to dispute them⁷, nor where he has assented to the act complained of under an erroneous opinion and view and in ignorance of the consequences⁸. The fact that the claimant has acquiesced in a state of things while it produced little injury to him does not constitute such acquiescence as would debar him from obtaining an interim injunction in the event of the injury being substantially increased⁹.

1 *Goldsmid v Tunbridge Wells Improvement Comrs* (1866) 1 Ch App 349; *Lehmann v McArthur* (1868) 3 Ch App 496 (specific performance); *A-G v Halifax Corpn* (1869) 39 LJ Ch 129; *Coles v Sims* (1854) 5 De G M & G 1.

2 *A-G v Halifax Corpn* (1869) 39 LJ Ch 129; *A-G v Leeds Corpn* (1870) 5 Ch App 583; *Smith v Smith* (1875) LR 20 Eq 500.

3 *Gordon v Cheltenham and Great Western Union Rly Co* (1842) 5 Beav 229.

4 *Innocent v North Midland Rly Co* (1839) 1 Ry & Can Cas 242.

5 *Davies v Marshall* (1861) 10 CBNS 697.

6 *A-G v Luton Local Board of Health* (1856) 2 Jur NS 180; *A-G v Birmingham Borough Council* (1858) 4 K & J 528.

7 *Greenhalgh v Manchester and Birmingham Rly Co* (1838) 3 My & Cr 784; *Marker v Marker* (1851) 9 Hare 1; *Weldon v Dicks* (1878) 10 ChD 247; *Armstrong v Sheppard & Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA. The doctrine of acquiescence is founded upon conduct with a knowledge of legal rights: *Willmott v Barber* (1880) 15 ChD 96 (specific performance).

8 *Bankart v Houghton* (1860) 27 Beav 425. See *Shaw v Applegate* [1978] 1 All ER 123, [1977] 1 WLR 970 (doubt as to true rights).

9 *Bankart v Houghton* (1860) 27 Beav 425; *Western v MacDermott* (1866) 2 Ch App 72; *A-G v Halifax Corpn* (1869) 39 LJ Ch 129; and see *Child v Douglas* (1854) 5 De G M & G 739 (acquiescence in violation of a covenant to a certain extent held a sufficient objection to an interim injunction against a greater violation of it); cf *Knight v Simmonds* [1896] 1 Ch 653; affd [1896] 2 Ch 294, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(v) Interim Injunctions/A. GRANTING INTERIM INJUNCTIONS/391. Acquiescence by one of several claimants.

391. Acquiescence by one of several claimants.

The acquiescence on the part of one of several claimants may preclude the court's interference upon an interim application¹. The court will frequently refuse an injunction where it acknowledges the right if it considers that the conduct of the claimant, not only with the party with whom the contest exists, but with others, has led to the state of things which occasions the contest². The effect of knowledge and acquiescence is the same in the case of a company as in the case of a private individual³.

1 *Marker v Marker* (1851) 9 Hare 1.

2 *Rundell v Murray* (1821) Jac 311; *Saunders v Smith* (1838) 3 My & Cr 711; and see *Rochdale Canal Co v King* (1851) 2 Sim NS 78.

3 *Laird v Birkenhead Rly Co* (1859) John 500; *Hill v South Staffordshire Rly Co* (1865) 11 Jur NS 192.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(v) Interim Injunctions/A. GRANTING INTERIM INJUNCTIONS/392. Delay.

392. Delay.

A claimant must be able to show that he has not been guilty of improper delay¹ in applying to the court, for delay, even if not amounting to acquiescence, may deprive him of the right to an interim injunction².

¹ As to delay by a claimant applying for a perpetual injunction see PARA 374. Delay is not so material in cases of waste: see PARA 441. As to the effect of delay and acquiescence in cases of breach of restrictive covenants see PARA 468.

² *Hilton v Earl of Granville* (1841) Cr & Ph 283; *South Eastern Rly Co v Martin* (1848) 18 LJ Ch 103; *Bridson v Benecke* (1849) 12 Beav 1; *M'Lure v Ripley* (1850) 2 Mac & G 274; *Rochdale Canal Co v King* (1851) 2 Sim NS 78; *A-G v Sheffield Gas Consumers Co* (1853) 3 De G M & G 304; *Great Western Rly Co v Oxford, Worcester and Wolverhampton Rly Co* (1853) 3 De G M & G 341; *Ware v Regent's Canal Co* (1858) 3 De G & J 212; *Bovill v Crate* (1865) LR 1 Eq 388; *Salisbury v Metropolitan Rly Co* (1870) 39 LJ Ch 429; *Isaacson v Thompson* (1871) 41 LJ Ch 101; *Mogul SS Co v M'Gregor, Gow & Co* (1885) 15 QBD 476; and see *Turner v Mirfield* (1865) 34 Beav 390; *Folkestone Corpn v Woodward* (1872) LR 15 Eq 159; and **EQUITY**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(v) Interim Injunctions/A. GRANTING INTERIM INJUNCTIONS/393. Refusal of application in case of doubt.

393. Refusal of application in case of doubt.

Where it is impossible to form any opinion as to whether or not the act complained of will amount to an actionable wrong, an application for an interim injunction will not be allowed to stand over until the act in question has been so far executed that its character may be judged, but will be refused at once¹.

¹ *Haines v Taylor* (1847) 2 Ph 209; and see *Honeywell Information Systems Ltd v Anglian Water Authority* (1976) Times, 30 June, CA (the way in which the injunction was framed was too wide; injunction discharged on appeal). See also PARA 385. As to appeals from an interim order see PARA 407.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(v) Interim Injunctions/B. EXTENT OF AND TERMS ON WHICH INTERIM INJUNCTIONS WILL BE GRANTED/394. Extent of restraint.

B. EXTENT OF AND TERMS ON WHICH INTERIM INJUNCTIONS WILL BE GRANTED

394. Extent of restraint.

In dealing with an interim application the court will confine itself strictly to the point which it is called upon to decide, and will express its opinion on the case only so far as is necessary to show the grounds upon which the interim application is disposed of¹, and, in the absence of very special circumstances, will impose only such restraint as will suffice to stop the mischief and keep things as they are until the hearing².

1 *Skinner's Co v Irish Society* (1835) 1 My & Cr 162.

2 *Blakemore v Glamorganshire Canal Navigation* (1832) 1 My & K 154. Even before the Judicature Acts a perpetual injunction could be granted in special circumstances without the claimant being required first to establish his right at law: see PARA 357. See *C v K (Ouster Order: Non-Parent)* [1996] 3 FCR 488 (woman sought injunction ousting man from council house in which they lived separately but as joint tenants; question of ousting postponed but application not dismissed pending outcome of applications for lesser injunctions with provision for monitoring behaviour).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(v) Interim Injunctions/B. EXTENT OF AND TERMS ON WHICH INTERIM INJUNCTIONS WILL BE GRANTED/395. Undertakings.

395. Undertakings.

The court will take care that the order for an injunction is so framed that neither party will be deprived of the benefit he is entitled to, if in the event it turns out that the party in whose favour it was made is in the wrong¹. For this purpose the court will, if necessary, impose terms upon the claimant as a condition of granting the injunction². He may also be required to undertake to prosecute the action with due diligence³ or, if the action has reference to the payment of money, to pay the amount in dispute into court⁴.

Similarly it may impose terms upon the defendant as a condition of withholding the injunction⁵. Thus, he may be required to undertake to keep an account, and in the event of the claimant establishing his case to pay such sum as the court directs⁶, or to give reasonable notice of his intention to build and to produce plans⁷, or not to do or continue the act complained of in the meantime⁸, or to abide by any order the court may make as to damages⁹ or as to pulling down the structure complained of¹⁰, or to make certain admissions for the purposes of the trial¹¹. Where the act complained of involves the making of profits, an undertaking by the defendant to keep an account is almost invariably required¹². The injunction may be suspended to enable the defendant to carry out an undertaking¹³.

1 *East Lancashire Rly Co v Hattersley* (1849) 8 Hare 72; *Rigby v Great Western Rly Co* (1846) 2 Ph 44.

2 *Boardman v Mostyn* (1801) 6 Ves 467; *Sanxter v Foster* (1841) Cr & Ph 302; *Rigby v Great Western Rly Co* (1846) 2 Ph 44; *East Lancashire Rly Co v Hattersley* (1849) 8 Hare 72; *Coleman v West Hartlepool Rly Co* (1861) 3 LT 847. Where the claimants were outside the jurisdiction, they were required to give security for their cross-undertaking in damages; *Harman Pictures NV v Osborne* [1967] 2 All ER 324, [1967] 1 WLR 723. As to undertakings relating to damages see PARA 419 et seq; as to enforcement of undertakings see PARA 425.

3 *Newson v Pender* (1884) 27 ChD 43, CA; and see *Sweet v Cater* (1841) 11 Sim 572; *Dickens v Lee* (1844) 8 Jur 183; *Bohn v Bogue* (1846) 7 LTOS 277, where the claimant was required to undertake to try his right at law.

4 *Whitworth v Rhodes* (1850) 20 LJ Ch 105; *Shaw v Earl of Jersey* (1879) 4 CPD 359, CA; *Cavenagh v Cohen* (1919) 147 LT Jo 252 (sale by moneylender of goods pledged to him restrained on payment into court of the amount claimed to be owing); and see *Jones v Pacaya Rubber and Produce Co Ltd* [1911] 1 KB 455, CA (forfeiture of shares restrained on payment into court of the amount of the call).

5 *Rigby v Great Western Rly Co* (1846) 2 Ph 44; *Cromford and High Peak Rly Co v Stockport, Disley and Whaley Bridge Rly Co* (1857) 1 De G & J 326; *Low v Innes* (1864) 4 De G J & Sm 286; *Elwes v Payne* (1879) 12 ChD 468, CA; *Mitchell v Henry* (1880) 15 ChD 181, CA; *Wall v London and Northern Assets Corpn* [1898] 2 Ch 469, CA; *Smith v Baxter* [1900] 2 Ch 138; *British Thomson-Houston Co Ltd v BTT Electric Lamp and Accessories Co* (1922) 39 RPC 167.

6 *Rigby v Great Western Rly Co* (1846) 2 Ph 44; and see *Jones v Great Western Rly Co* (1840) 1 Ry & Can Cas 684. See also PARA 336.

7 *Smith v Baxter* [1900] 2 Ch 138.

8 *Clarke v Clark* (1864) 13 WR 133; and see *Wall v London and Northern Assets Corpn* [1898] 2 Ch 469, CA.

9 *M'Neill v Williams* (1847) 11 Jur 344; *A-G v Manchester and Leeds Rly Co* (1838) 1 Ry & Can Cas 436.

10 *Ford v Gye* (1858) 6 WR 235.

11 *Hilton v Earl of Granville* (1841) Cr & Ph 283.

12 *Cory v Yarmouth and Norwich Rly Co* (1844) 3 Hare 593; *Rigby v Great Western Rly Co* (1846) 2 Ph 44; *M'Neill v Williams* (1847) 11 Jur 344; *Swallow v Wallingford* (1848) 12 Jur 403; *Elwes v Payne* (1879) 12 ChD 468, CA; *Mitchell v Henry* (1880) 15 ChD 181, CA. See *East Lancashire Rly Co v Hattersley* (1849) 8 Hare 72.

13 *Spencer v London and Birmingham Rly Co* (1836) 1 Ry & Can Cas 159; *Northam Bridge and Road Co Proprietors v London and Southampton Rly Co* (1840) 1 Ry & Can Cas 653; *A-G v Eastern Counties Rly Co* (1843) 3 Ry & Can Cas 337.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(vi) Freezing Injunctions and Search Orders/A. FREEZING INJUNCTIONS/396. In general.

(vi) Freezing Injunctions and Search Orders

A. FREEZING INJUNCTIONS

396. In general.

Under its wide power to grant an injunction without notice or an interim injunction¹ the court has jurisdiction to grant such an injunction so as to prevent a defendant from disposing of assets in order to defeat a judgment². This power depends not on the territorial jurisdiction of the court over assets in England but on the unlimited jurisdiction of the English court in personam³ against any person whether an individual who or a corporation which is, under English procedure, properly made a party⁴ to proceedings⁵ in the English court⁶.

Accordingly, an order may be made before⁷ or after⁸ judgment against a defendant, whether or not based in England⁹, to restrain the removal of assets from the jurisdiction¹⁰, the disposal of or otherwise dealing with¹¹ assets within the jurisdiction¹² in such a way as to place them beyond the reach of the claimant¹³, or exceptionally to restrain dealing with assets outside the jurisdiction¹⁴. In an appropriate case the court has power to order the transfer of assets to a jurisdiction in which the order of the English court after the trial of the action will be recognised from a jurisdiction in which that order will not be recognised¹⁵.

1 See the Supreme Court Act 1981 s 37(1); the Civil Jurisdiction and Judgments Act 1982 s 25(1) (amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 12; and SI 2001/3929); and PARA 347 et seq. See also PARAS 315 head (6), 318; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 998 et seq. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

The Civil Jurisdiction and Judgments Act 1982 s 25 confers jurisdiction on the English courts to grant interim relief including a freezing injunction in aid of proceedings which have been commenced in a convention country other than the United Kingdom without any limit to the retrospective operation of the power: *Alltrans Inc (formerly known as Trans Freight Lines Inc) v Interdom Holdings Ltd (Johnson Stevens Agencies Ltd, third parties)* [1991] 4 All ER 458, CA. A freezing injunction may be available under that provision even where a foreign court trying the substantive dispute would not be able to make a similar order: *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, [1997] 3 All ER 724, CA (world-wide freezing injunction granted, although no similar relief available in Swiss proceedings). Unless specifically excluded by the arbitration agreement, the court has the power to grant a freezing injunction by way of ancillary relief in arbitral proceedings: *Re Q's Estate* [1999] 1 All ER (Comm) 499. As to the general principles which are to apply when the court is asked to grant an asset-freezing order ancillary to proceedings in a foreign jurisdiction pursuant to the Civil Jurisdiction and Judgments Act 1982 s 25 see *Ryan v Friction Dynamics Ltd* (2000) Times, 14 June; and as to the approach to be adopted by members of the legal profession in the United Kingdom when requested by overseas lawyers to pursue such an order see *Lewis v Eliades* (2002) Times, 28 February. In deciding the proper scope of any interim relief under the Civil Jurisdiction and Judgments Act 1982 s 25 it is necessary to have regard to the nature of the substantive proceedings and their possible outcome in order to ensure that an order made in the instant jurisdiction would be effective to achieve its purpose; the principle which underpins s 25 is that the court should be willing to assist the courts of other jurisdictions by providing such interim relief as would be available if it were itself seised of the substantive proceedings: *Kensington International Ltd v Republic of Congo* [2007] EWCA Civ 1128, [2008] 1 All ER (Comm) 934, [2008] 1 WLR 1144. See also *ETI Euro Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880, [2008] 2 Lloyd's Rep 421, [2008] All ER (D) 358 (Jul); and *Mediterranean Shipping Co v OMG International Ltd* [2008] EWHC 2150 (Comm), [2008] All ER (D) 89 (Sep). An English court will not assist any action by a foreign state in civil proceedings to enforce a foreign penal or revenue law, but for the purposes of this rule the court must look at the substance of what is being sought to be enforced: *United States Securities and Exchange Commission v Manterfield* [2009] EWCA Civ 27, [2009] All ER (D) 225 (Jan).

2 CPR 25.1(1)(f)(i). The power was originally expressed in *Mareva Compania Naviera SA v International Bulkcarriers SA, The Mareva* (1975) [1980] 1 All ER 213n at 215, [1975] 2 Lloyd's Rep 509-511, CA, per Lord Denning MR, and has now been enshrined in the Civil Procedure Rules. For other early examples see *Nippon Yusen Kaisha v Karageorgis* [1975] 3 All ER 282, [1975] 1 WLR 1093, CA; *Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia intervening)* [1978] QB 644, [1977] 3 All ER 324, CA (for a historical survey see at 657, 331-332 per Lord Denning MR). See also *Siskina (Cargo Owners) v Distos Compania Naviera SA, The Siskina* [1979] AC 210, [1977] 3 All ER 803, HL. As to the form of injunction see *Practice Direction--Interim Injunctions* PD 25A para 6, Annex.

In *Mareva Compania Naviera SA v International Bulkcarriers SA, The Mareva* (1975) [1980] 1 All ER 213n, [1975] 2 Lloyd's Rep 509, CA, the Court of Appeal held that the court's wide general powers to grant an injunction meant that contrary to observations in *Lister & Co v Stubbs* (1890) 45 ChD 1 at 13, CA, per Cotton LJ and 14 per Lindley LJ the court did have jurisdiction to protect a creditor before judgment. However, the purpose of a freezing injunction is not in any way to improve the position of claimants in an insolvency but simply to prevent the injustice of a defendant placing assets which might otherwise have been available to satisfy judgment out of the reach of the claimant: *Iraqi Ministry of Defence v Arcepey Shipping Co SA, The Angel Bell* [1981] QB 65, [1980] 1 All ER 480. A defendant in such an application is not to be treated like a judgment debtor: *A J Bekhor & Co Ltd v Bilton* [1981] QB 923, [1981] 2 All ER 565, CA; *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch 65, [1989] 1 All ER 1002, CA.

See *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366, [1994] 1 All ER 110, CA (injunction to enforce judgment debt relating to one defendant granted against another defendant against whom claim abandoned because injunction was incidental to enforcement of debt). A freezing injunction is not intended to be used as an aid to obtaining preference for repayment from an insolvent party: see *Camdex International Ltd v Bank of Zambia (No 2)* [1997] 1 All ER 728, [1997] 1 WLR 632, CA (company sought to seize bank notes printed by national bank of third world country in order to 'hold the bank to ransom'; notes themselves had no market value). It may be within the scope of the court's power to grant a freezing injunction to require a company and its only effective officer to return money paid to the company: *Yukong Lines Ltd v Rendsburg Investments Corp'n (No 2)* [1998] 4 All ER 82, [1998] 1 WLR 294. As to a party's entitlement to apply without notice for a freezing injunction see *Don King Productions Inc v Warren (No 2)* (1998) Times, 18 June. On an application without notice, legal representatives have a duty to provide a full note of the hearing to any party affected by the grant of relief: *Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd* (1999) Times, 10 November.

A disclosure order contained in the injunction carries with it an obligation to do more than simply tell the truth: *Bird v Hadkinson* (1999) Times, 7 April. The jurisdiction can be invoked even where the defendant proposes a bona fide transfer of assets for a price in accordance with a valuation from an independent and respectable firm of accountants, although the courts must not be too ready to grant such relief: *Customs and Excise Comrs v Anchor* [1999] 3 All ER 268, [1999] 1 WLR 1139.

See also *Dadourian Group International Inc v Simms (No 2)* [2006] EWCA Civ 1745, [2007] 2 All ER 329, [2007] 1 WLR 2967 (use of information obtained from party against whom freezing order was made).

3 A freezing injunction does not operate as an attachment. It merely restrains the owner from dealing with the assets in certain ways: *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 3 All ER 164, [1978] 1 WLR 966, CA. See *Standard Chartered Bank v Walker, TSB plc v Walker* [1992] 1 WLR 561 (injunction to restrain shareholder from voting against resolutions upon which viability of company depended). It does not have any 'in rem' effect on the assets themselves or on the defendant's title to them: *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch 65, [1989] 1 All ER 1002, CA. But cf *Z Ltd v A-Z and AA-LL* [1982] QB 558, [1982] 1 All ER 556, CA, and *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA (in rem effect on third parties); see PARA 342.

4 Supreme Court Act 1981 s 37(3). See PARA 207 et seq; and the Civil Jurisdiction and Judgments Act 1982 s 25(1) (as amended: see note 1). The jurisdiction to grant freezing orders against third parties is not rigidly restricted to those cases in which the third party is in control of the assets of the defendant to the action: *HM Revenue and Customs v Egleton* [2006] EWHC 2313 (Ch), [2007] 1 All ER 606.

5 *North London Ry Co v Great Northern Ry Co* (1883) 11 QBD 30, CA; and see note 1.

The Supreme Court Act 1981 s 37(1) predicates that there is a cause of action in respect of which the court may make an order: *Steamship Mutual Underwriting Association (Bermuda) Ltd v Thakur Shipping Co Ltd* [1986] 2 Lloyd's Rep 439n, CA; *Ninemia Maritime Corp'n v Trave Schiffahrtsgesellschaft mbH & Co KG, The Niedersachsen* [1984] 1 All ER 398; affd at 413, [1983] 1 WLR 1412, CA; cf *Siskina (Cargo Owners) v Distos Compania Naviera SA, The Siskina* [1979] AC 210, [1977] 3 All ER 803, HL; and see the Civil Jurisdiction and Judgments Act 1982 s 25(1) (as amended: see note 1). See *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA (no substantive relief claimed in England but injunction granted over assets representing proceeds of payments claimed in a foreign action). See *A v B* [1989] 2 Lloyd's Rep 423 where a conditional freezing order was granted at a time when the claimant had no cause of action but was to take effect when the cause of action arose. The claimant contracted to buy a vessel from a foreign defendant and pursuant to the contract had paid a deposit into an account in the joint names of the claimant and defendant. The claimant alleged that delivery might be in breach of contract. As the defendant had no assets within the jurisdiction the

claimant sought the order to assist the claim in potential arbitration proceedings against the defendant. The order was to come into effect on delivery of the vessel. See also *Securities and Investments Board v Pantell SA*[1990] Ch 426, [1989] 2 All ER 673 (a private cause of action is unnecessary where eg there is a statutory right of action for the benefit of investors); *Chief Constable of Kent v V*[1983] QB 34, [1982] 3 All ER 36, CA; *Chief Constable of Hampshire v A Ltd*[1985] QB 132, [1984] 2 All ER 385, CA; and *Chief Constable of Leicestershire v M*[1988] 3 All ER 1015, [1989] 1 WLR 20, where the police sought injunctions over the proceeds of crime; and see the Proceeds of Crime Act 2002 ss 41, 72; the Terrorism Act 2000 s 23(9), Sch 4 paras 5, 6; and *Re Peters*[1988] QB 871, [1998] 3 All ER 46, CA. See also *TSB Private International Bank SA v Chabra*[1992] 2 All ER 245, [1992] 1 WLR 231 (grant of injunction against co-defendant company, majority shareholder in which already injunctioned); *Veracruz Transportation Inc v VC Shipping Co Inc, The Veracruz I* [1992] 1 Lloyd's Rep 353, CA (no jurisdiction to grant injunction to secure retention of the purchase price of a ship anticipated to be defective prior to delivery); *C Inc plc v L*[2001] 2 All ER (Comm) 446 (grant of injunction against non-party against whom there was no claim for substantive relief, but against whom defendant had substantive right); *Fourie v Le Roux*[2007] UKHL 1, [2007] 1 All ER 1087, [2007] 1 WLR 320 (insolvency proceedings constituted by a compulsory winding-up order in a foreign court and the issue of a letter of request to the English High Court not 'proceedings' within the meaning of the Civil Jurisdiction and Judgments Act 1982 s 25(1)). International arbitration proceedings are not 'proceedings' for the purpose of the Civil Jurisdiction and Judgments Act 1982 s 25 to enable the English court to grant interim relief to preserve the outcome of arbitration proceedings: *ETI Euro Telecom International NV v Republic of Bolivia*[2008] EWCA Civ 880, [2008] 2 Lloyd's Rep 421, [2008] All ER (D) 358 (Jul).

As to statutory restraint orders analogous to freezing injunctions see PARA 339; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARAS 400, 403; **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 423 et seq.

6 *Derby & Co Ltd v Weldon (No 6)*[1990] 3 All ER 263, [1990] 1 WLR 1139, CA.

7 *Mareva Compania Naviera SA v International Bulkcarriers SA, The Mareva*[1980] 1 All ER 213n, [1975] 2 Lloyd's Rep 509, CA.

8 *Stewart Chartering Ltd v C & O Managements SA*[1980] 1 All ER 718, [1980] 1 WLR 460; *Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (U K) Ltd*[1985] 3 All ER 747, [1984] 1 WLR 1097; *Babanaft International Co SA v Bassatne*[1990] Ch 13, [1989] 1 All ER 433, CA. See also *Jet West Ltd v Haddican* [1992] 2 All ER 545, CA (injunction granted after order for costs but before taxation); *Gwembe Valley Development Co Ltd v Koshy (No 4)*(2002) Times, 28 February (injunction and cross-undertaking in damages granted after judgment where leave to appeal also given).

9 *Prince Abdul Rahman bin Turki al Sudairy v Abu-Taha*[1980] 3 All ER 409, [1980] 1 WLR 1268, CA; and see the Supreme Court Act 1981 s 37(3).

10 See note 2.

11 *Z Ltd v A-Z and AA-LL*[1982] QB 558, [1982] 1 All ER 556, CA. The words 'dealing with' include disposing of, selling, pledging or charging assets: *CBS United Kingdom Ltd v Lambert*[1983] Ch 37, [1982] 3 All ER 237, CA.

12 *Barclay-Johnson v Yuill*[1980] 3 All ER 190, [1980] 1 WLR 1259; approved in *Prince Abdul Rahman bin Turki al Sudairy v Abu-Taha*[1980] 3 All ER 409, [1980] 1 WLR 1268, CA; *Z Ltd v A-Z and AA-LL*[1982] QB 558, [1982] 1 All ER 556, CA; and see the Supreme Court Act 1981 s 37(3).

13 A freezing injunction is designed to prevent the judgment being a mere *brutum fulmen*: *Siskina (Cargo Owners) v Distos Compania Naviera SA, The Siskina*[1979] AC 210, [1977] 3 All ER 803, HL; *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch 65, [1989] 1 All ER 1002, CA. It is not designed to improve the position of claimants in an insolvency (*Iraqi Ministry of Defence v Arcepey Shipping Co SA, The Angel Bell*[1981] QB 65, [1980] 1 All ER 480), or to bring to an end entirely a bona fide and established method of trading (*Avant Petroleum Inc v Gatoil Overseas Inc* [1986] 2 Lloyd's Rep 236, CA), or to inhibit the ordinary course of business or to interfere with a defendant's ordinary transactions especially where third parties are involved (*Normid Housing Association Ltd v Ralphs and Mansell and Assicurazioni General SpA (No 2)* [1989] 1 Lloyd's Rep 274, CA (bona fide settlement of claim)). See also *Atlas Maritime Co SA v Avalon Maritime Ltd, The Coral Rose*[1991] 4 All ER 769, [1991] 1 Lloyd's Rep 563, CA; *Zucker v Tyndall Holdings plc*[1993] 1 All ER 124, [1992] 1 WLR 1127, CA; *Camdex International Ltd v Bank of Zambia (No 2)*[1997] 1 All ER 728, [1997] 1 WLR 632, CA (bank notes with no open market value).

14 *Babanaft International Co Sa v Bassatne*[1990] Ch 13, [1989] 1 All ER 433, CA (after judgment); *Republic of Haiti v Duvalier*[1990] 1 QB 202, [1989] 1 All ER 456, CA (before judgment); *Derby & Co Ltd v Weldon*[1990] Ch 48, [1989] 1 All ER 469 (before judgment); *Derby & Co Ltd v Weldon (Nos 3 and 4)*[1990] Ch 65, [1989] 1 All ER 1002, CA (before judgment); the court will only make a pre-judgment order in exceptional cases where there are no or insufficient assets held within the jurisdiction: *Derby & Co Ltd v Weldon (Nos 3 and 4)*[1990] Ch 65, [1989] 1 All ER 1002, CA; *Bayer AG v Winter (No 3)* [1986] FSR 357, (1986) Times, 24 March (approved in

Babanaft International Co SA v Bassatne[1990] Ch 13, [1989] 1 All ER 433, CA). But cf *Ashtiani v Kashi*[1987] QB 888, [1986] 2 All ER 970, CA. Both pre-judgment and post-judgment worldwide freezing injunctions should be restricted so as to bind only the defendant personally and should contain a limiting provision to ensure that they do not purport to have an unintended extra-territorial operation and to ensure that only third parties affected are those who are within the jurisdiction and are able to prevent acts or omissions outside the jurisdiction in breach of the injunction or are within the jurisdiction of a foreign court which has declared it enforceable: *Babanaft International Co SA v Bassatne*[1990] Ch 13, [1989] 1 All ER 433, CA; *Derby & Co Ltd v Weldon (Nos 3 and 4)*[1990] Ch 65, [1989] 1 All ER 1002, CA. Cf *MBPXL Corp v Intercontinental Bank Corp Ltd* [1975] CA Transcript 411, where the Court of Appeal held that a freezing injunction could only be granted if there were movable assets within the jurisdiction; and see *Intraco Ltd v Notis Shipping Corp* [1981] 2 Lloyd's Rep 256, CA. Cf the Matrimonial Causes Act 1973 s 37(2); and *Hamlin v Hamlin*[1986] Fam 11, [1985] 2 All ER 1037, CA.

Republic of Haiti v Duvalier[1990] 1 QB 202, [1989] 1 All ER 456, CA, was distinguished in *Rosseel NV v Oriental Commercial and Shipping (UK) Ltd*[1990] 3 All ER 545, [1990] 1 WLR 1387, CA. See also *Ghosh v Ghosh* [1992] 2 All ER 920, CA (worldwide freezing injunction inappropriate in matrimonial proceedings); *Re Bank of Credit and Commerce International (Overseas) Ltd*[1994] 3 All ER 764, [1994] 1 WLR 708, CA. As to the court's power to grant a worldwide disclosure order see *Gidrxslme Shipping Co Ltd v Tantomar-Transportes Maritimos Lda*[1994] 4 All ER 507, [1995] 1 WLR 299. As to jurisdiction to hear counterclaims in worldwide proceedings for a freezing injunction see *Balkanbank v Taher (No 3)* [1995] 2 All ER 904, [1995] 1 WLR 1067, CA. See also *S & T Bautrading v Nordling*[1997] 3 All ER 718, CA (German plaintiff refused a worldwide freezing injunction). As to protection of a third party's duties by a worldwide asset-freezing order see *Bank of China v NBM LLC*[2001] EWCA Civ 1933, [2002] 1 All ER 717, [2002] 1 WLR 844; and PARA 315 note 14. A worldwide asset freezing order cannot normally be effective without the disclosure of assets: *Motorola Credit Corp v Uzan*[2002] EWCA Civ 989, [2002] 2 All ER (Comm) 945. The grant of permission to enforce a worldwide freezing order abroad should be just and convenient for the purpose of ensuring the effectiveness of the order, and should not be oppressive: *Dadourian Group International Inc v Simms*[2006] EWCA Civ 399, [2006] 3 All ER 48, [2006] 1 WLR 2499. The grant of a world-wide freezing order requires a real connection between the subject matter of the measure and the territorial jurisdiction of the contracting state of the court: *Banco Nacional de Comercio Exterior SNC v Empresa de Telecomunicaciones de Cuba SA*[2007] EWCA Civ 662, [2007] 2 All ER (Comm) 1093, [2008] 1 WLR 1936.

15 *Derby & Co Ltd v Weldon (No 6)*[1990] 3 All ER 263, [1990] 1 WLR 1139, CA. This is a discretion which should be exercised with great caution: see *Derby & Co Ltd v Weldon (No 6)*[1990] 3 All ER 263 at 275-276, [1990] 1 WLR 1139 at 1154, CA, per Staughton LJ.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(vi) Freezing Injunctions and Search Orders/A. FREEZING INJUNCTIONS/397. Meaning of 'assets'.

397. Meaning of 'assets'.

There are no limitations put upon the word 'assets', from which it follows that this word includes chattels such as motor vehicles, aeroplanes¹, ships², machinery³, jewellery, objets d'art and other valuables as well as choses (or things) in action⁴. It includes the goodwill of a business⁵ and could well extend to the disposition of a freehold interest in a house⁶. A freezing injunction can cover any assets acquired between the grant of the injunction and the eventual execution of judgment⁷.

Assets do not include banknotes printed by the national bank of a third world country which are of value only to the bank, where to seize them would, effectively, hold the bank to ransom, possibly to the severe detriment of the country's precarious economy⁸. Assets do include those of which the defendant is the bare legal, but not the beneficial, owner⁹.

1 *Allen v Jambo Holdings Ltd* [1980] 2 All ER 502, [1980] 1 WLR 1252, CA.

2 *The Rena K* [1979] QB 377, [1979] 1 All ER 397. See *Clipper Maritime Co Ltd of Monrovia v Mineralimportexport* [1981] 3 All ER 664, [1981] 1 WLR 1262, CA (cargo on board ship).

3 *Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia intervening)* [1978] 1 QB 644, [1977] 3 All ER 324, CA.

4 *CBS United Kingdom Ltd v Lambert* [1983] Ch 37, [1982] 3 All ER 237, CA.

5 *Darashah v UFAC (UK) Ltd* (1982) Times, 30 March.

6 *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch 65, [1989] 1 All ER 1002, CA. Cf *Stockler v Fourways Estates Ltd* [1983] 3 All ER 501, [1984] 1 WLR 25 (land registration and Mareva injunctions).

7 *TDK Tape Distributor (UK) Ltd v Videochoice Ltd* [1985] 3 All ER 345, [1986] 1 WLR 141 (proceeds of life assurance policy maturing after grant of injunction).

8 *Camdex International Ltd v Bank of Zambia (No 2)* [1997] 1 All ER 728, [1997] 1 WLR 632, CA.

9 *Federal Bank of the Middle East v Hadkinson* [2000] 2 All ER 395, [2000] 1 WLR 1695, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(vi) Freezing Injunctions and Search Orders/A. FREEZING INJUNCTIONS/398. Criteria for grant.

398. Criteria for grant.

A freezing injunction may be granted when (1) it appears likely that the claimant will recover judgment against the defendant for a certain or approximate item; and (2) there are also reasons to believe that the defendant has assets to meet the judgment in whole or in part but may well take steps designed to ensure that these are no longer available or traceable when judgment is given against him¹. It may also be granted where judgment has been given for the claimant and there are grounds for believing that the judgment debtor will dispose of assets to avoid execution².

¹ *Z Ltd v A-Z and AA-LL* [1982] QB 558, [1982] 1 All ER 556, CA. See also eg *Congentra AG v Sixteen Thirteen Marine SA, The Nicholas M* [2008] EWHC 1615 (Comm), [2009] 1 All ER (Comm) 479 (ex parte application for a freezing injunction).

² *Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd* [1985] 3 All ER 747, [1984] 1 WLR 1097.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(vi) Freezing Injunctions and Search Orders/A. FREEZING INJUNCTIONS/399. Guidelines.

399. Guidelines.

Those who apply for a freezing injunction should bear in mind the following guidelines¹:

- 521 (1) the claimant should make full and frank disclosure² of all matters in his knowledge³ which are material⁴ for the judge to know;
- 522 (2) the claimant should give particulars of his claim against the defendant, stating the ground of his claim⁵ and the amount thereof⁶, and fairly stating the points made against it by the defendant;
- 523 (3) the claimant should give some grounds for believing that the defendant has relevant assets⁷;
- 524 (4) the claimant should give some grounds for believing that there is a risk of the assets being dissipated before the judgment or award is satisfied⁸;
- 525 (5) the claimant must give an undertaking in damages in case he fails in his claim or the injunction turns out to be unjustified⁹.

It is an abuse of process to obtain a freezing injunction and then hold it with no intention of prosecuting the action¹⁰.

1 *Third Chandris Shipping Corp v Unimarine SA* [1979] QB 645, [1979] 2 All ER 972, CA. See also *Practice Direction--Interim Injunctions* PD 25A.

2 *Brinks-MAT Ltd v Elcombe* [1988] 3 All ER 188, [1988] 1 WLR 1350, CA, where the authorities are reviewed. See PARA 321. If the injunction is discharged because of material non-disclosure the court has a discretion to grant a second injunction when all the facts are placed before it: *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc* [1988] 3 All ER 178, [1988] 1 WLR 1337, CA. See *Ali and Fahd Shobokshi Group Ltd v Moneim* [1989] 2 All ER 404, [1989] 1 WLR 710. See *The Motor Vessel P* [1992] 1 Lloyd's Rep 470 (claimant must disclose to the court the intention not to disclose a without notice application to the defendant). Failing to disclose that the defendant has offered security for the claimant's claim amounts to a material non-disclosure, as it is contrary to the claimant's implicit request that the court's assistance is required to prevent the defendant from dissipating his assets: *Gulf Interstate Oil Corp v ANT Trade and Transport Ltd of Malta, The Giovanna* [1999] 1 All ER (Comm) 97.

3 The duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known had he made such inquiries: *Brinks-MAT Ltd v Elcombe* [1988] 3 All ER 188, [1988] 1 WLR 1350, CA. The claimant must bring to the court's attention any subsequent material change in the situation: *Commercial Bank of the Near East plc v P* [1989] NLJR 645. Non-disclosure of law by counsel may result in the discharge of a freezing order: *Memory Corp plc v Sidhu (No 2)* [2000] 1 WLR 1443, CA (application to discharge freezing order refused). See also *Franses (liquidator of Arab News Network Ltd) v Al Assad* [2007] EWHC 2442 (Ch), [2007] BPIR 1233. Where a defendant seeks the discharge of an injunction on grounds of material non-disclosure and the claimant seeks its continuation on the merits, whether both applications should be heard together depends on the facts and circumstances of the case: *Network Multimedia Television Ltd v Jobserve Ltd* (2001) Times, 25 January. See also *Thane Investments Ltd v Tomlinson* [2002] All ER (D) 91 (Dec) (freezing order obtained ex parte without sufficient disclosure not discharged).

4 See PARA 321. The fact that proceedings between the parties are taking place or are contemplated in another jurisdiction is a highly material matter to be put before the court when applying for a freezing injunction: *Behbehani v Salem* [1989] 2 All ER 143, [1989] 1 WLR 723n, CA.

5 See PARA 321. The claimant must show a good arguable case that he will succeed at trial: *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG, The Niedersachsen* [1984] 1 All ER 398, [1983] 1 WLR 1412, CA. An injunction discharged on the ground that the claimant does not have a good arguable case can be extended as the result of a post argument amendment if the amendment raises a fresh claim which is so

inextricably linked to the original claim that it is in the interests of justice for it to be heard: *Aiglon Ltd v Gau Shan Co Ltd* [1993] 1 Lloyd's Rep 164.

6 See PARA 401.

7 As to the meaning of 'assets' see PARA 397. The court's jurisdiction is not confined to assets within the jurisdiction: see PARA 396 notes 14-15.

8 See PARA 398. See *The Motor Vessel P* [1992] 1 Lloyd's Rep 470 (failure to notify of a without notice application is unjustified if notification is unlikely to precipitate removal of assets)

9 See PARA 400 text and note 2 and PARA 419.

10 *Town and Country Building Society v Daisystar Ltd and Raja* [1989] NLJR 1563.

UPDATE

399 Guidelines

NOTE 4--See *Linsen International Ltd v Humpuss Sea Transport PTE Ltd* [2010] EWHC 303 (Comm), [2010] All ER (D) 258 (Feb) (not obliged to draw judge's attention to fact and content of without prejudice meeting).

NOTE 8--See also *JSC BTA Bank v Ablyazov* [2009] EWHC 2840 (Comm), [2009] All ER (D) 160 (Nov) (evidence of misappropriation of funds was good indicator that assets would be dissipated; freezing order continued).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(vi) Freezing Injunctions and Search Orders/A. FREEZING INJUNCTIONS/400. Undertakings by claimant.

400. Undertakings by claimant.

A claimant will normally¹ have to give an undertaking in damages as the price of the injunction². If a claimant wishes a third party to be bound by a freezing injunction³ he must give notice of it to that third party⁴. The claimant will normally be obliged to undertake as a term of the order to indemnify any third party against costs and expenses reasonably incurred by the third party in seeking to comply⁵ with the order as well as all liabilities which may flow from such compliance⁶.

1 *Allen v Jambo Holdings Ltd* [1980] 2 All ER 502, [1980] 1 WLR 1252, CA (undertaking not required as claimant poor).

2 See *Practice Direction--Interim Injunctions* PD 25A paras 5.1, 5.1A; and PARA 419. It may be appropriate to require the applicant's solicitors, as well as the applicant, to give undertakings: see para 6.1. Cf *Commodity Ocean Transport Corp v Basford Unicorn Industries Ltd, The Mito* [1987] 2 Lloyd's Rep 197 (application for order requiring claimant to give security for undertaking after discharge of injunction refused); *Re DPR Futures Ltd* [1989] 1 WLR 778 (joint liquidators not required to give unlimited cross-undertaking in damages). A plaintiff should be required in an appropriate case to support a cross-undertaking in damages by a payment into court or the provision of a bond by an insurance company where there is an application for an order without notice: *Practice Direction* [1994] 4 All ER 52; *Practice Direction (Mareva Injunctions and Anton Piller Orders: Forms)* [1996] 1 WLR 1552. See the form of freezing injunction in *Practice Direction--Interim Injunctions* PD 25A Annex. See *Staines v Walsh* [2003] EWHC 1486 (Ch), [2003] All ER (D) 117 (Jun) (claimant's undertaking grossly misleading; variation of freezing order refused).

3 The court will where possible implement the freezing jurisdiction in a manner which takes account of innocent third parties' interests if they may be affected by the injunction: *Clipper Maritime Co Ltd of Monrovia v Mineralimportexport* [1981] 3 All ER 664, [1981] 1 WLR 1262. As to when third parties claim an interest in the assets see *SCF Finance Co Ltd v Masri* [1985] 2 All ER 747, [1985] 1 WLR 876, CA. As to worldwide freezing injunctions and third parties see PARA 396.

4 A bank or other innocent third party should be told with as much certainty as possible what he is to do or not to do: *Z Ltd v A-Z and AA-LL* [1982] QB 558, [1982] 1 All ER 556, CA; and see *Law Society v Shanks* [1988] 1 FLR 504.

5 A third party may apply to the court to vary the order: *Iraqi Ministry of Defence v Arcepey Shipping Co SA, The Angel Bell* [1981] QB 65, [1980] 1 All ER 480, *Project Development Co Ltd SA v KMK Securities Ltd* [1983] 1 All ER 465, [1982] 1 WLR 1470; *Galaxia Maritime SA v Mineralimportexport, The Eleftherios* [1982] 1 All ER 796, [1982] 1 WLR 539, CA; *Oceanica Castelana Armadora SA v Mineralimportexport (Barclays Bank International Ltd intervening), The Theotokos* [1983] 2 All ER 65, [1983] 1 WLR 1294; *SCF Finance Co Ltd v Masri* [1985] 2 All ER 747, [1985] 1 WLR 876, CA. Cf *Capital Cameras Ltd v Harold Lines Ltd* [1991] 3 All ER 389, [1991] 1 WLR 54 (variation by receiver).

6 *Z Ltd v A-Z and AA-LL* [1982] QB 558, [1982] 1 All ER 556, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(vi) Freezing Injunctions and Search Orders/A. FREEZING INJUNCTIONS/401. Form and scope of order.

401. Form and scope of order.

It is usual in the order to make an allowance for legal expenses and for ordinary living and business expenses¹ and to insert the maximum amount to be restrained in case the defendant has assets which exceed the amount of the claimant's claim².

In aid of a freezing injunction the court may make ancillary orders such as an order for disclosure of documents³ or to provide further information⁴ as to the defendant's assets, an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction⁵, a direction that the defendant attend for cross-examination on his affidavits⁶ or for delivery up of assets⁷. In order to prevent a defendant from quitting the court's jurisdiction with assets the High Court can issue a writ *ne exeat regno*⁸ to prevent a defendant leaving the country in conjunction with a freezing injunction⁹.

1 *Practice Direction--Interim Injunctions* PD 25A para 6, Annex, Freezing Injunction para 11; *Z Ltd v A-Z and AA-LL* [1982] QB 558, [1982] 1 All ER 556, CA. Cf *Atlas Maritime Co SA v Avalon Maritime Ltd, The Coral Rose (No 3)* [1991] 4 All ER 783, [1991] 1 WLR 917, CA, where the court looked behind the corporate veil and determined that legal expenses could be met by a parent company, and so refused to release assets which had been frozen. A freezing injunction should not inhibit the ordinary course of business or interfere with a defendant's ordinary transactions, especially where third parties are involved: *Normid Housing Association Ltd v Ralphs and Mansell and Assicurazioni Generali SpA (No 2)* [1989] 1 Lloyd's Rep 274, CA. A freezing injunction which would interfere with the normal course of a defendant's business will not be granted in order to protect a purely speculative cause of action: *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769, [1992] 2 Lloyd's Rep 238, CA.

2 See *Practice Direction--Interim Injunctions* PD 25A para 6, Annex, Freezing Injunction paras 5, 8; and *Iraqi Ministry of Defence v Arcepey Shipping Co SA, The Angel Bell* [1981] QB 65, [1980] 1 All ER 480; *PCW (Underwriting Agencies) Ltd v Dixon* [1983] 2 All ER 697n, CA. The term 'ordinary living expenses' means the ordinary recurrent expenses involved in maintaining the defendant in a style to which he is reasonably accustomed and does not include for example legal expenses incurred by the defendant in defending a serious criminal charge: *TDK Tape Distributor (UK) Ltd v Videochoice Ltd* [1985] 3 All ER 345, [1986] 1 WLR 141. Cf *Arbuthnot Leasing International Ltd v Havelot Leasing Ltd* [1991] 1 All ER 591 (discretion of court to allow director to appear in person when company's assets frozen by injunction). Where a defendant has been granted permission by the court to incur reasonable legal expenses, that permission is no guarantee for the recipients of the money that they will be protected from a possible future claim in constructive trust for knowing receipt: *United Mizrahi Bank v Doherty* [1998] 2 All ER 230, [1998] 1 WLR 435.

3 CPR Pt 31; *A J Bekhor & Co Ltd v Bilton* [1981] QB 923, [1981] 2 All ER 565, CA; *Z Ltd v A-Z and AA-LL* [1982] QB 558, [1982] 1 All ER 556, CA; see PARA 538 et seq. See *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310, [1990] 3 All ER 283, CA (criteria for claiming privilege against self-incrimination in relation to discovery); *Bank of Crete SA v Koskotas* [1991] 2 Lloyd's Rep 587, CA (order for discovery set aside upon abandonment of opposition to Mareva injunction); *Cinar Corp v Panju* [2006] EWHC 2557 (QB), [2007] 1 All ER (Comm) 373 (order for disclosure made pre-judgment, based on a personal action for damages without any proprietary claim); and *Practice Direction--Interim Injunctions* PD 25A para 7.9.

4 *A v C* [1981] QB 956n, [1980] 2 All ER 347. See CPR 18.1; and PARA 611.

5 See CPR 25.1(1)(g); and PARA 315. The court must guard against the procedure, intended to police the order, from being used to help a claimant establish his claim: *Den Norske Bank ASA v Antonatos* [1999] QB 271, [1998] 3 All ER 74, CA. Where a defendant fails to answer questions put to him at the cross-examination, the matter ought to be referred to the master; committal proceedings ought to be used only as a last resort: *Belgolaise SA v Purchandani* (1998) 142 Sol Jo LB 252, (1998) Times, 30 July. A defendant may claim privilege against self-incrimination: *Memory Corp plc v Sidhu* [2000] Ch 645, [2000] 1 All ER 434.

6 CPR 32.7; *A J Bekhor & Co Ltd v Bilton* [1981] QB 923, [1981] 2 All ER 565, CA; and see PARA 1042.

7 *CBS United Kingdom Ltd v Lambert* [1983] Ch 37, [1982] 3 All ER 237, CA. As to search orders see PARA 402 et seq.

8 See **EQUITY** vol 16(2) (Reissue) PARA 495.

9 *Al Nahkel for Contracting and Trading Ltd v Lowe* [1986] QB 235, [1986] 1 All ER 729. The conditions for the issue of the writ must be satisfied (as to which see *Felton v Callis* [1969] 1 QB 200, [1968] 3 All ER 673), and while the arrest of the debtor may incidentally prevent breach of the freezing injunction, a writ ne exeat regno may not be ordered for the purpose of enforcing a freezing injunction: see *Allied Arab Bank v Hajar* [1988] QB 787, [1987] 3 All ER 739.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(vi) Freezing Injunctions and Search Orders/B. SEARCH ORDERS/402. In general.

B. SEARCH ORDERS

402. In general.

The court has an inherent jurisdiction¹ to order a defendant to give permission² to the claimant to enter premises under the control of the defendant³ for the purposes of (1) inspecting documents or other articles⁴; or (2) taking custody of documents or other articles⁵ pending trial of the action or in aid of execution⁶. This power has now been given a statutory basis⁷.

Such orders are made without notice⁸ and are characterised by secrecy and there being no notice to the defendant of what is afoot⁹. Because their essence is surprise and because they operate drastically such orders are closely controlled by the court¹⁰.

1 *Anton Piller KG v Manufacturing Processes Ltd*[1976] Ch 55, [1976] 1 All ER 779, CA.

2 The order is an order on the defendant in personam to permit inspection: *Anton Piller KG v Manufacturing Processes Ltd*[1976] Ch 55 at 62, [1976] 1 All ER 779 at 784, CA, per Ormrod LJ. It is not a search warrant: see at 60, 782-783 per Lord Denning MR; and see *East India Co v Kynaston* (1882) 3 Bli 153. Cf *Manor Electronics Ltd v Dickson*[1988] RPC 618 (order which 'entitled' claimant's representatives to enter defendants' premises instead of requiring defendants to permit entry was defective).

3 The order does not order entry on premises unless they are in occupation or use by the defendants, so that the rights of other persons who may be interested in the property are fully protected: *EMI Ltd v Pandit*[1975] 1 All ER 418, [1975] 1 WLR 302.

4 These do not have to be the subject matter of the action but must be essential for the claimant's case: *Yousif v Salama*[1980] 3 All ER 405, [1980] 1 WLR 1540, CA; *Emmanuel v Emmanue*[1982] 2 All ER 342, [1982] 1 WLR 669 (order for possession of documents relating to spouse's financial position and sale of matrimonial property). Cf *Kepa v Kepa*(1983) 4 FLR 515 (order for entry into former matrimonial home to inspect documents relating to financial position and to value certain items).

5 The purpose of a search order is primarily preservation of evidence which might otherwise be removed, destroyed or concealed but it operates of course also as an order for discovery in advance of pleadings: *Crest Homes plc v Marks*[1987] AC 829, [1987] 2 All ER 1074, HL.

6 *Distribution Automatici Italia SpA v Holford General Trading Co Ltd*[1985] 3 All ER 750, [1985] 1 WLR 1066 (court can grant search order in aid of execution).

7 See the Civil Procedure Act 1997 s 7; CPR 25.1(1)(h); and PARA 319. See also PARA 315 head (8).

8 See PARA 307 et seq.

9 *Columbia Picture Industries Inc v Robinson*[1987] Ch 38, [1986] 3 All ER 338.

10 *Rank Film Distributors Ltd v Video Information Centre*[1982] AC 380, [1981] 2 All ER 76, HL; and see PARA 404 et seq. Such orders were said to stand at the extremity of the court's jurisdiction: see eg *Bhimji v Chatwan*[1991] 1 All ER 705; but see the text and note 7; and *Practice Direction--Interim Injunctions* PD 25A.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(vi) Freezing Injunctions and Search Orders/B. SEARCH ORDERS/403. Pre-conditions for order.

403. Pre-conditions for order.

There are three essential pre-conditions for the making of a search order. First, there must be an extremely strong prima facie case. Secondly, the damage, potential or actual, must be very serious for the applicant. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made¹.

¹ *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55, [1976] 1 All ER 779, CA; *Ex p Island Records Ltd* [1978] Ch 122, [1978] 3 All ER 824, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(vi) Freezing Injunctions and Search Orders/B. SEARCH ORDERS/404. Safeguards for the defendant.

404. Safeguards for the defendant.

Search orders are only granted upon clear and compelling evidence and a number of safeguards in the interests of preserving essential rights have been introduced¹. These safeguards include the following²:

- 526 (1) the order³ should be drawn so as to extend no further than the minimum extent necessary to achieve the purpose for which it is granted, namely the preservation of documents or articles which might otherwise be destroyed or concealed;
- 527 (2) it is essential that a detailed record of the material should always be required to be made by the solicitors⁴ who execute the order before the material is removed from the defendant's premises⁵;
- 528 (3) no material should be taken from the defendant's premises by the executing solicitors unless it is clearly covered by the terms of the order⁶;
- 529 (4) it is inappropriate that seized material the ownership of which is in dispute should be retained by the plaintiff's solicitors pending the trial; either a neutral officer of the court should be charged with the custody of such material or it should be delivered to the defendant's solicitors on their undertaking for its safe custody and production, if required, in court⁷;
- 530 (5) the affidavits in support of the order ought to err on the side of excessive disclosure⁸.

An undertaking is included in every search order not to use the material disclosed nor allow it to be used for any purpose other than the proper conduct of the action⁹.

1 *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, [1981] 2 All ER 76, HL. These are now provided for in *Practice Direction--Interim Injunctions* PD 25A para 7: see PARA 319.

2 *Columbia Picture Industries Inc v Robinson* [1987] Ch 38, [1986] 3 All ER 338. As to undertakings on interlocutory injunctions see PARA 419.

3 For a form of order see *Practice Direction--Interim Injunctions* PD 25A para 7.11, Annex.

4 The order allows the plaintiff's solicitors to enter the premises; cf *EMI Ltd v Pandit* [1975] 1 All ER 418, [1975] 1 WLR 302. If, as he normally will be, the solicitor is accompanied by one or more of the plaintiff's directors or employees or expert witnesses employed on their behalf they should, if possible, be named in the order and the order should provide for them to be identified to the defendant by the solicitor effecting service: *Vapormatic Co Ltd v Sparex Ltd* [1976] 1 WLR 939. See *Practice Direction--Interim Injunctions* PD 25A Annex, Search Order para 6.

5 See *Practice Direction--Interim Injunctions* PD 25A para 7.5(6), (7).

6 See *Practice Direction--Interim Injunctions* PD 25A para 7.5(1).

7 See *Practice Direction--Interim Injunctions* PD 25A para 7.5(4).

8 The affidavit must disclose very fully the reason the order is sought, including the probability that relevant material would disappear if the order were not made: see *Practice Direction--Interim Injunctions* PD 25A para 7.3(2). As to the duty to make full and frank disclosure on an application without notice see PARA 321. The absolute duty of full disclosure is one owed to the court and not to any party who may be affected by the

proceedings: *Digital Equipment Corp v Darkcrest Ltd* [1984] Ch 512, [1984] 3 All ER 381. It will normally be expected that, where the defendant is a company, the plaintiff provides information on the nature of the company, its accounts and directors: *Naf Naf SA v Dickens (London) Ltd* [1993] FSR 424. The question whether or not there has been full disclosure should normally be dealt with at trial and not at the hearing between the parties: *Dormeul Freres SA v Nicolian International (Textiles) Ltd* [1988] 3 All ER 197, [1988] 1 WLR 1362. But cf *Ali and Fahd Shobokshi Group Ltd v Moneim* [1989] 2 All ER 404, [1989] 1 WLR 710 (Mareva injunction).

9 See *Practice Direction--Interim Injunctions* PD 25A Annex, Search Order Sch C para (4); *Crest Homes plc v Marks* [1987] AC 829, [1987] 2 All ER 1074, HL; *EMI Records Ltd v Spillane* [1986] 2 All ER 1016, [1986] 1 WLR 967 (the use of documents held as the result of discovery under a search order in criminal proceedings brought under fiscal laws with no connection with the original cause of action should not be authorised).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(vi) Freezing Injunctions and Search Orders/B. SEARCH ORDERS/405. Privilege against self-incrimination.

405. Privilege against self-incrimination.

Compliance with a search order may expose a defendant to the risk of criminal proceedings, which accordingly raises the issue of the privilege against self-incrimination¹. However, this privilege has been withdrawn in relation to the following civil proceedings in the High Court: (1) proceedings for infringement of rights pertaining to any intellectual property² or for passing off³; (2) proceedings brought to obtain disclosure of information relating to any such infringement or passing off⁴; and (3) proceedings brought to prevent any apprehended infringement of such rights or apprehended passing off⁵. In any such proceedings a person will not be excused from answering any question⁶ or from complying with any order made in them⁷ by reason that to do so would tend to expose that person, or his or her spouse or civil partner, to proceedings for a related offence⁸ or the recovery of any related penalty⁹. On the other hand no statement or admission made by a person in answering such a question or in complying with such an order will, in proceedings for any related offence or the recovery of any related penalty, be admissible in evidence against that person, or, unless they married or became civil partners after the making of the statement or admission, against the spouse or civil partner of that person¹⁰, although such a statement will be admissible in proceedings for perjury or contempt of court¹¹. These provisions apply to civil proceedings in the High Court including proceedings on appeals¹².

1 *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, [1981] 2 All ER 76, HL. See *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310, [1990] 3 All ER 283, CA; *Tate Access Floors Inc v Boswell* [1991] Ch 512, [1990] 3 All ER 303; and see *Practice Direction--Interim Injunctions* PD 25A para 7.9; and PARA 319 note 10.

2 'Intellectual property' means any patent, trade mark, copyright, design right, registered design, technical or commercial information or other property: Supreme Court Act 1981 s 72(5) (amended by the Copyright, Designs and Patents Act 1988 s 303(1), Sch 7 para 28). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. The reference to a trade mark includes a reference to a service mark: Patents, Designs and Marks Act 1986 s 2(3), Sch 2 para 1(2)(h). See **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS; PATENTS AND REGISTERED DESIGNS; TRADE MARKS AND TRADE NAMES**. See *Cobra Golf Inc v Rata* [1998] Ch 109, [1997] 2 All ER 150.

3 Supreme Court Act 1981 s 72(2)(a).

4 Supreme Court Act 1981 s 72(2)(b).

5 Supreme Court Act 1981 s 72(2)(c); s 72 came into force on 28 July 1981: s 153(3). Parliament acted timeously on the suggestion made by Lord Russell of Killowen in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 448, [1981] 2 All ER 76 at 86, HL, to authorise Anton Piller (now search) orders to be made somewhat on the lines of the Theft Act 1968 s 31, to remove the privilege against self-incrimination while at the same time preventing the use in criminal proceedings of statements which would otherwise have been privileged. See *Universal City Studios Inc v Hubbard* [1984] Ch 225, [1984] 1 All ER 661, CA.

6 Supreme Court Act 1981 s 72(1)(a).

7 Supreme Court Act 1981 s 72(1)(b).

8 'Related offence', in relation to any proceedings to which the Supreme Court Act 1981 s 72(1) applies (see heads (1)-(3) in the text), means, in the case of proceedings under head (1) or head (2) in the text, any offence committed by or in the course of the infringement or passing off to which the proceedings relate or any other offence (involving fraud or dishonesty) committed in connection with that infringement or passing off; and in the case of proceedings within head (3), any offence revealed by the facts on which the claimant relies in those

proceedings: s 72(5). The most important related offence is conspiracy to defraud or any similar offence involving fraud or dishonesty. In *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, [1981] 2 All ER 76, HL, it was held that reliance could not be placed on the privilege against self-incrimination for breach of the Copyright Act 1956 s 21 (repealed), or a conspiracy to breach that provision. 'Any offence', in relation to head (3), is not limited to offences likely to be committed in connection with infringement of copyright: *Universal City Studios Inc v Hubbard* [1984] Ch 225, [1984] 1 All ER 661, CA.

9 Supreme Court Act 1981 s 72(1) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 69(1), (2)). 'Related penalty', in relation to any proceedings to which the Supreme Court Act 1981 s 72(1) applies (see heads (1)-(3) in the text), means, in the case of proceedings under head (1) or head (2) in the text, any penalty incurred in respect of anything done or omitted in connection with the infringement or passing off to which the proceedings relate; and, in the case of proceedings under head (3), any penalty in respect of any act or omission revealed by the facts on which the claimant relies in those proceedings: s 72(5).

10 Supreme Court Act 1981 s 72(3) (amended by the Civil Partnership Act 2004 Sch 27 para 69(3)).

11 Supreme Court Act 1981 s 72(4).

12 Supreme Court Act 1981 s 72(6).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(vi) Freezing Injunctions and Search Orders/B. SEARCH ORDERS/406. Property or defendant out of jurisdiction.

406. Property or defendant out of jurisdiction.

As a search order acts in personam¹ the court has a discretion² to order disclosure and inspection of the contents of a flat abroad and an injunction to restrain the disposal or removal of those contents if the defendant is within the jurisdiction of the English court³. If a search order is sought against a foreign defendant in respect of foreign premises it is essential that the case is one in which leave for service out of the jurisdiction⁴ ought to be given since otherwise the court has no jurisdiction over the defendant. Where, however, a search order has been accompanied by leave for service out of the jurisdiction, the order should not be executed until the foreign defendant has been given the opportunity to set aside the leave for service out of the jurisdiction because until then the assumption of jurisdiction by the court is only provisional⁵.

1 See PARA 342.

2 As to discretion see PARA 346. See *Protector Alarms Ltd v Maxim Alarms Ltd* [1978] FSR 442 (search order refused in respect of premises in Scotland).

3 *Cook Industries Inc v Galliher* [1979] Ch 439, [1978] 3 All ER 945 (flat in Paris).

4 See CPR 6.36; and PARA 170 et seq.

5 *Altertext Inc v Advanced Data Communications Ltd* [1985] 1 All ER 395, [1985] 1 WLR 457.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(1) THE REMEDY AND THE JURISDICTION/(vi) Freezing Injunctions and Search Orders/B. SEARCH ORDERS/407. Effect on defendant.

407. Effect on defendant.

A search order does not involve forcible entry but would make the defendant liable for contempt proceedings if he disobeyed the order¹. A defendant can refuse immediate compliance with the order and instead make an urgent application to have the order set aside but, if this fails, he renders himself liable for proceedings for contempt². The proper course for an applicant seeking to challenge the order is to apply to the judge who made the order or to another High Court judge to discharge or vary it and to appeal to the Court of Appeal³ only after that application has been heard and determined⁴.

1 *EMI Ltd v Pandit* [1975] 1 All ER 418, [1975] 1 WLR 302. See **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 477 et seq. Where a defendant, acting on legal advice, makes an application to discharge or vary a search order and declines to allow execution in the meantime but at the same time makes a reasonable offer to protect the relevant documents for a short period to enable him to make his application and there is no evidence of subterfuge or impropriety, the defendant's refusal to allow execution until after his application will not justify a finding of contempt: see *Bhimji v Chatwani* [1991] 1 All ER 705. As to the effect of the risk of violence to a defendant on the court's discretion to order disclosure see *Coca-Cola Co v Gilbey* [1995] 4 All ER 711.

2 *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 2 All ER 589, [1983] 1 WLR 721, CA. If a defendant wishes to seek legal advice he should set about obtaining it as soon as he is served with the order: see *Bhimji v Chatwani* [1991] 1 All ER 705, [1991] 1 WLR 989. See also *Hallmark Cards Inc v Image Arts Ltd* [1977] FSR 150, CA; *Wardle Fabrics Ltd v G Myristis Ltd* [1984] FSR 263; *Columbia Picture Industries Inc v Robinson* [1987] Ch 38, [1986] 3 All ER 338.

3 As to hearings in private on appeals to the Court of Appeal see *Practice Note* [1999] 2 All ER 490, CA.

4 *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 2 All ER 589, [1983] 1 WLR 721, CA; considered in *Ocean Software Ltd v Kay* [1992] QB 583, [1992] 2 All ER 673, CA (the Court of Appeal does not have jurisdiction to entertain an application to discharge a freezing injunction which it has granted on appeal from a High Court judge).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(2) PARTIES/408. Applicant must have sufficient interest.

(2) PARTIES

408. Applicant must have sufficient interest.

An injunction will only be granted at the suit of a party having sufficient interest in the relief sought¹. If the injury complained of affects the public interest, the Attorney General² must be joined³, unless the claimant can show that the interference with the public right involves an interference with his private rights⁴ or that, although his private rights are not interfered with, he suffers special damage, peculiar to himself, from the interference with the public right⁵. Where the legislature has made special provision for the protection of a private individual he may sue without either joining the Attorney General or proving any particular damage⁶. The particular application of the above principles in relation to the restraining of ultra vires acts by corporations⁷, the restraining of nuisances on highways⁸ and of breaches of byelaws⁹, the restraining of public nuisances¹⁰ and the protection of rights of navigation¹¹ are considered elsewhere in this work.

A reversioner may obtain an injunction without joining his tenant as co-claimant¹² and a mortgagor in possession without joining his mortgagee¹³.

1 *Wynne v Lord Newborough* (1790) 1 Ves 164; *Leake v Beckett* (1827) 1 Y & J 339; *Hunter v Nockolds* (1846) 15 LJ Ch 320; *Maxwell v Hogg* (1867) 2 Ch App 307. See also *Hampstead and Suburban Properties Ltd v Diomedous* [1969] 1 Ch 248, [1968] 3 All ER 545, where a landlord was held to have sufficient interest if his tenants suffered damage; and *Scott v Tuff-Kote (Australia) Pty Ltd* [1975] 1 NSWLR 537, where a Lloyd's underwriter was held entitled to proceed in his own name for an injunction to prevent misuse of the name 'Lloyd's of London' without joining the society or any of its members.

2 As to the jurisdiction of the court to grant an injunction at the suit of the Attorney General see PARAS 491-492. As to the procedure see PARA 409.

3 *Gouriet v Union of Office Workers* [1978] AC 435, [1977] 3 All ER 70, HL; *A-G v Compton* (1842) 1 Y & C Ch Cas 417; *Soltau v De Held* (1851) 2 Sim NS 133; *Thorne v Taw Valley Rly and Dock Co* (1850) 13 Beav 10; *Ware v Regent's Canal Co* (1858) 3 De G & J 212; *Bermondsey Vestry v Brown* (1865) LR 1 Eq 204; *Dover Picture Palace Ltd and Pessers v Dover Corpn and Crundall, Wraith, Gurr and Knight* (1913) 11 LGR 971, CA; *A-G v North Eastern Rly Co* [1915] 1 Ch 905, CA; *Hurley v Stepney Borough Council* (1923) 67 Sol Jo 767, CA; *A-G v Bastow* [1957] 1 QB 514, [1957] 1 All ER 497. The rights for the protection of which the Attorney General intervenes must be the rights of the community in general and not those of a limited portion, especially when the limited portion has representatives who can bring the action: *A-G and Spalding RDC v Garner* [1907] 2 KB 480. See also PARAS 443 note 5, 491-492.

4 *Holyoake v Shrewsbury and Birmingham Rly Co* (1848) 5 Ry & Can Cas 421; *Liverpool Corpn v Chorley Waterworks Co* (1852) 2 De G M & G 852; *Cromford and High Peak Rly Co v Stockport, Disley and Whaley Bridge Rly Co* (1857) 24 Beav 74; on appeal 1 De G & J 326; *Cook v Bath Corpn* (1868) LR 6 Eq 177; *Lyon v Fishmongers Co* (1876) 1 App Cas 662, HL; *Fritz v Hobson* (1880) 14 ChD 542; *A-G v Logan* [1891] 2 QB 100; *Duke of Bedford v Ellis* [1901] AC 1, HL; *W H Chaplin & Co Ltd v Westminster Corpn* [1901] 2 Ch 329; *Sheringham UDC v Holsey* (1904) 91 LT 225; *London Passenger Transport Board v Moscrop* [1942] AC 332, [1942] 1 All ER 97, HL; *Barrs v Bethell* [1982] Ch 294, [1982] 1 All ER 106.

5 *Iveson v Moore* (1699) 1 Ld Raym 486; *Spencer v London and Birmingham Rly Co* (1836) 8 Sim 193; *Sampson v Smith* (1838) 8 Sim 272; *Soltau v De Held* (1851) 2 Sim NS 133; *Stockport District Waterworks Co v Manchester Corpn* (1862) 7 LT 545; *Holt v Rochdale Corpn* (1870) LR 10 Eq 354; *Pudsey Coal Gas Co v Bradford Corpn* (1873) LR 15 Eq 167; *Benjamin v Storr* (1874) LR 9 CP 400; *Nuneaton Local Board v General Sewage Co* (1875) LR 20 Eq 127; *London Association of Shipowners and Brokers v London and India Docks Joint Committee* [1892] 3 Ch 242, CA; *Boyce v Paddington Borough Council* [1903] 1 Ch 109; revsd on the facts [1903] 2 Ch 556, CA; on appeal sub nom *Paddington Corpn v A-G* [1906] AC 1, HL; *Cardiff Corpn v Cardiff Waterworks Co* (1859) 4 De G & J 596, as explained in *Marriott v East Grinstead Gas and Water Co* [1909] 1 Ch 70 at 78 per

Swinfen Eady J; *Vanderpant v Mayfair Hotel Co Ltd*[1930] 1 Ch 138; *Stockwell v Southgate Corpn*[1936] 2 All ER 1343; *Medcalf v R Strawbridge Ltd*[1937] 2 KB 102, [1937] 2 All ER 393; *London Passenger Transport Board v Moscrop*[1942] AC 332, [1942] 1 All ER 97, HL; see also *Winterbottom v Lord Derby*(1867) LR 2 Exch 316; *A-G v Barker* (1900) 83 LT 245, where relators were held to be entitled to succeed in their own special right and obtain an injunction as well as the Attorney General. Where a right is vested in the inhabitants of a parish, such as a right to hold a fair, they may be able to enforce the right in a representative action without joining the Attorney General: *Wyld v Silver*[1962] Ch 561, [1961] 3 All ER 1014; affd [1963] Ch 243, [1962] 3 All ER 309, CA.

6 *Devonport Corpn v Plymouth, Devonport and District Tramways Co* (1884) 52 LT 161, CA; *Chamberlaine v Chester and Birkenhead Rly Co*(1848) 1 Exch 870; and see *Price v Bala and Festiniog Rly Co* (1884) 50 LT 787, where a mandatory injunction was granted; *Holt v Rochdale Corpn*(1870) LR 10 Eq 354; *Herron v Rathmines and Rathgan Improvement Comrs*[1892] AC 498, HL. It is probable that the insertion of a statement in a statute that a particular provision is for the protection of an individual is sufficient to entitle him to sue without invoking the Attorney General: *Joseph Crosfield & Son Ltd v Manchester Ship Canal Co*[1905] AC 421, HL; *A-G v North Eastern Rly Co*[1915] 1 Ch 905; but see *A-G v Pontyrydd Waterworks Co*[1908] 1 Ch 388. In *LCC v South Metropolitan Gas Co*[1904] 1 Ch 76, CA, the claimants were held to be entitled, without joining the Attorney General, to sue for an injunction to restrain the defendants from interfering with matters the control and management of which was by statute vested in the claimants. For the principle that an injunction may not be granted if the damage is trifling, notwithstanding that a company may have exceeded its statutory powers, see *Holyoake v Shrewsbury and Birmingham Rly Co* (1848) 5 Ry & Can Cas 421; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 228.

7 See **CORPORATIONS** vol 9(2) (2006 Reissue) PARAS 1241-1242

8 See eg *A-G v Shrewsbury (Kingsland) Bridge Co*(1882) 21 ChD 752; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 334.

9 See eg *A-G v Ashborne Recreation Ground Co*[1903] 1 Ch 101; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 569.

10 See eg *Wallasey Local Board v Gracey*(1887) 36 ChD 593; and **NUISANCE** vol 78 (2010) PARA 189.

11 See eg *A-G v Johnson* (1819) 2 Wils Ch 87; and **WATER AND WATERWAYS** vol 101 (2009) PARA 690.

12 *Jones v Llanrwst UDC*[1911] 1 Ch 393; see also *Dayrell v Champress* (1700) 1 Eq Cas Abr 400 (waste).

13 See PARA 472 text and note 3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(2) PARTIES/409. Where the Attorney General is a necessary party.

409. Where the Attorney General is a necessary party.

On receiving information of the infringement of any public right the Attorney General may bring proceedings¹. Where he is a necessary party² he may either bring proceedings himself or permit his name to be used by a person or body, known as the relator, who seeks to enforce the performance of the public duty or restrain the interference with the public right, such person or body being liable for costs³. Leave must be obtained from the Attorney General⁴ before the proceedings are brought⁵.

Any person may act as relator in the proceedings, and the absence of any interest in or injury to the relator affords no answer to that⁶. The Attorney General's right of action does not depend on the presence of a relator⁷.

1 *A-G v Cockermouth Local Board* (1874) LR 18 Eq 172; *A-G v Logan* [1891] 2 QB 100. There is no difference between proceedings brought ex officio by the Attorney General and a proceeding by him at the relation of a third party, except as to costs. If there is no relator the Attorney General is responsible for the costs, as opposed to the relator in a relator action: *A-G v Cockermouth Local Board* (1874) LR 18 Eq 172.

2 As to joining the Attorney General as a party see PARA 408.

3 *A-G v Logan* [1891] 2 QB 100; *A-G and Spalding RDC v Garner* [1907] 2 KB 480; *A-G and Dommes v Basingstoke Corp'n* (1876) 45 LJ Ch 726; and see also *Re Cardwell*, *A-G v Day* [1912] 1 Ch 779. The Crown is not deemed to be a party to any proceedings, so as to be liable for costs, by reason only that the proceedings are proceedings by the Attorney General on the relation of some other person: see the Administration of Justice (Miscellaneous Provisions) Act 1933 s 7(2) (amended by virtue of the Crown Proceedings Act 1947 s 23, Sch 1). The action is entitled: 'The Attorney General at the relation of . . .', and the relator is not joined as a co-claimant unless he has a separate cause of action or there are special circumstances: see *A-G v Barker* (1900) 83 LT 245. Claims by the Attorney General and by the relator which are inconsistent with one another cannot be joined: *A-G v Earl of Durham* (1882) 46 LT 16. As to relator actions see PARA 236 et seq.

4 His discretion is absolute: see PARA 491.

5 Application is made at the Law Officers' Department, Royal Courts of Justice.

6 *A-G v Logan* [1891] 2 QB 100; *A-G and Dommes v Basingstoke Corp'n* (1876) 45 LJ Ch 726; *A-G v Crayford UDC* [1962] Ch 575, [1962] 2 All ER 147, CA; cf *O'Shea v Cork RDC* [1914] 1 IR 16.

7 *A-G v Logan* [1891] 2 QB 100; *A-G and Spalding RDC v Garner* [1907] 2 KB 480 at 485 per Channell J.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(2) PARTIES/410. Against whom an injunction may be granted.

410. Against whom an injunction may be granted.

If a proper case is made out for the exercise by the court of its jurisdiction, any person against whom a right of action exists¹ can usually be restrained by injunction². A mandatory injunction may be granted against a wrongdoer even if he is only acting as agent³.

1 See *Ayers v Hanson, Stanley and Prince* (1912) 56 Sol Jo 735; *Gilford Motor Co Ltd v Horne* [1933] Ch 935, CA, where an injunction was granted against both a company and an individual; see also PARA 428.

2 However, an injunction cannot be granted against the Crown: see PARA 354. For the power to grant an injunction against a minor see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1427

3 *Cohen v Poland* [1887] WN 159.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(2) PARTIES/411. Defendants.

411. Defendants.

The fact that a person claims as of right to be able to do an act, even though he has no present intention of doing it, is sufficient ground for making him a party to an action for an injunction to restrain him from doing it¹. Someone who has parted with his whole interest in the subject matter ought not to be made a party², but where a person has not parted with his interest until after the action has been begun against him, an injunction may be granted against him³. In an action for an injunction to prevent the violation of an agreement, the persons alleged to have made the agreement must be parties⁴. The legal owner of property should be joined in an application by the equitable owner for the purpose of obtaining a perpetual injunction, but need not be joined in an interim application⁵.

1 *Hext v Gill* (1872) 7 Ch App 699; *Shafto v Bolckow, Vaughan & Co* (1887) 34 ChD 725; see also *Tipping v Eckersley* (1855) 2 K & J 264; *Dickens v National Telephone Co* (1911) 75 JP 557; *Thornhill v Weeks* [1913] 1 Ch 438.

2 *Hawkins v Gardiner* (1853) 1 WR 345; *Clements v Welles* (1865) LR 1 Eq 200; *Evans v Davis* (1878) 10 ChD 747.

3 *Bird v Lake* (1863) 1 Hem & M 111.

4 *Landed Estates Investment Co v Weeding* (1869) 18 WR 35.

5 See PARA 358.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(2) PARTIES/412. Absent parties and third persons.

412. Absent parties and third persons.

The absence of persons who will benefit by an injunction will not prevent the court from granting one¹, but it will not be expressed so as to extend to persons who are not parties to the action², nor will it be granted in the absence of parties where it would operate injuriously against them³.

Although an injunction will not as a rule be granted against a person who is not a party to the action⁴, even if he attends court⁵, yet it may be granted against a person claiming title under an order made in the action. Thus a purchaser under a decree may be restrained from committing waste before completion⁶, or a tenant to whom a receiver appointed in an action has let part of the estates may be restrained from acting in breach of his tenancy agreement⁷, even though such a purchaser or tenant is not a party to the action. Where an injunction is granted against a sole defendant, acts by his employees and agents should usually be included in the order⁸. Where a person was threatening to aid and abet the defendant in committing a breach of an injunction, the court granted an injunction restraining him personally from so doing, without his being made a party⁹.

Where an injunction is granted against a company, an injunction, with costs, may also be granted against its secretary if he has been joined as a defendant and acknowledged service and adopted the company's defence, although no evidence is adduced to show that he took any personal part in the acts complained of¹⁰.

The position and rights of third persons or strangers to the suit will be taken into account¹¹, but the mere fact that a claimant sues at the instigation of another is not of itself sufficient to prevent him from obtaining an injunction on the merits of the case¹².

In the case of an interim injunction, where an order will affect a person other than the applicant or respondent, who did not attend the hearing at which the order was made and is served with the order, where such a person served with the order requests a copy of any materials read by the judge, including material prepared after the hearing at the direction of the judge or in compliance with the order or a note of the hearing, the applicant, or his legal representative, must comply promptly with the request, unless the court orders otherwise¹³.

1 *Const v Harris* (1824) Turn & R 496; *Evans v Coventry* (1854) 5 De G M & G 911. So it seems where the absent parties, although proper parties to the action, would not be affected by the application: *Hamp v Robinson* (1865) 3 De G J & Sm 97.

2 See *Gadd v Worrall* (1795) 2 Anst 555; as to freezing injunctions and third parties see PARA 400.

3 *M'Beath v Ravenscroft* (1839) 8 LJ Ch 208; *Hartlepool Gas and Water Co v West Hartlepool Harbour and Rly Co* (1865) 12 LT 366, CA. In *Hardinge v Southborough Local Board* (1875) 32 LT 250, an injunction was granted although all the members of the local board had resigned.

4 *Iveson v Harris* (1802) 7 Ves 251; and see also *Metropolitan District Rly Co Ltd v Earl's Court Ltd* (1911) 55 Sol Jo 807, where in a lessor's action against his lessee for breach of covenants in the lease an injunction was granted against the lessee but refused against an underlessee whom the lessor had refused to join as a party; and cf *Barnes v Allen* [1927] WN 217, where in an action against the lessee of property for obstruction of light, a mandatory injunction was refused because the freeholder in whom the property in the offending buildings was vested had not been joined as a party. See PARA 416. See also *Broadmoor Hospital Authority v R* [2000] QB 775, [2000] 2 All ER 727, CA.

5 *Edison and Swan United Electric Light Co v Holland* (1889) 41 ChD 28, CA. The proper course is to add such persons as defendants: *Edison and Swan United Electric Light Co v Holland* (1889) 41 ChD 28, CA. Leave to amend and add the third person as a defendant will not be given after trial for the purposes of an appeal: *Edison and Swan United Electric Light Co v Holland* (1889) 41 ChD 28, CA; but see at 34 per Lindley LJ.

6 *Casamajor v Strobe* (1823) 1 Sim & St 381.

7 *Walton v Johnson* (1848) 15 Sim 352.

8 See PARA 416.

9 *Hubbard v Woodfield* (1913) 57 Sol Jo 729, where sale of property by an auctioneer was restrained; cf *Acrow (Automation) Ltd v Rex Chainbolt Inc* [1971] 3 All ER 1175, [1971] 1 WLR 1676, CA.

10 *Welsbach Incandescent Gas Light Co Ltd v Daylight Incandescent Mantle Co Ltd* (1899) 16 RPC 344 at 356. However, in such circumstances damages will not be awarded against him: *Welsbach Incandescent Gas Light Co Ltd v Daylight Incandescent Mantle Co Ltd* (1899) 16 RPC 344.

11 *Maythorn v Palmer* (1864) 11 Jur NS 230.

12 *Colman v Eastern Counties Rly Co* (1846) 10 Beav 1.

13 *Practice Direction--Interim Injunctions* PD 25A para 9.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(3) FORM OF ORDER/413. Language of the order.

(3) FORM OF ORDER

413. Language of the order.

As the right to an injunction is founded on the fact that injury is accruing to the claimant, that fact should be mentioned in the order¹. The court should see that the language of its order is such as to make it quite plain what it permits and what it prohibits². An order which prohibits someone from doing what he has no authority to do, without informing him of the limits of such authority, leaves the question undecided and to be discussed on an application for the breach of the injunction, and is irregular³. Liberty will not be given to the claimant to apply to the court in the event of the defendant's doing an act which will infringe the claimant's legal right, for if there is no present reason for the court's interference, it would be premature, and if reason afterwards arises, it must be the subject of another suit⁴.

However, if adequate protection cannot be given in any other way, an injunction may be granted in extensive terms⁵. An injunction to protect a right which is limited in duration should not be perpetual in form⁶.

The order will state on its face that if the defendant does not obey it he will be guilty of contempt of court and may be sent to prison⁷.

1 *Lingwood v Stowmarket Co*(1865) LR 1 Eq 77. As to orders generally see CPR Pt 25; and PARA 315 et seq; CPR Pt 40; and PARA 1136 et seq. In general, an ex parte order in the Family Division containing injunctions should indicate the material that has been read by the judge: *W v H (Family Division: without notice orders)* [2001] 1 All ER 300.

2 *Low v Innes* (1864) 4 De G J & Sm 286; *Hackett v Baiss*(1875) LR 20 Eq 494; *A-G v Staffordshire County Council*[1905] 1 Ch 336; *Ellerman Lines Ltd v Read*[1928] 2 KB 144, CA; *United Fruit Co Ltd v Frederick Leyland & Co Ltd* (1930) 47 TLR 33, CA (unsatisfactory interim order concerning perishable goods); *P A Thomas & Co v Mould*[1968] 2 QB 913, [1968] 1 All ER 963, where the terms of an interim injunction restraining user of confidential information were held to be too uncertain to be enforced; *Redland Bricks Ltd v Morris*[1970] AC 652, [1969] 2 All ER 576, HL (mandatory injunction); *Lock International plc v Beswick*[1989] 3 All ER 373, [1989] 1 WLR 1268 (confidential information). Cf *Thompson-Schwab v Costaki*[1956] 1 All ER 652, [1956] 1 WLR 335, CA. An order directed to more than one defendant should clearly state that it applies to them severally if such be the case: *Lenton v Tregoning*[1960] 1 All ER 717, [1960] 1 WLR 333, CA.

3 *Cotter v Midland Rly Co* (1848) 2 Ph 469; *Warden and Assistants of Dover Harbour v London, Chatham and Dover Rly Co* (1861) 3 De G F & J 559; *Parker v First Avenue Hotel Co*(1883) 24 ChD 282, CA. See also *A-G v Boyle* (1864) 10 LT 290.

4 *Low v Innes* (1864) 4 De GJ & Sm 286.

5 *A-G v London and South-Western Rly Co* (1849) 3 De G & Sm 439; *North-Eastern Rly Co v Crossland* (1862) 2 John & H 565; *Elliot v North-Eastern Rly Co* (1863) 10 HL Cas 333; see also *Vere v Minter* (1914) 49 L Jo 129, where in an action for obstruction of light an injunction was granted in general terms, the court refusing to limit the injunction to restrain the defendant building otherwise than in accordance with an altered plan submitted by him which he alleged would not cause an actionable obstruction.

6 *Daw v Eley*(1867) LR 3 Eq 496 (patent); *Savory Ltd v Gyptican Oil Co Ltd* (1904) 48 Sol Jo 573 (copyright).

7 See Form N16: *Practice Direction--Forms* PD 4 para 1.3, Table 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(3) FORM OF ORDER/414. Form of interim order.

414. Form of interim order.

The form of an interim order is generally 'until judgment or further order'¹, except where the parties consent to treat the application as trial of the action. In lieu of an undertaking imposed by order, the defendant may give an undertaking in the terms of the injunction sought, or the operation of an injunction granted may be suspended²; in either case, directions for a speedy trial may be given. The claimant must normally give an undertaking in damages³.

1 See, however, *Allport v Securities Corp*n (1895) 64 LJ Ch 491. A date should be named in an order restraining proceedings on a bill of sale: *Re Johnstone, ex p Abrams* (1884) 50 LT 184; and see PARA 316.

2 See PARA 426.

3 See PARA 419.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(3) FORM OF ORDER/415. Form of final order.

415. Form of final order.

In addition to or, occasionally, in lieu of an injunction, the final order may contain a declaration of right or title. If the application is dismissed the order may direct an inquiry as to damages¹. The order may suspend or limit the operation of the injunction². Liberty to apply may be inferred in an interim order, but should be expressly inserted in a final order³. Directions as to costs may be included⁴.

Where the parties have agreed terms, the court may order that all further proceedings in the action be stayed, except for the purpose of carrying the terms into effect with liberty to apply for that purpose⁵.

1 As to application for an inquiry as to damages see PARA 424.

2 See PARA 426.

3 See PARA 1165.

4 As to costs see PARA 1729 et seq.

5 See PARA 505.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(3) FORM OF ORDER/416. Inclusion of acts of defendant's employees etc.

416. Inclusion of acts of defendant's employees etc.

Although an injunction is claimed against the defendant alone, if necessary, the order will be extended, as of course, to acts of his employees¹ or solicitors², but not to acts of his tenants³ or undertenants⁴. The order in such a case should take the form of restraining the defendant from committing the prohibited acts by himself or his employees⁵, and not the form of directly restraining the employees from committing the acts: as they are not before the court it is not proper to make an order directly against them⁶.

1 *Humphreys v Roberts* (1828) 1 Seton's Judgments and Orders (7th Edn) 509; *Freeman v Burke* (1845) 7 I Eq R 282.

2 *Seaward v Paterson* [1897] 1 Ch 545; *Hubbard v Woodfield* (1913) 57 Sol Jo 729 (as to which see PARA 412).

3 *Hodson v Coppard* (1860) 29 Beav 4. In *A-G v Duke of Ancaster* (1737) 1 Dick 68, however, an injunction was apparently granted against a tenant in possession, although not a party, to stay waste.

4 *Lord Norbury v Alleyne* (1838) 1 Dr & Wal 337; *Metropolitan District Rly Co v Earl's Court Ltd* (1911) 55 Sol Jo 807.

5 The usual order is that the defendant is forbidden from committing the act whether by himself or by instructing or encouraging or permitting any other person: see Form N16; and see *Home v Page* [1980] FSR 500.

6 *Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All ER 406, HL.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(3) FORM OF ORDER/417. Form of mandatory injunction.

417. Form of mandatory injunction.

It was formerly the practice of the Court of Chancery to word mandatory injunctions in an indirect prohibitory form, but now all such injunctions should be worded in the direct mandatory form, such as directing buildings to be pulled down and removed¹. There is now no distinction in principle between the negative and the positive form². When granting a mandatory injunction, except in certain cases³, the order must specify the time after service of the order (or some other time) within which the act is to be done⁴. The consequences of failure to do an act within the time specified may be set out in the order⁵.

1 *Jackson v Normanby Brick Co* [1899] 1 Ch 438, CA; cf *Guinness v Fitzsimmons* (1884) 13 LR Ir 71; *Bidwell v Holden* (1890) 63 LT 104; *Puddephatt v Leith* [1916] 1 Ch 200; and see **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 154.

2 *Davies v Gas Light and Coke Co* [1909] 1 Ch 708, CA. As to the procedure to enforce a mandatory injunction see PARA 1249.

3 I.e. an order which requires an act to be done, other than a judgment or order for the payment of an amount of money: see *Practice Direction--Judgments and Orders* PD 40B para 8.1.

4 See *Practice Direction--Judgments and Orders* PD 40B para 8.1.

5 See *Practice Direction--Judgments and Orders* PD 40B para 8.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(3) FORM OF ORDER/418. Failure of defendant to attend court.

418. Failure of defendant to attend court.

On an application for an injunction, if the defendant does not attend court, the order may be made on an affidavit of service¹. Such an order is taken subject to every objection² and will be discharged if there is any irregularity in the application notice³, the service or the affidavit⁴, or if the order goes beyond⁵, or departs from⁶, the application notice in any respect.

1 *Davidson v Leslie* (1845) 9 Beav 104; *Angier v May* (1855) 3 WR 330.

2 *Salomon v Stalman* (1841) 4 Beav 243.

3 See *Moody v Hebbard* (1847) 11 Jur 941 (application to dispauper the claimant).

4 *Salomon v Stalman* (1841) 4 Beav 243.

5 *Re Dover, Hastings and Brighton Junction Rly Co, ex p Carew* (1854) 23 LJ Ch 761, CA.

6 *Hutton v Hepworth* (1848) 6 Hare 315. The court could grant less than the notice asked for only if the lesser order could be made without prejudice to the party against whom it was to operate: *Hutton v Hepworth* (1848) 6 Hare 315.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(3) FORM OF ORDER/419. Undertaking as to damages.

419. Undertaking as to damages.

An undertaking as to damages is the price which the person asking for an interim injunction has to pay for it¹ and any order for an interim injunction, unless the court orders otherwise, must contain such an undertaking². By the undertaking the party obtaining the order undertakes to pay any damages which the respondent sustains which the court considers the applicant should pay³. The court may consider whether to require an undertaking by the applicant to pay any damages sustained by a person other than the respondent, including another party to the proceedings or any other person who may suffer loss as a consequence of the order⁴. As a general rule, the benefit of the undertaking applies to all the defendants, even though only one or some are restrained⁵. Where an undertaking is given to the court by the defendant in lieu of an interim order, there will be inserted in the order a cross-undertaking as to damages by the applicant unless the contrary is agreed and expressed at the time⁶.

1 See *Chappell v Davidson* (1856) 8 De G M & G 1; *Tuck v Silver* (1859) John 218; *Adamson v Wilson* (1864) 10 LT 24; *Wakefield v Duke of Buccleugh* (1865) 11 Jur NS 523; *Teign Valley Rly Co v Southwood* (1871) 19 WR 690; *Graham v Campbell* (1878) 7 ChD 490, CA; *Smith v Day* (1882) 21 ChD 421, CA (in which the history and meaning of these undertakings are discussed); see also *Howard v Press Printers Ltd* (1904) 74 LJ Ch 100, CA.

2 See *Practice Direction--Interim Injunctions* PD 25A para 5.1; and PARA 316 note 7. Liquidators of a company may not be required to provide an unlimited cross-undertaking in damages but a cross-undertaking limited to an amount commensurate with the size of the company's assets where it would be sufficient to cover any realistic estimate of potential loss: *Re DPR Futures Ltd* [1989] 1 WLR 778. For an example of a case where an injunction was granted notwithstanding that the undertaking would have been worthless see *Allen v Jambo Holdings Ltd* [1980] 2 All ER 502, [1980] 1 WLR 252, CA. The court has a discretion not to require an undertaking in damages from the Crown and that special privilege afforded to the Crown as law enforcer not to give a cross-undertaking in damages on the grant of an interlocutory injunction also applies to other public authorities, including a local authority, when exercising a law enforcement function in the public interest: *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227, [1992] 3 All ER 717, HL. As to the position of the Crown see PARA 422. See also *Blue Town Investments Ltd v Higgs and Hill plc* [1990] 2 All ER 897, [1990] 1 WLR 696 (court would strike out claim unless claimant applied for interim injunction accompanied by undertaking as to damages) and, contra, *Oxy Electric Ltd v Zainuddin* [1990] 2 All ER 902, [1991] 1 WLR 115 (jurisdiction of court as asserted in *Blue Town Investments Ltd v Higgs and Hill plc* [1990] 2 All ER 897, [1990] 1 WLR 696 questioned).

Although in family proceedings the applicant for an interlocutory injunction is not normally required to give an undertaking as to damages, such an undertaking may be required where one spouse seeks to restrain the use of property which, at least on the face of it, is vested in a third party: see *W v H (Family Division: without notice orders)* [2001] 1 All ER 300.

3 *Practice Direction--Interim Injunctions* PD 25A para 5.1; and see *Newby v Harrison* (1861) 3 De G F & J 287; *Baxter v Claydon* [1952] WN 376 (undertaking fortified by payment to parties' solicitors). As to determination to be made when deciding whether an undertaking as to damages should be enforced when an interlocutory injunction is discharged before trial see *Cheltenham and Gloucester Building Society v Ricketts* [1993] 4 All ER 276, [1993] 1 WLR 1545, CA.

4 *Practice Direction--Interim Injunctions* PD 25A para 5.1A.

5 *Tucker v New Brunswick Trading Co of London* (1890) 44 ChD 249, CA.

6 *Practice Note* [1904] WN 203; *GmbH Oberrheinische Metallwerke v Cocks* [1906] WN 127. Formerly there was no general practice to this effect: *Howard v Press Printers Ltd* (1904) 74 LJ Ch 100, CA. See also *Stollmeyer v Trinidad Lake Petroleum Co Ltd* [1918] AC 485, PC, and *Stollmeyer v Petroleum Development Co Ltd* [1918] AC 498n, PC, where on undertakings by the defendants the injunctions were in the first case postponed with liberty to apply for a further suspension. In the absence of a cross-undertaking, damages are not recoverable

for loss suffered as a result of the grant of an interim injunction: *Smithkline Beecham plc v Apotex Europe Ltd* [2006] EWCA Civ 658, [2007] Ch 71.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(3) FORM OF ORDER/420. Effect of undertaking.

420. Effect of undertaking.

The claimant's undertaking as to damages on an order for an injunction remains in force notwithstanding the dismissal¹ or discontinuance of the action², and if the claimant ultimately fails on the merits the defendant is entitled to an inquiry as to the damages³ sustained by reason of the interim injunction⁴, unless there are special circumstances⁵. The undertaking applies, even if the claimant has not been guilty of misrepresentation, suppression or other default in obtaining the injunction⁶, and is equally enforceable whether the mistake in granting the injunction was on a point of law or on the facts⁷.

1 *Newby v Harrison* (1861) 3 De G F & J 287.

2 *Newcomen v Coulson* (1878) 7 ChD 764.

3 See PARA 425.

4 *Kino v Rudkin* (1877) 6 ChD 160; *Ross v Buxton* [1888] WN 55.

5 *Griffith v Blake* (1884) 27 ChD 474, CA; see *Bingley v Marshall* (1863) 11 WR 1018; *Modern Transport Co Ltd v Duneric Steamship Co* [1917] 1 KB 370, CA, where the inquiry was refused. See also PARA 425.

6 *Griffith v Blake* (1884) 27 ChD 474, CA, dissenting from the contrary dictum of Jessel MR in *Smith v Day* (1882) 21 ChD 421, CA.

7 *Hunt v Hunt* (1884) 54 LJ Ch 289.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(3) FORM OF ORDER/421. Court cannot compel an undertaking to be given.

421. Court cannot compel an undertaking to be given.

On making an order for an injunction, the court cannot compel the claimant to give an undertaking as to damages, but it can refuse to grant an injunction unless he does¹. The court may dispense with the undertaking, but will only do so in very special circumstances, such as when the order is in the nature of a final order and is not intended to be open to review at any time afterwards².

1 *Tucker v New Brunswick Trading Co of London* (1890) 44 ChD 249, CA; *A-G v Albany Hotel Co* [1896] 2 Ch 696, CA; *Howard v Press Printers Ltd* (1904) 74 LJ Ch 100, CA.

2 *Fenner v Wilson* [1893] 2 Ch 656, CA (order restraining threats). See *Rochdale Borough Council v Anders* [1988] 3 All ER 490 (an undertaking may not be required where a local authority is exercising a power to enforce a statute); and see PARA 419 note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(3) FORM OF ORDER/422. Undertaking by the Crown.

422. Undertaking by the Crown.

Where the Crown seeks by interim injunction to restrain a breach of the law, or to enforce what is prima facie the law of the land, the Crown should not generally be required to give an undertaking as to damages as a condition of being granted the injunction¹. However, where the Crown applies for an interim injunction to enforce or protect its proprietary rights, the ordinary rule applies and an injunction should not be granted unless the Crown chooses to give the usual undertaking².

¹ *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, [1974] 2 All ER 1128, HL, where an injunction was granted to restrain breach of a statutory order and the Secretary of State was not required to give an undertaking as to damages. See also *A-G v Wright* [1987] 3 All ER 579, [1988] 1 WLR 164; *Director General of Fair Trading v Tobyward Ltd* [1989] 2 All ER 266, [1989] 1 WLR 517. The exception in favour of the Crown also applies to other public authorities, including a local authority, when exercising a law enforcement function in the public interest: *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227, [1992] 3 All ER 717, HL.

² *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, [1974] 2 All ER 1128, HL. Before the Crown Proceedings Act 1947 came into force, where the Crown was seeking to enforce its proprietary rights by injunction, eg as lessor of Crown land, the Crown, as in other cases affecting the Crown, was not as a matter of general practice required to give an undertaking as to damages: *A-G v Albany Hotel Co* [1896] 2 Ch 696, CA; and see *Secretary of State for War v Cope* [1919] 2 Ch 339. As to proceedings by and against the Crown see **ADMINISTRATIVE LAW; CONSTITUTIONAL LAW AND HUMAN RIGHTS**. See also PARA 354.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(3) FORM OF ORDER/423. Who may give an undertaking.

423. Who may give an undertaking.

If the applicant is out of the jurisdiction, an undertaking on an order for an injunction must be given by his solicitor or some other responsible person¹. When the applicant is a limited company² or other corporation³ the undertaking should be given by counsel on behalf of the corporation. There is no established practice that where a company is in liquidation the liquidator must give a personal undertaking as to damages⁴. The undertaking should be given by counsel or by the parties appearing in person⁵ and, when given, it forms part of the order. In an application for a freezing injunction, it may be appropriate to require the applicant's solicitors, as well as the applicant, to give undertakings⁶.

1 *Solignac v Durden* (1859) 1 Seton's Judgments and Orders (7th Edn) 510. Where the claimant was a foreign corporation, a joint undertaking by the claimant and an English subsidiary, not a party to the action, was accepted: *Hobart Manufacturing Co v Cannon Industries Ltd (Trading as Cannon EA)* [1959] RPC 269.

2 *Manchester and Liverpool Banking Co v Parkinson* (1888) 60 LT 47; *East Molesey Local Board v Lambeth Waterworks Co* [1892] 3 Ch 289, CA.

3 *East Molesey Local Board v Lambeth Waterworks Co* [1892] 3 Ch 289, CA; see **COMPANIES** vol 14 (2009) PARA 306.

4 *Rosling and Flynn Ltd v Law Guarantee and Trust Co* (1903) 47 Sol Jo 255. In *Westminster Association Ltd v Upward* (1880) 24 Sol Jo 690, counsel for the claimant offered to give the undertaking on behalf of the liquidator.

5 *Walter v Brown* (1885) 29 Sol Jo 435. If given by the parties' solicitors it is not binding: *Walter v Brown* (1885) 29 Sol Jo 435.

6 *Practice Direction--Interim Injunctions* PD 25A para 6.1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(3) FORM OF ORDER/424. Application for inquiry as to damages.

424. Application for inquiry as to damages.

The time at which the application for an inquiry as to damages is made is material¹. It may be made when the injunction is dissolved or at the trial, but, if made when the injunction is dissolved, it will probably be ordered to stand over until the trial². Where an action is dismissed at the hearing it may be dismissed without prejudice to any application by the defendant in respect of damages; the defendant will then be required to show a prima facie case sufficient to justify an inquiry³. It may be made after the trial, but if so should be made speedily, and if not made within a reasonable time it may be refused⁴.

The damages must be confined to loss which is the natural consequence of the injunction in the circumstances of which the party obtaining the injunction has notice when he makes his application⁵.

1 *Smith v Day* (1882) 21 ChD 421, CA; see *Hunt v Hunt* (1884) 54 LJ Ch 289.

2 *Smith v Day* (1882) 21 ChD 421, CA; see also *Southworth v Taylor* (1860) 28 Beav 616; *Ushers Brewery Ltd v P S King & Co (Finance) Ltd* [1972] Ch 148, [1971] 2 All ER 468.

3 *Butt v Imperial Gas Light and Coke Co* (1866) 14 LT 349; see also PARA 336.

4 *Newby v Harrison* (1861) 3 De G F & J 287; *Smith v Day* (1882) 21 ChD 421, CA; *Re Wood, ex p Hall* (1883) 23 ChD 644, CA; *Re Hailstone, Hopkinson v Carter* (1910) 102 LT 877, CA.

5 *Smith v Day* (1882) 21 ChD 421, CA, per Cotton LJ; *Mansell v British Linen Co Bank* [1892] 3 Ch 159; *Schlesinger v Bedford* [1893] WN 57, CA; *Re Pemberton and Cooper and Cooper* (1912) 107 LT 716. Where a consent order provides for an inquiry as to damages 'which the plaintiff ought to pay', the question of discretion as to enforcement of liability remains to be decided by the judge who makes the order: *Balkanbank v Taher (No 3)* [1995] 2 All ER 904, [1995] 1 WLR 1067, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(3) FORM OF ORDER/425. What damages will be awarded.

425. What damages will be awarded.

Whenever an undertaking as to damages has been given and the claimant ultimately fails on the merits an inquiry as to damages will be granted unless there are special circumstances to the contrary¹. For example, an interim injunction may be dissolved for delay² or some cause which disentitles the claimant to an interim injunction, although not to relief at the trial. Regard must also be had to the amount of the damage and, if it is trifling or remote, the court will not be justified in granting an inquiry³, nor will it be ordered where the court can satisfy itself as to the amount of the damage without it⁴. Where an action is dismissed, but without costs, because the court thinks that it was rightly instituted, no inquiry will be ordered⁵.

The application to enforce an undertaking as to damages should be made in the High Court division in which the undertaking was given⁶.

1 *Griffith v Blake* (1884) 27 ChD 474, CA. See *Lewis v Eliades* [2005] EWHC 2966 (QB), [2005] All ER (D) 291 (Dec).

2 See PARA 374.

3 *Smith v Day* (1882) 21 ChD 421, CA.

4 *Graham v Campbell* (1878) 7 ChD 490, CA.

5 *Bingley v Marshall* (1863) 9 LT 144; *Modern Transport Co Ltd v Duneric Steamship Co* [1917] 1 KB 370, CA; but see *Novello v James* (1854) 24 LJ Ch 111, where the defendant was held entitled to an inquiry on the dismissal of the action, although at the time the claimant began his action the law was conflicting and the balance of authority in his favour.

6 *Re Hailstone, Hopkinson v Carter* (1910) 102 LT 877, CA.

UPDATE

425 What damages will be awarded

NOTES 3, 4--The remedy under a cross-undertaking in damages is by way of equitable compensation rather than common law damages, so the defendant has to show the damage would not have been sustained but for the injunction and not that the injunction was the sole cause: *Lilly Icos LLC v 8PM Chemist Ltd* [2009] EWHC 1905 (Ch), [2010] FSR 95, [2009] All ER (D) 360 (Jul).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(3) FORM OF ORDER/426. Suspending an injunction.

426. Suspending an injunction.

If there is a possibility of the parties being able to come to some arrangement, the operation of an injunction may be postponed until a certain date¹; but not where the injunction applies solely to the erection or construction of new works in the future². When the difficulty of removing the injury is great³ or where a good deal of time must necessarily elapse to enable the defendant to comply with an injunction, without being put to grievous annoyance and expense, then, in granting a perpetual injunction, the court will postpone its operation for such time as may be necessary to enable him to comply with it, with liberty to any of the parties to apply in the meantime⁴. If an injunction is refused by a court of first instance but granted on appeal with its operation suspended, application for a further suspension should be made to the court of first instance⁵.

1 *Jessel v Chaplin* (1856) 2 Jur NS 931; *Smith v Smith* (1875) LR 20 Eq 500; *Shiel v Godfrey & Co* [1893] WN 115; see also *A-G v South Staffordshire Waterworks Co* (1909) 25 TLR 408, where the injunction was suspended because the defendants had promoted a bill to obtain the necessary rights. See *Mid Bedfordshire District Council v Brown* [2004] EWCA Civ 1709, [2005] 1 WLR 1460 (suspension of injunction preventing gipsies from moving caravans onto certain land pending determination of their planning permission was wrong as implied that court condoned breach); applied in *Wychavon District Council v Rafferty* [2006] EWCA Civ 628, [2006] 18 EG 150 (CS).

2 *A-G v Action Local Board* (1882) 22 ChD 221; however, see *Litchfield-Speer v Queen Anne's Gate Syndicate (No 2) Ltd* [1919] 1 Ch 407, where in a quia timet action to restrain threatened obstruction of ancient lights a declaration was granted with liberty to apply for an injunction.

3 *A-G v Colney Hatch Lunatic Asylum* (1868) 4 Ch App 146; cf *A-G v Birmingham Borough Council* (1858) 4 K & J 528; *Charrington v Simons & Co Ltd* [1971] 2 All ER 588, [1971] 1 WLR 598, CA. Cf *Woollerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483, [1970] 1 WLR 411.

4 *A-G v Proprietors of Bradford Canal* (1866) LR 2 Eq 71; and see *Pennington v Brinsop Hall Coal Co* (1877) 5 ChD 769; *Jones v Llanrwst UDC* [1911] 1 Ch 393; *A-G v Lewes Corpn* [1911] 2 Ch 495, where the defendants had a scheme which would mitigate the nuisance complained of; *Phillimore v Watford RDC* [1913] 2 Ch 434. See also *Great Central Rly Co v Doncaster RDC* (1917) 118 LT 19; *Frost v King Edward VII Welsh etc Association* [1918] 2 Ch 180, compromised 35 TLR 138, CA, where the operation of the injunction was suspended for the duration of the war; *Stollmeyer v Petroleum Development Co Ltd* [1918] AC 498n, PC, where the loss to the defendants would be out of all proportion to the claimant's gain, and the injunction was suspended accordingly for a period of two years to enable necessary works to be carried out; *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149, [1953] 1 All ER 179, CA; *Lotus Ltd v British Soda Co Ltd* [1972] Ch 123, [1971] 1 All ER 265; see also PARAS 430, 413.

5 *Shelfer v City of London Electric Lighting Co, Meux's Brewery Co v City of London Electric Lighting Co* [1895] 2 Ch 388, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(i) Corporations and Associations/A. INJUNCTIONS AGAINST CORPORATIONS/427. Public corporations.

(4) INJUNCTIONS IN PARTICULAR CASES

(i) Corporations and Associations

A. INJUNCTIONS AGAINST CORPORATIONS

427. Public corporations.

Corporations, other than the Crown¹, are amenable to the court's jurisdiction in the same way as individuals². A public body incorporated by statute is a corporation only for the purposes for which it has been established, and whatever it does beyond the scope of those purposes is ultra vires and void³ and may be restrained by injunction⁴. For an injunction to be granted, except in an action brought by the Attorney General⁵, the claimant must establish an interest in preventing the defendant from doing what has been referred to as a violation of its contract with the legislature⁶. However, the court will not interfere so long as public bodies keep strictly within the limits of their powers and duties entrusted to them by the legislature⁷, act reasonably and in good faith⁸ and do not exceed their discretion unfairly⁹.

1 As to proceedings against the Crown see PARA 354.

2 See eg *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1952] 1 All ER 1326; affd [1953] Ch 149, [1953] 1 All ER 179, CA, where injunctions were granted against a limited company, a local authority and a statutory corporation.

3 *Rochdale Canal Co v Radcliffe* (1852) 18 QB 287; and see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1230.

4 *A-G v Great Northern Ry Co* (1860) 1 Drew & Sm 154; and see **CORPORATIONS** vol 9(2) (2006 Reissue) PARAS 1231, 1241-1241.

5 As to proceedings by the Attorney General see PARAS 220, 443 note 5, 491-492.

6 *Liverpool Corpn v Chorley Waterworks Co* (1852) 2 De G M & G 852.

7 *Frewin v Lewis* (1838) 4 My & Cr 249; *Liverpool Corpn v Chorley Waterworks Co* (1852) 2 De G M & G 852; *Tinkler v Wandsworth District Board of Works* (1858) 2 De G & J 261.

8 *Westminster Corpn v London and North Western Ry Co* [1905] AC 426, HL.

9 *Broadbent v Rotherham Corpn* [1917] 2 Ch 31.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(i) Corporations and Associations/A. INJUNCTIONS AGAINST CORPORATIONS/428. Companies.

428. Companies.

In general an injunction may be ordered against a company regulated by the Companies Acts 1985 to 2006 where it would be ordered against an individual¹. In addition, an injunction may be directed against a company in relation to its powers or the conduct of its affairs as a corporation regulated by statute². If a company attempts to act ultra vires, it may be restrained by injunction at the instance of a shareholder³.

If the acts of a company amount to an injury or wrong to an individual member of the company, that member has a right of action against the company, and in a proper case may obtain an injunction against the company in aid of his right⁴.

The principles applicable to individuals trading under identical or similar names⁵ apply equally to companies⁶, and in a proper case a company will be restrained from using a style or name which is calculated to deceive⁷.

1 Where a company is used as a cloak to cover the activities of an individual, an injunction will lie against both: *Gilford Motor Co Ltd v Horne* [1933] Ch 935, CA.

2 For examples of where an injunction lies see text and notes 3-7.

3 See **COMPANIES** vol 14 (2009) PARA 262. As to ultra vires acts see generally **COMPANIES** vol 14 (2009) PARA 542 et seq.

4 See **COMPANIES** vol 14 (2009) PARA 373. As to proceedings to protect the rights of members generally see **COMPANIES** vol 14 (2009) PARA 466 et seq.

5 See generally **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 319 et seq.

6 *Merchant Banking Co of London v Merchants' Joint Stock Bank* (1878) 9 ChD 560.

7 See **COMPANIES** vol 14 (2009) PARA 205.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(i) Corporations and Associations/A. INJUNCTIONS AGAINST CORPORATIONS/429. Common law corporations.

429. Common law corporations.

The court's jurisdiction to interfere with the application of the property of a common law corporation is dependent upon the question whether the property is affected by a trust¹. If one can be shown to exist the court will interfere by way of injunction to prevent a breach of the trust², whether the corporation is lay or ecclesiastical³. The burden of proof lies upon the party seeking to establish the trust⁴.

1 *A-G v Dublin Corpn* (1827) 1 Bli NS 312, HL; *Parr v A-G* (1842) 8 Cl & Fin 409, HL; *A-G v Avon (otherwise Aberavon) Corpn* (1863) 3 De G J & Sm 637; *A-G v Cashel Corpn* (1842) 3 Dr & War 294; *Evan v Avon Corpn* (1860) 29 Beav 144. See also **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1244.

2 *A-G v Avon (otherwise Aberavon) Corpn* (1863) 3 De G J & Sm 637; *A-G v St John's Hospital, Bedford* (1865) 2 De G J & Sm 621.

3 *A-G v St John's Hospital, Bedford* (1865) 2 De G J & Sm 621.

4 *Evan v Avon Corpn* (1860) 29 Beav 144. Prima facie a common law corporation has full power to dispose of all its property like a private individual: *Evan v Avon Corpn* (1860) 29 Beav 144; *A-G St John's Hospital, Bedford* (1865) 2 De G J & Sm 621; *Re Patent File Co, ex p Birmingham Banking Co* (1870) 6 Ch App 83.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(i) Corporations and Associations/A. INJUNCTIONS AGAINST CORPORATIONS/430. Local authorities.

430. Local authorities.

There is nothing in the statutes relating to local authorities¹ to exclude the court's ordinary jurisdiction to restrain ultra vires acts² or nuisance³ or to prevent breaches of trust⁴. Consequently, a local authority may be restrained from applying its funds for purposes⁵, or from dealing with its property in a manner⁶, not authorised by statute. The court also has jurisdiction to restrain an authority from making a rate if a proper case for the exercise of that jurisdiction is made out⁷, or to restrain the improper application of rates⁸. The fact that compliance with an injunction may depend on matters outside the authority's control may be no reason for refusing the injunction⁹. In deciding what order to make, the court will, however, take into account the important duties which a local authority is required to discharge and will suspend the operation of an injunction in a case where it is impossible or virtually impossible for the authority to comply with it immediately¹⁰.

1 See the Local Government Act 1972; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 1 et seq. The cases cited in this paragraph decided before 1972 relate to municipal corporations which ceased to exist on 1 April 1974; see s 1(9), (11). As to the preservation of their status see s 246; and **LOCAL GOVERNMENT** vol 69 (2009) PARAS 108-109, 113.

2 See *Cardiff Corpn v Cardiff Waterworks Co* (1859) 4 De G & J 596; explained in *Marriott v East Grinstead Gas and Water Co* [1909] 1 Ch 70; *A-G v Rathmines and Rathgar Township Improvement Comrs* (1880) 5 LR 114; *A-G v Pontypridd UDC* [1906] 2 Ch 257, CA; *Rayner v Stepney Corpn* [1911] 2 Ch 312; *Davies v City of London Corpn* [1913] 1 Ch 415; *Sydney Municipal Council v Campbell* [1925] AC 338, PC. For the courts' control of ultra vires acts by local authorities see generally **JUDICIAL REVIEW** vol 61 (2010) PARA 610 et seq; and CPR Pt 54.

3 See *A-G v Mid-Kent Rly Co and South-Eastern Rly Co* (1867) 3 Ch App 100; *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149, [1953] 1 All ER 179, CA, where the court rejected a contention that no injunction should ever be granted against a local authority by reason of the public services which it is its duty to perform; *A-G v Wellingborough UDC* (1974) 72 LGR 507, CA. See **NUISANCE** vol 78 (2010) PARAS 230 et seq.

4 See the cases cited in PARA 429.

5 *A-G v Aspinall* (1837) 2 My & Cr 613; *A-G v Wilson* (1840) Cr & Ph 1; *Parr v A-G* (1842) 8 Cl & Fin 409, HL; *A-G v Lichfield Corpn* (1848) 11 Beav 120; *A-G v Newcastle-upon-Tyne Corpn and North Eastern Rly Co* (1889) 23 QBD 492, CA; affd [1892] AC 568, HL; *Tynemouth Corpn v A-G* [1899] AC 293, HL; *A-G v West Ham Corpn* [1910] 2 Ch 560; see also *A-G v Norwich Corpn* (1837) 2 My & Cr 406.

6 *A-G v Great Yarmouth Corpn* (1855) 21 Beav 625; and see *Armistead v Durham* (1848) 11 Beav 556; *A-G v Westminster City Council* [1924] 2 Ch 416, CA, where the use of library premises for administrative purposes was restrained.

7 *A-G v Lichfield Corpn* (1848) 11 Beav 120; *A-G v Newcastle-upon-Tyne Corpn and North Eastern Rly Co* (1889) 23 QBD 492, CA; affd [1892] AC 568, HL; and see *A-G (on relation of Tremain) UDC* (1909) 73 JP 437; *Llangollen Parish Council and Overseers v Denbighshire County Council* [1921] 3 KB 313.

8 Cf *A-G v Merthyr Tydfil Union* [1900] 1 Ch 516, CA.

9 *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1952] 1 All ER 1326; affd [1953] Ch 149, [1953] 1 All ER 179, CA.

10 *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149, [1953] 1 All ER 179, CA; see eg *A-G v Birmingham Borough Council* (1858) 4 K & J 528; *Jones v Llanrwst UDC* [1911] 1 Ch 393; and PARA 426.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(i) Corporations and Associations/A. INJUNCTIONS AGAINST CORPORATIONS/431. Company incorporated by royal charter.

431. Company incorporated by royal charter.

An injunction may be granted at the suit of a member of a company incorporated by royal charter to prevent the company from taking a step which might occasion a forfeiture of its charter¹.

¹ *Rendall v Crystal Palace Co* (1858) 4 K & J 326; *Jenkin v Pharmaceutical Society of Great Britain* [1921] 1 Ch 392; *Ward v Society of Attornies* (1844) 1 Coll 370; cf **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1241. See also *Macbride v Lindsay* (1852) 9 Hare 574, where it was held that a member alleging that he was induced to become a member by false representations made to himself and other members must sue on behalf of himself and other members.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(i) Corporations and Associations/A. INJUNCTIONS AGAINST CORPORATIONS/432. Statutory bodies.

432. Statutory bodies.

The court will grant an injunction against a body of public functionaries if that body does not confine itself strictly within the exercise of those duties which are conferred by law¹, unless the body is entitled to be treated as an emanation of the Crown².

1 *Frewin v Lewis* (1838) 4 My & Cr 249 at 254. For the principle that an injunction may be granted even though it involves interference with the decision of a statutory tribunal, see PARA 351.

2 See **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1115. As to the principle that the court has no power to issue an injunction against the Crown see PARA 354.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(i) Corporations and Associations/A. INJUNCTIONS AGAINST CORPORATIONS/433. Eleemosynary corporations.

433. Eleemosynary corporations.

In the case of an eleemosynary corporation established by charter or statute, the court has no jurisdiction to interfere with the persons having control of the charity unless they are committing breaches of trust in relation to the charity's property¹. Where the persons having control of the charity's funds or property are also visitors, they are, so far as there is a trust, also subject to the court's jurisdiction².

In the case of an ecclesiastical corporation, the court has no jurisdiction over visitatorial powers unless it finds a trust of property³, but, once it finds a trust, it may interfere, whether or not there is a visitor⁴.

Pending a suit to determine the right to nominate to a benefice⁵, or where the election of a vicar is declared void and a new election is directed⁶, the bishop may be restrained from presenting in the meantime⁷. If a person is improperly appointed to a benefice, the court can restrain the bishop from instituting the person so appointed⁸, and in a proper case a bishop can be restrained from interfering with a vicar in the enjoyment of his preferment⁹.

An injunction cannot be granted by the High Court to restrain persons who have presented a petition to the consistory court from doing that which, if they obtain a faculty, they will be entitled to do¹⁰.

1 *A-G v Governors of Foundling Hospital* (1793) 2 Ves 42; *Ex p Berkhamstead Free School* (1813) 2 Ves & B 134; *Thomson v London University* (1864) 33 LJ Ch 625; cf *Re Whitworth Art Gallery Trusts, Manchester Whitworth Institute v Victoria University of Manchester* [1958] Ch 461, [1958] 1 All ER 176. As to the court's jurisdiction in relation to charities, injunctions to restrain breaches of trust and injunctions against trustees establishing a charity so as to cause nuisance or breach of covenant see **CHARITIES** vol 8 (2010) PARAS 479, 486, 596.

2 *A-G v Lock* (1744) 3 Atk 164; *A-G v Smythies* (1836) 2 My & Cr 135. As to visitatorial powers see **CHARITIES** vol 8 (2010) PARA 510 et seq; see also **EDUCATION** vol 15(1) (2006 Reissue) PARA 656.

3 *Whiston v Dean and Chapter of Rochester* (1849) 7 Hare 532. As to ecclesiastical corporations see **ECCLESIASTICAL LAW** vol 14 PARA 768 et seq.

4 *Whiston v Dean and Chapter of Rochester* (1849) 7 Hare 532.

5 *Nicholson v Knapp* (1838) 9 Sim 326; *A-G v Cuming* (1843) 2 Y & C Ch Cas 139. As to benefices see **ECCLESIASTICAL LAW** vol 14 PARA 768 et seq.

6 *Edenborough v Archbishop of Canterbury* (1826) 2 Russ 93.

7 In *Notley v Bishop of Birmingham* (1930) 99 LJ Ch 305, where the bishop had refused to admit and license the presentee, and the patrons of the living commenced an action to which the bishop did not enter an appearance, an order was made in default that the bishop should admit and license the presentee. On the bishop's neglect to comply with the order it was subsequently discharged on the ground that it could only be enforced by process in the nature of contempt, which would be an unsatisfactory remedy, and a writ was issued to the Archbishop of Canterbury commanding him to admit a fit person on the nomination or presentation or other legal requisition of the patrons: see *Notley v Bishop of Birmingham (No 2)* [1931] 1 Ch 529.

8 *A-G v Bishop of Litchfield* (1801) 5 Ves 825; and see *A-G v Earl of Powis* (1853) Kay 186.

9 *Sweet v Bishop of Ely* [1902] 2 Ch 508.

10 *Proud v Price* (1893) 63 LJQB 61, CA. As to the jurisdiction of ecclesiastical courts see **ECCLESIASTICAL LAW**
vol 14 PARA 1259 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(i) Corporations and Associations/B. INJUNCTIONS AGAINST UNINCORPORATED BODIES AND PARTNERS/434. Jurisdiction in relation to unincorporated bodies.

B. INJUNCTIONS AGAINST UNINCORPORATED BODIES AND PARTNERS

434. Jurisdiction in relation to unincorporated bodies.

The court's jurisdiction to interfere in the case of clubs¹, societies², trade unions³ and other unincorporated bodies⁴ is based not only upon the right which the members have to the common use and enjoyment of the property which has been purchased or acquired by means of the funds contributed by them⁵, but also upon the court's jurisdiction to protect rights of contract⁶. Thus, the court has jurisdiction to restrain wrongful expulsion⁷, illegal division of funds⁸, misapplication of funds⁹ or acts which are ultra vires or otherwise illegal¹⁰. However, the court will only interfere by way of injunction if it is necessary to protect a proprietary right of a member or his right to earn his livelihood¹¹. Where the contract between the parties creates a purely personal relationship, it will not do so¹². Thus, a member of a proprietary club, in which members have no right of property, who has been expelled by a committee may not be able to obtain relief by way of an injunction even though the proceedings were irregular¹³.

1 As to clubs see **CLUBS; LICENSING AND GAMBLING**.

2 In the case of building societies, registered friendly societies and also in the case of industrial and provident societies, which are bodies corporate, the court's jurisdiction may be excluded by statutory provisions by which certain disputes must be determined in the manner provided by the rules of the society: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 1856 et seq, 2534 et seq. In the case of friendly societies (but not in the case of building societies or industrial and provident societies) disputes whether a member is entitled to continue as such are among the disputes which must be determined in accordance with the rules: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 1856 et seq, 2349, 2534.

3 See eg *Bonsor v Musicians' Union*[1954] Ch 479, [1954] 1 All ER 822, CA, not affected, as regards the relief by injunction, on appeal [1956] AC 104, [1955] 3 All ER 518, HL; *Hiles v Amalgamated Society of Woodworkers*[1968] Ch 440, [1967] 3 All ER 70; *Esterman v National and Local Government Officers Association* [1974] ICR 625, where an injunction was granted to restrain a domestic tribunal from taking disciplinary action against the claimant.

4 Eg partnerships: see PARA 436. See also **CONTRACT** vol 9(1) (Reissue) PARA 765; **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1101.

5 *Forbes v Eden*(1867) LR 1 Sc & Div 568, HL; *Rigby v Connol*(1880) 14 ChD 482; *Baird v Wells*(1890) 44 ChD 661, CA; *Millican v Sullivan* (1888) 4 TLR 203, CA; *Wing v Burn* (1928) 44 TLR 258.

6 *Lee v Showmen's Guild of Great Britain*[1952] 2 QB 329, [1952] 1 All ER 1175, CA; *Woodford v Smith*[1970] 1 All ER 1091n, [1970] 1 WLR 806. Cf *Dawkins v Antrobus*(1881) 17 ChD 615, CA; *Edwards v Society of Graphical and Allied Trades*[1971] Ch 354, [1970] 3 All ER 689, CA.

7 *Gray v Allison* (1909) 25 TLR 531; *Philip Michael Faraday v Auctioneers' and Estate Agents' Institute of the United Kingdom*[1936] 1 All ER 496, CA, See also **CLUBS** vol 13 (2009) PARA 241; but see note 2, and text to notes 11-13.

8 *Scott v Peel* (1895) Diprose & Gammon 277; *Osborne v Amalgamated Society of Railway Servants*[1911] 1 Ch 540, CA.

9 *Yorkshire Miners' Association v Howden*[1905] AC 256, HL; *Taylor v National Union of Mineworkers (Derbyshire Area)*[1985] BCLC 237.

10 *Amalgamated Society of Railway Servants v Osborne*[1910] AC 87, HL. In *Noonan v De Pinna*(1953) Times, 18 November, an injunction was refused on the ground of balance of convenience. In *Conteh v Onslow Fane*(1975) Times, 6 June, the British Boxing Board, a domestic tribunal, was restrained by injunction from imposing conditions in relation to a fight outside the jurisdiction, the conditions being ultra vires.

11 *Lee v Showmen's Guild of Great Britain*[1952] 2 QB 329, [1952] 1 All ER 1175, CA; see *Nagle v Feilden*[1966] 2 QB 633, [1966] 1 All ER 689, CA, where a woman trainer, refused a licence by the Jockey Club, was held to have an arguable case based on a person's right to work. See also *Longley v National Union of Journalists*[1987] IRLR 109, CA, where the court would not interfere to restrain a hearing by the disciplinary council of a trade union.

12 *Millican v Sullivan* (1888) 4 TLR 203, CA. See also *Weinberger v Inglis (No 2)*[1919] AC 606, HL (re-election of members of the Stock Exchange).

13 *Baird v Wells*(1890) 44 ChD 661, CA. As to the form of action where one of a number of proprietors is also a member see *Weinberger v Inglis (No. 2)*[1919] AC 606 at 644, HL. Cf the right to a declaration: see **CLUBS** vol 13 (2009) PARA 241.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(i) Corporations and Associations/B. INJUNCTIONS AGAINST UNINCORPORATED BODIES AND PARTNERS/435. Trade union and labour relations.

435. Trade union and labour relations.

In general trade unions and employers' associations can sue and be sued in the same way as any legal entity¹.

The court may not grant an injunction without notice in the context of a trade dispute in the absence of the party against whom it is sought or any representative of his unless satisfied that all steps which in the circumstances were reasonable have been taken with a view to securing that notice of the application and an opportunity of being heard with respect to the application have been given to him². The court must consider the likelihood of success by the party against whom an injunction is sought of establishing at the trial of the action a defence based on acts done in contemplation or furtherance of a trade dispute or on peaceful picketing³.

1 See the Trade Union and Labour Relations (Consolidation) Act 1992 s 10 (trade unions), s 127 (unincorporated employers' associations); PARA 227; and **EMPLOYMENT** vol 40 (2009) PARAS 851 et seq, 1029 et seq. In each case this is subject to immunity in certain actions in tort: see ss 11, 128.

2 Trade Union and Labour Relations (Consolidation) Act 1992 s 221(1); see **EMPLOYMENT** vol 41 (2009) PARA 1398.

3 Trade Union and Labour Relations (Consolidation) Act 1992 s 221(2). As to acts done in furtherance or contemplation of a trade dispute, and peaceful picketing, see ss 219, 220 respectively; and **EMPLOYMENT** vol 41 (2009) PARAS 1327, 1349.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(i) Corporations and Associations/B. INJUNCTIONS AGAINST UNINCORPORATED BODIES AND PARTNERS/436. Jurisdiction in relation to partners.

436. Jurisdiction in relation to partners.

The court will restrain a partner from violating the terms of his partnership contract or acting inconsistently with his duties as a partner, both during the partnership, whether or not dissolution is sought, and also after dissolution¹.

In the case of partnership proceedings, the appointment of a receiver operates to exclude all the partners from the management of the partnership affairs, whereas an injunction may be directed to some or one only of the partners; therefore, because the appointment of a receiver would be refused, it does not follow that an injunction restraining one or more of the partners from doing what is complained of would also be refused².

1 See **PARTNERSHIP** vol 79 (2008) PARA 166 et seq.

2 *Hall v Hall* (1850) 3 Mac & G 79; and see **PARTNERSHIP** vol 79 (2008) PARA 163.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(ii) Restraint of Wrongs/A. RESTRAINT GENERALLY/437. Injunction as a historical remedy.

(ii) Restraint of Wrongs

A. RESTRAINT GENERALLY

437. Injunction as a historical remedy.

Historically an injunction has always been available as a remedy for nuisance, waste, trespass and interference with easements¹.

The principle upon which the court interferes by injunction, in cases of both public and private nuisance, is the inadequacy of the remedy at common law². If an action for damages will lie, then the remedy of injunction must be available if the nuisance is a continuing one³.

An injunction will generally be granted to restrain interference with an easement where the remedy of damages is insufficient, on the principle that the court will not compel the claimant to submit to what is virtually a compulsory purchase of his easement by awarding damages for its deprivation⁴.

1 As to waste see PARA 439 et seq; as to trespass see PARA 442 et seq; and as to the court's jurisdiction to grant injunctions restraining the publication of defamatory statements and restraining a person acting in a public office in which he is not entitled to act see PARAS 445-446.

2 *A-G v Sheffield Gas Consumers Co* (1853) 3 De G M & G 304. There is no distinction between the principles upon which the court acts in the case of private and public nuisances: *A-G v Sheffield Gas Consumers Co* (1853) 3 De G M & G 304; see PARA 356; and **NUISANCE** vol 78 (2010) PARA 230 et seq. In certain cases of public nuisance, an action should be brought by the Attorney General: see PARAS 491-492.

3 *McCombe v Read* [1955] 2 QB 429, [1955] 2 All ER 458 per Harman J.

4 See **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 154.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(ii) Restraint of Wrongs/A. RESTRAINT GENERALLY/438. Threatened wrongs.

438. Threatened wrongs.

Where a claimant has established that he has a right which has been infringed and that further infringement is threatened to a material extent, he is entitled to an injunction to restrain the threatened infringement¹.

¹ See eg *Lotus Ltd v British Soda Co Ltd* [1972] Ch 123, [1971] 1 All ER 265, where damage had been caused to factory buildings due to subsidence of the land during brine pumping nearby and there was a continuing threat which could have catastrophic consequences for the factory; an injunction was granted to restrain further pumping: see further **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 128. See also eg *Heathrow Airport Ltd v Garman* [2007] EWHC 1957 (QB), [2007] All ER (D) 28 (Aug). Relief by injunction may also be given where the wrong is merely threatened: see further PARA 362.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(ii) Restraint of Wrongs/B. WASTE/439. Threatened or apprehended waste.

B. WASTE

439. Threatened or apprehended waste.

An injunction to prevent any threatened or apprehended¹ serious² waste³ may be granted⁴ either before, at or after the hearing⁵ where it appears to the court to be just and convenient to do so⁶. The court's jurisdiction is not limited to cases where there is a right and remedy at law⁷, but extends also to equitable waste⁸ and to cases where there is an intervening legal estate or life interest⁹.

Where waste has been committed, the court will not decline to interfere merely because the defendant has ceased committing waste upon the action being brought¹⁰. Where equitable waste of one kind only has been done or is threatened, the injunction will not be extended to equitable waste of other kinds¹¹.

¹ See *Gibson v Smith* (1741) 2 Atk 182; *Coffin v Coffin* (1821) Jac 70; *Campbell v Allgood* (1853) 17 Beav 623.

² An injunction will not be granted if the act is trivial (*Barry v Barry* (1820) 1 Jac & W 651; *Doran v Carroll* (1860) 11 I Ch R 379; *Grand Canal Co v M'Namee* (1891) 29 LR Ir 131, CA; *Doherty v Allman* (1878) 3 App Cas 709, HL) or if it is meliorating waste (*Meux v Cobley* [1892] 2 Ch 253), but a small degree of waste where there is an intention to do more will be sufficient for the court to act on (*Barry v Barry* (1820) 1 Jac & W 651).

³ As to the various kinds of waste, and what acts constitute legal, equitable and permissible waste respectively, see eg **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 431 et seq; **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 275; **SETTLEMENTS**. See also **EQUITY** vol 16(2) (Reissue) PARA 603.

⁴ See eg *Worsley v Stuart* (1711) 4 Bro Parl Cas 377 (perpetual injunction); *Anwyl v Owens* (1853) 22 LJ Ch 995 (interim injunction to restrain cutting timber where property in jeopardy).

⁵ There is no need to wait until the waste is actually committed where the intention appears and the person insists on his right to do it: *Gibson v Smith* (1741) 2 Atk 182.

⁶ Supreme Court Act 1981 s 37(1). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to the rights of equitable owners see PARA 358.

⁷ *Jefferson v Bishop of Durham* (1797) 1 Bos & P 105.

⁸ See **EQUITY** vol 16(2) (Reissue) PARAS 481, 603.

⁹ *Tracy v Tracy* (1681) 1 Vern 23; *Robinson v Litton* (1744) 3 Atk 209; *Farrant v Lovel* (1750) 3 Atk 723; and see *Emperor of Austria v Day and Kossuth* (1861) 3 De G F & J 217. As to the liability of a tenant for life for waste see eg *Woodhouse v Walker* (1880) 5 QBD 404; and **SETTLEMENTS** vol 42 (Reissue) PARA 986 et seq. As to mining operations see eg *Dashwood v Magniac* [1891] 3 Ch 306, CA; and **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 275.

¹⁰ *Anon* (1747) 3 Atk 485; but see *Anon* (1773) Lofft 151; *Barry v Barry* (1820) 1 Jac & W 651, where, however, there were additional reasons for refusing the injunction. Planting potatoes in land previously ploughed was not such a breach of an injunction to stay waste as would be punished by attachment: *Brophy v Quarry* (1832) Hayes 449. For a case where an order was granted against the removal of timber wrongfully cut see *Anon* (1790) 1 Ves 93.

¹¹ *Coffin v Coffin* (1821) Jac 70, before Lord Eldon LC; but see the previous proceedings in that case before Leach V-C, reported in (1821) 6 Madd 17.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(ii) Restraint of Wrongs/B. WASTE/440. Landlord and tenant.

440. Landlord and tenant.

Whether a tenant's liability is founded on waste or on implied contract¹, it can be enforced by an injunction² or damages³; and damages can be awarded for waste completed at the time of the action and an injunction granted against further waste⁴. To obtain an injunction against waste it is necessary to show that the waste will cause substantial injury to the reversion⁵, although damages may be awarded in a case where an injunction would be refused⁶.

A landlord can obtain an injunction against an underlessee⁷, but, unless given in lieu of an injunction, it seems that only damages are recoverable against the immediate lessee⁸.

1 As to a tenant's liability for waste or breach of implied covenant see eg *Harnett v Maitland* (1847) 16 M & W 257; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 434. As to the remedy against breach of covenant or custom or the committing of waste by tenants under agricultural leases see **AGRICULTURAL LAND** vol 1 (2008) PARA 362. As to property in trees cf **FORESTRY** vol 52 (2009) PARA 55.

2 *Kimpton v Eve* (1813) 2 Ves & B 349; *Pratt v Brett* (1817) 2 Madd 62; cf *Lathropp v Marsh* (1800) 5 Ves 259; *London Corp'n v Hedger* (1810) 18 Ves 355.

3 See and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 435. The action must be supported by specific evidence as to the particulars of the dilapidations: *Smith v Douglas* (1855) 16 CB 31.

4 *Hindley v Emery* (1865) LR 1 Eq 52.

5 See **DAMAGES** vol 12(1) (Reissue) PARA 869; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 435.

6 See PARAS 364-365.

7 *Farrant v Lovel* (1750) 3 Atk 723.

8 Cf *Steel v Western* (1822) 7 Moore CP 29 (underlease by one of two joint tenants; only tenant who underlet could maintain action for waste against undertenant). For the principle that there is in general no privity either of contract or of estate between a head-lessor and an underlessee see eg *Berney v Moore* (1791) 2 Ridg Parl Rep 310 at 331; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 108.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(ii) Restraint of Wrongs/B. WASTE/441. Effect of delay.

441. Effect of delay.

An application to stay waste should be made promptly¹, especially in the case of mines², but delay is not so material here as in other applications for injunctions³. For example, even if a man allows half his trees to be cut down before he applies, the court will not permit the remaining half to be cut down⁴. However, if the party committing waste has been encouraged by the claimant's acquiescence to spend money and bestow labour upon the property, relief will be refused⁵.

1 *Barry v Barry* (1820) 1 Jac & W 651. In an urgent case an interim order will be granted: *Anwyl v Owens* (1853) 1 WR 205.

2 *Hilton v Earl of Granville* (1841) Cr & Ph 283; *Parrott v Palmer* (1834) 3 My & K 632; *Clegg v Edmondson* (1857) 8 De G M & G 787. See generally **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 32.

3 As to the general effect of acquiescence or delay see PARAS 373-375, 388-392.

4 *A-G v Eastlake* (1853) 11 Hare 205; see also *Lord Courtown v Ward* (1802) 1 Sch & Lef 8; *Cregan v Cullen* (1864) 16 I Ch R 339; *Elias v Griffith* (1878) 8 ChD 521, CA.

5 *Barry v Barry* (1820) 1 Jac & W 651; *Parrott v Palmer* (1834) 3 My & K 632; *Elias v Griffith* (1878) 8 ChD 521, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(ii) Restraint of Wrongs/C. TRESPASS/442. Trespass.

C. TRESPASS

442. Trespass.

An injunction may be granted to prevent any threatened or apprehended trespass¹.

Where the trespass is of a trifling nature², where damages are a sufficient remedy³ or where the granting of an injunction would be oppressive, an injunction may be refused⁴. However, where damages are not an adequate remedy, an injunction may be granted even if the trespass causes little or no injury to the claimant⁵, although its operation may be suspended for a limited period if hardship would otherwise be caused to the defendant⁶. Where the defendant claims a right to enter upon the land in question, the court, in addition to or in substitution for damages⁷ or an injunction, may make a declaration concerning the claim⁸.

1 *Eardley v Granville*(1876) 3 ChD 826; *Hickman v Maisey*[1900] 1 QB 752, CA; *Brinckman v Matley*[1904] 2 Ch 313, CA; *Marriott v East Grinstead Gas and Water Co*[1909] 1 Ch 70; *Hope v Osborne*[1913] 2 Ch 349 (commoners unjustifiably cutting down trees in assertion of a claim to common of turbary and of estovers over heath); *Walker v Murphy*[1914] 2 Ch 293; affd [1915] 1 Ch 71, CA (damage to pasture on moor by traction engines); and cf *Hope Bros Ltd v Cowan*[1913] 2 Ch 312. See *Hampstead Garden Suburb Trust Ltd v Denbow*(1913) 77 JP 318, where an injunction was granted to restrain the holding of a public meeting on roads along which there was no public right of way; and see **TORT** vol 45(2) (Reissue) PARA 527. As to the granting of injunctions to restrain distress see **DISTRESS** vol 13 (2007 Reissue) PARA 1099. See also the Supreme Court Act 1981 s 37(1). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 See PARA 360.

3 See PARA 356.

4 *Leader v Moody*(1875) LR 20 Eq 145; *Mayfair Property Co v Johnston*[1894] 1 Ch 508; *Rileys v Halifax Corpn* (1907) 97 LT 278; *Waterhouse v Waterhouse* (1905) 94 LT 133; *Stevens v Stevens* (1907) 24 TLR 20; *Llandudno UDC v Woods*[1899] 2 Ch 705; *Behrens v Richards*[1905] 2 Ch 614; *Shelfer v City of London Electric Lighting Co, Meux's Brewery Co v City of London Electric Lighting Co*[1895] 1 Ch 287, CA. See *Patel v Pate*[1988] 2 FLR 179, CA (injunction would not be granted to enforce exclusion zone around claimant's home, in the absence of actual or threatened trespass); and *Jaggard v Sawyer*[1995] 2 All ER 189, [1995] 1 WLR 269, CA (grant of injunction to prevent breach of restrictive covenant oppressive to defendant where injury to plaintiff minimal and plaintiff had failed to seek interlocutory relief at early stage; damages awarded in lieu).

5 *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd*[1957] 2 QB 334, [1957] 2 All ER 343 (trespass to claimant's airspace by an advertisement sign; injunction granted ordering removal of the sign). This principle applies equally to the grant of an interim injunction: *Patel v W H Smith (Eziot) Ltd*[1987] 2 All ER 569, [1987] 1 WLR 853, CA.

6 *Woollerton and Wilson Ltd v Richard Costain Ltd*[1970] 1 All ER 483, [1970] 1 WLR 411 (trespass to airspace by overhanging crane; injunction granted but suspended for a period to give defendant an opportunity to finish construction work). Where trespass is admitted, the balance of convenience is not a factor to be considered: *Woollerton and Wilson Ltd v Richard Costain Ltd*[1970] 1 All ER 483, [1970] 1 WLR 411. See also *Patel v W H Smith (Eziot) Ltd*[1987] 2 All ER 569, [1987] 1 WLR 853, CA.

7 See PARA 364.

8 *Llandudno UDC v Woods*[1899] 2 Ch 705.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(ii) Restraint of Wrongs/C. TRESPASS/443. Trespass by bodies taking land.

443. Trespass by bodies taking land.

Injunctions will be granted to restrain trespass by public companies or bodies having statutory powers compulsorily to take and enter land¹. As a general rule an injunction will not be refused where it is clearly shown that a public company is exceeding its powers², but if the company, acting in good faith, has made a mistake as to the land it has valued and taken and the question between the company and the landowner is merely one of value³, or, it seems, if the company has taken land in excess of its powers but the quantity and value of the land are extremely small⁴, the court may decline to interfere.

A private person⁵ cannot obtain an injunction on the mere ground of a deviation by the company on another's land in the construction of its undertaking, which is not injurious to him⁶.

1 *Frewin v Lewis* (1838) 4 My & Cr 249; *Sutton v Norwich Corp* (1858) 27 LJ Ch 739; *Price's Patent Candle Co Ltd v LCC* [1908] 2 Ch 526, CA; *Saunby v London (Ontario) Water Comrs* [1906] AC 110, PC; *Rayner v Stepney Corp* [1911] 2 Ch 312; *Schweder v Worthing Gas Light and Coke Co* [1912] 1 Ch 83; *Davies v City of London Corp* [1913] 1 Ch 415; *Sydney Municipal Council v Campbell* [1925] AC 338, PC. As to the jurisdiction to restrain ultra vires acts see PARA 427 et seq. See also **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 636, 667, 671.

2 See *Dun River Navigation Co v North Midland Rly Co* (1838) 1 Ry & Can Cas 135. A ground for refusing an injunction is that the wrong done is trivial: see *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA.

3 *Wood v Charing Cross Rly Co* (1863) 33 Beav 290 at 295, where Romilly MR stated that the fact that the public would be inconvenienced was an element to be considered, but cf *Stretton v Great Western and Brentford Rly Co* (1870) 5 Ch App 751; *Price v Bala and Festiniog Rly Co* (1884) 50 LT 787.

4 *Dowling v Pontypool, Caerleon and Newport Rly Co* (1874) LR 18 Eq 714.

5 Where the injury affects the public interest, the action should normally be by way of information at the suit of the Attorney General, but in certain cases a private person may sue alone: see PARA 408. As to applications for injunctions in lieu of quo warranto see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 259.

6 *Lee v Milner* (1837) 2 Y & C Ex 611.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(ii) Restraint of Wrongs/C. TRESPASS/444. Grant of injunction to reversioner.

444. Grant of injunction to reversioner.

A reversioner will only obtain an injunction if he can show that injury is occasioned to his reversion by the trespass¹. The question of injury or no injury is one for the court or tribunal which has to find the facts of the case, and where injury is found the reversioner may obtain an injunction without joining his tenant as co-claimant².

1 *Cooper v Crabtree* (1882) 20 ChD 589, CA; *Mayfair Property Co v Johnston* [1894] 1 Ch 508. See generally **DAMAGES** vol 12(1) (Reissue) PARAS 868-870; **TORT** vol 45(2) (Reissue) PARA 520.

2 *Jones v Llanrwst UDC* [1911] 1 Ch 393; see also *Dayrell v Champress* (1700) 1 Eq Cas Abr 400.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(ii) Restraint of Wrongs/D. EXTENSION OF INJUNCTION REMEDY/445. Defamation.

D. EXTENSION OF INJUNCTION REMEDY

445. Defamation.

The court has jurisdiction to restrain the publication of defamatory statements, if necessary on an interim application¹, and even where no damage has actually accrued, provided it is imminent². However, an interim injunction will not be granted when the defendant swears that he will be able to justify the libel and the court is not satisfied that he may not be able to do so³.

1 *Quartz Hill Consolidated Gold Mining Co v Beall*(1882) 20 ChD 501, CA. As to interim injunctions see PARA 383 et seq; and see also **LIBEL AND SLANDER** vol 28 (Reissue) PARA 170 et seq.

2 *Dunlop Pneumatic Tyre Co Ltd v Maison Talbot, Earl of Shrewsbury and Talbot and Weigel* (1903) 52 WR 254; revsd (1904) 20 TLR 579, CA, on the ground inter alia that there was no evidence of future damage.

3 *Bonnard v Perryman*[1891] 2 Ch 269, CA; *Khashoggi v IPC Magazines Ltd*[1986] 3 All ER 577, [1986] 1 WLR 1412, CA. See further **LIBEL AND SLANDER** vol 28 (Reissue) PARA 170. Cf *Gulf Oil (Great Britain) Ltd v Page*[1987] Ch 327, [1987] 3 All ER 14, CA; *Femis-Bank (Anguilla) Ltd v Lazar*[1991] Ch 391, [1991] 2 All ER 865 (the same principle is not applicable where the cause of action for the defamatory words is not libel but conspiracy). Where an alternative cause of action is brought in order to circumvent the defence of public interest in a defamation action, an injunction will not be granted: *Service Corpn International plc v Channel Four Television Corpn* [1999] EMLR 83.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(ii) Restraint of Wrongs/D. EXTENSION OF INJUNCTION REMEDY/446. Usurpation of office.

446. Usurpation of office.

Where a person acts in an office of a public nature in which he is not entitled to act, or acts or claims to be entitled to act as a member of a local authority or as mayor of a borough while disqualified, the High Court may grant an injunction restraining him from so acting¹. The application for the injunction must be made by way of application for judicial review². The court's permission must be obtained in order to proceed with a claim³. The court will generally, in the first instance, consider the question of permission without a hearing⁴. Where permission to proceed is given the court may also give directions⁵. The court may decide the claim without a hearing where all the parties agree⁶.

1 See the Supreme Court Act 1981 s 30(1)(a) (which applies to any substantive office of a public nature and permanent character held under the Crown or created by statute or royal charter: s 30(2)); the Local Government Act 1972 ss 92(2)(a), (4), 270(4)(a); and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1173; **LOCAL GOVERNMENT** vol 69 (2009) PARA 301. Such proceedings must be brought in the Administrative Court: see *Practice Direction--Judicial Review* PD 54 para 2.1; PARA 1530; and **JUDICIAL REVIEW** vol 61 (2010) PARA 662. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 Supreme Court Act 1981 s 31(1)(c); CPR 54.2(d).

3 See *Practice Direction--Judicial Review* PD 54 para 8.4.

4 CPR 54.4. The application must include a statement of the name and address of any person the applicant considers to be an interested party, that the applicant is requesting permission to proceed with a claim for judicial review and any remedy (including any interim remedy) he is claiming: CPR 54.6(1). It must be accompanied by or include, inter alia, a detailed statement of the claimant's grounds for bringing the claim and copies of any documents on which the claimant proposes to rely and copies of any relevant statutory material: see CPR 54.6(2); *Practice Direction--Judicial Review* PD 54 paras 5.6-5.7.

5 CPR 54.10(1).

6 See CPR 54.18.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(ii) Restraint of Wrongs/D. EXTENSION OF INJUNCTION REMEDY/447. Restraint of other civil wrongs.

447. Restraint of other civil wrongs.

An injunction may be granted to restrain unlawful interference with contractual relationships or trade¹ or where there has been a breach of statute constituting a tort².

An infringement of a registered trade mark, or the passing off of goods, generally gives the right to an injunction to restrain its continuance³. Another wrong which may give grounds for an injunction is pollution, for instance the doing of something which changes the natural quality of water, such as the discharge of effluents, so as to pollute a river⁴.

1 *Daily Mirror Newspapers Ltd v Gardner* [1968] 2 QB 762, [1968] 2 All ER 163, CA, where an injunction was granted on the balance of convenience.

2 *Warder v Cooper* [1970] Ch 495, [1970] 1 All ER 1112. As to the granting of injunctions under the Protection from Harassment Act 1997 (see **TORT** vol 45(2) (Reissue) PARA 457) see *Hall v Save Newchurch Guinea Pigs (Campaign)* [2005] EWHC 372 (QB), (2005) Times, 7 April; *First Global Locums Ltd v Cosias* [2005] EWHC 1147 (QB), [2005] IRLR 873.

3 See eg *Slazenger & Sons v Spalding & Bros* [1910] 1 Ch 257; and **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 437 et seq.

4 See eg *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149, [1953] 1 All ER 179, CA; and **WATER AND WATERWAYS** vol 100 (2009) PARA 413.

UPDATE

447 Restraint of other civil wrongs

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/A. PROTECTION GENERALLY/448. Positive and negative covenants.

(iii) Protection of Contractual Rights

A. PROTECTION GENERALLY

448. Positive and negative covenants.

Contracts, or the covenants continued in them¹, may be either affirmative or negative, or partly affirmative and partly negative.

As a general rule the proper remedy of a person seeking to enforce the observance of a positive contract is by way of an action for specific performance², unless it is either voluntary or otherwise of a kind which the court will not specially enforce³, such as a contract of service between employer and employee which will not be enforced against the employee⁴ or, as a general rule, against the employer⁵. On the other hand, where the contract or covenant is negative, his proper remedy is by way of an injunction to restrain the breach⁶, although the indirect result may be to enforce a positive stipulation in the contract⁷. In the case of a positive contract, the court will sometimes import a negative covenant not to do anything inconsistent with the contract, and grant an injunction to restrain the breach of this implied covenant⁸.

The court assumes jurisdiction to restrain a breach of contract because the remedy at law is not sufficient, and the party's interest requires that the act should be prevented instead of his merely receiving compensation in the shape of damages⁹.

1 As to construction of covenants and the circumstances in which covenants will be implied from the language of the contracting parties see **DEEDS AND OTHER INSTRUMENTS** vol (2007 Reissue) PARA 247 et seq.

2 See *Widowhood Chemical Co v Hardman*[1891] 2 Ch 416, CA; *Mortimer v Beckett*[1920] 1 Ch 571; and **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 803. As to injunctions in aid of specific performance see PARA 469.

3 See eg *Penn v Lord Baltimore* (1750) 1 Ves Sen 444; cf PARA 460 text and notes 4-8; and see further **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 805.

4 No court may compel an employee, by way of an injunction restraining a breach or threatened breach of a contract of employment, to do any work or attend at any place to do any work: Trade Union and Labour Relations (Consolidation) Act 1992 s 236.

5 See eg *Chappell v Beaverbrook Newspapers Ltd*(1975) Times, 23 January, CA; cf *Hill v C A Parsons & Co Ltd*[1972] Ch 305, [1971] 3 All ER 1345, CA. See, however, *Hughes v London Borough of Southwark*[1988] IRLR 55, where an interim injunction was granted restraining employers from enforcing an instruction to employees to work outside the scope of their normal duties.

6 Cf *William Robinson & Co Ltd v Heuer*[1898] 2 Ch 451, CA; see also PARA 452. An injunction was granted to restrain an employee from working for a rival company his ten month paid notice period (*Evening Standard Co Ltd v Henderson* [1987] ICR 588, CA), but refused where an employee worked for a new employer in a field unrelated to that of his former employer, despite a covenant purporting to prohibit him from working for anyone else during the unexpired notice period (*Provident Financial Group plc v Hayward*[1989] 3 All ER 298, CA). A covenant negative in form may be affirmative in substance, and vice versa. The appropriate remedy for a breach will depend upon the substance and not upon the mere form: see PARA 463 et seq.

7 See PARA 460.

8 See PARA 463.

9 *Sainter v Ferguson* (1849) 1 Mac & G 286; and see *Lundley v Wagner* (1825) 1 De G M & G 604; *Holmes v Eastern Counties Rly Co* (1857) 3 K & J 675. See also PARA 366 text and notes 3-4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/A. PROTECTION GENERALLY/449. Injunction granted subject to equitable principles.

449. Injunction granted subject to equitable principles.

It is not every breach of contract or covenant that the court will restrain by injunction. The mere fact that the obligation and the breach are clear is not of itself sufficient to warrant interference, unless the obligation is itself of such a nature that it can be enforced consistently with the rules and principles upon which the court acts in granting relief. Thus the court will not restrain the breach of a covenant which would involve the court's supervision¹. An injunction will not be granted to restrain the breach of an indefinite², ambiguous and uncertain³ or vague⁴ covenant⁵, or of a negative covenant which is coupled with other terms so vague and loose that the court cannot execute them⁶. Nor will the court interfere where the covenant is oppressive⁷ or harsh⁸ towards the defendant, nor if the agreement in respect of which the breach has been committed is illegal⁹.

Relief will also generally be refused if the damage apprehended from the breach is not irreparable or is susceptible of pecuniary compensation¹⁰, or if the parties themselves treated the non-performance of the agreement as a subject for pecuniary compensation¹¹. The fact that compensation has been accepted for a violation will not debar the claimant from obtaining relief if there is in other respects a continued violation and there has been no acquiescence in that violation¹².

1 *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116, CA; see PARA 465.

2 *Mann v Stephen* (1846) 15 Sim 377.

3 *Low v Inns* (1864) 4 De G J & Sm 286; and see *Bernard v Meara* (1861) 12 I Ch R 389.

4 *Davies v Davies* (1887) 36 ChD 359, CA.

5 See also *Collins v Plumb* (1810) 16 Ves 454, where the covenant was not to sell or dispose of water from a well to the injury of the claimants.

6 *Kimberley v Jennings* (1836) 6 Sim 340.

7 *Talbot v Ford* (1842) 13 Sim 173.

8 *Kimberley v Jennings* (1836) 6 Sim 340.

9 *Davies v Makuna* (1885) 29 ChD 596, CA. The court will not lend its aid to enforce a contract which is against public policy as tending to provoke a breach of the peace: *Woodward v Battersea Corp* (1911) 104 LT 51. See also **CONTRACT** vol 9(1) (Reissue) PARA 836 et seq.

10 *Furness Rly Co v Smith* (1847) 1 De G & Sm 299; *Garrett v Banstead and Epsom Downs Rly Co* (1864) 4 De G J & Sm 462; but as to express negative covenants see PARA 453 et seq.

11 *Paris Chocolate Co v Crystal Palace Co* (1855) 3 Sm & G 119; and see *Wood v Sutcliffe* (1851) 2 Sim NS 163; but cf *Ainsworth v Bentley* (1866) 14 WLR 630. See also PARA 372.

12 *Earl of Mexborough v Bower* (1847) 7 Beav 127; affd (1843) 2 LTOS 205; cf PARA 373.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/A. PROTECTION GENERALLY/450. Penalty clauses.

450. Penalty clauses.

Where a contract contains a clause providing for the payment of a sum of money in the event of a breach, the court's jurisdiction to restrain the breach by way of injunction will depend upon whether the sum was inserted to secure the performance of the contract or whether it was intended by the parties to be the fixed price for which the act complained of might lawfully be done. The question in every case is what is the meaning of the contract¹. If the intention is that the named sum should be treated as the fixed price at which the defendant buys the right to do the act complained of, then, whether it is described in the contract as liquidated damages or as a penalty², the court will not grant an injunction. However, if the intention is that the named sum should not be treated as the fixed price at which the defendant buys the right to do the act complained of, even if it is described in the contract as liquidated damages³, an injunction will, in a proper case, be granted to restrain the breach⁴. In cases of this description a party did not have both the injunction and damages, but elected which to have⁵. On an interim application to dissolve an injunction, the court will not determine whether the sum was inserted by way of a penalty or as the price at which a breach might be committed⁶.

1 *French v Macade* (1842) 2 Dr & War 269; *Ranger v Great Western Rly Co* (1854) 5 HL Cas 72; *Dimech v Corlett* (1858) 12 Moo PCC 199; *Mercer v Irving* (1858) E B & E 563; *Howard v Woodward* (1864) 34 LJ Ch 47; *National Provincial Bank of England v Marshall* (1888) 40 ChD 112, CA; *Dunlop Pneumatic Type Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79, HL. See also **DAMAGES** vol 12(1) (Reissue) PARA 1065 et seq; **EQUITY** vol 16(2) (Reissue) PARA 801.

2 *Gerrard v O'Reilly* (1843) 3 Dr & War 414.

3 *Coles v Sims* (1854) 5 De G M & G 1; *Howard v Woodward* (1864) 34 LJ Ch 47; *General Accident Assurance Corp v Noel* [1902] 1 KB 377; *National Provincial Bank of England v Marshall* (1888) 40 ChD 112, CA; and see *French v Macade* (1842) 2 Dr & War 269, where the injunction was refused on the ground that the act had been done.

4 See also *Bird v Lake* (1863) 1 Hem & M 111; *Fox v Scard* (1863) 33 Beav 327; *London and Yorkshire Bank Ltd v Pritt* (1887) 56 LJ Ch 987; cf *Clarkson v Edge* (1863) 33 Beav 227; *Gravely v Barnard* (1874) LR 18 Eq 518; *William Robinson & Co Ltd v Heuer* [1898] 2 Ch 451, CA, per Chitty LJ.

5 *Sainter v Ferguson* (1849) 1 Mac & G 286; *Carnes v Nesbitt* (1862) 7 H & N 778; *Fox v Scard* (1863) 33 Beav 327; *Young v Chalkley* (1867) 16 LT 286; *General Accident Assurance Corp v Noel* [1902] 1 KB 377.

6 *Coles v Sims* (1854) 5 De GM & G 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/A. PROTECTION GENERALLY/451. Interim injunctions.

451. Interim injunctions.

In exercising its jurisdiction by way of interim injunction, the court acts upon the principle of preventing irreparable injury¹. In a strong case where serious injury is likely to arise from the act complained of the court will interfere at the hearing to restrain the breach, but if the contract or covenant is obscure, or the breach doubtful, and no irreparable damage can arise to the claimant, then the question resolves itself into a question of comparative injury, whether the defendant will be more damnified by the injunction being granted or the claimant by its being withheld².

1 See PARA 356. As to the court's regard for third persons see PARA 412.

2 *Wilkinson v Rogers* (1864) 2 De G J & Sm 62; *Garrett v Banstead and Epsom Downs Rly Co* (1864) 4 De G J & Sm 462; and see *Warden and Assistants of Dover Harbour v South Eastern Rly Co* (1852) 9 Hare 489. As to mandatory injunctions and interim applications see PARA 376 et seq. See also *Patel v W H Smith (Eziot) Ltd* [1987] 2 All ER 569, [1987] 1 WLR 853, CA, where it was held that a landowner whose title was not at issue was prima facie entitled to an injunction, including an interim injunction, to restrain trespass, and it was for the defendant to establish exceptional circumstances which would persuade the court to refuse an injunction.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/A. PROTECTION GENERALLY/452. Threatened breach.

452. Threatened breach.

The court's jurisdiction is not limited to cases where the breach has actually been committed; it is enough if the defendant claims and insists on a right to do the act¹. However, an interim injunction will only be granted in such cases if it is clear that a breach must result from the defendant's acts².

1 *Tipping v Eckersley* (1855) 2 K & J 264. As to injunctions to restrain the threatened infringement of legal rights see further PARA 362.

2 *Worsley v Swann* (1882) 51 LJ Ch 576, CA; and see *Pattisson v Gilford* (1874) LR 18 Eq 259, and PARA 384.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/B. EXPRESS NEGATIVE COVENANTS/453. Proof of damage unnecessary.

B. EXPRESS NEGATIVE COVENANTS

453. Proof of damage unnecessary.

Where parties to an agreement contract, with their eyes open, that a particular thing is not to be done, proof of damage is generally not necessary in order to entitle the claimant to a perpetual injunction to restrain a breach¹. The principle applies² not only to a breach by the original covenantor, but also to a breach by an assignee with notice of the covenant³; but in cases where there is no privity of contract the court is probably bound to exercise its judicial discretion with regard to granting an injunction⁴. If the construction of the contract is clear and the breach is clear, the mere circumstance of the breach affords sufficient ground for the injunction⁵. In such a case the court has no discretion to exercise. All that it has to do is to say by way of injunction⁶ that the thing not be done. The injunction does nothing more than give the sanction of the process of the court to that which is already the contract between the parties. In effect it is the specific performance by the court of that negative bargain which the parties made with their eyes open⁷.

1 *Doherty v Allman*(1878) 3 App Cas 709, HL; *Allen v Seckham* (1978) 47 LJ Ch 472 (mandatory); *Formable v Barker*[1903] 2 Ch 539, CA; see also *Elliston v Reacher*[1908] 2 Ch 374; affd [1908] 2 Ch 665, CA; *Sharp v Harrison*[1922] 1 Ch 502; *Marco Productions Ltd v Pagola*[1945] KB 111, [1945] 1 All ER 155 (breach or restrictive covenant in artist's contract with producer; proof of damage unnecessary to obtain grant of injunction).

2 The principle does not apply to interim injunctions: see *Texaco Ltd v Mulberry Filling Station Ltd*[1972] 1 All ER 513, [1972] 1 WLR 814. See, however, *Patel v W H Smith (Eziot) Ltd*[1987] 2 All ER 569, [1987] 1 WLR 853, CA; and PARA 451.

3 *Achilli v Tovel*[1927] 2 Ch 243.

4 *Kelly v Barrett*[1924] 2 Ch 379, CA, where the court expressed no opinion on this point.

5 *Tipping v Eckersley* (1855) 2 K & J 264; *Lord Manners v Johnson*(1875) 1 ChD 673; *Richards v Revitt*(1877) 7 ChD 224; *Collins v Castle*(1887) 36 ChD 243; and see *Piggott v Stratton* (1859) John 341; *Western v MacDermott*(1866) 2 Ch App 72. As to contracts containing both positive and negative covenants see PARA 460.

6 Ie either restrictive or mandatory (where the circumstances of the case require it) or both.

7 *Doherty v Allman*(1878) 3 App Cas 709, HL; and see *McEacharn v Colton*[1902] AC 104, PC.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/B. EXPRESS NEGATIVE COVENANTS/454. Ineffectual defences.

454. Ineffectual defences.

The fact that the breach has not occasioned the claimant any loss¹, or that the fact complained of has effected an improvement of his property², is no defence; nor does the fact that the breach has been committed in connection with a matter of great public importance³ or that compliance with the covenant would involve inconvenience to the public⁴, make any difference. The question of the balance of convenience does not arise if the claimant's case is made out and there is no arguable defence, and the court will not take the balance of convenience into consideration⁵ unless the circumstances of the case are very special⁶.

1 *Kemp v Sober* (1851) 1 Sim NS 517, *Dickenson v Grand Junction Canal Co* (1852) 15 Beav 260; *Lord Manners v Johnson* (1875) 1 ChD 673; and see PARA 453.

2 *Earl of Mexborough v Bower* (1843) 7 Beav 127; *Dickenson v Grand Junction Canal Co* (1852) 15 Beav 260; *Wells v Attenborough* (1871) 24 LT 312; *Lord Manners v Johnson* (1875) 1 ChD 673. In such a case an interim injunction would not be granted if the result would be to inflict a serious injury on the covenantor: *Wells v Attenborough* (1871) 24 LT 312; and see PARA 386.

3 *Lloyd v London, Chatham and Dover Rly Co* (1865) 2 De G J & Sm 568.

4 *A-G v Mid-Kent Rly Co and South-Eastern Rly Co* (1867) 3 Ch App 100; and see *Foster v Birmingham, Wolverhampton and Dudley Rly Co and Oxford Junction Rly Co* (1854) 2 WR 378; *Lord v London, Chatham and Dover Rly Co* (1865) as reported in 34 LJ Ch 401; *Raphael v Thames Valley Rly Co* (1867) 2 Ch App 147; *Hood v North Eastern Rly Co* (1870) 5 Ch App 525.

5 *Dickenson v Grand Junction Canal Co* (1952) 15 Beav 260; *Doherty v Allman* (1878) 3 App Cas 709, HL.

6 *Leader v Moody* (1875) LR 20 Eq 145, where the acts in question were temporary only; *Patel v W H Smith (Eziot) Ltd* [1987] 2 All ER 569, [1987] 1 WLR 853, CA (interim injunction: question of balance of convenience did not arise where defendants could not show arguable case).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/B. EXPRESS NEGATIVE COVENANTS/455. Covenants in leases.

455. Covenants in leases.

In a proper case the court will restrain the breach of covenants in leases, such as covenants not to carry on any business, trade or calling¹. The circumstance that the lessor has a right of entry for breach of covenant does not preclude him from applying for an injunction to restrain commission of the breach². In order that a reversioner may obtain an injunction to restrain the breach of restrictive covenants affecting the estate, he must bring his case within the legal principles applicable to damages and show that damage will be done to the reversion³.

1 *Johnstone v Hall* (1856) 2 K & J 414 (carrying on a school: reversioner's application for injunction refused); *Bramwell v Lacy* (1879) 10 ChD 691 (hospital for poor persons where small payments were made by patients according to means: injunction granted); *Rolls v Miller* (1884) 27 ChD 71, CA (home for working girls where the inmates were provided with board and lodging, whether any payment was taken or not, held to be a business). Payment is not essential to constitute a business, nor does payment necessarily make something a business where without payment it would not be one: *Rolls v Miller* (1884) 27 ChD 71, CA. As to covenants in leases generally see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 132.

2 *Parker v Whyte* (1863) 32 LJ Ch 520. The issue of a writ to recover possession may operate to determine the lease and so preclude the landlord from claiming an injunction on the basis that the covenant is still subsisting: *Wheeler v Keeble (1914) Ltd* [1920] 1 Ch 57. Cf *Calabar Properties Ltd v Seagull Autos Ltd* [1969] 1 Ch 451, [1968] 1 All ER 1; and see PARA 334 note 8.

3 *Johnstone v Hall* (1856) 2 K & J 414. See generally **DAMAGES** vol 12(1) (Reissue) PARA 869; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 134.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/B. EXPRESS NEGATIVE COVENANTS/456. Examples of enforceable covenants.

456. Examples of enforceable covenants.

Authors who have sold the copyright of works written by them may be restrained from republishing them in breach of covenant¹. In a proper case a husband² or a wife³ will be prevented by injunction from committing breaches of negative covenants contained in a separation deed. Defendants may also be restrained from ringing church bells at stated times contrary to covenant⁴, and a man who has agreed not to enter a judgment nor to publish it in any way may be restrained from advertising the judgment debt for sale, where the threat of sale is not made in good faith for the purposes of sale but only to obtain better terms⁵. Where an employee covenanted not to disclose information discovered in his employment and that covenant was expressed to apply both during and after his service, an injunction, with worldwide effect, was granted restraining publication by him of a book containing such information⁶.

The court has jurisdiction to restrain the breach of a contract not to apply to Parliament⁷.

1 *Barfield v Nicholson* (1824) 2 Sim & St 1; *Ingram v Stiff* (1859) 5 Jur NS 947; *Educational Co of Ireland v Fallon Bros Ltd and Getz* [1919] 1 IR 62; cf *Erskine Macdonald Ltd v Eyles* [1921] 1 Ch 631, where an author who had granted the claimants an option to publish her next three books was restrained from disposing of a novel written by her in breach of the agreement. See also *Ainsworth v Bentley* (1866) 14 WR 630, where the covenant was not to publish a magazine of a particular description. In such a case the court would not take so harsh a step as to stop publication altogether until the hearing, but would limit the injunction to the named magazine only. As to injunctions granted for the protection of copyright see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 412 et seq.

2 *Sanders v Rodway* (1852) 16 Beav 207; *Hunt v Hunt* (1862) 4 De G F & J 221; see generally **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 445.

3 *Besant v Wood* (1879) 12 ChD 605; and see *Marshall v Marshall* (1879) 5 PD 19; *Clark v Clark* (1885) 10 PD 188, CA. As to the invalidity of a provision in an agreement restricting any right to apply to the court for financial arrangements see the Matrimonial Causes Act 1973 s 34.

4 *Martin v Nutkin* (1724) 2 P Wms 266.

5 *Jamieson v Teague* (1857) 3 Jur NS 1206; cf *Jones v Trinder, Capron & Co* [1918] 2 Ch 7, CA.

6 *A-G v Barker* [1990] 3 All ER 257, CA.

7 See PARA 355.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/B. EXPRESS NEGATIVE COVENANTS/457. Covenants in restraint of trade.

457. Covenants in restraint of trade.

The court will enforce by injunction negative covenants in restraint or partial restraint of trade, where such covenants are not wider than is reasonably necessary for the protection of the covenantee and are not injurious to the public interest¹.

¹ *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1894] AC 535, HL; and see *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, [1967] 1 All ER 699, HL; *John Michael Design plc v Cooke* [1987] 2 All ER 332, CA; and **COMPETITION** vol 18 (2009) PARA 386 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/B. EXPRESS NEGATIVE COVENANTS/458. Mandatory injunctions.

458. Mandatory injunctions.

Where the injunction asked for is a mandatory injunction to enforce a negative contract, principles similar to those previously discussed¹ apply, and the main point is whether or not the contract has been broken². In such cases a mandatory injunction will usually be granted, even though no damage or injury is shown³, although in special circumstances the court may refuse the mandatory injunction and award damages instead⁴.

1 See PARA 453.

2 *A-G v Mid-Kent Rly Co and South-Eastern Rly Co* (1867) 3 Ch App 100.

3 *Lord Manners v Johnson* (1875) 1 ChD 673.

4 *Bowes v Law* (1870) LR 9 Eq 636; *Kilbey v Haviland* (1871) 19 WR 698; and see *Lloyd v London, Chatham and Dover Rly Co* (1865) 2 De G J & Sm 568; *Sharp v Harrison* [1922] 1 Ch 502, where a mandatory injunction was refused and nominal damages were awarded. See also *Charrington v Simons & Co Ltd* [1971] 2 All ER 588, [1971] 1 WLR 598, CA, where a judge was not entitled to suspend a mandatory injunction so that ameliorative works could be carried out by the defendant.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/B. EXPRESS NEGATIVE COVENANTS/459. Restrictive covenants.

459. Restrictive covenants.

The burden and benefit of covenants which are entered into between a lessor and a lessee and which touch or concern the land run with the reversion and the term at law¹. In the case of a covenant relating to land entered into between persons other than a lessor and lessee, such as a vendor and a purchaser, the benefit, but not the burden, may run with the land at law, but if the covenant is negative in substance the burden as well as the benefit will pass in equity, provided certain conditions are fulfilled, so as to render the covenant enforceable by persons other than the original covenantee against the covenantor's successors in title². Apart from statute, conditions cannot generally be imposed in contract for the sale of goods so as to bind persons who may purchase the goods from the original buyer and be enforceable against them by the original seller³.

¹ See **EQUITY** vol 16(2) (Reissue) PARA 613 et seq; ; **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) PARA 1666.

² See **EQUITY** vol 16(2) (Reissue) PARA 615. As to the discharge or modification of restrictive covenants under statutory powers see **EQUITY** vol 16(2) (Reissue) PARA 630 et seq.

³ See **CONTRACT** vol 9(1) (Reissue) PARA 750. For exceptions in the case of patented articles and ships see **CONTRACT** vol 9(1) (Reissue) PARA 750 text and notes 13, 15.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/C. EXPRESS COVENANTS, BOTH POSITIVE AND NEGATIVE/460. Contract containing both positive and negative covenants.

C. EXPRESS COVENANTS, BOTH POSITIVE AND NEGATIVE

460. Contract containing both positive and negative covenants.

In the case of a contract containing both positive and negative covenants, the court in a proper case will restrain breaches of the negative covenants with a view to the complete performance of the contract¹. Relief will not be refused merely because there are other covenants by the claimant which may possibly be broken in the future². However, an injunction will not be granted with a view to specific performance of an agreement to grant a lease where, if the agreement were specifically performed, the lease could be determined by the re-entry clause which the lease would contain³. This jurisdiction will be exercised even where the positive covenants are of such a nature as to be incapable of forming the subject of a decree for specific performance⁴, such as in the case of a contract for personal services⁵, or for the sale of chattels⁶, provided the negative part of the contract is capable of being separated from the rest of the contract⁷ and, where the contract is one relating to personal services, is not unreasonable⁸. However, an interim injunction ought not to be granted where the contract is for personal services if the result would be to prevent the defendant from earning his livelihood⁹. In the case of a contract for personal services the negative stipulation must be expressed on the face of the contract, or at least be clearly and definitely implied by its language; it is not sufficient for this purpose to show that the act done is inconsistent with some positive stipulation in the contract¹⁰. An injunction will not be granted at the suit of the employer where he is himself the first to break the contract¹¹. Where the court grants an injunction, it repudiates the idea of indirectly compelling performance where it could not directly enforce it, but it gives all the relief in its power, without looking to the effect which may ultimately be produced by the restraint which it places on the party who is disposed to break his contract¹², although the effect may be to compel the specific performance of the contract¹³.

1 See *Rankin v Huskisson* (1830) 4 Sim 13.

2 *Rigby v Great Western Rly Co* (1846) 15 LJ Ch 266; on appeal 2 Ph 44; and see *Waring v Manchester, Sheffield and Lincolnshire Rly Co* (1849) 7 Hare 482.

3 *Gourlay v Duke of Somerset* (1812) 1 Ves & B 68.

4 As to contracts the performance of which will not be specifically enforced see generally **SPECIFIC PERFORMANCE**.

5 *Morris v Colman* (1812) 18 Ves 437, where a man was restrained from writing for any other than a particular theatre; *Lumley v Wagner* (1852) 1 De G M & G 604, where the defendant was restrained from singing elsewhere than at the claimant's theatre (overruling *Kemble v Kean* (1829) 6 Sim 333, and *Kimberley v Jennings* (1836) 6 Sim 340); *Stiff v Cassell* (1856) 2 Jur NS 348, where an author was restrained at the suit of a newspaper publisher from writing for any other newspaper; *Chaplin v North-Western Rly Co* (1861) 5 LT 601, where there was an agreement between carriers and a railway company by which the carriers were to perform certain duties for the company and the company was not to take such duties into its own hands; an injunction to restrain the company from itself performing the duties in question was refused; *Daggett v Ryman* (1868) 16 WR 302, where the defendant was restrained from setting up the same business as that of the claimant in the same neighbourhood; *Fellowes v Wood* (1888) 59 LT 513, DC, where an injunction was granted to restrain the defendant from serving his former employer's customers in contravention of an agreement entered into while the defendant was a minor; *Grimston v Cuninghame* [1894] 1 QB 125, DC, where the defendant was restrained from acting at any other theatre than that at which the claimant's company played; *William Robinson & Co Ltd v Heuer* [1898] 2 Ch 451, CA, where the defendant was restrained from engaging in any business competing with

that of the claimant, his employer, in breach of negative covenants; *Warner Bros Pictures Inc v Nelson*[1937] 1 KB 209, [1936] 3 All ER 160, where a film star was restrained from rendering services in pictures and stage productions; *Marco Productions Ltd v Pagola*[1945] KB 111, [1945] 1 All ER 155, where a restriction not to perform for another producer was enforced by injunction; *Hill v C A Parsons & Co Ltd*[1972] Ch 305, [1971] 3 All ER 1345, CA, where an employer was restrained from treating an inadequate notice as having terminated his employee's contract. Cf *Page One Records Ltd v Britton (t/a The Troggs)*[1967] 3 All ER 822, [1968] 1 WLR 157, where an interim injunction was refused where the totality of obligations under a contract almost amounted to a partnership or joint venture.

6 *Dietrichsen v Cabburn* (1846) 2 Ph 52; *Donnell v Bennett*(1883) 22 ChD 835; and see the Sale of Goods Act 1979 s 52.

7 *Rolfe v Rolfe* (1846) 15 Sim 88; *Kernot v Potter* (1862) 3 De G F & J 447 at 459; cf *Ogden v Fossick* (1862) 32 LJ Ch 73.

8 *Ehrman v Bartholomew*[1898] 1 Ch 671, where Romer J held that the negative covenant was unreasonable and refused the injunction; and see *William Robinson & Co Ltd v Heuer*[1898] 2 Ch 451, CA, where, however, the injunction was granted; *Warner Bros Pictures Inc v Nelson*[1937] 1 KB 209, [1936] 3 All ER 160.

9 *Palace Theatre Ltd v Clensy and Hackney and Shepherd's Bush Empire Palaces Ltd* (1909) 26 TLR 28, CA.

10 *Whitwood Chemical Co v Hardman*[1891] 2 Ch 416, CA; and see PARA 463.

11 *Fechter v Montgomery* (1863) 33 Beav 22; and see PARA 467.

12 *De Mattos v Gibson* (1859) 4 De G & J 276.

13 *Lumley v Wagner* (1852) 1 De G M & G 604; and see *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd*[1926] AC 108, PC; *Warner Bros Pictures Inc v Nelson*[1937] 1 KB 209, [1936] 3 All ER 160.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/C. EXPRESS COVENANTS, BOTH POSITIVE AND NEGATIVE/461. Apprenticeship.

461. Apprenticeship.

In a contract of apprenticeship, the court will neither order specific performance¹ nor, during the currency of the apprenticeship, grant an injunction against committing a breach². However, if the contract has been on the whole for the benefit of the apprentice, the court will enforce a restrictive covenant against him after the termination of the apprenticeship³.

1 *Webb v England* (1860) 29 Beav 44.

2 *Argles v Heaseman* (1739) 1 Atk 518.

3 *Gadd v Thompson* [1911] 1 KB 304, DC. As to contracts of apprenticeship see **EMPLOYMENT** vol 39 (2009) PARA 103 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/C. EXPRESS COVENANTS, BOTH POSITIVE AND NEGATIVE/462. Limits of jurisdiction.

462. Limits of jurisdiction.

The principle by which the court restrains breaches of negative covenants, even where the contract contains positive covenants of which specific performance will not be ordered¹, has been criticised² and is not to be extended³. It is in any case essential that the negative stipulation which the court is asked to enforce is a stipulation requiring the contracting party not to do some particular act which the court can identify and so frame the injunction as to restrain him from doing it⁴. It seems that the right to an injunction in cases of this kind will not depend upon the use of a negative rather than a positive form of expression, and that if the substance of the contract is such that it ought not to be performed specifically an injunction will not be granted merely because the covenant is in a negative rather than a positive form; nor, on the other hand, will the injunction necessarily be refused merely because the agreement contains no negative stipulation⁵.

1 See PARA 460.

2 *Wolverhampton and Walsall Rly Co v London and North Western Rly Co* (1873) LR 16 Eq 433; and see *Brett v East India and London Shipping Co Ltd* (1864) 2 Hem & M 404.

3 *Whitwood Chemical Co v Hardman* [1891] 2 Ch 416, CA.

4 *Chapman v Westerby* (1913) 58 Sol Jo 50, where the defendant had agreed to act for ten years as skipper of a trawler and not give his time or personal attention to any other business or occupation, and the court refused an injunction on the grounds that it would force the defendant to be idle for ten years so far as earning his living was concerned or to continue the contract; *Rely-a-Bell Burglar and Fire Alarm Co Ltd v Eisler* [1926] Ch 609, where the defendant had agreed during his employment not to enter into any other employment nor be interested in any other burglar or fire alarm business, and the court refused to grant an injunction restraining his continuing in employment with a competing company, but granted an injunction restraining him from being interested in its business or any other burglar or fire alarm business. See also *Ehrman v Bartholomew* [1898] 1 Ch 671; *William Robinson & Co Ltd v Heuer* [1898] 2 Ch 451, CA.

5 See *Wolverhampton and Walsall Rly Co v London and North Western Rly Co* (1873) LR 16 Eq 433; *Donnell v Bennett* (1883) 22 ChD 835; *Davis v Foreman* [1894] 3 Ch 654; *Ehrman v Bartholomew* [1898] 1 Ch 671; *Metropolitan Electric Supply Co Ltd v Ginder* [1901] 2 Ch 799; *Kirchner & Co v Gruban* [1909] 1 Ch 413; *London, Chatham and Dover Rly Co and South Eastern and Chatham Rly Cos' Managing Committee v Spiers and Pond Ltd* (1916) 32 TLR 493. In *Peperno v Harmiston* (1886) 31 Sol Jo 154, CA, the court held that it was the rule not to grant an injunction where specific performance was impossible unless damages would be an absolutely inadequate remedy for the non-performance of the agreement.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/D. IMPLIED NEGATIVE COVENANTS/463. Implication of negative covenant.

D. IMPLIED NEGATIVE COVENANTS

463. Implication of negative covenant.

Although where there is only an affirmative covenant the court will not enforce performance of the covenant affirmatively, it will, in special cases, intervene to prevent that being done which would be a departure from and a violation of the covenant¹. In such cases the court implies a negative covenant not to act inconsistently with the agreement, and restrains by injunction the breach of that implied undertaking. To found a claim for this relief it is necessary to point to something specific which a defendant has by implication agreed not to do². Each case in this class must be judged on its merits. There appears to be no rule of principle dividing the cases where, finding itself unable to decree specific performance, the court declines to grant an injunction restraining a breach of contract, from those in which an injunction is nonetheless granted³.

1 *De Mattos v Gibson* (1859) 4 De G & J 276; *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108, PC; *Doherty v Allman* (1878) 3 App Cas 709, HL; *Jackson v Astley* (1883) Cab & El 181; and see *Hudson v Cripps* [1896] 1 Ch 265.

2 *Bower v Bantam Investments Ltd* [1972] 3 All ER 349, [1972] 1 WLR 1120.

3 See eg *Fothergill v Rowland* (1873) LR 17 Eq 132; *Keith, Prowse & Co v National Telephone Co* [1894] 2 Ch 147.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/D. IMPLIED NEGATIVE COVENANTS/464. Examples where negative covenant implied.

464. Examples where negative covenant implied.

A contract to give a person the first refusal of property is deemed to involve a negative undertaking¹ not to part with the property to any other person without giving that first refusal², and a covenant to take the whole of the electric power required for his premises from the claimant implies a negative covenant not to take power from anyone else³.

A lessor who has covenanted with his lessee for quiet enjoyment will be restrained from acting in such a manner as to deprive his lessee of that benefit⁴, and a corporation which grants the exclusive right for a limited period to persons to sell certain goods on its premises will be restrained from evicting them⁵ or permitting the sale by other persons of similar goods⁶.

1 As to the implication of a negative covenant see PARA 463.

2 *Manchester Ship Canal Co v Manchester Racecourse Co* [1901] 2 Ch 37, CA; although in that case, if the contract in question had not been given statutory validity it might have been void for remoteness or uncertainty. Cf *Ryan v Thomas* (1911) 55 Sol Jo 364; *Erskine Macdonald Ltd v Eyles* [1921] 1 Ch 631. It is implicit in a grant of first refusal that the person who has to offer the property to the other person should not be entitled to give it away without offering it and so to defeat the first refusal: *Gardner v Coutts & Co* [1967] 3 All ER 1064, [1968] 1 WLR 173.

3 *Metropolitan Electric Supply Co Ltd v Ginder* [1901] 2 Ch 799; and see *Keith, Prowse & Co v National Telephone Co* [1894] 2 Ch 147, where the defendants, who had agreed to erect and maintain a telephone wire, were restrained from interfering with the wire after it was erected. As to modern distribution of electricity see **FUEL AND ENERGY**.

4 See eg *Tipping v Eckersley* (1855) 2 K & J 264; and as to injunctions to restrain breaches of covenants contained in leases see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 494.

5 *Holmes v Eastern Counties Rly Co* (1857) 3 K & J 675.

6 *Altman v Royal Aquarium Society* (1876) 3 ChD 228. For further instances where the court has intervened to restrain acts in violation of or inconsistent with subsisting contracts, in the absence of any negative covenant, see *Newmarch v Brandling* (1818) 3 Swan 99; *Phillips v Treeby* (1862) 8 Jur NS 999 (obstruction of rights of way); *Foster v Birmingham, Wolverhampton and Dudley Rly Co and Birmingham and Oxford Junction Rly Co* (1854) 2 WR 378 (construction of a road at a lower level than that provided for by the agreement); *Frogley v Earl of Lovelace* (1859) John 333 (interference by landlord with his tenant in the exercise of the exclusive right of sporting and killing game); *Edinburgh and Glasgow Rly Co v Campbell* (1863) 1 M 53, HL; *Slee v Bradford Corp* (1863) 4 Giff 262 (where there was no absolute agreement, but only an understanding by which the claimant had been misled); *Hood v North Eastern Rly Co* (1870) 5 Ch App 525 (stopping less than a certain number of trains at a station); *Wolverhampton and Walsall Rly Co v London and North-Western Rly Co* (1873) LR 16 Eq 433 (in effect compelling the defendants to use their line as agreed); *Nuneaton Local Board v General Sewage Co* (1875) LR 20 Eq 127 (permitting sewage to remain in sewers so as to be a nuisance or damage to the claimants); *Ashworth v Hebden Bridge Local Board* (1877) 47 LJ Ch 195 (enforcement of order for payment of rates in breach of an agreement not to do so for three months); *James Jones & Sons Ltd v Earl of Tankerville* [1909] 2 Ch 440 (prevention of due execution of a contract for the purchase of timber to be cut and removed by the purchaser); *Joel v International Circus and Christmas Fair* (1920) 124 LT 459, CA (contract to allow occupation of space in an exhibition which on construction was held to confer an interest in the land upon the claimant).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/D. IMPLIED NEGATIVE COVENANTS/465. Examples where negative covenant not imported.

465. Examples where negative covenant not imported.

The court will often decline to imply a negative covenant into a contract containing an affirmative covenant and to interfere by way of injunction to restrain its breach¹. Examples are (1) where specific performance of the affirmative contract is impossible², such as in the case of a contract for personal service³ and in the case of some contracts for the sale and delivery of chattels which are not specifically enforceable⁴; (2) where the contract would require the court's constant supervision, which it has always declined to give⁵; (3) if the terms sought to be enforced are too vague, uncertain and indefinite to enable the court to carry them out⁶; or (4) where the terms are subsidiary to the whole contract and the contract as a whole is incapable of specific performance⁷. The court will not interfere when the contract, although negative in form, is affirmative in substance⁸. However, in a contract for personal services, the court may grant an injunction even though the contract does not contain a covenant which is absolutely and clearly negative in terms if it can extract from the contract a negative covenant which is sufficiently clear and definite to enable it to state exactly what the parties were agreeing that one of them should not do⁹.

A negative covenant will not be implied nor its breach be restrained where the contract on the claimant's part is of such a nature as to be incapable of specific performance and is wholly executory. In such a case an undertaking by the claimant specifically to perform his part is not sufficient¹⁰.

1 As to the implication of a negative covenant see PARA 463.

2 *Lumley v Ravenscroft* [1895] 1 QB 683, CA; and see *Capes v Hutton* (1826) 2 Russ 357 (agreement by minor to execute a bond).

3 *Clarke v Price* (1819) 2 Wils Ch 157; *Baldwin v Society for the Diffusion of Useful Knowledge* (1838) 9 Sim 393; *Pickering v Bishop of Ely* (1843) 2 Y & C Ch Cas 249; *Stocker v Brocklebank* (1851) 3 Mac & G 250; *Johnson v Shrewsbury and Birmingham Rly Co* (1853) 3 De G M & G 914; *Brett v East India and London Shipping Co Ltd* (1864) 2 Hem & M 404; *Mair v Himalaya Tea Co* (1865) LR 1 Eq 411; *Millican v Sullivan* (1888) 4 TLR 203, CA; *Whitwood Chemical Co v Hardman* [1891] 2 Ch 416, CA (disapproving *Montague v Flockton* (1873) LR 16 Eq 189, where Malins V-C restrained an actor from performing at a rival theatre, although there was no stipulation in terms that he would not do so); *Cochrane v Exchange Telegraph Co Ltd* (1896) 65 LJ Ch 334, where the contract related to a chattel coupled with personal services; *Mortimer v Beckett* [1920] 1 Ch 571, where a boxer contracted to give the claimant the sole arrangements for matching him for seven years; *Prosperity Ltd v Lloyds Bank Ltd* (1923) 39 TLR 372, where an injunction restraining a bank from closing a customer's account without due notice was refused on the grounds that it involved personal services and involved borrowing money from the customer. See also *Thornton v Kendall* (1863) 11 WR 352, CA; *Firth v Ridley* (1864) 33 Beav 516. *Webster v Dillon* (1857) 3 Jur NS 432, where an actor was restrained from acting elsewhere than at the claimant's theatre, although there was no express stipulation that he should not act elsewhere, must be regarded as overruled: see *Whitwood Chemical Co v Hardman* [1891] 2 Ch 416 at 427, CA, where *Webster v Dillon* (1857) 3 Jur NS 432 is referred to and passed over on the ground that it was not argued and that the defendant did not appear. Cf *Crisp v Holden* (1910) 54 Sol Jo 784, where the court granted an interim injunction to restrain the managers of a school from dismissing the headmaster until his employment should have been lawfully terminated.

4 *Fothergill v Rowland* (1873) LR 17 Eq 132; See *Baldwin v Society for the Diffusion of Useful Knowledge* (1838) 9 Sim 393. As to special cases where the sale of a chattel will be restrained see PARA 480.

5 *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116, CA; and see *Musgrave v Horner* (1874) 31 LT 632, where the court refused to grant a mandatory injunction to compel a tenant to perform a covenant on his part to keep land in cultivation.

- 6 *Paris Chocolate Co v Crystal Palace Co* (1855) 3 Sm & G 119; *De Mattos v Gibson* (1859) 4 De G & J 276; *Low v Innes* (1864) 4 De G J & Sm 286; *Bernard v Meara* (1861) 12 I Ch R 389; *Bower v Bantam Investments Ltd* [1972] 3 All ER 349, [1972] 1 WLR 1120.
- 7 *Paris Chocolate Co v Crystal Palace Co* (1855) 3 Sm & G 119; *Hamilton v Dunsford* (1857) 6 1 Ch R 412.
- 8 *Davis v Foreman* [1894] 3 Ch 654; *Kirchner & Co v Gruban* [1909] 1 Ch 413; *London, Chatham and Dover Rly Co and South Eastern and Chatham Rly Cos' Managing Committee v Spiers and Pond Ltd* (1916) 32 TLR 493.
- 9 *Mutual Reserve Fund Life Association v New York Life Assurance Co and Harvey* (1890) 75 LT 528, CA; *Whitwood Chemical Co v Hardman* [1891] 2 Ch 416, CA.
- 10 *Peto v Brighton, Uckfield and Tunbridge Wells Rly Co* (1863) 1 Hem & M 468.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/D. IMPLIED NEGATIVE COVENANTS/466. Contract conferring interest in property.

466. Contract conferring interest in property.

Where the owner of property has contracted that it is to be used or dealt with in a particular manner, the court may, in certain cases, restrain him from dealing with it in a manner inconsistent with the contract and thus indirectly enforce specific performance. Thus, if a charterparty is entered into in good faith between the owner of a vessel and the charterer, the charterer is entitled to an injunction to restrain the owner from employing the vessel in a manner inconsistent with the charterparty¹. The principle is applicable to property of any nature, whether land, a chattel or a chose (or thing) in action, but the contract must be such as to confer upon the claimant an actual interest in the property which requires protection².

1 *De Mattos v Gibson* (1859) 4 De G & J 276, discussed in *Whitwood Chemical Co v Hardman* [1891] 2 Ch 416, CA; *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108, PC; cf *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146, [1958] 1 All ER 787, where it was held, not following *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108, PC, and explaining *De Mattos v Gibson* (1859) 4 De G & J 276, that the purchaser of a ship with notice of a charterparty was not bound by it. See also *Herne Bay Steam Boat Co v Hutton* [1903] 2 KB 683, CA; *Modern Transport Co Ltd v Duneris SS Co* [1917] 1 KB 370, CA; *Sevin v Deslandes* (1860) 30 LJ Ch 457; *Messageries Imperiales Co v Baines* (1863) 11 WR 322, where the injunction was against purchasers of a ship with notice of the charterparty, to restrain them from interfering with its performance (considered in *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146, [1958] 1 All ER 787); *Heriot v Nicholas* (1864) 12 WR 844. According to *Sevin v Deslandes* (1860) 30 LJ Ch 457, the owner is entitled to an injunction restraining the charterer from doing anything inconsistent with the charterparty.

2 *De Mattos v Gibson* (1859) 4 De G & J 276; *Macdonald v Eyles* [1921] 1 Ch 631 (copyright); *Lord Strathcona SS Co Ltd v Dominion Coal Co Ltd* [1926] AC 108, PC. As to covenants restricting the user of property see PARA 459.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/E. EFFECT OF CLAIMANT'S CONDUCT/467. Claimant's conduct to be regarded.

E. EFFECT OF CLAIMANT'S CONDUCT

467. Claimant's conduct to be regarded.

The court takes into consideration the conduct of the party seeking the injunction. Relief will be refused if the claimant does not come to the court with clean hands¹; therefore, where one party to a contract containing mutual covenants fails to perform his part, the other party will not be restrained from committing a breach of a negative covenant on his part².

However, the fact that the claimant has committed trifling breaches of covenant³ or a trifling breach of another covenant which has caused no injury to anyone⁴, or a breach of a covenant which is altogether of minor importance⁵, will not preclude him from obtaining an injunction⁶. Even if he has been guilty of misconduct in not strictly and honourably performing his part of the agreement, an injunction may be granted where it is quite impossible in the circumstances of the case to estimate the damage to which he would be exposed if it were not granted⁷.

1 *Stiff v Cassell* (1856) 2 Jur NS 348; *Maythorn v Palmer* (1864) 11 Jur NS 230; *Litvinoff v Kent* (1918) 34 TLR 298, where an injunction to restrain a landlord from interfering with the claimant's tenancy was refused when the tenant in breach of the tenancy agreement had issued circulars inciting to revolution. As to acquiescence and delay by the claimant see PARAS 373-375; and see generally **EQUITY** vol 16(2) (Reissue) PARAS 560, 909.

2 *De Mattos v Gibson* (1859) 4 De G & J 276; *Fechter v Montgomery* (1863) 33 Beav 22; *Telegraph Despatch and Intelligence Co v McLean* (1873) 3 Ch App 658; and see *Holmes v Eastern Counties Rly Co* (1857) 3 K & J 675; *Munro v Wivenhoe and Brightlingsea Rly Co* (1865) 4 De G J & Sm 723; *Grimston v Cuninghame* [1894] 1 QB 125, DC; *General Billposting Co Ltd v Atkinson* [1909] AC 118, HL; *Measures Bros Ltd v Measures* [1910] 2 Ch 248, CA; *Consolidated Agricultural Supplies Ltd v Rushmere* (1976) 120 Sol Jo 523, CA. In *Fechter v Montgomery* (1863) 33 Beav 22, and *Telegraph Despatch and Intelligence Co v McLean* (1873) 3 Ch App 658, the negative covenants on the part of the defendant were implied. However, where under an agreement containing mutual grants the claimants have been put into possession of what was granted to them and have enjoyed it for several years, while the defendants have taken no steps to require the performance of the stipulation for their benefit but have allowed the time to expire within which it should have been performed, an injunction will be granted to restrain the defendants from disturbing the claimants' enjoyment: *Great Northern Rly Co v Lancashire and Yorkshire Rly Co* (1853) 1 Sm & G 81.

3 *Besant v Wood* (1879) 12 ChD 605.

4 *Western v MacDermott* (1866) 2 Ch App 72; *Richards v Revitt* (1877) 7 ChD 224; and see *Jackson v Winniffrith* (1882) 47 LT 243.

5 *Chitty v Bray* (1883) 48 LT 860.

6 See *Besant v Wood* (1879) 12 ChD 605.

7 *Holmes v Eastern Counties Rly Co* (1857) 3 K & J 675.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/E. EFFECT OF CLAIMANT'S CONDUCT/468. Effect of acquiescence and delay.

468. Effect of acquiescence and delay.

The claimant may lose his right to an injunction by acquiescence or delay¹, especially where a mandatory injunction is sought². Mere delay³ by a claimant in taking steps to prevent the continuance of a breach of a restrictive covenant will not amount to such acquiescence as to disentitle him to relief⁴, but if he delays bringing his action, notwithstanding the fact that the defendant is, to his knowledge⁵, expending money in the erection or alteration of buildings⁶, or if he acquiesces in the defendant's proceedings⁷, he will lose his right to an injunction. The right to enforce a covenant entered into between the vendor and purchaser of land may be lost by acquiescence in breaches of the covenant⁸. On similar principles a covenant in a lease may be presumed to have been released if the lessor is aware of a continuing breach and acquiesces in it for a long period⁹. Relief will not be granted where there has been for a considerable time a violation by both the claimant and the defendant of the agreement in respect of which relief is sought¹⁰, and by acquiescence a person may lose not only his right to an injunction but even his right to recover nominal damages¹¹.

1 *Scarlsbrick v Tunbridge* (1854) 3 Eq Rep 240; *Pollard v Clayton* (1855) 1 K & J 462; *Hope v Gloucester Corp'n and Charity Trustees* (1855) 1 Jur NS 320; *Maythorn v Palmer* (1864) 11 Jur NS 230; and see PARAS 373-375.

2 See PARA 382.

3 The defence of laches is more easily established where an ordinary right is interfered with, as in the case of nuisance, than where the claimant's right is founded on contract: see *Price v Bala and Festiniog Rly Co* (1884) 50 LT 787.

4 *Duke of Northumberland v Bowman* (1887) 56 LT 773.

5 However, delay is immaterial where the person entitled to insist upon the contract is unaware that expenditure is taking place on an erroneous construction of the contract: *Price v Bala and Festiniog Rly Co* (1884) 50 LT 787.

6 *Roper v Williams* (1822) Turn & R 18; *Johnstone v Hall* (1856) 2 K & J 414; *Eastwood v Lever* (1863) 4 De GJ & Sm 114.

7 *Sayers v Collyer* (1884) 28 ChD 103, CA; and see *Osborne v Bradley* [1903] 2 Ch 446. The fact that the claimant may have passively acquiesced in one breach of a covenant will not disentitle him to an injunction to restrain another breach: *Lloyd v London, Chatham and Dover Rly Co* (1865) 34 LJ Ch 401.

8 See **EQUITY** vol 16(2) (Reissue) PARA 909.

9 Cf *Lloyds Bank Ltd v Jones* [1955] 2 QB 298, [1955] 2 All ER 409, CA, where it was held that a landlord's acquiescence in the occupation of a farm by one only of two trustees of a deceased tenant did not amount to a release of a provision in the tenancy agreement that the tenant should personally occupy; see further **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 506.

10 *Sheard v Webb* (1854) 2 WR 343.

11 *Kelsey v Dodd* (1881) 52 LJ Ch 34; and see PARA 373.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/ (iii) Protection of Contractual Rights/F. INJUNCTION IN AID OF SPECIFIC PERFORMANCE/469. Circumstances in which injunction granted.

F. INJUNCTION IN AID OF SPECIFIC PERFORMANCE

469. Circumstances in which injunction granted.

Pending proceedings for specific performance, the court will grant an injunction to restrain a vendor from dealing with property if there is a clear and undisputed contract¹, but, if this is open to doubt, the question becomes one of comparative convenience and an injunction will be granted or refused according to the side to which the balance of convenience inclines². Where, on an agreement for the sale of a house at a fixed price and the fixtures and furniture at a valuation to be made by a named person, permission to enter the premises for the purpose of making the valuation is refused by the vendor, a mandatory injunction may be granted to compel him to allow the entry to enable the valuation to proceed³. Similarly, a mandatory injunction in aid of specific performance may be granted in a case where it is necessary for the preservation of the property sold, and what is necessary to be done can be done by the defendant at little inconvenience and small expense⁴. However, a purchaser will not be restrained on the vendor's application from purchasing an estate on the ground that he will be rendered unable to perform his contract with the vendor⁵.

An agreement by the holder of shares to exercise the votes conferred by them for a particular purpose or in accordance with the wishes of some other person may be enforced by mandatory injunction⁶.

1 *Hadley v London Bank of Scotland Ltd* (1865) 3 De G J & Sm 63; see also *Spiller v Spiller* (1819) 3 Swan 556; *Hart v Herwig* (1873) 8 Ch App 860; *Allgood v Merrybent and Darlington Rly Co* (1886) 33 ChD 571, where an injunction was granted in favour of an unpaid vendor of land to a railway company to restrain the company from running trains over or from continuing in possession of the land.

2 *Hadley v London Bank of Scotland Ltd* (1865) 3 De G J & Sm 63, where, however, the injunction was refused; see also *Preston v Luck* (1884) 27 ChD 497, CA, where it was granted.

3 *Smith v Peters* (1875) LR 20 Eq 511.

4 *Strelley v Pearson* (1880) 15 ChD 113; and see CPR 25.5(1); and PARAS 114, 315. See also *Astro Exito Navegacion SA v Southland Enterprise Co Ltd (Chase Manhattan Bank NA intervening), The Messiniali Tolmi* [1982] QB 1248, [1982] 3 All ER 335, CA; on appeal [1983] 2 AC 787, [1983] 2 All ER 725, HL.

5 *Syers v Brighton Brewery Co Ltd, Wright v Brighton Brewery Co Ltd* (1864) 11 LT 560.

6 *Greenwell v Porter* [1902] 1 Ch 530; *Puddephat v Leith* [1916] 1 Ch 200. See **COMPANIES** vol 14 (2009) PARA 251.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(iv) Protection of Fiduciary and Mortgage Rights/A. INJUNCTIONS AGAINST PERSONAL REPRESENTATIVES OR TRUSTEES/470. Injunctions against personal representatives.

(iv) Protection of Fiduciary and Mortgage Rights

A. INJUNCTIONS AGAINST PERSONAL REPRESENTATIVES OR TRUSTEES

470. Injunctions against personal representatives.

If there is danger of the property of a deceased person being lost owing to the insolvency¹ or bankruptcy² of an executor or administrator or to the fact that the executor or administrator is about to leave the country³, the court will grant an injunction restraining him from collecting and getting in the deceased's estate or from selling or disposing of it and receiving the proceeds of sale⁴. The mere fact that a personal representative is poor will not justify the court in interfering⁵, but an injunction will be granted if he is of bad character, drunken habits and great poverty⁶.

If undue influence is established, an executor claiming under a will and also by gift from the testator in his lifetime will, when the will and the gift are impeached, be restrained from selling⁷.

To induce the court to grant an injunction restraining an executor or administrator from parting with assets, without making provision for a future contingent liability, a case of past or probable future misapplication of the assets must be made out⁸, but where the liability is certain, although payable in the future, it must be provided for⁹.

An executor may be restrained at the suit of a co-executor from intermeddling in an estate and dealing with the property before probate¹⁰.

It seems that an injunction may be granted against personal representatives in respect of a continuance or repetition of a wrong committed by the deceased¹¹.

1 *Utterson v Mair* (1793) 2 Ves 95; *Scott v Becher* (1817) 4 Price 346; *Mansfield v Shaw* (1818) 3 Madd 100; but see note 5; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 20.

2 *Gladdon v Stoneman* (1808) 1 Madd 143n; *Bowen v Phillips* [1897] 1 Ch 174.

3 *Colebourne v Colebourne* (1876) 1 ChD 690; and see *Scott v Becher* (1817) 4 Price 346.

4 See also *Harrison v Cockerell* (1817) 3 Mer 1. An executor de son tort may be restrained from parting with assets in a proper case (*Re Lovett*, *Ambler v Lindsay* (1876) 3 ChD 198; *Brand v Mitson (otherwise Brand)* (1876) 24 WR 524), but if there are legal personal representatives of the deceased, they must be made parties to the action before such an injunction can be granted (*Cheetham v Hollingsworth* [1914] WN 25). The court will not restrain the agent in England of the administrator of a deceased trader in a foreign country from sending over the intestate's money and effects to that country when the intestate's estate is the subject of a suit there: *Wallace v Campbell* (1840) 4 Y & C Ex 167. See also **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 20.

5 *Hathornthwaite v Russell* (1740) 2 Atk 126; *Howard v Papera* (1815) 1 Madd 142.

6 *Everett v Prythergch* (1841) 12 Sim 363.

7 *Edmunds v Bird* (1813) 1 Ves & B 542.

8 *Read v Blunt* (1832) 5 Sim 567; and see *Norman v Johnson* (1860) 29 Beav 77; *Burrell v Delevante* (1862) 30 Beav 550; *King v Malcott* (1852) 9 Hare 692; *Re King, Mellor v South Australian Land Mortgage and Agency Co*[1907] 1 Ch 72.

9 *King v Malcott* (1852) 9 Hare 692; and see *Atkinson v Grey* (1853) 1 Sm & G 577; *Re Royal Bank of Australia, Robinson's Executor's Case* (1856) 6 De G M & G 572. As to the circumstances in which executors or administrators may be required to set aside sums to meet contingent debts and liabilities see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 407 et seq.

10 *Re Moore* (1888) 13 PD 36. Unless litigation is pending in another division, the application may be made in the Chancery Division (*Re Green, Green v Knight* [1895] WN 69; *Salter v Salter*[1896] P 291, CA, explaining *Re Parker, Dearing v Brooks* (1885) 54 LJ Ch 694); and see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 218. In *Re Cassidy, Cassidy v Foley*[1904] 2 IR 427, an injunction was granted without notice at the suit of the sole next of kin of a deceased tenant, to restrain the landlord from interfering with the tenant's assets pending administration.

11 See generally **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 814 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(iv) Protection of Fiduciary and Mortgage Rights/A. INJUNCTIONS AGAINST PERSONAL REPRESENTATIVES OR TRUSTEES/471. Injunctions against trustees.

471. Injunctions against trustees.

The court will restrain a trustee¹ from using his powers under the trust otherwise than for the legitimate purposes of the trust². This jurisdiction is founded not upon the irremediable consequences which would result from the act complained of, but upon the breach of trust itself³. Trustees for charitable or religious purposes may also be restrained or granted relief by way of injunction, as the case may be⁴.

One of several beneficiaries may sue and obtain an injunction to restrain a breach of trust⁵. The smallness of his interest, the fact that he is a minor and that the proceedings may have been instituted with other motives are not reasons for depriving him of his remedy⁶. A trustee may and ought to apply for an injunction to restrain a breach of trust by a co-trustee⁷.

In an action to restrain a sale⁸ which is being conducted in such a manner as to constitute a breach of trust, an injunction may be granted restraining both the trustees and the purchaser from completing⁹. In a proper case trustees may be restrained from selling trust property if it can be shown that a sale would be detrimental to the beneficiaries' interests¹⁰.

If an injunction is granted against trustees, and new trustees are appointed and, with knowledge of the order, do what is forbidden by it, they may be committed for contempt¹¹.

1 As to trustees generally see **TRUSTS**.

2 *Hipkins v Newton* (1831) 9 LJOS Ch 227; *Balls v Strutt* (1841) 1 Hare 146; *M'Fadden v Jenkyns* (1842) 1 Ph 153; *Snare v Baker, Beasley v Snare* (1849) 13 Jur 203; *Dance v Goldingham* (1873) 8 Ch App 902; but see *Lambert v Lambert* (1843) 5 I Eq R 339; *Parker v River Dunn Navigation Co* (1847) 1 De G & Sm 192.

3 *A-G v Liverpool Corpn* (1835) 1 My & Cr 171; *A-G v Aspinall* (1837) 2 My & Cr 613; *A-G v De Winton* [1906] 2 Ch 106; and see *Anon* (1821) 6 Madd 10; *Pechel v Fowler* (1795) 2 Anst 549, where an injunction was refused on the ground that irreparable injury was not shown and that the trustees would be answerable to the claimants for damage sustained, which is not consistent with the later authorities.

4 See eg *Daugars v Rivaz* (1860) 28 Beav 233 (restraining trustees of protestant church from interference with exercise by minister of his office); and see **CHARITIES** vol 8 (2010) PARAS 529, 535 (restraining breaches of charitable trusts); **ECCLESIASTICAL LAW** vol 14 PARAS 797 note 2, 820, 1406, 1409 (restraining improper presentation or election of ministers and restraining ministers who have acted improperly or have been dismissed from officiating); and see PARA 433.

5 *Dance v Goldingham* (1873) 8 Ch App 902.

6 *Dance v Goldingham* (1873) 8 Ch App 902.

7 *Re Chertsey Market, ex p Walthew* (1819) 6 Price 261.

8 A trustee has power to sell subject to depreciatory conditions: see the Trustee Act 1925 s 13. Trustees for sale will not be restrained from completing on the ground that they cannot show a good title: *Roberts v Bozon* (1825) 3 LJOS Ch 113; and see **TRUSTS** vol 48 (2007 Reissue) PARA 1041 et seq.

9 *Dance v Goldingham* (1873) 8 Ch App 902. However, an injunction will not be granted where the trustees are selling at the request and by the direction of the tenant for life, on merely speculative evidence, adduced by the remainderman objecting to an immediate sale, of an expected future increase in the value of the property: *Thomas v Williams* (1883) 24 ChD 558.

10 *Wiles v Gresham* (1853) 1 WR 514; and see *Marshall v Sladden* (1849) 7 Hare 428.

11 *Avory v Andrews* (1882) 30 WR 564.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(iv) Protection of Fiduciary and Mortgage Rights/B. INJUNCTIONS AGAINST MORTGAGEES OR MORTGAGORS/472. Injunctions against mortgagees.

B. INJUNCTIONS AGAINST MORTGAGEES OR MORTGAGORS

472. Injunctions against mortgagees.

Where sufficient grounds for relief are shown, the court may interfere in favour of a mortgagor to restrain an improper exercise by a mortgagee of his powers and remedies¹, but the court will rarely interfere to prevent a mortgagee from taking possession².

A mortgagor in receipt of the rents and profits may maintain an action for an injunction to restrain an injury done to the mortgaged property without joining the mortgagee³.

1 See *Puddephatt v Leith*[1916] 1 Ch 200, where an agreement by a mortgagee of shares to vote in accordance with the mortgagor's wishes was enforced by mandatory injunction; and **MORTGAGE**. See eg *Whitworth v Rhodes* (1850) 20 LJ Ch 105 (mortgagee's forms of sale); and **MORTGAGE** vol 77 (2010) PARA 457. As to the rights and liabilities of parties to bills of sale see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1620 et seq. As to the grant of an injunction at the suit of the charterers of a ship against a mortgagee of the ship see eg *Collins v Lamport* (1864) 4 De G J & Sm 500; and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 327 et seq.

2 Cf *Booth v Booth* (1742) 2 Atk 343. The dictum of Grant MR in *Marquis of Cholmondeley v Lord Clinton* (1817) 2 Mer 171 at 359, that the court will never interfere, may be too strong. As to the power to adjourn a summons for possession see the Administration of Justice Act 1970 s 36(3); the Administration of Justice Act 1973 s 8(1)-(3); and *Redditch Benefit Building Society v Roberts*[1940] Ch 415, [1940] 1 All ER 342, CA, and *Hinckley and South Leicestershire Permanent Benefit Building Society v Freeman*[1941] Ch 32, [1940] 4 All ER 212; *Robertson v Cilia*[1956] 3 All ER 651, [1956] 1 WLR 1502 (power to adjourn is a power to adjourn for a reasonable period only in order to give the mortgagor an opportunity of making some offer acceptable to the mortgagee or finding means of discharging the loan).

3 See *Fairclough v Marshall* (1878) 4 ExD 37, CA; the Law of Property Act 1925 s 98; and **MORTGAGE** vol 77 (2010) PARAS 360, 397.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(iv) Protection of Fiduciary and Mortgage Rights/B. INJUNCTIONS AGAINST MORTGAGEES OR MORTGAGORS/473. Injunctions against mortgagors.

473. Injunctions against mortgagors.

A mortgagor may be restrained by injunction from preventing the mortgagee from taking possession of the premises¹, or interfering with a receiver appointed by him², or committing such waste as would render the security insufficient³, or otherwise dealing with the security against the mortgagee's interest⁴, or committing a breach of a collateral term which does not amount to a clog on the equity of redemption⁵.

1 *Truman & Co v Redgrave* (1881) 18 ChD 547.

2 *Bayly v Went* (1884) 51 LT 764; *Woolston v Ross* [1900] 1 Ch 788.

3 See eg *King v Smith* (1843) 2 Hare 239; *Harper v Aplin* (1886) 54 LT 383; and **MORTGAGE** vol 32 (2005 Reissue) PARAS 558, 639.

4 See **MORTGAGE** vol 77 (2010) PARA 395.

5 *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, HL.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(iv) Protection of Fiduciary and Mortgage Rights/B. INJUNCTIONS AGAINST MORTGAGEES OR MORTGAGORS/474. Rights of equitable mortgagees.

474. Rights of equitable mortgagees.

An equitable mortgagee¹ by deposit of title deeds², a holder of a lien³, or a mortgagee by assignment of an equitable chose (or thing) in action⁴, may respectively, in a proper case, obtain an injunction for the purpose of preserving his security⁵.

1 *Holroyd v Marshall* (1862) 10 HL Cas 191. See **MORTGAGE** vol 77 (2010) PARA 105.

2 *Whitbread v Jordan* (1835) 1 Y & C Ex 303; *Meux v Smith*, *Seager v Smith* (1841) 1 Mont D & De G 396.

3 *Middleton v Magnay* (1864) 2 Hem & M 233; *Gurnell v Gardner* (1863) 4 Giff 626; *Watson v Lyon* (1855) 7 De G M & G 288; but see *Stedman v Webb* (1839) 4 My & Cr 346. As to liens generally see **LIEN**.

4 See *Levinger v Crombie* (1872) 21 WR 37. The assignor is a necessary party: *Levinger v Crombie* (1872) 21 WR 37.

5 *London and County Banking Co v Lewis* (1882) 21 ChD 490, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(iv) Protection of Fiduciary and Mortgage Rights/C. CONFIDENTIAL INFORMATION/475. Where injunction granted.

C. CONFIDENTIAL INFORMATION

475. Where injunction granted.

An injunction will be granted to restrain a person in a confidential position from disclosing information with which he became acquainted through that position¹. In such a case a fiduciary relationship must be established, but it cannot be implied from every form of contract². Thus a person may be restrained from making an improper use of, or from disclosing or communicating, information obtained by him in the course of his employment or of any other confidential relationship³.

Not only persons who have acquired the information direct, but others to whom they have communicated it, will be restrained in a proper case from making use of the information so acquired⁴. The use of evidence wrongfully obtained may also be restrained⁵.

1 See generally **EQUITY** vol 16(2) (Reissue) PARA 855.

2 *Accumulator Industries Ltd v C A Vandervell & Co* (1912) 29 RPC 391; *Dunford and Elliott Ltd v Johnson and Firth Brown Ltd* [1977] 1 Lloyd's Rep 505, CA. As to when an action for breach of confidence succeeds, apart from contract, see *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

3 Cf the cases cited in PARA 346 note 2. The use of confidential information for purposes of trade may be restrained by injunction: see eg *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96. While in a proper case the court is prepared to restrain an employee from disclosing confidential information, it is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth: *Woodward v Hutchins* [1977] 2 All ER 751, [1977] 1 WLR 760, CA. See also *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, [1981] 2 All ER 321, CA; *Speed Seal Products Ltd v Paddington* [1986] 1 All ER 91, [1985] 1 WLR 1327, CA. Cf *Re a Company's Application* [1989] Ch 477, [1989] 2 All ER 248, where an injunction would not be granted restraining an employee from disclosing confidential information to the Inland Revenue or to a financial regulatory body. See *A-G v Greater Manchester Newspapers Ltd* (2001) Times, 7 December (injunction prohibiting publication of information likely to lead to identification of whereabouts of convicted child murderers); and *Townends Group Ltd v Cobb* [2004] EWHC 3432 (Ch), (2004) Times, 1 December. See further **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 13; **EMPLOYMENT** vol 39 (2009) PARA 55; **LEGAL PROFESSIONS** vol 65 (2008) PARA 740; **LEGAL PROFESSIONS** vol 66 (2009) PARA 817.

4 *Lewis v Smith* (1849) 1 Mac & G 417; *Morison v Moat* (1851) 9 Hare 241; *Russell v Jackson* (1851) 9 Hare 387; *Exchange Telegraph Co Ltd v Gregory & Co* [1896] 1 QB 147, CA; and see *Tipping v Clarke* (1843) 2 Hare 383; *Prince Albert v Strange* (1849) 1 Mac & G 25; *Exchange Telegraph Co Ltd v Central News Ltd* [1897] 2 Ch 48; *William Sumner & Co Ltd v Boyce and Kimmond & Co* (1907) 97 LT 505; *Rex Co and Rex Research Corp v Muirhead and Comptroller-General of Patents* (1926) 96 LJ Ch 121, CA; *Nichrotherm Electrical Co Ltd v Percy* [1957] RPC 207, CA (where the principle as stated in the text was approved). See also *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316, [1987] 1 WLR 1248, HL; *Lord Advocate v Scotsman Publications Ltd* [1990] 1 AC 812, [1989] 2 All ER 852, HL; *X v Y* [1988] 2 All ER 648; *Re C (a Minor) (No 2)* [1990] Fam 39, [1989] 2 All ER 791, CA; *Re W (Minors) (Surrogacy)* [1991] FCR 419, [1991] 1 FLR 385.

5 See PARA 765.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(iv) Protection of Fiduciary and Mortgage Rights/C. CONFIDENTIAL INFORMATION/476. Hearing in private.

476. Hearing in private.

An application to restrain the disclosure of confidential communications will be heard in private if a public hearing would defeat the object of an action brought by the claimant¹. The defendant is entitled to particulars of the secret information alleged to have been divulged by him, but the order for particulars will be so framed as to prevent the persons to whom they are communicated from disclosing them, and the particulars must be returned to the claimant when the proceedings are closed².

1 *Mellor v Thompson* (1885) 31 ChD 55, CA.

2 *Sorbo Rubber Sponge Products Ltd v Defries* (1930) 47 RPC 454.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(v) Protection of Property/A. INJUNCTIONS TO RESTRAIN DISPOSITION/477. Restraining improper transfers of stocks and shares.

(v) Protection of Property

A. INJUNCTIONS TO RESTRAIN DISPOSITION

477. Restraining improper transfers of stocks and shares.

An injunction¹, even without notice², may be granted to restrain a defendant from making an improper transfer of stock³ or shares⁴ or from improperly parting with bonds⁵. Where a transfer of stock is about to be made to the wrong person through mistake, an injunction will not be granted without notice to restrain the transfer unless the claimant swears that he believes the defendant will avail himself of the error, and will refuse to make a retransfer⁶. However, the Bank of England cannot prevent the executor of a testator possessed of stock in government funds from selling or transferring it. All that the bank has to do is to look to the legal title and not to the trusts of the will beyond it⁷. The court will not interfere with the bank's discretion as to the evidence it requires, exercised in good faith, so as to compel it to depart from its settled practice⁸.

1 The dealing with stocks, shares, securities and dividends may also be temporarily prevented by means of a stop notice or, when the stocks, shares or securities and dividends are in court, by means of a stop order: see PARA 339.

2 *Barry v Donnellan* (1826) 1 Hog 339; but see *Doolittle v Walton* (1771) 2 Dick 442, where it was said that an injunction to prevent the transfer of stock would not be granted until after the defendants had appeared or were in contempt for want of it and upon notice.

3 *Lord Chedworth v Edwards* (1802) 8 Ves 46; *Stead v Clay* (1828) 4 Russ 550.

4 *Mann v Patent Cable Tramways Corp'n* (1886) 2 TLR 454; *Everitt v Automatic Weighing Machine Co* [1892] 3 Ch 506.

5 *Glasse v Marshall* (1845) 15 Sim 71.

6 *Arkwright v Gryles* (1844) 13 LJ Ch 303.

7 *Bank of England v Moffat* (1791) 3 Bro CC 260; *Bank of England v Parsons* (1800) 5 Ves 665; *Bank of England v Lunn* (1809) 15 Ves 569; *Franklin v Bank of England* (1826) 1 Russ 575; and see *Fowler v Churchill*, *Churchill v Bank of England* (1843) 11 M & W 323; *Adam v Bank of England* (1908) 52 Sol Jo 682.

8 *Prosser v Bank of England* (1872) LR 13 Eq 611, a case arising out of the National Debt Act 1870 ss 23, 24 (repealed by the Finance Act 1942 s 47, subject to certain savings: see s 47(4)(a)).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(v) Protection of Property/A. INJUNCTIONS TO RESTRAIN DISPOSITION/478. Negotiable instruments.

478. Negotiable instruments.

In a proper case an injunction¹ may be obtained to restrain the negotiation, indorsement, assignment, pledge or parting with negotiable instruments which have been illegally, fraudulently or improperly obtained², and if the instrument is liable to be completely avoided³ the court may also order it to be delivered up and cancelled⁴.

1 The injunction may be granted without notice: -- *v Bozon* (1824) 3 LJOS Ch 57.

2 *Green v Pledger* (1844) 3 Hare 165; *Smith v Hakewell* (1746) 1 Seton's Judgments and Orders (7th Edn) 712; *Earl of Lewes v Barnett* (1876) 1 Seton's Judgments and Orders (7th Edn) 713; *Day v Longhurst* (1893) 62 LJ Ch 334. See also *Thiedemann v Goldschmidt* (1859) 1 De GF & J 4, and *Maitland v Chartered Mercantile Bank of India, London and China* (1865) 12 LT 372, where the negotiable instruments were being used improperly for purposes other than those for which they were issued.

3 *Brooking v Maudslay, Son and Field* (1888) 38 ChD 636.

4 See *Esdaile v La Nauze* (1835) 1 Y & C Ex 394; *Cooper v Joel* (1859) 1 De G F & J 240; *Traill v Baring* (1864) 4 De G J & Sm 318.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(v) Protection of Property/A. INJUNCTIONS TO RESTRAIN DISPOSITION/479. Restraining disposition of property.

479. Restraining disposition of property.

An injunction¹ may be obtained in a proper case to restrain the sale², assignment³ or alienation⁴ of property notwithstanding that a principal party interested is out of the jurisdiction⁵. A person claimed, but not proved, to be an agent of a foreign government has been restrained from transmitting securities abroad which ought to be deposited in this country⁶, and a bank has been restrained from parting with a fund⁷, so as to protect the bank from any proceedings by an ambassador⁸. Where property has been directed to be sold by decree, the court will sometimes stay the sale pending an appeal, but, in such circumstances, if the property consists of personal chattels remaining in the possession of the appellant, he will be required to give ample security for their value⁹.

1 In an urgent case the injunction may be granted without notice: see PARA 477. As to freezing injunctions see PARA 396 et seq.

2 *Hawes v James* (1818) 1 Wils Ch 2, where a sale by commissioners under colour of an Act of Parliament was stayed, it being doubtful whether the sale was a proper exercise of their power, the property also being offered at an undervalue; *Wallis v Wallis* (1802) 2 Daniell's Chancery Practice (8th Edn) 1407, where the representative of a mortgagor who had obtained mortgage deeds from the mortgagee by fraud was restrained from selling the mortgaged property; *Delafield v Guanabeus* (1809) 2 Daniell's Chancery Practice (8th Edn) 1407, where the master of a ship which had been driven into Plymouth by bad weather was restrained from selling the ship's cargo at the instance of the supercargo and ship-owner (but as to the conditions of relief which will be imposed on the owners of the goods when the ship has become unable to proceed on her voyage without repairs see *Rayne v Benedict* (1841) 10 LJ Ch 297); *Sheppard v Oxenford* (1855) 3 WR 397, where the sale by the sole director of an association of its property for the purpose of recouping sums he had advanced was restrained; *Blakely v Dent, Re Blakely Ordnance Co Ltd* (1867) 15 WR 663, where the sale of machinery and plant was restrained at the suit of a claimant who set up a lien; *Brand v Mitson (otherwise Brand)* (1876) 24 WR 524, where a defendant, claiming to be the widow of an intestate, was restrained from disposing of the estate at the suit of the claimant, who claimed the grant of administration as next of kin; *Lemprière v Lange* (1879) 12 ChD 675, where in an action against a minor who had agreed to take a lease of a furnished house, the furniture to become his on payment at any time of a lump sum, the lease was declared void and the defendant was restrained from selling the furniture; *Wheelwright v Walker* (1883) 23 ChD 752, where a tenant for life was restrained from selling until trustees had been properly appointed for the purposes of the Settled Land Act 1882; *Dickenson v Brown* (1887) 3 TLR 350, CA, where the sale of goods was restrained until trial; *Hampden v Earl of Buckinghamshire* [1893] 2 Ch 531, CA, where a tenant for life was restrained from mortgaging the settled estates; *Erskine Macdonald Ltd v Eyles* [1921] 1 Ch 631, where an author who had given a publisher an option to publish a novel was restrained from allowing another to publish it. For the position of a tenant for life as a trustee of all parties interested see the Settled Land Act 1925 s 107. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1620 et seq; **DISTRESS; MORTGAGE**. As to the restraining of actions or proceedings against a company after a petition to wind up has been presented see PARA 496.

3 *Powell v Wright* (1844) 7 Beav 444.

4 *Beyfus v Bullock* (1869) LR 7 Eq 391; *Gooch v London Banking Association* (1885) 32 ChD 41; *Lord Elphinstone v Monkland Iron and Coal Co* (1886) 11 App Cas 332, HL; but as to the last two cases see *Re Midland Coal, Coke and Iron Co, Craig's Claim* [1895] 1 Ch 267, CA; *Re Panther Lead Co* [1896] 1 Ch 978. See also *Ketchum International plc v Group Public Relations Holdings Ltd* [1996] 4 All ER 374, CA (the Court of Appeal has original jurisdiction, similar to that exercised when a stay of execution is sought, to injunct a party not to dispose of assets which are the subject of litigation pending the outcome of an appeal, and the considerations applicable to the grant of a freezing injunction can apply in such a case).

5 *Malcolm v Scott* (1843) 3 Hare 39; and see *Re John Barry Enterprises Ltd* (1977) Times, 27 October, where royalties were due to a composer living outside the jurisdiction and an injunction was granted restraining the defendants holding the royalties from disposing of them, together with a declaration or charging order so that the royalties held by the defendants were frozen.

6 *Foreign Bondholders Corp'n v Pastor* (1874) 23 WR 109. As to foreign states' immunity from civil process see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 244 et seq.

7 An injunction may be granted in respect of money at a bank: see *Pennell v Deffell* (1853) 4 De G M & G 372.

8 *Gladstone v Musurus Bey* (1862) 1 Hem & M 495. As to a diplomatic agent's immunity see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 273 et seq.

9 *Nerot v Burnand* (1826) 2 Russ 56; *Jenkins v Herries* (undated) Sugden's Vendors and Purchasers (14th Edn) 63.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(v) Protection of Property/A. INJUNCTIONS TO RESTRAIN DISPOSITION/480. Chattels.

480. Chattels.

Where the thing which the defendant threatens to sell is a chattel, the court will interfere if it possesses a peculiar and intrinsic value, so that damages would not be an adequate remedy¹, but damages may be an adequate remedy where the claimant has put a value upon the property². Where a fiduciary relationship exists between the parties, the court may interfere whether or not the article possesses any such value³. A claimant wishing to prevent the disposition of goods must show a specific right in the property, and that they are in danger of being lost⁴.

An injunction will not be granted to restrain a defendant who is alleged to be a debtor from parting with his property⁵, unless there is a danger that the debtor may dispose of his assets so as to defeat judgment⁶.

1 *Tonnins v Prout* (1766) 1 Dick 387 (diamonds); *Lady Arundell v Phipps and Taunton* (1804) 10 Ves 139 (family pictures); *Earl of Macclesfield v Davis* (1814) 3 Ves & B 16 (plate and an iron chest); *North v Great Northern Rly Co* (1860) 2 Giff 64 (where the chattel had acquired a special value from being used in business); see also *Ridgway v Roberts* (1844) 4 Hare 106 (ship); *Falcke v Gray* (1859) 4 Drew 651 (china jars; specific performance case).

2 *Dowling v Betjemann* (1862) 2 John & H 544.

3 *Wood v Rowcliffe* (1844) 3 Hare 304 (furniture and effects); and see *Pooley v Budd* (1851) 14 Beav 34 (iron; specific performance case).

4 *Ximenes v Franco* (1751) 1 Dick 149.

5 *Robinson v Pickering* (1881) 16 ChD 660; and see *Lister and Co v Stubbs* (1880) 45 ChD 1; and *Mills v Northern Rly of Buenos Ayres Co* (1870) 5 Ch App 621.

6 See PARA 396 et seq as to freezing injunctions; and see *Siskina (Cargo Owners) v Distos Compania Naviera SA, The Siskina* [1979] AC 210, [1977] 3 All ER 803, HL.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(v) Protection of Property/A. INJUNCTIONS TO RESTRAIN DISPOSITION/481. Documents.

481. Documents.

In a proper case an injunction may be granted to restrain a defendant from parting with documents in his possession belonging to the claimant and from preventing the claimant or his solicitor from having access to them at all reasonable times and after reasonable notice¹.

1 *Goodale v Goodale* (1848) 16 Sim 316. Cf search orders PARA 402 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(v) Protection of Property/A. INJUNCTIONS TO RESTRAIN DISPOSITION/482. Forfeiture of shares.

482. Forfeiture of shares.

In pending proceedings for the rescission of a contract to take shares, if the defendant company gives notice to the claimant to forfeit the shares for non-payment of calls, an injunction may be granted on terms restraining the forfeiture until the trial of the action¹.

¹ *Jones v Pacaya Rubber and Produce Co Ltd* [1911] 1 KB 455, CA; see **COMPANIES** vol 15 (2009) PARA 1077.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(v) Protection of Property/A. INJUNCTIONS TO RESTRAIN DISPOSITION/483. Spouses and civil partners.

483. Spouses and civil partners.

A husband may be restrained from interfering or intermeddling with his wife's property¹ or from entering his wife's premises². A mandatory injunction may be granted ordering a wife to deliver up her husband's house and furniture³. The same considerations would presumably apply to civil partners⁴.

1 *Wood v Wood* (1871) 19 WR 1049; and see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 659 et seq.

2 *Boyt v Boyt* [1948] 2 All ER 436, CA. See **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 444 et seq; and see PARA 345.

3 *Hill v Hill* [1916] WN 59, where an injunction was suspended until the husband provided a suitably furnished house as a home for his wife and children.

4 Eg an injunction granted by the High Court or a county court which excludes the respondent from the civil partnership home is recognised in the Civil Partnership Act 2004 s 46(5). As to civil partners see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(v) Protection of Property/B. INJUNCTIONS TO PROTECT INDUSTRIAL PROPERTY/484. Copyright.

B. INJUNCTIONS TO PROTECT INDUSTRIAL PROPERTY

484. Copyright.

An injunction may be granted in a proper case to restrain the infringement of copyright¹ and connected matters such as breach of confidential relations², and passing off³. Where the statutory provisions relating to copyright⁴ create a new offence and enact a particular penalty, the court's jurisdiction by way of injunction is not excluded by them⁵. The court is less disposed to grant an interim injunction when the work in question is of a transitory nature⁶.

1 See **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 410 et seq. Copyright owners who exploit their rights by licensing are entitled to an indefinite injunction requiring infringers to pay for both past and future use of the copyright material, prior to the grant of a licence: *Phonographic Performance Ltd v Maitra*[1998] 2 All ER 638, [1998] 1 WLR 870, CA.

2 See **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 13; see also PARA 475.

3 See **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 14; and **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 304.

4 I.e the Copyright, Designs and Patents Act 1988, although it seems that the principle stated in the text applies in relation to any Act.

5 *Cooper v Whittingham*(1880) 15 ChD 501; see *Russell v Smith* (1846) 15 Sim 181; *Carlton Illustrators v Coleman & Co*[1911] 1 KB 771.

6 *Matthewson v Stockdale* (1806) 12 Ves 270.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(v) Protection of Property/B. INJUNCTIONS TO PROTECT INDUSTRIAL PROPERTY/485. Patent rights.

485. Patent rights.

In an action to restrain the infringement of a patent¹, a perpetual injunction will be granted when the validity of the patent and the fact of the infringement are established², if there is a probability of the infringement being repeated or any intention to infringe is shown³. The grant of interim injunctions for infringement of patents⁴ is governed by the same principles as those in any other type of action⁵.

An interim injunction may be granted to the equitable assignee of a patent, but the legal owner must be a party before a perpetual injunction can be obtained⁶.

1 See **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARAS 523, 538, 543-544; and the Patents Act 1977 s 61. In urgent cases an interim injunction may be obtained without notice: *British Thomson-Houston Co Ltd v P Henry & Co Ltd* (1928) 45 RPC 218, CA.

2 *Bridson v M'Alpine* (1845) 8 Beav 229.

3 *Proctor v Bayley* (1889) 42 ChD 390, CA; *Lyon v Newcastle Corpn* (1894) 11 RPC 218; see also *Dunlop Pneumatic Tyre Co v Neal* [1899] 1 Ch 807.

4 See *Bridson v M'Alpine* (1845) 8 Beav 229; *Shillito v Larmuth & Co* (1884) 2 RPC 1; *Challender v Royle* (1887) 4 RPC 363, CA; see also *Bacon v Spottiswoode*, *Bacon v Jones* (1839) 1 Beav 382; affd sub nom *Bacon v Jones* 4 My & Cr 433, where the principles and practice of the court in granting injunctions in patent cases upon interim application and the hearing are discussed. Generally the injunction is refused where the validity of the patent is disputed.

5 See *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL; and PARAS 383, 385.

6 *E M Bowden's Patents Syndicate Ltd v H Smith & Co* [1904] 2 Ch 86. As to the effect of equitable assignments see **CHOSES IN ACTION** vol 13 (2009) PARA 68 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(v) Protection of Property/B. INJUNCTIONS TO PROTECT INDUSTRIAL PROPERTY/486. Threats of action.

486. Threats of action.

Where any person, whether or not entitled to or interested in a patent, or an application for one, by circulars, advertisements or otherwise threatens any other person with proceedings for infringement of a patent, the other person may obtain an injunction against the continuance of the threats¹ unless the person making the threats proves that the acts in respect of which proceedings were threatened constitute, or, if done, would constitute, an infringement of a patent or of rights arising from the publication of a complete specification in respect of a claim of the specification not shown by the claimant to be invalid².

Where a person (whether or not the proprietor of, or entitled to any right in, a patent) by circulars, advertisements or otherwise threatens another person with proceedings for any infringement of a patent, a person aggrieved by the threats (whether or not he is the person to whom the threats are made) may, subject to exceptions, bring proceedings in the court against the person making the threats, claiming, inter alia, an injunction against the continuance of the threats³.

¹ Patents Act 1949 s 65(1), (2)(b). As to other relief which may be obtained see **PATENTS AND REGISTERED DESIGNS**.

² Patents Act 1949 s 65(2). A mere notification of the existence of a patent does not constitute a threat of proceedings: s 65(3); and see *Household and Rosher v Fairburn and Hall* (1885) Griffin's Patent Cases (1884-1886) 131; *Driffield and East Riding Pure Linseed Cake Co v Waterloo Mills Cake and Warehousing Co* (1886) 31 ChD 638; and **PATENTS AND REGISTERED DESIGNS**. Circulating threats of a third person does not necessarily constitute a breach of an injunction restraining threats of legal proceedings or liability: *Ellam v H F Martyn & Co* (1898) 68 LJ Ch 123, CA.

³ Patents Act 1977 s 70(1), (3)(b). For the purposes of s 70 a person does not threaten another person with proceedings for infringement of a patent if he merely (1) provides factual information about the patent; (2) makes inquiries of the other person for the sole purpose of discovering whether, or by whom, the patent has been infringed by making or importing a product for disposal or of using a process; or (3) makes an assertion about the patent for the purpose of any inquiries so made: s 70(5) (substituted by the Patents Act 2004 s 12(1), (4)). See **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 557.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(v) Protection of Property/B. INJUNCTIONS TO PROTECT INDUSTRIAL PROPERTY/487. Trade marks.

487. Trade marks.

The court's jurisdiction in the protection given to trade marks rests upon property, and the court interferes by injunction because that is the only mode by which property of this kind can be effectually protected¹. The court acts upon the same principles in granting relief by way of injunction in the case of the infringement of the right to a trade mark as in the case of the violation of any other right of property².

It is also a fundamental rule that no man has a right to pass off his goods for sale as the goods of a rival trader³.

An action for threats⁴ does not lie in relation to trade marks as it does in relation to patents⁵.

1 See generally **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 437 et seq.

2 *Leather Cloth Co Ltd v American Leather Cloth Co Ltd* (1863) 4 De G J & Sm 137; affd (1865) 11 HL Cas 523. It would seem that in passing-off cases the right invaded is the property in the business or goodwill likely to be injured by the misrepresentation: *Spalding & Bros v A W Gamage Ltd* (1915) 84 LJ Ch 449, HL.

3 *Leather Cloth Co Ltd v American Leather Cloth Co Ltd* (1865) 11 HL Cas 523. See further **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 344.

4 See PARA 486.

5 *Colley v Hart* (1888) 6 RPC 17.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(v) Protection of Property/C. INJUNCTIONS TO PROTECT PARTICULAR PROPERTY RIGHTS/488. Letters.

C. INJUNCTIONS TO PROTECT PARTICULAR PROPERTY RIGHTS

488. Letters.

An injunction may be obtained to restrain the opening of letters not addressed to the defendant¹. The court will also interfere to prevent a defendant, by reason of his having been employed in the claimants' business, from obtaining letters which, although addressed to him by name, really belong to the claimants. When such letters come to his private address, under a notice given by him to the Post Office, a mandatory injunction may be granted compelling the defendant to withdraw his notice to the Post Office².

1 *Schelle v Brakell* (1863) 11 WR 796; and see *Edgington v Edgington* (1864) 11 LT 299. For the statutory penalties for tampering with postal packets etc see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 292, 540; and see **POST OFFICE** vol 36(2) (Reissue) PARA 181.

2 *Hermann Loog v Bean* (1884) 26 ChD 306, CA, where the claimants were put upon an undertaking to open the letters in question only at certain specified times, with liberty to the defendant to be present at the opening. See also *Stapleton v Foreign Vineyard Association Ltd and HM Postmaster-General* (1864) 4 New Rep 317 (converse case; the injunction was sought by a former employee).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(v) Protection of Property/C. INJUNCTIONS TO PROTECT PARTICULAR PROPERTY RIGHTS/489. Rights in connection with land and buildings.

489. Rights in connection with land and buildings.

Where water is diverted from a known and defined channel for a non-riparian or extraordinary purpose in such a manner that it is not returned substantially undiminished in quantity or unaltered in character, then, without proof of actual damage, a riparian owner may obtain an injunction to restrain the diversion¹.

An injunction may be obtained to restrain building on a disused burial ground² or the use of land as burial ground³.

In a proper case an injunction may be granted to restrain a defendant from disturbing the claimant in his possession or occupation of a house⁴.

1 See eg *Roberts v Gwyrfa District Council* [1899] 2 Ch 608, CA; and **WATER AND WATERWAYS** vol 101 (2009) PARAS 519-521.

2 *LCC v Greenwich Corpn* [1929] 1 Ch 305; and see **CREMATION AND BURIAL** vol 10 (Reissue) PARA 1146.

3 *Godden v Hythe Burial Board* [1906] 2 Ch 270, CA.

4 *Spurgin v White* (1860) 2 Giff 473; *Collison v Warren* [1901] 1 Ch 812, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(v) Protection of Property/C. INJUNCTIONS TO PROTECT PARTICULAR PROPERTY RIGHTS/490. Use of name.

490. Use of name.

An injunction may be granted to restrain the use of a name in connection with a trade or business¹ or the use of a designation implying membership of a professional association², but not to restrain the use of a patronymic name of a family³. In the absence of fraud or malice, a defendant will not be restrained from calling his house by the name of the claimant's house⁴.

However, a person may be restrained from the unauthorised use of another person's name when such use amounts to a pledge of the other's credit or is otherwise calculated to subject him to a probability of risk or liability, such as when a person holds another out as his partner⁵ or to be connected with him in business⁶ in such circumstances that the other might be exposed to litigation and possibly held liable on the ground of acquiescing in the use of his name, or might be injured in his business and reputation by the connection of his name with that person's⁷.

1 *Du Boulay v Du Boulay* (1869) LR 2 PC 430; *Poiret v Jules Poiret Ltd and Nash* (1920) 37 RPC 177; *Bollinger v Costa Brava Wine Co Ltd (No 2)* [1961] 1 All ER 561, [1961] 1 WLR 277; cf *George Outram & Co Ltd v London Evening Newspapers Co Ltd* (1911) 27 TLR 231; *Conan Doyle v London Mystery Magazine Ltd* (1949) 66 RPC 312, where the injunction was refused; *Taittinger v Allbev Ltd* [1993] 2 CMLR 741, CA (although the grant of an injunction under domestic law is discretionary, where the plaintiff's Community law right is infringed and the defendant offered no undertaking, an injunction will be granted in any ordinary circumstances); and see **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 438.

2 *Institute of Electrical Engineers v Emmerson* (1950) 67 RPC 167; *Society of Incorporated Accountants v Vincent* (1954) 71 RPC 325.

3 *Du Boulay v Du Boulay* (1869) LR 2 PC 430; *Earl of Cowley v Countess of Cowley* [1901] AC 450, HL.

4 *Day v Brownrigg* (1878) 10 ChD 294, CA; and see *Street v Union Bank of Spain and England* (1885) 30 ChD 156, where an injunction to restrain the use of the phrase 'Street, London' as a cypher address for telegrams was refused.

5 *Burchell v Wilde* [1900] 1 Ch 551, CA; and see **PARTNERSHIP**.

6 *Routh v Webster* (1847) 10 Beav 561; *Walter v Ashton* [1902] 2 Ch 282.

7 *Routh v Webster* (1847) 10 Beav 561; *Walter v Ashton* [1902] 2 Ch 282; and see *Society of Motor Manufacturers and Traders Ltd v Motor Manufacturers' and Traders' Mutual Insurance Co Ltd* [1925] Ch 675, CA. Where there is fraud on the defendant's part, probable risk of injury to the claimant would be implied or deduced: *Society of Motor Manufacturers and Traders Ltd v Motor Manufacturers' and Traders' Mutual Insurance Co Ltd* [1925] Ch 675, CA. An injunction may also be granted to restrain a person from acting in such a way as to imply that he has a trade relationship with the claimant: *Morris Motors Ltd v Lilley (t/a G and L Motors)* [1959] 3 All ER 737, [1959] 1 WLR 1184, where the defendant sold a 'new' Morris car implying that he was an authorised dealer.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(vi) Protection of Public Rights and Administration of Justice/491. Proceedings by the Attorney General.

(vi) Protection of Public Rights and Administration of Justice

491. Proceedings by the Attorney General.

Where an illegal act which affects the public is committed or threatened, the court has jurisdiction to grant an injunction at the suit of the Attorney General¹. The decision whether or not the Attorney General should sue is a matter for him², and the courts have no power either to question his right to sue, as distinct from his right to relief, or his right to refuse to do so³. However, the court has a discretion here as in other cases of injunction and the Attorney General is not entitled to an injunction as of right on proving his case⁴. Where there has been a clear and deliberate breach of a duty imposed by statute, an injunction will follow as a matter of course⁵, except where the injunction would place a public body in serious difficulty⁶, in which case the court may allow the defendant a reasonable time to comply with the law⁷.

1 As to proceedings by the Attorney General as guardian of public rights see generally PARAS 220, 236. As to proceedings by the Attorney General in relation to charities see **CHARITIES** vol 8 (2010) PARAS 583, 590 et seq. For the general status and functions of the Attorney General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 529 et seq. As to the necessity for the Attorney General to be joined as a party in order to enable relief to be granted in the case of interference with a public right see PARA 408.

2 See *Gouriet v Union of Office Workers*[1978] AC 435, [1977] 3 All ER 70, HL, where it was held that the Attorney General's refusal to give his consent to a relator action is not subject to review by the courts. Cf *A-G v Westminster City Council*[1924] 2 Ch 416, CA.

3 *LCC v A-G*[1902] AC 165, HL; *A-G v Wimbledon House Estate Co Ltd*[1904] 2 Ch 34; *A-G v Birmingham, Tame and Rea District Drainage Board*[1910] 1 Ch 48, CA; affd [1912] AC 788, HL; *A-G v Westminster City Council*[1924] 2 Ch 416, CA.

4 *A-G v Shrewsbury (Kingsland) Bridge Co*(1882) 21 ChD 752; *A-G v West Gloucestershire Water Co*[1909] 2 Ch 338, CA; *A-G v London and North Western Rly Co*[1900] 1 QB 78, CA; *A-G v Wimbledon House Estate Co Ltd*[1904] 2 Ch 34; *A-G v Birmingham, Tame and Rea District Drainage Board*[1910] 1 Ch 48, CA; affd [1912] AC 788, HL; *A-G v Kerr and Ball*(1914) 79 JP 51. The courts should pay great heed to the intervention of the Attorney General and only refuse relief in the most exceptional circumstances: *A-G v Harris*[1961] 1 QB 74, [1960] 3 All ER 207, CA; and see *Gouriet v Union of Office Workers*[1978] AC 435, [1977] 3 All ER 70, HL (civil proceedings in aid of the criminal law).

Where there have been persistent and deliberate breaches of the law an injunction will normally be granted to restrain future breaches in the absence of any other sufficient sanction: *A-G v Harris*[1961] 1 QB 74, [1960] 3 All ER 207, CA; *A-G v Battistini*(1965) Times, 6 October; and see *Manchester Corp v Penson*[1970] 1 All ER 646, [1970] 1 WLR 204, DC. As to laches on the part of the Attorney General see PARA 375.

5 *A-G v Wimbledon House Estate Co Ltd*[1904] 2 Ch 34 at 44.

6 *A-G v Acton Local Board*(1882) 22 ChD 221; *St Mary, Islington Vestry v Hornsey UDC*[1900] 1 Ch 695, CA.

7 *A-G v Birmingham, Tame and Rea District Drainage Board*[1912] AC 788, HL; and see also PARAS 430, 426.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(vi) Protection of Public Rights and Administration of Justice/492. Circumstances in which injunction granted.

492. Circumstances in which injunction granted.

The Attorney General may take proceedings to abate any public nuisance¹, or to restrain individuals or corporations from contravening or exceeding powers conferred upon them by statute or charter², but the jurisdiction is not confined to such cases, and whenever public rights are infringed the court will come to the assistance of the Attorney General, as a public authority, to give the ancillary remedy which is necessary to enforce the public rights³, whether or not the infringement involves an invasion of any rights of property⁴. The public is concerned to see that Acts of Parliament are obeyed⁵, and the Attorney General represents the public as a whole in insisting that the law be observed⁶. The court therefore has jurisdiction to grant an injunction at the suit of the Attorney General in any case where there has been a breach of statutory duty, or where a statutory offence has been committed, for which no other remedy is adequate⁷. Where the Attorney General is suing for the purpose of enforcing a public right, the court has jurisdiction to grant an injunction, even though the right was conferred by a statute which prescribed remedies for its enforcement⁸. In exercising its discretion whether to grant an injunction in such a case, the court should have regard to the existence of other remedies open to the Attorney General or the relator, but if a clear breach of the public right is established, the court should be very slow to say that the Attorney General ought to have exhausted other remedies before coming to the court or to interfere with his decision to apply for an injunction⁹. Although a prosecution cannot be brought, an action may nevertheless lie at the suit of the Attorney General¹⁰.

1 See generally **NUISANCE**.

2 *A-G v Oxford, Worcester and Wolverhampton Rly Co* (1854) 2 WR 330; *A-G v Shrewsbury (Kingsland) Bridge Co* (1882) 21 ChD 752; *A-G v Ely, Haddenham and Sutton Rly Co* (1869) 4 Ch App 194; *A-G v Westminster City Council* [1924] 2 Ch 416, CA; *A-G v Stockton-on-Tees Corp* (1927) 91 JP 172, CA; *A-G v Wellingborough UDC* (1974) 72 LGR 507, CA.

3 *A-G v Sharp* [1931] 1 Ch 121, CA.

4 *A-G v Ashborne Recreation Ground Co* [1903] 1 Ch 101; *A-G v Sharp* [1931] 1 Ch 121, CA.

5 *A-G v Premier Line Ltd* [1932] 1 Ch 303.

6 *A-G v Ely, Haddenham and Sutton Rly Co* (1869) 4 Ch App 194. The High Court has jurisdiction to ensure obedience to the law whenever it is just and convenient to do so: *A-G v Chaudry* [1971] 3 All ER 938, [1971] 1 WLR 1614, CA. See *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, [1974] 2 All ER 1128, HL, where an interim injunction was granted to enforce an order reducing prices of drugs. The powers and duties of the Lord Advocate in Scotland are quite different, and he does not usually intervene except when some statute casts on him a duty to do so: *Dundee Harbour Trustees v Nicol* [1915] AC 550, HL.

7 *A-G v Ashborne Recreation Ground Co* [1903] 1 Ch 101 (where streets were laid out in manner not complying with byelaws made under statutory authority); *A-G v Wimbledon House Estate Co Ltd* [1904] 2 Ch 34 (infringement of building line); *A-G v Sharp* [1931] 1 Ch 121, CA; *A-G v Premier Line Ltd* [1932] 1 Ch 303 (motor omnibuses plying for hire without licence); *A-G v Harris* [1961] 1 QB 74, [1960] 3 All ER 207, CA (selling flowers in manner prohibited by statute); *A-G v Battistini* (1965) Times, 6 October; *Manchester Corp v Penson* [1970] 1 All ER 646, [1970] 1 WLR 204, DC. In each of the last three cases there had been persistent flouting of the law by street traders.

8 *A-G v Bastow* [1957] 1 QB 514, [1957] 1 All ER 497, approving dicta of Buckley J in *A-G v Ashborne Recreation Ground* [1903] 1 Ch 101 at 107; *A-G v Smith* [1958] 2 QB 173, [1958] 2 All ER 557. In such a case

proceedings for an injunction are not maintainable without the Attorney General: see *Gouriet v Union of Office Workers* [1978] AC 435, [1977] 3 All ER 70, HL; and PARA 351.

9 *A-G v Bastow* [1957] 1 QB 514, [1957] 1 All ER 497; and see *A-G v Harris* [1961] 1 QB 74, [1960] 3 All ER 207, CA; and PARA 491.

10 *A-G v Churchill's Veterinary Sanatorium Ltd* [1910] 2 Ch 401; see also *A-G v George C Smith Ltd* [1909] 2 Ch 524; *A-G v Weeks* [1932] 1 Ch 211 (cases under the Dentists Acts: see **MEDICAL PROFESSIONS**); *Lockwood v Chartered Institute of Patent Agents* (1912) 30 RPC 108; and see PARA 408.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(vi) Protection of Public Rights and Administration of Justice/493. Injunctions to restrain obstruction of justice.

493. Injunctions to restrain obstruction of justice.

In a proper case, the court may restrain the publication of pending proceedings if it tends to prejudice the public mind or obstructs the course of justice¹. It may also restrain the issue of circulars or notices abusive of a party to, and tending to the prejudice of the fair trial of, an action².

1 *Brook v Evans* (1860) 29 LJ Ch 616, CA, where the injunction was in fact refused; and see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 413 et seq.

2 *Kitcat v Sharp* (1882) 52 LJ Ch 134.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(vii) Restraint of Legal Proceedings/A. RESTRAINT OF PROCEEDINGS IN ENGLISH COURTS/494. In general.

(vii) Restraint of Legal Proceedings

A. RESTRAINT OF PROCEEDINGS IN ENGLISH COURTS

494. In general.

Proceedings in the High Court or the Court of Appeal may not be restrained by injunction¹ but both courts may direct a stay of proceedings².

However, the court has jurisdiction to restrain a person from instituting proceedings³. It may also restrain pending proceedings in a county court⁴ or before justices of the peace⁵.

1 As to the former jurisdiction to restrain proceedings immediately before the date of the commencement of the Supreme Court of Judicature Act 1873 (ie 1 November 1875) see **EQUITY** vol 16(2) (Reissue) PARA 493; and see *Garbutt v Fawcus*(1875) 1 ChD 155, CA. The power to restrain proceedings in the High Court by injunction was impliedly taken away from county courts also: *Cobbold v Pryke* (1879) 4 ExD 315; and see **COURTS** vol 10 (Reissue) PARA 711.

2 Supreme Court Act 1981 s 49(3); see also s 42 (amended by the Prosecution of Offences Act 1985 s 24(2)-(6)); the Civil Jurisdiction and Judgments Act 1982 s 49 (amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 24); and PARA 529 et seq. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

3 *Besant v Wood*(1879) 12 ChD 605; and see *Cercle Restaurant Castiglione Co v Lavery*(1881) 18 ChD 555; *Re a Company*[1894] 2 Ch 349; *Hart v Hart*(1881) 18 ChD 670; *Bryanston Finance Ltd v De Vries (No 2)*[1976] Ch 63, [1976] 1 All ER 25, CA. Where there is a dispute as to the conduct of an officer of the court, the court will not allow him, without its sanction, to be sued in another court with respect to acts done in the discharge of his office: *Re Maidstone Palace of Varieties Ltd, Blair v Maidstone Palace of Varieties Ltd*[1909] 2 Ch 283; and see *Aston v Heron* (1834) 2 My & K 390.

4 *Ratcliffe v Winch* (1853) 16 Beav 576; *Neighbour v Brown* (1857) 26 LJ Ch 670; *Re Original Hartleypool Collieries Co* (1882) 51 LJ Ch 508 (action against official liquidator in private capacity not restrained); *Re Womersley, Etheridge v Womersley*(1885) 29 ChD 557 (judgment creditor not restrained); *Murcutt v Murcutt*[1952] P 266, [1952] 2 All ER 427 (husband not restrained).

5 See *Hedley v Bates*(1880) 13 ChD 498, explained in *Stannard v St Giles, Camberwell Vestry*(1882) 20 ChD 190, CA; and see PARA 497. As to judicial review of inferior courts see **JUDICIAL REVIEW**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(vii) Restraint of Legal Proceedings/A. RESTRAINT OF PROCEEDINGS IN ENGLISH COURTS/495. Special tribunals.

495. Special tribunals.

Where Parliament has constituted a tribunal for a special purpose, the court may not restrain persons who are entitled to do so from applying to it¹, but it seems that the court might interfere if a case of fraud could be made out². The control of the court over special tribunals is discussed elsewhere in this work³. Where Parliament has pointed out a mode of procedure in a particular case, such as by proceedings before a magistrates' court, another court will not usually restrain such proceedings by injunction⁴.

1 *Harris v Jose* (1866) 14 WR 303; *Barnsley Canal Co v Twibell* (1844) 7 Beav 19.

2 *Earl of Beauchamp v Darby* [1866] WN 308.

3 See **JUDICIAL REVIEW**.

4 *Stannard v St Giles, Camberwell, Vestry* (1882) 20 ChD 190, CA; *Grand Junction Waterworks Co v Hampton UDC* [1898] 2 Ch 331; *Merrick v Liverpool Corp* [1910] 2 Ch 449; *Williams v Deptford UDC* (1924) 41 TLR 47. In *Hayward v East London Waterworks Co* (1884) 28 ChD 138, the court declined to restrain the defendants from cutting off the water supply from the claimant's house, on the claimant refusing to give an undertaking to begin proceedings with due speed before justices for the settlement of the dispute between him and the defendants in accordance with the Waterworks Clauses Act 1847 s 68. See **JUDICIAL REVIEW** vol 61 (2010) PARA 657.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(vii) Restraint of Legal Proceedings/A. RESTRAINT OF PROCEEDINGS IN ENGLISH COURTS/496. Proceedings against a company.

496. Proceedings against a company.

On the application of the company or any creditor or contributor, the court has power after the presentation of a petition to wind up a company, but before a winding up order has been made, to restrain any action or proceeding against the company¹.

¹ Insolvency Act 1986 s 126; and see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 887. As to unregistered companies see s 227 and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1155. As to the power of the judge, after a winding up order has been made, to order the transfer to him of proceedings pending by or against the company, see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 898.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(vii) Restraint of Legal Proceedings/A. RESTRAINT OF PROCEEDINGS IN ENGLISH COURTS/497. Criminal proceedings.

497. Criminal proceedings.

A court of equity generally has no jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by Act of Parliament for breach of its enactments¹, nor will the claimant in pending proceedings be restrained from instituting or continuing criminal proceedings against the defendant unless the criminal proceedings are of the same nature as the civil proceedings².

1 *Kerr v Preston Corpn* (1876) 6 ChD 463. However, proceedings for a penalty against a company in a magistrates' court may be restrained under the power set out in PARA 496: see *Re Briton Medical and General Life Assurance Association* (1886) 32 ChD 503; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 893.

2 *Saull v Browne* (1874) 10 Ch App 64, distinguishing *York Corpn v Pilkington* (1742) 9 Mod Rep 273, which was also doubted in *Kerr v Preston Corpn* (1876) 6 ChD 463; cf *Thames Launches Ltd v Trinity House Corpn (Deptford Strond)* [1961] Ch 197, [1961] 1 All ER 26, where (following *York Corpn v Pilkington* (1742) 9 Mod Rep 273) an injunction was granted to restrain prosecution of the claimants' employee by the defendants' agent, the issues in both criminal and civil proceedings being substantially the same.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(vii) Restraint of Legal Proceedings/B. RESTRAINT OF ARBITRATION PROCEEDINGS/498. Injunctions to restrain proceedings to arbitration.

B. RESTRAINT OF ARBITRATION PROCEEDINGS

498. Injunctions to restrain proceedings to arbitration.

The court has inherent jurisdiction to restrain arbitration proceedings¹ and statutory power to grant interim injunctions in arbitration proceedings².

1 *Kitts v Moore*[1895] 1 QB 253, CA. As to the court's jurisdiction to interfere in arbitration proceedings on equitable grounds see PARA 499. As to arbitration generally see the Arbitration Act 1996; and **ARBITRATION** vol 2 (2008) PARA 1201 et seq.

2 See the Arbitration Act 1996 s 44(2)(e); and **ARBITRATION** vol 2 (2008) PARA 1254. See also *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd*[2004] EWHC 479 (Comm), [2004] 1 All ER (Comm) 753; *Albon (t/a NA Carriage Co) v Naza Motor Trading SDN BHD*[2007] EWCA Civ 1124, [2008] 1 All ER (Comm) 351 (injunction granted to restrain arbitration proceedings so as to determine authenticity of signature in agreement).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(vii) Restraint of Legal Proceedings/B. RESTRAINT OF ARBITRATION PROCEEDINGS/499. Court's interference on equitable grounds.

499. Court's interference on equitable grounds.

The court has jurisdiction to interfere in arbitration proceedings on equitable grounds where the parties have by their conduct excluded themselves from the benefit of their contract to arbitrate¹. In order to justify the court in saying that an arbitrator named in a contract is disqualified from acting on the ground of bias, it is not, as in the case of judges and other persons in a judicial capacity, sufficient to show that he might be suspected of bias, but circumstances must be shown to exist which establish at least a probability that he will in fact be biased².

1 *Pickering v Cape Town Rly Co* (1865) LR 1 Eq 84, where the repudiation of a contract was held to be a waiver of the right to proceed by arbitration under the same contract. As to arbitration generally see the Arbitration Act 1996; and **ARBITRATION** vol 2 (2008) PARA 1201 et seq.

2 *Jackson v Barry Rly Co* [1893] 1 Ch 238, CA; *Eckersley v Mersey Docks and Harbour Board* [1894] 2 QB 667, CA; *Ives and Barker v Willans* [1894] 2 Ch 478, CA; *Bright v River Plate Construction Co* [1900] 2 Ch 835; see also *Re Haigh and London and North Western and Great Western Rly Cos* [1896] 1 QB 649; *R W Blackwell & Co Ltd v Derby Corpn* (1909) 75 JP 129, CA, where the court refused to stay proceedings under the provision now embodied in the Arbitration Act 1996 s 9; and see *Freeman & Sons v Chester RDC* [1911] 1 KB 783, CA; *Bristol Corpn v John Aird & Co* [1913] AC 241, HL.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(vii) Restraint of Legal Proceedings/C. RESTRAINT OF PROCEEDINGS IN FOREIGN COURTS/500. Restraining proceedings by person within the jurisdiction.

C. RESTRAINT OF PROCEEDINGS IN FOREIGN COURTS

500. Restraining proceedings by person within the jurisdiction.

With regard to foreign proceedings, the court will restrain a person within its jurisdiction from instituting or prosecuting proceedings in a foreign court whenever the circumstances of the case make such an interposition necessary or expedient¹. In a proper case the court in this country may restrain a person who has actually recovered judgment in a foreign court from proceeding to enforce that judgment². The jurisdiction is discretionary³ and the court will give credit to foreign courts for doing justice in their own jurisdiction⁴.

1 *Carron Iron Co v Maclaren* (1855) 5 HL Cas 416; and see *Marazura Navegacion SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1977] 1 Lloyd's Rep 283; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 137 et seq. See also *Continental Bank NA v Aeokos Cia Naviera SA* [1994] 2 All ER 540, [1994] 1 WLR 588, CA (injunction granted to restrain foreign proceedings in relation to loan agreement containing exclusive jurisdiction clause); *Advanced Portfolio Technologies Inc v Ainsworth* [1996] FSR 217 (court must consider whether injustice caused to defendant by permitting plaintiff to sue him on two fronts); *Bankers Trust Co v PT Jakarta International Hotels and Development* [1999] 1 All ER (Comm) 785 (giving effect to an arbitration clause included in the standard agreement developed by a worldwide commercial organisation was good reason to grant an injunction to restrain foreign proceedings). This proposition is subject to the application of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 171 et seq) and CPR 74.2-74.11 and, in relation to European Community judgments, CPR 74.19-74.26.

2 *Ellerman Lines Ltd v Read* [1928] 2 KB 144, CA; and see *Mildred v Neate* (1755) 1 Dick 279 (foreign attachment on goods); *E I Du Pont de Nemours & Co v Agnew (No 2)* [1988] 2 Lloyd's Rep 240, CA.

3 *Parnell v Parnell* (1858) 7 I Ch R 322. The court will intervene if the proceedings are vexatious and aggressive (*McHenry v Lewis* (1882) 22 ChD 397) or useless (*Settlement Corp v Hochschild* [1966] Ch 10, [1965] 3 All ER 486) or unconscionable (*British Airways Board v Laker Airways Ltd* [1985] AC 58, [1984] 3 All ER 39, HL), but will also consider the injustice to the claimant in the foreign action if the restriction to the natural forum for determining the dispute would unjustly deprive him of advantages available in the foreign forum (*Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871, [1987] 3 All ER 510, PC). See also *Shell UK Exploration and Production Ltd v Innes* 1995 SLT 807.

4 *Wright v Simpson* (1802) 6 Ves 714; *Wallace v Campbell* (1840) 4 Y & C Ex 167; see further **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 150 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(vii) Restraint of Legal Proceedings/C. RESTRAINT OF PROCEEDINGS IN FOREIGN COURTS/501. Foreigner resident abroad.

501. Foreigner resident abroad.

The English courts have no jurisdiction to restrain a foreigner, resident abroad, from suing for his debt in the courts of his own country, even after an order for administration of the debtor's estate has been made in this country¹. The mere fact that a foreigner has property or agents for sale of goods here does not give the court jurisdiction², although the case would be different if he had come in under the administration order or had sought or obtained relief in this country³.

1 *Carron Iron Co v Maclaren* (1855) 5 HL Cas 416; *Re Boyse, Crofton v Crofton* (1880) 15 ChD 591; *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196.

2 *Carron Iron Co v Maclaren* (1855) 5 HL Cas 416; and see *Sudlow v Dutch Rhenish Rly Co* (1855) 21 Beav 43.

3 *Carron Iron Co v Maclaren* (1855) 5 HL Cas 416; and see *Board of Governors of Hospital for Sick Children v Walt Disney Productions Inc* [1968] Ch 52, [1967] 1 All ER 1005, CA, where an injunction to restrain a breach of contract granted against a foreign corporation was enforceable by sequestration of any assets it might have within the jurisdiction.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/12. INJUNCTIONS/(4) INJUNCTIONS IN PARTICULAR CASES/(viii) Injunctions in Anti-social Behaviour Proceedings/502. Anti-social behaviour.

(viii) Injunctions in Anti-social Behaviour Proceedings

502. Anti-social behaviour.

The jurisdiction of the civil courts to deal with proceedings relating to anti-social behaviour and harassment¹ extends inter alia to the granting of injunctions under the Housing Act 1996². In certain circumstances, where an injunction is granted prohibiting conduct capable of causing nuisance or annoyance, a local authority may make an application for a power of arrest to be attached to the injunction³.

1 See CPR Pt 65; and PARA 1532.

2 See the Housing Act 1996 Pt V Ch III (ss 153A-158); CPR Pt 65 Section I (CPR 65.1-65.7); and **HOUSING** vol 22 (2006 Reissue) PARA 268 et seq.

3 See the Local Government Act 1972 s 222; the Anti-social Behaviour Act 2003 s 91 (repealed); the Police and Justice Act 2006 s 27; CPR Pt 65 Section II (CPR 65.8-65.10); and **LOCAL GOVERNMENT** vol 69 (2009) PARA 573; **STATUTES**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(1) INTRODUCTION/503. The disposal of proceedings without a trial.

13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL

(1) INTRODUCTION

503. The disposal of proceedings without a trial.

The disposal of proceedings without a trial is one of the court's duties in furthering the overriding objective of dealing with cases justly¹. This includes saving expense², dealing with the case in ways which are proportionate³ and ensuring that it is dealt with expeditiously and fairly⁴. The court is also required to further the overriding objective by actively managing cases and in particular, amongst other case management functions, by identifying issues at an early stage⁵ and deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others⁶.

In order to achieve these ends the Civil Procedure Rules provide that:

- 531 (1) the court may strike out a statement of case or part of a statement of case which discloses no reasonable grounds for bringing or defending the claim or which is an abuse of the court's process⁷;
- 532 (2) the court may give summary judgment against a claimant or a defendant if the court considers that the claim or defence (as to its entirety or an issue within it) has no real prospect of succeeding and there is no other compelling reason why the case or issue should be disposed of at trial⁸.

These provisions are closely interlinked and applications for orders striking out statements of case and for summary judgment may be made and heard at the same time⁹.

The court may also make these orders on its own initiative¹⁰.

1 As to the overriding objective see CPR 1.1; and PARA 33.

2 See CPR 1.1(2)(b); and PARA 33.

3 See CPR 1.1(2)(c); and PARA 33.

4 See CPR 1.1(2)(d); and PARA 33.

5 See CPR 1.4(2)(b); and PARAS 35, 246.

6 See CPR 1.4(2)(c); and PARAS 35, 246.

7 See CPR 3.4(2); and PARAS 252, 520. Such an order would also be in accordance with the requirement to allot to a case an appropriate share of the court's resources while taking into account the need to allot resources to other cases: see CPR 1.1(2)(e); and PARA 33. As to the meaning of 'statement of case' see PARA 584; and as to the meaning of 'striking out' see PARA 218 note 2.

8 See CPR 24.2; and PARA 524. As to the meanings of 'claimant' and 'defendant' see PARA 18.

9 See *Practice Direction--Striking out a Statement of Case* PD 3A para 1.2.

10 See CPR 3.3; and PARA 251.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(1) INTRODUCTION/504. Difference between the procedure for striking out a statement of case and the procedure of summary judgment.

504. Difference between the procedure for striking out a statement of case and the procedure of summary judgment.

The court¹ has power to strike out² a statement of case (or part of a statement of case) which discloses no reasonable grounds for bringing or defending the claim³. This is an example of active case management, in ensuring the summary disposal of issues which do not need full investigation at trial⁴. Striking out the statement of case means that no court time is wasted, even in pre-trial processes. It is a decision on the merits, and not a sanction for non-compliance with a procedural requirement imposed by an order⁵. On an application for summary judgment⁶, the court may give judgment without trial where it considers that there is no real prospect of success on the part of either the claimant or the defendant. This may involve the court in treating the facts averred as true, even if it thinks that they may be difficult to prove⁷. In applications for striking out, the court is mainly concerned with the adequacy of the statements of case, with whether they disclose reasonable grounds for bringing or defending the action⁸, while in considering whether to give summary judgment the court may look beyond the statement of case and consider the evidence⁹.

The two procedures do have similarities¹⁰. A party may apply for a striking-out order and in the alternative for summary judgment¹¹ and in appropriate cases the court may treat an application to strike out as an application for summary judgment¹². There are differences, though, in that the summary judgment procedure, unlike the striking out procedure, also applies to the summary disposal of issues, including preliminary issues; the striking out procedure applies to all proceedings, including proceedings excluded from the summary judgment procedure; and there are additional procedural requirements relating to the summary judgment procedure¹³.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'striking out' see PARA 218 note 2.

3 See CPR 3.4(2)(a); *Practice Direction--Striking out a Statement of Case* PD 3A para 1.2; and PARA 252. As to the meaning of 'statement of case' see PARA 584.

4 See CPR 1.4(2)(c); and PARA 35.

5 Ie under CPR 3.5: see PARA 521.

6 Ie under CPR Pt 24: see PARA 524 et seq.

7 See *Swinney v Chief Constable of the Northumbria Police* [1997] QB 464, [1996] 3 All ER 449, CA; *Marsh v Chief Constable of Lancashire Constabulary* [2003] EWCA Civ 284, [2003] All ER (D) 73 (Mar). Cf *Farah v British Airways plc* (2000) Times, 26 January, CA.

8 *Swain v Hillman* [2001] 1 All ER 91, [1999] CPLR 779, CA; *Green v Hancocks (a firm)* [2000] All ER (D) 2318, CA; *E D & F Man Liquid Products v Patel* [2003] EWCA Civ 472, [2003] All ER (D) 75 (Apr); *Three Rivers District Council v Governors and Company of the Bank of England (No 3)* [2001] UKHL 16, [2001] 2 All ER 513. Even in applications for striking out, however, the court may look at factual allegations.

9 See *Kent v Griffiths* [2001] QB 36, [2000] 2 All ER 474, CA; *Marsh v Chief Constable of Lancashire Constabulary* [2003] EWCA Civ 284, [2003] All ER (D) 73 (Mar). 'Courts are now encouraged, where an issue or issues can be identified which will resolve or help to resolve litigation, to take that issue or those issues at an early stage of the proceedings so as to achieve expedition and save expense. There is no question of any contravention of art 6 of the ECHR in so doing. Defendants as well as claimants are entitled to a fair trial and it

is an important part of the case management function to bring proceedings to an end as expeditiously as possible. Although a strike-out may appear to be a summary remedy, it is in fact indistinguishable from deciding a case on a preliminary point of law': *Kent v Griffiths* [2001] QB 36 at [38], [2000] 2 All ER 474, CA, per Lord Woolf MR.

10 See *Independents' Advantage Insurance Co v Personal Representatives of Cook* [2003] EWCA Civ 1103, [2004] PNL R 3, [2003] All ER (D) 423 (Jul).

11 *Green v Hancocks (a firm)* [2000] All ER (D) 2318, CA.

12 *Taylor v Midland Bank Trust Co Ltd (No 2)* [2002] WTLR 95, CA; *S v Gloucestershire County Council* [2001] Fam 313, [2000] 3 All ER 346, CA.

13 See PARAS 520-523, 524-528.

UPDATE

504 Difference between the procedure for striking out a statement of case and the procedure of summary judgment

NOTE 7--See also *Berezovsky v Abramovich* [2010] EWHC 647 (Comm), [2010] All ER (D) 02 (Apr).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(2) SETTLEMENT OR COMPROMISE OF PROCEEDINGS/505. Settlement or compromise of proceedings; in general.

(2) SETTLEMENT OR COMPROMISE OF PROCEEDINGS

505. Settlement or compromise of proceedings; in general.

Encouraging and facilitating the settlement or compromise of proceedings without a trial is one of the court's duties in furthering the overriding objective of dealing with cases justly¹. In order to do so, in actively managing cases, the court is required to:

- 533 (1) encourage the parties to co-operate with each other in the conduct of proceedings²;
- 534 (2) encourage the parties to use an alternative dispute resolution procedure if the court thinks that appropriate and facilitate the use of such procedure³; and
- 535 (3) help the parties to settle the whole or part of a case⁴.

The court may stay⁵ the proceedings for attempts at settlement by alternative dispute resolution or other means where the parties request it or, where the court considers it appropriate, the claim may be stayed on the court's own initiative⁶.

The parties are also required to exchange information and documents before the commencement of proceedings, thus enabling them to avoid litigation by agreeing a settlement or compromise of the claim⁷. These requirements are given effect by the court taking into account whether the parties have complied with them:

- 536 (a) when giving directions as to the conduct of the proceedings⁸;
- 537 (b) in deciding whether to impose a condition that a party pay a sum of money into court⁹;
- 538 (c) in deciding whether to strike out a statement of case¹⁰;
- 539 (d) in deciding whether to grant a party relief from a sanction imposed as a result of failure to comply with a rule, practice direction or order of the court¹¹;
- 540 (e) in deciding what order (if any) to make as to the costs payable by one party to another¹².

The provisions under Part 36 of the Civil Procedure Rules¹³ relating to Part 36 offers¹⁴ are also intended to encourage the parties to settle or compromise proceedings by making reasonable offers both before¹⁵ and after the commencement of proceedings¹⁶. Failure to accept a Part 36 offer which is not bettered at a trial may result in orders for costs more adverse than otherwise might have been made¹⁷.

1 As to the overriding objective see CPR 1.1(1); and PARA 33.

2 See CPR 1.4(2)(a); and PARA 246. The parties are required to help the court further the overriding objective: see CPR 1.3; and PARA 33. As to the procedure where the parties are agreed as to the terms on which proceedings can be disposed of, as to the terms of an interim order, or as to the discontinuance or withdrawal of proceedings see *Practice Statement (Administrative Court: uncontested proceedings)*[2009] 1 All ER 651.

3 See CPR 1.4(2)(e); and PARAS 35, 246. As to the meaning of 'alternative dispute resolution' (ADR) see PARA 35 note 3; and as to alternative dispute resolution see generally **ARBITRATION**. If a party refuses a proposal of

alternative dispute resolution, that refusal may later have uncomfortable consequences in costs: *Dunnett v Railtrack plc (in railway administration)*[2002] EWCA Civ 303, [2002] 2 All ER 850.

4 See CPR 1.4(2)(f); and PARA 246. As to the effect of a settlement of the claim against one party on linked claims against other parties see *Heaton v AXA Equity and Law Life Assurance Society plc*[2001] Ch 173, [2000] 4 All ER 673, [2000] CPLR 505, CA. As to the effect of a settlement on separate proceedings arising out of the same transaction see *Kenburgh Investments (Northern) Ltd (in liquidation) v Minton* [2000] All ER (D) 885, [2000] CPLR 549, CA.

5 As to the meaning of 'stay' see PARA 233 note 11.

6 See CPR 26.4(2); and PARA 265. See eg *Animatrix Ltd v O'Kelly*[2008] EWCA Civ 1415, [2008] All ER (D) 161 (Dec) (parties compromised the action on terms that it would be stayed to allow the defendant to procure finance to pay the claimants a settlement fee; no payment was made and the claimants sought the relief contained in the settlement agreement; it was held that it was clear that the parties had proceeded on the basis of the compromise agreement and the ingredients of estoppel were fulfilled; although the court should not grant declarations in the form asked simply because the parties had consented, it was necessary in this particular case to grant the declarations in order to do justice between the parties).

7 See *Practice Direction--Protocols* para 1.4; and PARA 108. As to the approved pre-action protocols see PARA 107. The parties in cases not covered by any approved pre-action protocol are required to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings: see *Practice Direction--Protocols* para 4.1. Parties engaging in meaningful settlement discussions between the reserving and delivery of judgment have a duty to inform the court of the fact: *Gurney Consulting Engineers (a firm) v Gleeds Health and Safety Ltd*[2006] EWHC 536 (TCC), (2006) 108 Con LR 43.

8 See CPR 3.1(4); and PARA 247.

9 See CPR 3.1(5); and PARA 247. As to payments into court see PARAS 742-744.

10 See CPR 3.4(2)(c); and PARAS 252, 520.

11 See CPR 3.9(1)(e); and PARA 256. As to the imposition of such a sanction see CPR 3.8; and PARA 255. The pre-action protocols (as well as the requirement in *Practice Direction--Protocols* para 4.1: see note 7) are given their authority by that practice direction so that a failure to comply with them is a breach of the practice direction and thus falls within this provision.

12 See CPR 44.3(4)(a), (5)(a). As to costs generally see also PARA 1729 et seq.

13 See CPR Pt 36: see PARA 729 et seq.

14 See CPR 36.2; CPR 36.5; and PARAS 729, 732. As to the meaning of 'Part 36 offer' see PARA 730 note 1.

15 See CPR 36.3(2)(a); and PARA 729.

16 See PARA 729 et seq.

17 See CPR 36.14(1)(a), (2); and PARA 740.

UPDATE

505 Settlement or compromise of proceedings; in general

NOTE 15--In order to avoid incurring unnecessary costs and wasting court time, parties must inform the court before a hearing if an appeal is compromised: *Red River UK Ltd v Sheikh*(2009) Times, 6 May, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/ (3) DEFAULT JUDGMENT/(i) Obtaining Default Judgments/506. Default judgment; in general.

(3) DEFAULT JUDGMENT

(i) Obtaining Default Judgments

506. Default judgment; in general.

In the Civil Procedure Rules, 'default judgment' means judgment without trial where a defendant¹ has failed to file an acknowledgment of service² or has failed to file a defence³.

A claimant⁴ may not obtain a default judgment:

- 541 (1) on a claim for delivery of goods subject to an agreement regulated by the Consumer Credit Act 1974⁵;
- 542 (2) where he uses the alternative procedure for claims under Part 8 of the Civil Procedure Rules⁶; or
- 543 (3) in any other case where a practice direction provides that the claimant may not obtain default judgment⁷.

1 As to the meaning of 'defendant' see PARA 18.

2 CPR 12.1(a). As to the requirements and procedure for filing an acknowledgment of service see CPR Pt 10; and PARAS 184, 186. As to the meaning of 'filing' see PARA 1832 note 8; and as to the meaning of 'service' see PARA 138 note 2.

3 CPR 12.1(b). As to the requirements and procedure for filing and serving a defence see CPR Pt 15; and PARA 199 et seq. For this purpose a defence includes any document purporting to be a defence: *Practice Direction--Default Judgment* PD 12 para 1.1.

4 As to the meaning of 'claimant' see PARA 18.

5 CPR 12.2(a). As to such regulated agreements see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 79.

6 CPR 12.2(b). As to the Part 8 procedure see CPR Pt 8; and PARA 127 et seq.

7 CPR 12.2(c). Examples of such proceedings are Admiralty proceedings, arbitration proceedings, contentious probate proceedings, claims for provisional damages and possession claims: *Practice Direction--Default Judgment* PD 12 para 1.3. As to the procedure where a claimant who would otherwise be entitled to judgment in default wishes to apply for an award of provisional damages see *Practice Direction--Provisional Damages* PD 41 paras 5.1-5.3; and PARA 1221.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/ (3) DEFAULT JUDGMENT/(i) Obtaining Default Judgments/507. Conditions to be satisfied for obtaining a default judgment.

507. Conditions to be satisfied for obtaining a default judgment.

The claimant¹ may obtain judgment in default of an acknowledgment of service² only if the defendant³ has not filed⁴ an acknowledgment of service or a defence to the claim or any part of the claim⁵ and the relevant time for doing so has expired⁶. Judgment in default of defence may be obtained only where an acknowledgment of service has been filed but a defence has not been filed and, in a counterclaim⁷, where a defence has not been filed, and, in either case, the relevant time limit for doing so has expired⁸. The claimant may not, however, obtain a default judgment if:

- 544 (1) the defendant has applied to have the claimant's statement of case struck out⁹ or for summary judgment¹⁰ and, in either case, that application has not been disposed of¹¹;
- 545 (2) the defendant has satisfied the whole claim (including any claim for costs) on which the claimant is seeking judgment¹²; or
- 546 (3) the claimant is seeking judgment on a claim for money¹³ and the defendant has filed or served¹⁴ on the claimant an admission¹⁵ together with a request for time to pay¹⁶.

Where the claim form is served by the claimant, he may not obtain default judgment unless he has filed a certificate of service¹⁷. Furthermore, under the service regulation regarding service in the member states of judicial and extrajudicial documents in civil or commercial matters¹⁸, judgment in default may not be given without proof of service¹⁹.

1 As to the meaning of 'claimant' see PARA 18.

2 In order to obtain a default judgment the claimant must either file a request which is dealt with administratively by a court officer, who enters judgment (see CPR 12.4(1); and PARA 508) or, when the prescribed conditions are met but the default judgment sought is not one prescribed by CPR 12.4(1)(a), (b), (c) or (d), by issuing and serving an application notice in accordance with CPR Pt 23 seeking an order for default judgment, which is dealt with judicially with or without a hearing (see CPR 12.10; and PARA 514). As to issuing and serving an application notice see PARA 307; and as to the hearing see CPR 23.8; and PARA 308. As to the meaning of 'default judgment', and as to judgment in default of an acknowledgment of service, see PARA 506. As to the meaning of 'court officer' see PARA 49 note 3.

3 As to the meaning of 'defendant' see PARA 18.

4 As to the meaning of 'filing' see PARA 1832 note 8.

5 CPR 12.3(1)(a).

6 CPR 12.3(1)(b). As to the time requirements and the procedure for filing an acknowledgment of service see CPR Pt 10; and PARAS 184, 186; and as to the time requirements and the procedure for filing and serving a defence see CPR Pt 15; and PARA 199 et seq. As to time limits generally see PARA 88 et seq.

7 I.e a counterclaim made under CPR 20.4: see PARA 621. As to the meaning of 'counterclaim' see PARA 618 note 3.

8 CPR 12.3(2). CPR Pt 10 (acknowledgment of service) does not apply to a counterclaim made under CPR 20.4: see CPR 20.4(3); and PARA 621.

9 le under CPR 3.4: see PARA 252, PARA 520. As to the meaning of 'striking out' see PARA 218 note 2.

10 le under CPR Pt 24: see PARA 524 et seq. 'Summary judgment' is to be interpreted in accordance with CPR Pt 24: CPR 2.3(1).

11 CPR 12.3(3)(a).

12 CPR 12.3(3)(b).

13 CPR 12.3(3)(c)(i).

14 As to the meaning of 'service' see PARA 138 note 2.

15 le under CPR 14.4 or CPR 14.7 (admission of liability to pay all of the money claimed): see PARAS 191, 194.

16 CPR 12.3(3)(c)(ii). As to the procedure to be followed where a defendant admits a money claim and asks for time to pay see CPR Pt 14; and PARA 187 et seq.

17 See CPR 6.17; and PARA 154. See also *Practice Direction--Default Judgment* PD 12 para 4.1(1).

18 le EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79): see PARA 157 et seq.

19 See EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 19(1); and PARA 167.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/ (3) DEFAULT JUDGMENT/(i) Obtaining Default Judgments/508. Procedure for obtaining default judgment.

508. Procedure for obtaining default judgment.

A default judgment may be obtained by request or by application: judgment by request is entered by means of an administrative act without any judicial involvement; judgment by application involves some judicial consideration.

Thus a claimant¹ may obtain a default judgment² by filing a request in the relevant practice form³ where the claim is for:

- 547 (1) a specified amount of money⁴;
- 548 (2) an amount of money to be decided by the court⁵;
- 549 (3) delivery of goods where the claim form gives the defendant⁶ the alternative of paying their value⁷; or
- 550 (4) any combination of these remedies⁸.

The claimant must, however, make an application in accordance with the general rules about applications for court orders⁹ if he wishes to obtain a default judgment on a claim which consists of or includes a claim for any other remedy¹⁰ or where certain specified rules relating to default judgments for costs only¹¹ or for default judgments which must be made by application¹² so provide¹³.

Where a claimant claims any other remedy in his claim form in addition to those specified in heads (1) to (4) above, but abandons that claim in his request for judgment, he may still obtain a default judgment by filing a request under these provisions¹⁴.

In civil proceedings against the Crown¹⁵, a request for a default judgment must be considered by a master or district judge, who must in particular be satisfied that the claim form and particulars of claim have been properly served¹⁶ on the Crown¹⁷.

1 As to the meaning of 'claimant' see PARA 18.

2 The procedure for obtaining a default judgment by filing a request (see the text and notes 3-8) which is dealt with administratively by a court officer who enters judgment, is to be contrasted with the procedure to be followed when the conditions prescribed in CPR 12.3 (see PARA 507) are met, but where the default judgment sought is not one set out in heads (1)-(4) in the text, in which case the claimant must issue and serve an application notice under CPR Pt 23 (see PARA 303 et seq) seeking an order for default judgment, which is dealt with judicially with or without a hearing: see further the text and notes 9-13; and PARAS 513-514. As to the hearing see CPR 23.8; and PARA 308. As to the meaning of 'default judgment' see PARA 506; as to the meaning of 'filing' see PARA 1832 note 8; and as to the meaning of 'court officer' see PARA 49 note 3.

3 See Forms N205A, N205B, N225 and N227 in *The Civil Court Practice*. As to the matters about which the court must be satisfied before entering judgment, which include the filing of a certificate of service see *Practice Direction--Default Judgment* PD 12 para 4.1; and note 9.

4 CPR 12.4(1)(a). Where the claim is for a specified sum of money expressed in a foreign currency, then the judgment will be for the amount of the foreign currency, with the addition of the words 'or the sterling equivalent at the date of payment': see *Practice Direction--Default Judgment* PD 12 para 5.2. Default judgment where the claim is for fixed costs may also be obtained by filing a request: see CPR 12.9(1)(a); and PARA 513. As to costs generally see also PARA 1729 et seq.

5 CPR 12.4(1)(b). As to the meaning of 'court' see PARA 22. As to the procedure for deciding the amount see CPR 12.7; and PARA 511.

6 As to the meaning of 'defendant' see PARA 18.

7 CPR 12.4(1)(c). As to the procedure for deciding value see CPR 12.7; and PARA 511.

8 CPR 12.4(1)(d).

9 Ie in accordance with CPR Pt 23: see PARA 303 et seq. As to the requirements regarding evidence in such applications see *Practice Direction--Default Judgment* PD 12 paras 4.1-4.6. A certificate of service will be sufficient evidence of service of the particulars of claim: see para 4.1(1).

10 CPR 12.4(2)(a). See eg *NCR Ltd v Buchanan* [2000] All ER (D) 1986 (application for summary judgment under CPR Pt 24 (see PARA 524 et seq), alternatively for summary judgment on admissions in writing pursuant to CPR 14.3 (see PARA 190) or alternatively for judgment in default of filing an acknowledgment of service under CPR 12.4, and applications for other interim relief).

11 Ie CPR 12.9: see PARA 513.

12 Ie CPR 12.10: see PARA 514.

13 CPR 12.4(2)(b). In addition, where the defendant is an individual, the claimant must provide the defendant's date of birth (if known) in Part C of the application notice: CPR 12.4(2).

14 See CPR 12.4(3).

15 As defined in CPR 66.1(2): see PARA 1239 note 8.

16 Ie in accordance with the Crown Proceedings Act 1947 s 18 and CPR 6.10: see PARA 145.

17 CPR 12.4(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/ (3) DEFAULT JUDGMENT/(i) Obtaining Default Judgments/509. Nature of judgment where default judgment obtained by filing a request.

509. Nature of judgment where default judgment obtained by filing a request.

Where the claim is for a specified sum of money, the claimant¹ may specify in a request for default judgment² the date by which the whole of the judgment debt is to be paid³ or the times and rate at which it is to be paid by instalments⁴. Except where the claim is for delivery of goods and the claim form gives the defendant⁵ the alternative of paying their value, a default judgment on a claim for a specified amount of money obtained on the filing of a request will be judgment for the amount of the claim, less any payments made, and costs to be paid by the date or at the rate specified in the request for judgment⁶ or, if none is specified, immediately⁷. Where, however, the claim is for delivery of goods and the claim form gives the defendant that alternative, a default judgment obtained on the filing of a request will be judgment requiring the defendant to deliver the goods or, if he does not do so, to pay the value of the goods as decided by the court⁸ less any payments made and to pay costs⁹.

Where the claim is for an unspecified amount of money, a default judgment obtained on the filing of a request will be for an amount to be decided by the court and costs¹⁰.

1 As to the meaning of 'claimant' see PARA 18.

2 I.e. a request filed under CPR 12.4(1): see PARA 508. For the relevant form see Form 205A in *The Civil Court Practice*. As to the meaning of 'filing' see PARA 1832 note 8; and as to the meaning of 'default judgment' see PARA 506.

3 CPR 12.5(1)(a).

4 CPR 12.5(1)(b).

5 As to the meaning of 'defendant' see PARA 18.

6 CPR 12.5(2)(a); and see Form 205A in *The Civil Court Practice*.

7 CPR 12.5(2)(b). Interest may be included in a default judgment obtained by filing a request if the conditions set out in CPR 12.6 are satisfied: see PARA 510. See also CPR 45.4, which provides for fixed costs on the entry of a default judgment. Where the claim is for a specified sum of money expressed in a foreign currency, then the judgment will be for the amount of the foreign currency, with the addition of the words 'or the sterling equivalent at the date of payment': see *Practice Direction--Default Judgment* PD 12 para 5.2. As to costs generally see also PARA 1729 et seq.

8 As to the procedure for deciding the value see CPR 12.7; and PARA 511. As to the meaning of 'court' see PARA 22.

9 CPR 12.5(4). The claimant's right to enter judgment requiring the defendant to deliver goods is subject to CPR 40.14 (judgment in favour of certain part owners relating to the detention of goods: see PARA 1153): CPR 12.5(5).

10 CPR 12.5(3). As to the procedure for deciding the amount see CPR 12.7; and PARA 511.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/ (3) DEFAULT JUDGMENT/(i) Obtaining Default Judgments/510. Interest.

510. Interest.

A default judgment¹ on a claim for a specified amount of money obtained on the filing of a request² may include the amount of interest claimed to the date of judgment if:

- 551 (1) the particulars of claim include the requisite details³;
- 552 (2) where interest is claimed under the general statutory power of the High Court or of a county court to award interest on debts and damages⁴, the rate is no higher than the rate of interest payable on judgment debts at the date when the claim form was issued⁵; and
- 553 (3) the claimant's⁶ request for judgment includes a calculation of the interest claimed for the period from the date up to which interest was stated to be calculated in the claim form to the date of the request for judgment⁷.

In any case where the above provisions do not apply, judgment will be for an amount of interest to be decided by the court⁸.

1 As to the meaning of 'default judgment' see PARA 506.

2 As to filing a request for default judgment see CPR 12.4(1); and PARA 508; and as to the meaning of 'filing' see PARA 1832 note 8.

3 CPR 12.6(1)(a). The details referred to are those required by CPR 16.4: see PARA 587.

4 Ie under the Supreme Court Act 1981 s 35A or the County Courts Act 1984 s 69: see PARA 1149. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

5 CPR 12.6(1)(b). CPR 12.6(1)(b) is amended, as from a day to be appointed, by virtue of the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2), to substitute a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981. At the date at which this title states the law, no such day had been appointed.

6 As to the meaning of 'claimant' see PARA 18.

7 CPR 12.6(1)(c).

8 CPR 12.6(2). As to the procedure for deciding the amount of interest following such a judgment see CPR 16.7; and PARA 511.

UPDATE

510 Interest

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/ (3) DEFAULT JUDGMENT/(i) Obtaining Default Judgments/511. Procedure for deciding an amount or value.

511. Procedure for deciding an amount or value.

Where the claimant¹ obtains a default judgment² on the filing of a request³ and judgment is for an amount of money to be decided by the court⁴, the value of goods to be decided by the court⁵ or an amount of interest to be decided by the court⁶, and the court enters judgment, it will give any directions it considers appropriate⁷ and, if it considers it appropriate, allocate the case⁸.

1 As to the meaning of 'claimant' see PARA 18.

2 As to the meaning of 'default judgment' see PARA 506.

3 I.e. a request under CPR 12.4(1): see PARA 508; and see Forms N205, N227 in *The Civil Court Practice*. As to the meaning of 'filing' see PARA 1832 note 8.

4 CPR 12.7(1)(a). As to the meaning of 'court' see PARA 22

5 CPR 12.7(1)(b).

6 CPR 12.7(1)(c).

7 CPR 12.7(2)(a). For general provisions as to the procedure and case management for assessing the amount of damages payable after such a judgment see *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 12; and PARA 273. On the entry of the judgment the court will list a disposal hearing: paras 12.2(1), 12.4. Where judgment has been entered with damages to be assessed, the defendant can raise any point which goes to the quantification of damages at the subsequent assessment of damages hearing, provided it is not inconsistent with any issue raised by the judgment. The default judgment is only conclusive as to the liability of the defendants as pleaded in the statement of claim: *Lunnun v Singh* [1999] All ER (D) 718, [1999] CPLR 587, CA.

8 CPR 12.7(2)(b). As to allocation to a track see CPR 26.5-CPR 26.8; and PARAS 266-270. Where a case is allocated to the multi-track under CPR 12.7, appeal from the final decision lies to the Court of Appeal: see the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 4 (amended by SI 2003/490). Contrast cases deemed to be allocated to that track under CPR 8.9(c): see PARA 127 note 13. As to appeals see PARA 1657 et seq. The court will not normally allocate the proceedings to a track (other than the small claims track), unless it appears that the amount payable is genuinely disputed on substantial grounds or the dispute is not suitable to be dealt with at a disposal hearing: see *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 12.3(2). If the court does not allocate the assessment to a track the court will direct that a disposal hearing be listed: see paras 12.2(1), 12.4; and note 7. At a disposal hearing the court may give directions or decide the amount payable: para 12.4(2). If the financial value of the claim is such that the claim would, if defended, be allocated to the small claims track, the court will normally allocate it to that track and may treat the disposal hearing as a final hearing in accordance with CPR Pt 27 (see PARA 274 et seq): *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 12.4(3). If the court does not allocate the claim to the small claims track, it may decide the amount payable under or in consequence of the relevant order and give judgment for that amount, or give directions as to the future conduct of the proceedings: para 12.4(2). It will not, however, exercise the power to give judgment (except where the claim has been allocated to the small claims track), unless any written evidence on which the claimant relies has been served on the defendant at least three days before the disposal hearing: para 12.4(5). CPR 32.6 (see PARA 751) applies to evidence at a disposal hearing unless the court otherwise directs: *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 12.4(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/ (3) DEFAULT JUDGMENT/(i) Obtaining Default Judgments/512. Claim against more than one defendant.

512. Claim against more than one defendant.

A claimant¹ may obtain a default judgment² on request³ on a claim for money or a claim for delivery of goods against one of two or more defendants⁴, and proceed with his claim against the other defendants⁵. Where a claimant applies for a default judgment against one of two or more defendants, then if the claim can be dealt with separately from the claim against the other defendants the court⁶ may enter a default judgment against that defendant⁷ and the claimant may continue the proceedings against the other defendants⁸. If, however, the claim cannot be dealt with separately from the claim against the other defendants, the court will not enter default judgment against that defendant⁹ and must deal with the application at the same time as it disposes of the claim against the other defendants¹⁰.

A claimant may not enforce against one of two or more defendants any default judgment¹¹ for possession of land or for delivery of goods unless he has obtained a judgment for possession or delivery¹² against all the defendants to the claim¹³ or the court gives permission¹⁴.

1 As to the meaning of 'claimant' see PARA 18.

2 As to the meaning of 'default judgment' see PARA 506.

3 Ie under CPR Pt 12: see PARA 506 et seq, PARA 513 et seq. See Forms N205A, N205B, N227 in *The Civil Court Practice*.

4 As to the meaning of 'defendant' see PARA 18.

5 CPR 12.8(1).

6 As to the meaning of 'court' see PARA 22

7 CPR 12.8(2)(a)(i).

8 CPR 12.8(2)(a)(ii).

9 CPR 12.8(2)(b)(i).

10 CPR 12.8(2)(b)(ii).

11 See note 3.

12 Ie whether or not obtained under CPR Pt 12: see CPR 12.8(3)(a).

13 CPR 12.8(3)(a).

14 CPR 12.8(3)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/ (3) DEFAULT JUDGMENT/(i) Obtaining Default Judgments/513. Procedure for obtaining a default judgment for costs only.

513. Procedure for obtaining a default judgment for costs only.

Where a claimant¹ wishes to obtain a default judgment² for costs only, then if the claim is for fixed costs³, he may obtain it by filing a request in the relevant practice form⁴. If the claim is for any other type of costs, he must make an application in accordance with the general rules⁵ about applications for court orders⁶. Where such an application is made, judgment will be for an amount to be decided by the court⁷.

1 As to the meaning of 'claimant' see PARA 18.

2 As to the meaning of 'default judgment' see PARA 506.

3 As to when a claimant is entitled to fixed costs see CPR Pt 45; and see *The Civil Court Practice*. As to costs generally see also PARA 1729 et seq.

4 CPR 12.9(1)(a). See Forms N205A, N205B, N227 in *The Civil Court Practice*.

5 ie in accordance with CPR Pt 23: see PARA 303 et seq.

6 See CPR 12.9(1)(b).

7 CPR 12.9(2). As to the meaning of 'court' see PARA 22

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/ (3) DEFAULT JUDGMENT/(i) Obtaining Default Judgments/514. Default judgment obtained by making an application.

514. Default judgment obtained by making an application.

The claimant¹ must make an application in accordance with the general rules about applications for court orders² in order to obtain default judgment³ where the claim is a claim against a child⁴ or protected party⁵, or a claim in tort by one spouse or civil partner against the other⁶. He must also make such application where the defendant⁷ has failed to file an acknowledgment of service⁸ if he wishes to obtain a default judgment:

- 554 (1) against a defendant who has been served with the claim out of the jurisdiction⁹ without the permission of the court¹⁰;
- 555 (2) against a defendant domiciled¹¹ in Scotland or Northern Ireland or in any other Convention territory or member state¹²;
- 556 (3) against a state¹³;
- 557 (4) against a diplomatic agent¹⁴ who enjoys immunity from civil jurisdiction by virtue of the Diplomatic Privileges Act 1964¹⁵; or
- 558 (5) against persons or organisations who enjoy immunity from civil jurisdiction pursuant to the provisions of the International Organisations Acts 1968 and 1981¹⁶.

In addition to these specific cases, the claimant must make an application¹⁷ for default judgment on a claim which consists of or includes a claim for any remedy in respect of which default judgment by filing a request¹⁸ is not available¹⁹; thus, for example, he must make such application where the claim is for delivery up of goods and the defendant will not be allowed the alternative of paying their value²⁰.

Where the claimant makes an application for a default judgment, judgment will be such judgment as it appears to the court that the claimant is entitled to on his statement of case²¹.

1 As to the meaning of 'claimant' see PARA 18.

2 In accordance with CPR Pt 23: see PARA 303 et seq. However, neither the application notice nor any evidence relied on need be served upon a defendant who has failed to file an acknowledgment of service, unless notice needs to be given under any other provision of the Civil Procedure Rules: see CPR 12.11(2), (4)(b), (c). As to the requirements for evidence in such applications see *Practice Direction--Default Judgment* PD 12 para 4, in particular, para 4.1(1) which provides that a certificate of service (see Form N215 in *The Civil Court Practice*) will be sufficient evidence of service where the claimant has served the claim form himself. As to the meaning of 'filing' see PARA 1832 note 8; and as to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'default judgment' see PARA 506.

4 As to the meaning of 'child' see PARA 222 note 3.

5 CPR 12.10(a)(i). On an application against a child or protected party, a litigation friend to act on behalf of the child or protected party must be appointed by the court before judgment can be obtained, and the claimant must satisfy the court by evidence that he is entitled to the judgment claimed: *Practice Direction--Default Judgment* PD 12 para 4.2; and see CPR 12.11(3), cited in note 6. As to the meaning of 'protected party' see PARA 222 note 1; and as to litigation friends see PARA 222.

6 CPR 12.10(a)(ii). An application for a default judgment on a claim against a child or protected party or a claim in tort between spouses or civil partners must be supported by evidence: CPR 12.11(3).

7 As to the meaning of 'defendant' see PARA 18.

8 As to the requirements for filing acknowledgment of service see PARAS 184-186.

9 le under CPR 6.32(1), 6.33(1) or 6.33(2) (service where the permission of the court is not required): see PARA 169. As to the meaning of 'jurisdiction' see PARA 117 note 6. An application for a default judgment may be made without notice if a claim was served in accordance with the Civil Jurisdiction and Judgments Act 1982 or the judgments regulation, unless notice is required under any other provision of the Civil Procedure Rules: see CPR 12.11(4)(a), (c). As to the judgments regulation see CPR 12.11(6)(e); and PARA 169 note 12.

10 CPR 12.10(b)(i). On such an application, or on an application within head (2) in the text, where the defendant has not acknowledged service the evidence must establish that the claim is one that the court has power to hear and decide, that no other court has exclusive jurisdiction to hear and decide the claim, and that the claim has been properly served: see *Practice Direction--Default Judgment* PD 12 para 4.3. Evidence in support of such an application must be by affidavit: para 4.5. As to the meaning of 'affidavit' see PARA 540 note 5. As to proof of service in another member state see also PARA 167.

11 For these purposes, 'domicile' is to be determined, in relation to a Convention territory, in accordance with the provisions of the Civil Jurisdiction and Judgments Act 1982 ss 41-46 (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 84 et seq); and in relation to a member state, in accordance with the judgments regulation and the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 paras 9-12: CPR 12.11(6)(a). For these purposes, 'Convention territory' means the territory or territories of any contracting state, as defined by the Civil Jurisdiction and Judgments Act 1982 s 1(3) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65), to which the Brussels Conventions or Lugano Convention apply: CPR 12.11(6)(b).

12 CPR 12.10(b)(ii). Such a defendant will have been served without the permission of the court under CPR 6.32(1) or 6.33(1): see PARAS 168, 169. See also PARA 168 note 7; and as to evidence in support of the application see note 10. As to proof of service in another member state see also PARA 167.

13 CPR 12.10(b)(iii). For these purposes, 'state' has the meaning given by the State Immunity Act 1978 s 14 (see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 245): CPR 12.11(6)(c). Where an application is made against a state for a default judgment where the defendant has failed to file an acknowledgment of service, the application may be made without notice, but the court hearing the application may direct that a copy of the application notice be served on the state: CPR 12.11(5)(a). If the court either grants the application or directs that a copy of the application notice be served on the state, the judgment or application notice (and the evidence in support) may be served out of the jurisdiction without any further order and the procedure for serving the judgment or the application notice is the same as for serving a claim form under CPR Pt 6 Section III (service out of the jurisdiction: see PARA 168 et seq) except where an alternative method of service has been agreed under the State Immunity Act 1978 s 12(6) (see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 256): CPR 12.11(5)(b), (c). On an application against a state the evidence must (1) set out the grounds of the application; (2) establish the facts proving that the state is excepted from the immunity conferred by the State Immunity Act 1978 s 1; (3) establish that the claim was sent through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the state (unless the state agreed to a different form of service); and (4) establish that the time for acknowledging service, which is extended to two months by s 12(2) of that Act, has expired: *Practice Direction--Default Judgment* PD 12 para 4.4. Evidence in support of such an application must be by affidavit: para 4.5. As to when default judgment against a state takes effect see CPR 40.10; and PARA 1142.

14 For these purposes, 'diplomatic agent' has the meaning given by the Diplomatic Privileges Act 1964 s 1, Sch 1 art 1(e) (see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 273 note 1): CPR 12.11(6)(d).

15 CPR 12.10(b)(iv).

16 CPR 12.10(b)(v). As to such persons and organisations see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 309 et seq.

17 le in accordance with CPR Pt 23: see PARA 303 et seq.

18 As to obtaining default judgment by filing a request see CPR 12.4(1); and PARA 508; CPR 12.9(1)(a) (claim for fixed costs); and PARA 513.

19 See CPR 12.4(2)(a); and PARA 508.

20 See *Practice Direction--Default Judgment* PD 12 para 2.3(4). On an application for judgment for delivery up of goods where the defendant will not be given the alternative of paying their value, the evidence must identify the goods and state where the claimant believes the goods to be situated and why their specific delivery up is sought: para 4.6.

21 CPR 12.11(1). As to the meaning of 'statement of case' see PARA 584.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/ (3) DEFAULT JUDGMENT/(i) Obtaining Default Judgments/515. Special provisions relating to default judgment on certain additional claims.

515. Special provisions relating to default judgment on certain additional claims.

Except in the case of a counterclaim¹ or a claim by a defendant² for contribution³ or indemnity⁴ against another defendant⁵, if the party against whom an additional claim⁶ is made fails to file⁷ an acknowledgment of service or defence in respect of that claim, then the party against whom the additional claim is made is deemed to admit that claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the additional claim⁸. If default judgment is given⁹ against the additional claimant, that claimant may obtain judgment in respect of the additional claim by filing a request in the relevant practice form¹⁰. An additional claimant may not, however, enter judgment under this provision without the court's permission if he has not satisfied the default judgment which has been given against him¹¹ or if he wishes to obtain judgment for any remedy other than a contribution or indemnity¹². An application for such permission may be made without notice unless the court directs otherwise¹³.

The court may at any time set aside¹⁴ or vary a judgment so entered¹⁵.

1 As to the meaning of 'counterclaim' see PARA 618 note 3.

2 As to the meaning of 'defendant' see PARA 18.

3 As to the meaning of 'contribution' see PARA 618 note 3.

4 As to the meaning of 'indemnity' see PARA 232 note 33

5 Ie under CPR 20.6: see PARA 623.

6 As to the meaning of 'additional claim' see PARA 618.

7 As to the meaning of 'filing' see PARA 1832 note 8.

8 CPR 20.11(1), (2)(a).

9 Ie under CPR Pt 12: see PARA 506 et seq.

10 CPR 20.11(1), (2)(b).

11 CPR 20.11(3)(a).

12 CPR 20.11(3)(b).

13 CPR 20.11(4).

14 As to the meaning of 'set aside' see PARA 197 note 6.

15 CPR 20.11(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/ (3) DEFAULT JUDGMENT/(ii) Setting Aside or Varying Default Judgments/516. Setting aside or varying a default judgment as of right.

(ii) Setting Aside or Varying Default Judgments

516. Setting aside or varying a default judgment as of right.

The rules in Part 13 of the Civil Procedure Rules¹ set out the procedure for setting aside² or varying judgment entered under Part 12 of the rules³.

The court⁴ must set aside a judgment entered under Part 12 if judgment was wrongly entered because:

- 559 (1) in the case of a judgment in default of acknowledgment of service⁵, the conditions upon which a default judgment is obtainable relating to the filing of an acknowledgment of service or defence⁶ were not satisfied, or the defendant has applied for an order striking out the claim or for summary judgment and that application has not been disposed of⁷, or the claimant is seeking judgment on a money claim and the defendant has filed or served an admission⁸ together with a request to pay⁹;
- 560 (2) in the case of a judgment in default of a defence¹⁰, the conditions upon which a default judgment is obtainable relating to the filing of a defence were not satisfied¹¹ or the other circumstances set out in head (1) above apply¹²; or
- 561 (3) the whole of the claim was satisfied before judgment was entered¹³.

These are the only grounds on which a default judgment must be set aside as of right; the fact that the defendant did not know of the claim because he had not received the claim form does not, on its own, entitle the defendant to have the default judgment set aside¹⁴.

1 le CPR Pt 13: see the text and notes 2-13; and PARAS 517-519.

2 As to the meaning of 'set aside' see PARA 197 note 6.

3 CPR 13.1. As to judgments entered under CPR Pt 12 (default judgments) see PARA 506 et seq; and as to the meaning of 'default judgment' see PARA 506. As to the procedure for varying the rate at which a county court judgment debt must be paid see CPR Sch 2 CCR Ord 22 r 10. See also the County Courts Act 1984 s 71; and PARA 1229.

4 As to the meaning of 'court' see PARA 22.

5 As to when judgment in default of acknowledgment of service may be obtained by filing a request see CPR 12.3(1); and PARA 507. As to when such default judgment must be obtained by making an application see CPR 12.10(b); and PARA 514. As to the meaning of 'service' see PARA 138 note 2; and As to the meaning of 'filing' see PARA 1832 note 8.

6 le any of the conditions in CPR 12.3(1), (3): see PARA 507.

7 See CPR 12.3(a); and PARA 507. As to the meaning of 'striking out' see PARA 218 note 2; and as to summary judgment see PARA 524 et seq.

8 le under CPR 14.4 or CPR 14.7 (see PARAS 191, 194): see CPR 12.3(3)(c).

9 See CPR 13.2(a).

10 As to when judgment in default of defence may be obtained by filing a request see CPR 12.3(2); and PARA 507. As to when such default judgment must be obtained by making an application see CPR 12.10(a); and PARA 514.

11 Ie any of the conditions in CPR 12.3(2), (3): see PARA 507.

12 See CPR 13.2(b).

13 CPR 13.2(c).

14 See *Akram v Adam*[2004] EWCA Civ 1601, [2005] 1 All ER 741; but cf *Nelson v Clearsprings (Management) Ltd*[2006] EWCA Civ 1252, [2007] 2 All ER 407.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/ (3) DEFAULT JUDGMENT/(ii) Setting Aside or Varying Default Judgments/517. Discretionary setting aside or varying of a default judgment.

517. Discretionary setting aside or varying of a default judgment.

In a case where the court¹ is not required to set aside² a default judgment entered under Part 12 of the Civil Procedure Rules³, the court has a discretion to set aside or vary such a judgment if the defendant has a real prospect of successfully defending the claim⁴ or it appears to the court that there is some other good reason why the judgment should be set aside or varied⁵ or the defendant should be allowed to defend the claim⁶. An application under this provision must be supported by evidence⁷. In considering whether to set aside or vary a judgment so entered, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly⁸.

When making an order setting aside or varying a default judgment, the court may attach conditions, including a condition that the defendant pay a sum of money into court⁹.

When a claim form or an equivalent document has had to be transmitted to another member state for the purpose of service, under the provisions of the service regulation¹⁰, and a default judgment has been entered against a defendant who has not appeared, the judge has the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if certain conditions are fulfilled¹¹. An application for relief may be filed only within a reasonable time after the defendant has knowledge of the default judgment¹².

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'set aside' see PARA 197 note 6.

3 I.e. under CPR 13.2: see PARA 516. As to CPR Pt 12 (default judgments) see PARA 506 et seq; and as to the meaning of 'default judgment' see PARA 506.

4 CPR 13.3(1)(a). The words 'a real prospect of successfully defending the claim' do not need amplification, elaboration or explanation: *Swain v Hillman* [2001] 1 All ER 91, [1999] CPLR 779, CA, when considering the same wording in relation to summary judgment (see CPR 24.2; and PARA 524). The wording of CPR 13.3(1)(a) requires a case to be better than merely arguable before a judgment entered by default can be set aside; a person who holds a regular judgment, even a default judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason: *International Finance Corp'n v Ute Africa Sprl* [2001] All ER (D) 101 (May) per Moore-Bick J. As to setting aside judgments and orders see also PARA 1143.

5 CPR 13.3(1)(b). For an example of a case where such an application was refused see *Solid Capital Markets (UK) Ltd v Little Rock Mining* [2001] All ER (D) 104 (Jan).

6 CPR 13.3(1)(c). The purpose of CPR 13.3 is to avoid injury to a defendant or a third party and nothing therein entitles a claimant to vary or set aside a judgment in circumstances where that variation would increase the judgment amount in his favour: *Hertford Management Ltd v Mastorakis* [2001] All ER (D) 277 (Mar).

7 CPR 13.4(3).

8 CPR 13.3(2); but see *MacDonald v Thorn plc* [1999] All ER (D) 989, [1999] CPLR 660, CA (delay not a ground per se for refusing to set aside a default judgment).

9 See CPR 3.1(3); and PARA 247. A condition should not be imposed unless the party has some prospect of compliance with it: *Chapple v Williams* [1999] CPLR 731, CA.

10 I.e. EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79): see PARA 157 et seq.

11 See EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 19(4); and PARA 167.

12 See EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) art 19(4). As to the application of this provision to applications to appeal a default judgment when the time limit for appealing has expired see CPR 13.3. note. As to time limits generally see PARA 88 et seq.

UPDATE

517 Discretionary setting aside or varying of a default judgment

NOTE 9--See *Camden LBC v Makers UK Ltd* [2009] EWHC 605 (TCC), (2009) 124 Con LR 32 (imposition of condition prohibiting defendant from commencing adjudication refused).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/ (3) DEFAULT JUDGMENT/(ii) Setting Aside or Varying Default Judgments/518. Application to set aside or vary a default judgment; procedure.

518. Application to set aside or vary a default judgment; procedure.

Where:

- 562 (1) the claim is for a specified amount of money;
- 563 (2) the judgment was obtained in a court which is not the defendant's home court¹;
- 564 (3) the claim has not been transferred to another defendant's home court under the rules relating to admissions² or automatic transfer³; and
- 565 (4) the defendant is an individual,

the court⁴ will transfer an application by a defendant to set aside or vary judgment to the defendant's home court⁵. This does not, however, apply where the claim was commenced in a specialist list⁶.

1 As to the meaning of 'defendant's home court' see PARA 58 note 16; and as to the meaning of 'defendant' see PARA 18.

2 Ie under CPR 14.12: see PARA 197.

3 Ie under CPR 26.2: see PARA 261.

4 As to the meaning of 'court' see PARA 22.

5 CPR 13.4(1).

6 CPR 13.4(2). As to the meaning of 'specialist list' see PARA 67 note 8; and as to specialist proceedings see PARA 1536 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/ (3) DEFAULT JUDGMENT/(ii) Setting Aside or Varying Default Judgments/519. Abandoned claim restored where default judgment set aside.

519. Abandoned claim restored where default judgment set aside.

Where the claimant¹ claimed a remedy in addition to the remedy which entitled him to obtain judgment in default by making a request² and he abandoned his claim for that additional remedy in order to obtain default judgment³ on request⁴, then if that default judgment is set aside⁵, the abandoned claim is restored when the default judgment is set aside⁶.

1 As to the meaning of 'claimant' see PARA 18.

2 Ie a remedy specified in CPR 12.4(1): see PARA 508.

3 As to the meaning of 'default judgment' see PARA 506.

4 Ie in accordance with CPR 12.4(3): see PARA 508.

5 Ie under CPR Pt 13: see PARAS 516-518.

6 CPR 13.6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(4) STRIKING OUT A CLAIM OR DEFENCE/520. Power to strike out a statement of case.

(4) STRIKING OUT A CLAIM OR DEFENCE

520. Power to strike out a statement of case.

The court¹ may strike out² a statement of case³ if it appears to the court:

- 566 (1) that the statement of case discloses no reasonable grounds for bringing or defending the claim⁴;
- 567 (2) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings⁵; or
- 568 (3) that there has been a failure to comply with a rule, practice direction or court order⁶.

This provision does not limit any other power of the court to strike out a statement of case⁷.

Where a court officer⁸ is asked to issue a claim form which he believes may fall within head (1) or head (2) above, he should issue it, but may then consult a judge⁹ who may, on his own initiative, make an immediate order designed to ensure that the claim is disposed of or that it proceeds in accordance with the Civil Procedure Rules¹⁰. The judge may allow the claimant¹¹ a hearing before deciding whether to make such an order¹². The fact that a judge allows a claim referred to him by a court officer to proceed does not prejudice the right of any party to apply for any order against the claimant¹³.

A court officer may similarly consult a judge about any document filed which purports to be a defence and which he believes may fall within head (1) or head (2) above¹⁴. If the judge decides that the document falls within either of those heads, he may on his own initiative make an order striking it out and where he does so he may extend the time for the defendant to file a proper defence¹⁵. He may allow the defendant a hearing before deciding whether to make such an order¹⁶. Alternatively, the judge may make an order¹⁷ requiring the defendant within a stated time to clarify his defence or to give additional information about it and the order may provide that the defence will be struck out if the defendant does not comply¹⁸. The fact that a judge does not strike out a defence on his own initiative does not prejudice the right of the claimant to apply for any order against the defendant¹⁹.

When the court strikes out a statement of case it may make any consequential order it considers appropriate²⁰.

Where the court has struck out a claimant's statement of case and the claimant has been ordered to pay costs to the defendant, then if, before the claimant pays those costs, he starts another claim against the same defendant, arising out of facts which are the same or substantially the same as those relating to the claim in which the statement of case was struck out, the court may, on the application of the defendant, stay that other claim until the costs of the first claim have been paid²¹.

Where a judge at a hearing strikes out all or part of a party's statement of case he may enter such judgment for the other party as that party appears entitled to²².

A party may believe he can show without a trial that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because

of a point of law, including the construction of a document. In such a case the party concerned may make an application²³ under the above provisions or an application for summary judgment²⁴, or both, as he thinks appropriate²⁵.

The court may strike out part only of a statement of case in order to limit the issues which are to be litigated between the parties²⁶.

If the court strikes out a claimant's statement of case and it considers that the claim is totally without merit, the court's order must record that fact and the court must at the same time consider whether it is appropriate to make a civil restraint order²⁷.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'striking out' see PARA 218 note 2.

3 For these purposes and the purposes of CPR 3.5 (see PARA 521), reference to a statement of case includes reference to part of a statement of case: CPR 3.4(1). As to the meaning of 'statement of case' see PARA 584. The power to strike out a statement of case under CPR 3.4 (see the text and notes 4-25) is an example of the court's active case management function to dispose summarily of issues which do not require full investigation at trial (see CPR 1.4(2)(c); and PARA 246): *Practice Direction--Striking out a Statement of Case* PD 3A para 1.1. The practice direction draws a parallel between this power and that under CPR 24.2 (see PARA 524) to give summary judgment: see *Practice Direction--Striking out a Statement of Case* PD 3A para 1.2. Whilst a party may apply for an order under these provisions, the court may also exercise these powers on its own initiative at any time (see CPR 3.3, in particular CPR 3.3(3), (5) as to notices to be given to parties when the court proposes to make or makes such an order; and PARA 251): *Practice Direction--Striking out a Statement of Case* PD 3A para 4.1. See also *Sinclair v Chief Constable of West Yorkshire* [2000] All ER (D) 2240, CA.

Where the court proposes to make such an order of its own initiative, it will not allocate the claim to a track but instead it will either (1) fix a hearing, giving the parties at least 14 days' notice of the date of the hearing and of the issues which it is proposed that the court will decide; or (2) make an order directing a party to take the steps described in the order within a stated time and specifying the consequence of not taking those steps: *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 5.4(1), (2). Where the court decides at the hearing of an application or a hearing fixed under para 5.4(2)(a) (see head (1)) that the claim (or part of the claim) is to continue it may treat that hearing as an allocation hearing, allocate the claim and give case management directions, or give other directions: para 5.5.

4 CPR 3.4(2)(a). Examples of claims which may be struck out under this rule include claims which set out no facts indicating what the claim is about, those which are incoherent and make no sense and those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant: see *Practice Direction--Striking out a Statement of Case* PD 3A para 1.4. Examples of defences which may be struck out under this rule include those which consist of a bare denial or otherwise set out no coherent statement of facts (and thus do not comply with CPR 16.5: see PARA 599) or which set out facts, which, although coherent, would not, even if true, amount in law to a defence to the claim: see *Practice Direction--Striking out a Statement of Case* PD 3A para 1.6. For an example of an application which was refused see *Turner v Copeland* [2000] All ER (D) 1439. See also *Walsh v Staines* [2008] EWCA Civ 1324, [2008] All ER (D) 34 (Dec).

5 CPR 3.4(2)(b). A claim may fall within this rule if it is vexatious, scurrilous or obviously ill-founded: *Practice Direction--Striking out a Statement of Case* PD 3A para 1.5. As to vexatious litigants see para 7.1; and PARA 258. As to striking out under CPR 3.4(2)(b) see eg *Felix v Department of Social Security* [2001] All ER (D) 85 (Jan) (when drafting a compromise settlement agreement in respect of employment rights it is beneficial specifically to spell out whether it is intended to encompass personal injury claims so as to avoid future litigation); *Carter Commercial Developments Ltd v Bedford Borough Council* [2001] All ER (D) 388 (Jul), [2001] 34 EG 99 (CS); *Harris v Bolt Burdon* [2000] CPLR 9, CA. See also *Harris v Society of Lloyd's*, *Adams v Society of Lloyd's* [2008] EWHC 1433 (Comm), [2008] All ER (D) 04 (Jul) (abuse of process to bring fraud action based on the same cause of action and the same documents as previous action).

6 CPR 3.4(2)(c); and see CPR 3.5; and PARA 521. It is the policy of CPR 3.4 that a claimant who is guilty of delay, and is in breach of an order of the court, is in default at his own peril if the issues in his case, for whatever reason, cannot still be tried fairly; where a fair trial cannot take place, a claimant is not entitled to raise a defence that the defendants are equally in breach of the rules: *West Riding Automobile Co Ltd v West Yorkshire Passenger Transport* [1999] All ER (D) 1165. See also *Habib Bank Ltd v Abbeypool Ltd* [2001] EWCA Civ 62, [2001] All ER (D) 185 (Jan) (claimant failing to adhere to timetabled directions); *UCB Corporate Services plc v Halifax (SW) Ltd* [1999] CPLR 691, CA (judge's failure to consider lesser sanctions available to him did not vitiate striking out). As to the court's general approach under CPR 3.4 see *Purdy v Cambran* [1999] All ER (D) 1518, [1999] CPLR 843, CA; and see eg *Walsh v Misseldine* [2000] All ER (D) 261, [2000] CPLR 201, CA; *S v*

Gloucestershire County Council [2001] Fam 313, [2000] 3 All ER 346, CA; *Chief Constable of Kent v Rixon* [2000] All ER (D) 476, CA; *Green v Hancocks (a firm)* [2000] Lloyd's Rep PN 813; *Mehta v Reid* [2000] All ER (D) 2406, CA; *Arab News Network v Khazen* [2001] EWCA Civ 118, [2001] All ER (D) 38 (Feb); *Delos Ltd v CAE Electronics Ltd* [2001] All ER (D) 253 (Feb); *Hyundai Engineering and Construction Co Ltd v His Royal Highness Prince Jefri Bolkiah* [2001] All ER (D) 104 (Mar); *Eastgate Group Ltd v Lindsey Morden Group Inc* [2001] All ER (D) 264 (Mar), [2001] NLJR 458; *Lennon v Birmingham City Council* [2001] EWCA Civ 435, [2001] IRLR 826, [2001] All ER (D) 321 (Mar); *Rio Guadalete SA of Panama v Hopwood* [2001] EWCA Civ 445, [2001] All ER (D) 322 (Mar); *W v Surrey County Council* [2001] EWCA Civ 691, [2001] All ER (D) 04 (May); *Clarke v Marlborough Fine Art (London) Ltd* [2001] All ER (D) 189 (May); *Chapper v M & L Management and Legal Ltd* [2001] All ER (D) 235 (May); *Tanna v Tanna* [2001] All ER (D) 333 (May); *Playboy Enterprises Inc v Levy* [2001] All ER (D) 71 (Jun); *Arkin v Borchard Lines Ltd (No 2)* [2001] All ER (D) 186 (Jun); *Thomas v News Group Newspapers* [2001] EWCA Civ 1233, [2001] All ER (D) 246 (Jul), [2001] 34 LS Gaz R 43.

7 CPR 3.4(5). As to striking out where there has been an abuse of process see eg *Habib Bank Ltd v Jaffer* [2000] All ER (D) 424, [2000] CPLR 438, CA; *Collins v CPS Fuels Ltd* [2001] EWCA Civ 1597, [2001] All ER (D) 124 (Oct). As to striking out for want of prosecution see eg *Heathrow Airport Ltd v Gross* [1999] CPLR 247; *Rogers v Rhys Evans (a firm)* [2000] All ER (D) 433, [2000] CPLR 400, CA.

8 As to the meaning of 'court officer' see PARA 49 note 3.

9 le under CPR 3.2: see PARA 250. As to the meaning of 'judge' see PARA 49.

10 *Practice Direction--Striking out a Statement of Case* PD 3A para 2.1.

11 As to the meaning of 'claimant' see PARA 18.

12 *Practice Direction--Striking out a Statement of Case* PD 3A para 2.3. Orders the judge may make include (1) an order that the claim be stayed until further order; (2) an order that the claim form be retained by the court and not served until the stay is lifted; (3) an order that no application by the claimant to lift the stay be heard unless he files such further documents (eg a witness statement or an amended claim form or particulars of claim) as may be specified in the order: para 2.4. Where the judge makes any such order or, subsequently, an order lifting the stay he may give directions about the service on the defendant of the order and any other documents on the court file: para 2.5. As to the meaning of 'stay' see PARA 233 note 11; as to the meaning of 'defendant' see PARA 18; and as to the meaning of 'filing' see PARA 1832 note 8.

13 *Practice Direction--Striking out a Statement of Case* PD 3A para 2.6.

14 *Practice Direction--Striking out a Statement of Case* PD 3A para 3.1.

15 *Practice Direction--Striking out a Statement of Case* PD 3A para 3.2.

16 *Practice Direction--Striking out a Statement of Case* PD 3A para 3.3.

17 le under CPR 18.1: see PARA 611.

18 *Practice Direction--Striking out a Statement of Case* PD 3A para 3.4.

19 *Practice Direction--Striking out a Statement of Case* PD 3A para 3.5.

20 CPR 3.4(3). The court's case management powers under CPR 3.4 are not available to employment tribunals in the absence of express provision: *Care First Partnership Ltd v Roffey* [2001] ICR 87, [2001] IRLR 85, CA.

21 CPR 3.4(4). As to costs generally see also PARA 1729 et seq.

22 *Practice Direction--Striking out a Statement of Case* PD 3A para 4.2.

23 Such application must be made under CPR Pt 23 (see PARA 303 et seq) and must, in particular, be made as soon as possible and before allocation if possible: see *Practice Direction--Striking out a Statement of Case* PD 3A para 5.1; and see also *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 5.3. While many applications under CPR 3.4(2) (see heads (1)-(3) in the text) can be made without evidence in support, the applicant must consider whether facts need to be proved and, if so, whether evidence in support should be filed and served: *Practice Direction--Striking out a Statement of Case* PD 3A para 5.2.

24 le under CPR Pt 24: see PARA 524 et seq.

25 *Practice Direction--Striking out a Statement of Case* PD 3A para 1.7.

26 See *AXA Insurance Co Ltd v Swire Fraser Ltd* [2000] CPLR 142, (2000), Times, 19 January, CA.

27 CPR 3.4(6). As to civil restraint orders see PARA 259.

UPDATE

520 Power to strike out a statement of case

NOTE 5--The power of the court to strike out a statement of case if it appears that it is an abuse of process does not provide a power to strike out a claim at the end of a hearing where there is no suggestion that it had not been possible to hold a fair hearing: *Ul-Haq v Shah*[2009] EWCA Civ 542, [2010] 1 All ER 73.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(4) STRIKING OUT A CLAIM OR DEFENCE/521. Judgment without trial after striking out.

521. Judgment without trial after striking out.

Where the court¹ makes an order which includes a term that the statement of case² of a party must be struck out³ if the party does not comply with the order⁴ and the party against whom the order was made does not comply with it⁵, any other party may obtain judgment with costs by filing⁶ a request for judgment if the order relates to the whole of a statement of case⁷ and, where the party wishing to obtain judgment is the claimant⁸, the claim is for:

- 569 (1) a specified amount of money⁹;
- 570 (2) an amount of money to be decided by the court¹⁰;
- 571 (3) delivery of goods where the claim form gives the defendant¹¹ the alternative of paying their value¹²; or
- 572 (4) any combination of these remedies¹³.

The request must state that the right to enter judgment has arisen because the court's order has not been complied with¹⁴.

In a case where the order including a term that the statement of case is to be struck out does not relate to the whole of the statement of case, and the conditions set out in heads (1) to (4) above do not apply¹⁵, a party must make an application¹⁶ if he wishes to obtain judgment against a party who has failed to comply with a term of an order as provided above¹⁷.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'statement of case' for these purposes see PARA 520 note 3.

3 As to the meaning of 'striking out' see PARA 218 note 2.

4 CPR 3.5(1)(a); and see eg *Dowles Manor Properties Ltd v Bank of Namibia* [1999] CPLR 259; *QPS Consultants Ltd v Kruger Tissue (Manufacturing) Ltd* [1999] All ER (D) 1000, [1999] CPLR 710, CA.

5 CPR 3.5(1)(b).

6 As to the meaning of 'filing' see PARA 1832 note 8.

7 CPR 3.5(2)(a). The order referred to is that referred to in CPR 3.5(1)(a): CPR 3.5(2)(a).

8 As to the meaning of 'claimant' see PARA 18.

9 CPR 3.5(2)(b)(i).

10 CPR 3.5(2)(b)(ii).

11 As to the meaning of 'defendant' see PARA 18.

12 CPR 3.5(2)(b)(iii). Where judgment is obtained under CPR 3.5 in a case to which CPR 3.5(2)(b)(iii) applies, it will be judgment requiring the defendant to deliver the goods, or (if he does not do so) to pay the value of the goods as decided by the court (less any payments made): CPR 3.5(3). As to assessments of value by the court see *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 12; and PARA 273.

13 CPR 3.5(2)(b)(iv). As to costs generally see also PARA 1729 et seq.

- 14 CPR 3.5(4).
- 15 Ie in a case where CPR 3.5(2) does not apply: CPR 3.5(5).
- 16 Ie under CPR Pt 23: see PARA 303 et seq.
- 17 CPR 3.5(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(4) STRIKING OUT A CLAIM OR DEFENCE/522. Setting aside judgment entered after striking out.

522. Setting aside judgment entered after striking out.

A party against whom the court¹ has entered judgment for failure to comply with a term of an order including a term that the statement of case of a party is to be struck out if the order is not complied with² may apply to the court to set the judgment aside³. The application must be made not more than 14 days after the judgment has been served⁴ on the party making the application⁵.

If the right to enter judgment had not arisen at the time when judgment was entered, the court must set aside the judgment⁶ but if the application to set aside is made for any other reason, the court will have regard to the criteria prescribed⁷ for granting relief from sanctions⁸.

1 As to the meaning of 'court' see PARA 22.

2 Ie under CPR 3.5: see PARA 521.

3 See CPR 3.6(1). As to the meaning of 'set aside' see PARA 197 note 6.

4 As to the meaning of 'service' see PARA 138 note 2.

5 CPR 3.6(2).

6 CPR 3.6(3).

7 Ie CPR 3.9 (relief from sanctions: see PARA 256) will apply: CPR 3.6(4).

8 See CPR 3.6(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(4) STRIKING OUT A CLAIM OR DEFENCE/523. Striking out as sanction for non-payment of certain fees.

523. Striking out as sanction for non-payment of certain fees.

In certain circumstances¹ where the claimant² has not paid a court fee by a specified date, and has not applied for exemption from or remission of such fee by that date, the claim will be struck out³ and he will be liable for costs incurred by the defendant⁴ unless the court orders otherwise⁵.

These provisions are discussed elsewhere in this title⁶.

1 le the circumstances set out in CPR 3.7(1)-(3); see PARA 253.

2 As to the meaning of 'claimant' see PARA 18.

3 As to the meaning of 'striking out' see PARA 218 note 2.

4 As to the meaning of 'defendant' see PARA 18.

5 See CPR 3.7(4). As to the meaning of 'court' see PARA 22. As to costs generally see also PARA 1729 et seq.

6 See PARA 253.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(5) SUMMARY JUDGMENT/524. Summary judgment; in general.

(5) SUMMARY JUDGMENT

524. Summary judgment; in general.

Part 24 of the Civil Procedure Rules¹ sets out the procedure by which the court² may decide a claim or a particular issue without a trial³.

The court may give summary judgment against a claimant⁴ or defendant⁵ on the whole of a claim or on a particular issue⁶ if it considers that the claimant has no real prospect of succeeding on the claim or issue⁷ or that the defendant has no real prospect of successfully defending the claim or issue⁸ and there is no other compelling reason why the case or issue should be disposed of at a trial⁹.

Where it appears to the court possible that a claim or a defence may succeed but improbable that it will do so, the court may make a conditional order that the claimant or the defendant pay a sum of money into court¹⁰ or take a specified step in relation to his claim or defence and providing that, if he fails to do so, the claim will be dismissed or his statement of case be struck out¹¹.

The court may give summary judgment against a claimant in any type of proceedings¹² and may give summary judgment against a defendant in any type of proceedings¹³ except:

- 573 (1) proceedings for possession of residential premises against a mortgagor¹⁴ or against a tenant or person holding over after the end of his tenancy, whose occupancy is protected within the meaning of the Rent Act 1977¹⁵ or the Housing Act 1988¹⁶; and
- 574 (2) proceedings for an Admiralty claim in rem¹⁷.

¹ ie CPR Pt 24: see the text and notes 2-17; and PARA 525 et seq.

² As to the meaning of 'court' see PARA 22.

³ CPR 24.1. See also CPR 53.2 (special provision about summary disposal of defamation claims in accordance with the Defamation Act 1996); and **LIBEL AND SLANDER**. See also *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 5 (summary judgment or other early termination); and PARA 525.

⁴ As to the meaning of 'claimant' see PARA 18.

⁵ As to the meaning of 'defendant' see PARA 18.

⁶ The application may be based on a point of law (including a question of construction of a document) or the evidence which may reasonably be expected to be available at trial or the lack of it, or a combination of these: *Practice Direction--the Summary Disposal of Claims* PD 24 para 1.3. See eg *Burgess v Governor of Maidstone Prison* [2001] 1 WLR 93, CA (defendant contending claim manifestly bad in law); *Dodson v Peter H Dodson Insurance Services (a firm)* [2001] 3 All ER 75, [2001] 1 WLR 1012, CA (construction of insurance policy); *Chiemgauer Membran Und Zeltbau GmbH v New Millenium Experience Co Ltd* [2000] All ER (D) 2313 (construction of clause in contract). As to the consideration of cases of great factual complexity, or cases where the issues involved mix questions of fact and law and where the application of law is complex because it depends on detailed findings of fact, see *De Molestina v Ponton* [2002] 1 All ER (Comm) 587, [2001] All ER (D) 206 (May) per Colman J (if the law is to some extent uncertain, that in itself may not be a reason for postponing to trial full argument upon it, for if the law can be as fully argued on the application as at trial, the achievement of the overriding objective may be more fully satisfied by the disposal of the issue of law on the hearing of the application). As to the overriding objective see PARA 33.

7 CPR 24.2(1)(a)(i). The words 'no real prospect of being successful or succeeding' do not need amplification, elaboration or explanation: *Swain v Hillman*[2001] 1 All ER 91, [1999] CPLR 779, CA. The prospect of success must be realistic rather than fanciful: *Nugent v Benfield Group plc* [2001] EWCA Civ 397, [2001] All ER (D) 166 (Mar); and see eg *Chief Constable of Kent v Rixon* [2000] All ER (D) 476, CA; *MSC Mediterranean Shipping Co SA v Delumar BVBA* [2000] 2 All ER (Comm) 458; *Turner v Copeland*[2000] All ER (D) 1439; *Khalaghy v Alliance and Leicester plc* [2000] All ER (D) 1499, CA; *Sinclair v Chief Constable of West Yorkshire* [2000] All ER (D) 2240, CA; *Green v Hancocks (a firm)*[2000] All ER (D) 2318, CA; *Royal Westmoreland v Skene* [2000] All ER (D) 2508; *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737, [2001] All ER (D) 352 (Feb); *Hyundai Engineering and Construction Co Ltd v His Royal Highness Prince Jefri Bolkiah* [2001] All ER (D) 104 (Mar); *Royal Brompton Hospital National Health Service Trust v Hammond* [2001] EWCA Civ 550, [2001] All ER (D) 130 (Apr), [2001] BLR 297; *Sasea Finance Ltd v KPMG* [2001] All ER (D) 127 (May); *Asprey & Garrard Ltd v WRA (Guns) Ltd (t/a William R Asprey Esq)*[2001] All ER (D) 244 (May); *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Co* [2001] All ER (D) 329 (May); *Kane v New Forest District Council* [2001] EWCA Civ 878, [2001] 3 All ER 914; *Branson v Bowyer*[2002] QB 737, [2001] All ER (D) 159 (Jun); *Arkin v Borchard Lines Ltd (No 2)* [2001] All ER (D) 186 (Jun); *Solo Industries UK Ltd v Canara Bank* [2001] EWCA 1041, [2001] 2 All ER (Comm) 217, [2001] 1 WLR 1800; *Stern v Channel Hotels & Properties Ltd* [2001] All ER (D) 238 (Jul); *Thomas v News Group Newspapers* [2001] EWCA Civ 1233, [2001] All ER (D) 246 (Jul), [2001] 34 LS Gaz R 43; *Mills v Ministry of Agriculture, Fisheries and Food* [2001] EWCA Civ 1346, [2001] All ER (D) 450 (Jul). Early identification of the issues should take place at the case management stage in order to avoid the unsatisfactory position of having to allocate court time and call witnesses, only to have the matter summarily dismissed: see the observations of the court in *James v Evans* [2000] 3 EGLR 1, [2000] 42 EG 173, CA. For an application for summary judgment to succeed where a strike out application would not, the court first needs to be satisfied that all substantial relevant facts which are reasonably capable of being before the court are before it, that those facts are undisputed or that there is no real prospect of successfully disputing them and that there is no real prospect of oral evidence affecting the court's assessment of the facts: see *S v Gloucestershire County Council* [2001] Fam 313, [2000] 3 All ER 346, CA. As to applications to strike out see CPR 3.4; and PARA 520.

8 CPR 24.2(1)(a)(ii); and see the cases cited in note 7.

9 CPR 24.2(1)(b). See also CPR 3.4 (court may strike out a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim); and PARA 520.

10 Ie under CPR 3.1(3) (see PARA 247), so that the money will stand as security for any sum payable by that party to any other party to the proceedings (see CPR 3.1(6A); and PARA 247). A condition should not be imposed unless the party has some prospect of complying with it: *Chapple v Williams* [1999] CPLR 731, CA. See eg *Rainford House Ltd (in administrative receivership) v Cadogan Ltd* [2001] All ER (D) 144 (Feb) (summary judgment stayed on condition of payment into court).

Notwithstanding, however, that it may be desirable for a claimant to receive some payment pending proper determination of his claim, a court has no power on an application for summary judgment under CPR Pt 24 to make an order for interim payment. Accordingly, a party should in practice make two applications, for summary judgment and in the alternative for an interim payment under CPR Pt 25 (see PARA 315 et seq): see *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] BLR 207, [2001] All ER (D) 384 (Feb).

11 *Practice Direction--the Summary Disposal of Claims* PD 24 paras 4, 5.2. As to the procedure to be followed if there is a failure to comply with the conditions of the order and the effect of such failure see CPR 3.5; and PARA 521. As to the meaning of 'striking out' see PARA 218 note 2.

12 CPR 24.3(1). CPR 24.3 does not, however, override the specific provision of the Supreme Court Act 1981 s 69(1) allowing for jury trials in certain proceedings: see *Safeway Stores plc v Tate*[2001] QB 1120, [2001] 4 All ER 193, CA; but cf *Alexander v Arts Council of Wales* [2001] EWCA Civ 514, [2001] 4 All ER 205, [2001] 1 WLR 1840, explaining the decision in *Safeway Stores plc v Tate*[2001] QB 1120, [2001] 4 All ER 193, CA. As to jury trial see PARA 1132. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

13 Ie including claims for accounts and inquiries (see *Practice Direction--the Summary Disposal of Claims* PD 24 para 6) and for specific performance of contracts relating to the sale or purchase of land (and similar related contracts) or rescission of such contracts or for the forfeiture or return of deposits paid under such contracts (see para 7). As to accounts and inquiries see PARA 1524 et seq; and as to specific performance of contracts see **SPECIFIC PERFORMANCE**.

14 CPR 24.3(2)(a)(i).

15 As to protected tenancies within the meaning of the Rent Act 1977 see **LANDLORD AND TENANT** vol 27(1) (Reissue) PARA 666.

16 CPR 24.3(2)(a)(ii). As to protected tenancies within the meaning of the Housing Act 1988 see **LANDLORD AND TENANT** vol 27(1) (Reissue) PARA 872.

17 CPR 24.3(2)(b). As to Admiralty claims see **SHIPPING AND MARITIME LAW**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(5) SUMMARY JUDGMENT/525. Procedure for obtaining summary judgment.

525. Procedure for obtaining summary judgment.

A claimant¹ may not apply for summary judgment until the defendant² against whom the application is made has filed an acknowledgment of service³ or a defence⁴, unless the court⁵ gives permission or a practice direction provides otherwise⁶. If a claimant applies for summary judgment before a defendant against whom the application is made has filed a defence, that defendant need not file a defence before the hearing⁷.

A party intending to make such an application must do so before or when filing his allocation questionnaire⁸. Where a party makes an application for such an order before a claim has been allocated to a track the court will not normally allocate the claim before the hearing of the application⁹. Where a party files an allocation questionnaire stating that he intends to make such an application but has not done so, the judge will usually direct that an allocation hearing is listed¹⁰. The application may be heard at that allocation hearing if the application notice has been issued and served in sufficient time¹¹.

Where a summary judgment hearing is fixed, the respondent (or the parties where the hearing is fixed of the court's own initiative) must be given at least 14 days' notice of the date fixed for the hearing¹² and the issues which it is proposed that the court will decide at the hearing¹³. A practice direction may, however, provide for a different period of notice to be given¹⁴.

1 As to the meaning of 'claimant' see PARA 18.

2 As to the meaning of 'defendant' see PARA 18.

3 As to the period for filing an acknowledgment of service see CPR 10.3; and PARA 186. As to the meaning of 'filing' see PARA 1832 note 8; and as to the meaning of 'service' see PARA 138 note 2.

4 As to the period for filing a defence see CPR 15.4; and PARA 201. Where the claimant has failed to comply with any relevant pre-action protocol, an action for summary judgment will not normally be entertained before the defence has been filed or, alternatively, the time for doing so has expired: *Practice Direction--the Summary Disposal of Claims* PD 24 para 2(6). As to pre-action protocols see PARAS 13, 107 et seq.

5 As to the meaning of 'court' see PARA 22.

6 CPR 24.4(1). In civil proceedings against the Crown, as defined in CPR 66.1(2) (see PARA 1239 note 8), a claimant may not apply for summary judgment until after expiry of the period for filing a defence specified in CPR 15.4: CPR 24.4(1A). In a case where the claim is for specific performance of an agreement (whether in writing or not) for the sale or purchase of land (and similar related contracts) or for rescission of such a contract or for the forfeiture or return of deposits paid under such a contract, application for summary judgment may be made at any time after service of the claim form, whether or not time for acknowledging service has expired, whether or not the defendant has acknowledged service and even if particulars of claim have not been served: see *Practice Direction--the Summary Disposal of Claims* PD 24 para 7.1. The application notice in such a case must have attached to it the text of the order sought by the claimant: para 7.2. That application notice, and a copy of every affidavit or witness statement in support and of any exhibit referred to therein, must be served on the defendant not less than four days before the hearing of the application, rather than the normal 14 days specified in CPR 24.4(3) (see the text and note 12); so that CPR 24.5 (see PARA 526) cannot, therefore, apply: *Practice Direction--the Summary Disposal of Claims* PD 24 para 7.3.

7 CPR 24.4(2). See also CPR 12.3(3)(a)(ii) (claimant may not obtain a judgment in default of the filing of a defence if the defendant has applied for summary judgment); and PARA 507.

8 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 5.3(1). As to filing an allocation questionnaire see PARA 263.

9 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 5.3(2).

10 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 5.3(3).

11 *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 5.3(4).

12 CPR 24.4(3)(a). As to the court's power to make orders on its own initiative and the notices required to be given see CPR 3.3; and PARA 251. As to time limits generally see PARA 88 et seq. Where the court proposes to make such an order of its own initiative, it will not allocate the claim to a track but instead it will either (1) fix a hearing, giving the parties at least 14 days' notice of the date of the hearing and of the issues which it is proposed that the court will decide; or (2) make an order directing a party to take the steps described in the order within a stated time and specifying the consequence of not taking those steps: *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 5.4(1), (2). Where the court decides at the hearing of an application or a hearing fixed under para 5.4(2)(a) (see head (1)) that the claim (or part of the claim) is to continue it may treat that hearing as an allocation hearing, allocate the claim and give case management directions, or give other directions: para 5.5.

13 CPR 24.4(3)(b). The application notice (see Form N244 or Form PF244 (for use in the Royal Courts of Justice) in *The Civil Court Practice*) must include a statement that it is an application for summary judgment made under CPR Pt 24 and that notice, or the evidence contained or referred to in it or served with it, must (1) identify concisely any point of law or provision in a document on which the applicant relies; and/or (2) state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue, and in either case state that the applicant knows of no other reason why the disposal of the claim or issue should await trial: *Practice Direction--the Summary Disposal of Claims* PD 24 para 2(2), (3). Unless the application notice itself contains all the evidence (if any) on which the applicant relies, the application notice must identify the written evidence on which the applicant relies; but this does not affect the applicant's right to file further evidence under CPR 24.5(2) (see PARA 526): *Practice Direction--the Summary Disposal of Claims* PD 24 para 2(4). The application notice must draw the attention of the respondent to CPR 24.5(1) (procedure where respondent wishes to rely on written evidence at the hearing: see PARA 526): *Practice Direction--the Summary Disposal of Claims* PD 24 para 2(5). See also CPR Pt 23 (general rules about how to make an application: see PARA 303 et seq) and, in particular, CPR 23.6 (application notice must state what order is being sought and, briefly, why it is being sought: see PARA 306).

14 CPR 24.4(4). See note 6.

UPDATE

525 Procedure for obtaining summary judgment

NOTE 13--See *Financial Services Authority v Anderson* [2010] EWHC 308 (Ch), [2010] All ER (D) 250 (Feb) (adjournment of application for summary judgment).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(5) SUMMARY JUDGMENT/526. Evidence for the purposes of a summary judgment hearing.

526. Evidence for the purposes of a summary judgment hearing.

If the respondent to an application for summary judgment wishes to rely on written evidence at the hearing, he must file¹ the written evidence and serve² copies on every other party to the application, at least seven days before the summary judgment hearing³. If the applicant wishes to rely on written evidence in reply, he must file the written evidence and serve a copy on the respondent at least three days before the summary judgment hearing⁴.

Where a summary judgment hearing is fixed by the court⁵ of its own initiative:

575 (1) any party who wishes to rely on written evidence at the hearing must file the written evidence and, unless the court orders otherwise, serve copies on every other party to the proceedings, at least seven days before the date of the hearing⁶;

576 (2) any party who wishes to rely on written evidence at the hearing in reply to any other party's written evidence must file the written evidence in reply and, unless the court orders otherwise, serve copies on every other party to the proceedings, at least three days before the date of the hearing⁷.

These provisions do not, however, require written evidence to be filed if it has already been filed or to be served on a party on whom it has already been served⁸.

1 As to the meaning of 'filing' see PARA 1832 note 8.

2 As to the meaning of 'service' see PARA 138 note 2.

3 CPR 24.5(1). As to time limits generally see PARA 88 et seq. CPR 24.5 does not apply in the case of certain claims for specific performance etc: see *Practice Direction--the Summary Disposal of Claims* PD 24 para 7; and PARA 525 note 6.

4 CPR 24.5(2). As to specific requirements for that evidence see PARA 525 the text and note 13.

5 As to the meaning of 'court' see PARA 22.

6 CPR 24.5(3)(a).

7 CPR 24.5(3)(b).

8 CPR 24.5(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(5) SUMMARY JUDGMENT/527. Determination of a summary judgment application.

527. Determination of a summary judgment application.

The hearing of a summary judgment application will normally take place before a master or a district judge but the master or district judge may direct that the application be heard by a High Court judge (if the case is in the High Court) or a circuit judge (if the case is in a county court)¹.

When the court determines a summary judgment application it may give directions as to the filing² and service³ of a defence⁴ and further directions about the management of the case⁵.

The orders the court may make on an application for summary judgment include:

- 577 (1) judgment on the claim;
- 578 (2) the striking out⁶ or dismissal of the claim;
- 579 (3) the dismissal of the application;
- 580 (4) a conditional order⁷;
- 581 (5) summary assessment of costs⁸.

1 *Practice Direction--the Summary Disposal of Claims* PD 24 para 3(1), (2).

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 As to the meaning of 'service' see PARA 138 note 2.

4 CPR 24.6(a).

5 CPR 24.6(b); and see *Practice Direction--the Summary Disposal of Claims* PD 24 para 10 (where the court dismisses the application or makes an order that does not completely dispose of the claim, it will give case management directions as to the future conduct of the case; this is in exercise of the court's active case management, particularly under CPR 1.4(2)(i): see PARA 246).

6 As to the meaning of 'striking out' see PARA 218 note 2.

7 *Practice Direction--the Summary Disposal of Claims* PD 24 para 5.1(1)-(4). As to the power to attach conditions to an order see CPR 3.1(3); and PARA 247. As to the meaning of 'conditional order' for these purposes see PARA 524 text and notes 10-11.

8 See *Practice Direction--the Summary Disposal of Claims* PD 24 para 9.2, drawing attention to the court's powers under *Practice Direction about Costs* PD43-48. If an order does not mention costs, no party is entitled to costs relating to that order: see CPR 44.13(1); and *Practice Direction--the Summary Disposal of Claims* PD 24 para 9.3. As to costs generally see also PARA 1729 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(5) SUMMARY JUDGMENT/528. Setting aside or varying an order for summary judgment.

528. Setting aside or varying an order for summary judgment.

If an order for summary judgment¹ is made against a respondent who does not appear at the hearing of the application, he may apply for the order to be set aside² or varied³ and the court may make such order as it considers just⁴.

1 Ie under CPR Pt 24: see PARA 524 et seq.

2 As to the meaning of 'set aside' see PARA 197 note 6.

3 *Practice Direction--the Summary Disposal of Claims* PD 24 para 8.1. See also CPR 23.11(2) (power of court to proceed in party's absence; application for re-listing of case); and PARA 313.

4 *Practice Direction--the Summary Disposal of Claims* PD 24 para 8.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(6) STAY OF PROCEEDINGS/529. In general.

(6) STAY OF PROCEEDINGS

529. In general.

A stay of proceedings¹ arises under an order of the court² which puts a stop or 'stay' on the further conduct of the proceedings in that court at the stage which they have then reached, so that the parties are precluded thereafter from taking any further step in the proceedings³. The object of the order is to avoid the trial or hearing of the claim taking place, where the court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of process.

The court's power to stay proceedings may be exercised under particular statutory provisions⁴, or under the Civil Procedure Rules⁵ or under the court's inherent jurisdiction⁶, or under one or all of these powers, since they are cumulative, not exclusive, in their operation.

1 A stay of proceedings must be distinguished from (1) a stay of execution (see CPR Sch 1 RSC Ord 47 r 1; *Ferdinand Wagner (a firm) v Laubscher Bros & Co (a firm)*[1970] 2 QB 313, [1970] 2 All ER 174, CA; and PARA 1361); and (2) stay pending an appeal (see CPR 52.7; and PARA 1669). Given that Court of Appeal judges are available even out of hours to consider an immediate stay of a county court order, it is unnecessary for a limited stay to be granted in order to give a claimant more time: *A (Child) (Change of Residence)*(2007) Times, 27 June, CA.

As to the stay of particular proceedings eg **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 845 et seq. As to the restraint of legal proceedings by injunction see PARA 316 et seq. As to the stay of proceedings by vexatious litigants see PARA 258. As to *lis alibi pendens* see PARA 536; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 128.

2 A stay of proceedings may take effect without a court order (1) if a defendant has admitted part of a claim and the claimant fails to return the required notice within the 14-day time limit set out in CPR 14.5 (see PARA 192); (2) if a defendant has admitted the whole of a claim for an unspecified amount of money and the claimant fails to file a request for judgment within the 14-day time limit set out in CPR 14.6 (see PARA 193); (3) if a defendant has offered to pay a sum of money in satisfaction of a claim for an unspecified amount of money and the defendant does not return the required notice within the 14-day time limit specified in CPR 14.7 (see PARA 194); (4) where the claimant fails to respond within the 28-day time limit set out in CPR 15.10 to a defendant's defence that an amount of money claimed has been paid (see PARA 203); (5) where neither party has taken any active steps in the proceedings and at least six months have elapsed since the period for filing the defence (see CPR 15.11; and PARA 205); (6) on acceptance of a Part 36 offer (defined in PARA 115 note 1) in relation to the whole claim, unless the claimant is a child or mental protected party (defined in PARA 222 notes 3, 1 respectively) (see CPR 36.11(1); and PARA 737). Other exceptions may be where the claimant is adjudged bankrupt (*Realisations Industrielles et Commerciales SA v Loescher & Partners*[1957] 3 All ER 241, [1957] 1 WLR 1026, per Lynskey J), and where the claimant becomes a mental protected party (see *Yonge v Toynbee*[1910] 1 KB 215, CA).

3 Such an order will not prevent the defendant from applying to dismiss the action: *La Grange v McAndrew*(1879) 4 QBD 210.

4 See PARA 531.

5 See PARA 532.

6 See PARA 533 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(6) STAY OF PROCEEDINGS/530. Effect of stay of proceedings.

530. Effect of stay of proceedings.

A stay of proceedings is not the equivalent of a judgment or of a discontinuance, and may be removed if proper grounds are shown, even if the stay is imposed by a consent order¹. In contrast with a judgment for the defendant or the dismissal or discontinuance of a claim, in the case of a stay of proceedings, whether conditional or absolute, the claim still subsists²; it is still 'pending'³, and the stay is therefore always potentially capable of being removed⁴.

A stay may be removed if good cause or proper grounds are shown or the continuance of the stay could cause or produce injustice or prejudice or where there has been a change in the law⁵. In the case of a general stay, an application for its removal is necessary⁶. On the other hand, the order to stay proceedings may define the circumstances in which it will be removed. For example, the order may provide that a specified act or condition should be performed or complied with within a specified time, otherwise the claim will be dismissed or the claimant will be at liberty to enter judgment within a specified time. In these circumstances the stay is removed immediately upon performance or compliance with the specified act or condition, and no application for the removal of the stay is necessary.

1 *Cooper v Williams* [1963] 2 QB 567, [1963] 2 All ER 282, CA. An order for the stay of proceedings does not have the effect of a *res judicata*: *Cooper v Williams* [1963] 2 QB 567, [1963] 2 All ER 282, CA. The former doubt raised by Willis J in *Selig v Lion* [1891] 1 QB 513 at 515, DC, whether a stay was a discontinuance which could not be removed or whether it was not the equivalent of a discontinuance and so could be removed has been answered by the Court of Appeal in favour of the second view: *Cooper v Williams* [1963] 2 QB 567, [1963] 2 All ER 282, CA. As to discontinuance see PARA 723 et seq.

2 *Empson v Smith* [1966] 1 QB 426, [1965] 2 All ER 881, CA.

3 See *MacCabe v Joynt* [1901] 2 IR 115. See also *Thomas v Exeter Flying Co* (1887) 18 QBD 822, DC (stay by withdrawal of juror).

4 See *Empson v Smith* [1966] 1 QB 426, [1965] 2 All ER 881, CA. So long as proceedings are only stayed, either party can come to the court: see *Harrington v Ramage* [1907] WN 137. In some cases, however, the restrictions or conditions imposed by the order to stay have the effect of bringing the entire proceedings to an end, in which event the stay will operate as a dismissal; and it may thereafter be necessary to examine closely the form of the order to determine whether the stay was intended to be permanent in the sense that no proper grounds can be adduced for its removal.

5 See *Empson v Smith* [1966] 1 QB 426, [1965] 2 All ER 881, CA, where there was a change in the law since the stay was imposed. See also *Bennett v Gamgee* (1876) 2 Ex D 11 (affd (1877) 46 LJQB 204, CA); *Selig v Lion* [1891] 1 QB 513, DC; *Bean v Flower* (1895) 73 LT 371, CA.

6 The application must be made in accordance with CPR Pt 23: see PARA 303 et seq. In deciding whether to lift the stay, the court must have regard to the overriding objective of the Civil Procedure Rules: see CPR 1.1, 1.2; and PARA 33.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(6) STAY OF PROCEEDINGS/531. Stay under statutory powers.

531. Stay under statutory powers.

Power to stay proceedings is conferred by a number of particular statutes, including (by way of example which does not purport to constitute an exhaustive list) the Arbitration Act 1996¹, the Insolvency Act 1986², the Domicile and Matrimonial Proceedings Act 1973³, the Law Reform (Husband and Wife) Act 1962⁴ and the Supreme Court Act 1981⁵.

1 See the Arbitration Act 1996 ss 9, 86; and **ARBITRATION** vol 2 (2008) PARA 1222.

2 See the Insolvency Act 1986 s 126 (registered companies); and **COMPANIES** vol 14 (2009) PARA 48; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 887; the Insolvency Act 1986 s 227 (unregistered companies and partnerships); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1155, 1260; and the Insolvency Act 1986 s 285 (bankrupt individuals); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 730.

3 See the Domicile and Matrimonial Proceedings Act 1973 s 5(6), Sch 1 para 8; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 841.

4 See the Law Reform (Husband and Wife) Act 1962 s 1(2); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 211.

5 Proceedings by a vexatious litigant may be stayed under the Supreme Court Act 1981 s 42: see PARA 258. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(6) STAY OF PROCEEDINGS/532. Stay under the Civil Procedure Rules.

532. Stay under the Civil Procedure Rules.

Except where the Civil Procedure Rules provide otherwise, the court¹ may stay² the whole or part of any proceedings or judgment either generally or until a specified date or event³.

Where the court makes an order of its own initiative without hearing the parties or giving them an opportunity to make representations⁴, a party affected by the order may apply to have it stayed and the order must contain a statement of the right to make such an application⁵.

Proceedings may be stayed to allow for settlement of a case⁶ and claims may be stayed under a group litigation order (a 'GLO')⁷ until further order⁸.

These powers are part of the court's general powers of case management and must be exercised in accordance with the overriding objective⁹.

Unless the court orders otherwise, an appeal does not generally operate as a stay¹⁰.

Subject to certain exceptions, under the transitional arrangements made by the practice direction supplementing Part 51 of the rules, if any pre-existing proceedings did not come before a judge, at a hearing or on paper, between 26 April 1999 and 25 April 2000, those proceedings were automatically stayed¹¹. Any party to those proceedings might, however, apply for the stay to be lifted¹².

An application to stay civil proceedings pending the determination of related criminal proceedings may be made by any party to the civil proceedings or by the prosecutor or any defendant in the criminal proceedings¹³.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'stay' see PARA 233 note 11. See also PARA 529.

3 See CPR 3.1(2)(f); and PARA 247 head (6) in the text.

4 ie under CPR 3.3(1): see PARA 251.

5 See PARA 251.

6 See CPR 26.4; and PARA 265.

7 As to group litigation orders see PARA 233.

8 See CPR 19.11(3)(a); and PARA 233.

9 As to case management see PARA 246 et seq. As to the overriding objective see PARA 33.

10 See CPR 52.7; and PARA 1669.

11 See CPR 51.1, which states that a practice direction may make provision for the extent to which the rules were to apply to proceedings issued before 26 April 1999 (the date when the Civil Procedure Rules came into force: see PARA 30); and *Practice Direction--Transitional Arrangements* PD 51 para 19(1). The exceptions are: (1) where the case had been given a fixed trial date which was after 25 April 2000; (2) personal injury cases where there was no issue on liability but the proceedings had been adjourned by court order to determine the prognosis; (3) where the court was dealing with the continuing administration of an estate or a trust or a receivership; and (4) applications relating to funds in court: see para 19(3). As to funds in court see PARA 1548 et seq.

12 See *Practice Direction--Transitional Arrangements* PD 51 para 19(2). A stay may be lifted subject to conditions, even where the litigant is under a disability: see *Stacey v Joint Mission Hospital Equipment Board Ltd* [2001] All ER (D) 207 (Oct).

13 See *Practice Direction--Applications* PD 23A para 11A; and PARA 310.

UPDATE

532 Stay under the Civil Procedure Rules

NOTE 3--See *Anglo Swiss Holdings Ltd v Packman Lucas* [2009] EWHC 3212 (TCC), (2009) 128 ConLR 67 (stay of proceedings pending compliance with adjudicator's decision).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(6) STAY OF PROCEEDINGS/533. Stay under inherent jurisdiction; in general.

533. Stay under inherent jurisdiction; in general.

The inherent jurisdiction of the court to stay proceedings is preserved by the Supreme Court Act 1981¹. This jurisdiction is, of course, discretionary², since it is exercisable where the court thinks fit to do so³, and the court may impose terms⁴. The court's general jurisdiction to stay proceedings in proper cases is not limited by the Civil Procedure Rules, and indeed is distinct from the jurisdiction conferred by the rules⁵, since the two sources of the court's power continue to exist side by side and may be invoked cumulatively or alternatively⁶.

Under its inherent jurisdiction the court has power to order the stay of proceedings or further proceedings in a variety of circumstances. These include power to stay proceedings:

- 582 (1) where there has been an abuse of the process of the court⁷;
- 583 (2) by striking out a notice of appeal where it is plainly not competent⁸;
- 584 (3) unless and until the claimant in a claim for damages for personal injuries submits himself to a medical examination of a reasonable character which is reasonably required⁹;
- 585 (4) unless and until the claimant gives security for costs as ordered¹⁰;
- 586 (5) where the costs of a previous claim or previous proceedings have not been paid¹¹;
- 587 (6) where the proceedings are instituted or continued without lawful authority by the claimant¹²;
- 588 (7) upon an agreement to refer the matter to a foreign court or tribunal¹³;
- 589 (8) where the parties have concluded an agreement for the compromise or settlement of a pending claim¹⁴;
- 590 (9) where a claim is begun by a minor or mental protected party without a litigation friend¹⁵;
- 591 (10) where there are cross-claims between the same parties¹⁶.

The court has an inherent jurisdiction to adjourn proceedings for a stated time¹⁷, but not generally or for an unreasonably long time¹⁸.

1 The Supreme Court Act 1981 s 49(3) provides that nothing in that Act is to affect the power of the Court of Appeal or the High Court to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceedings. This provision repeats in substance the Supreme Court of Judicature (Consolidation) Act 1925 s 41 proviso (a), and possibly also s 41 proviso (b) (both repealed), as to which see *Re Wickham, Marony v Taylor* (1887) 35 ChD 272, CA, although, of course, those provisions did not confer any new jurisdiction on the court: see *The James Westoll* [1905] P 47, CA. It may also be useful as well as necessary to refer to the Supreme Court Act 1981 s 19(2)(b), which provides that the High Court may exercise all such other jurisdiction (ie jurisdiction not conferred on it by that Act or any other Act), whether civil or criminal, as was exercisable by it immediately before the commencement of the Act (ie 1 January 1982: s 153(2)), including jurisdiction conferred on a judge of the High Court by any statutory provision. Jurisdiction under its inherent powers was exercisable by the High Court before that date in a great variety of circumstances to order the stay of proceedings. The effect of s 19(2)(b) is to confer statutory authority on the exercise of this jurisdiction, and it may, somewhat anomalously, appear that the powers to stay proceedings under the inherent jurisdiction of the court are now exercisable under its statutory jurisdiction. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to the court's inherent jurisdiction generally see PARA 15.

2 *Bettinson v Bettinson* [1965] Ch 465, [1965] 1 All ER 102.

3 Supreme Court Act 1981 s 49(3).

4 *Saunderson v Consolidated Credit and Mortgage Corp Ltd* (1890) 6 TLR 404. See, however, *Bright v Killey* (1900) 16 TLR 559, CA.

5 As to stay under the Civil Procedure Rules see PARA 532.

6 See *Re Wickham, Marony v Taylor* (1887) 35 ChD 272, CA; *Blair v Cordner (No 2)* (1887) 36 WR 64; *Davey v Bentinck* [1893] 1 QB 185, CA. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

7 As to abuse of process see PARA 534.

8 *Aviagents Ltd v Balstravest Investments Ltd* [1966] 1 All ER 450, [1966] 1 WLR 150, CA. This power can, of course, only be exercised by the appeal court itself.

9 *Edmeades v Thames Board Mills Ltd* [1969] 2 QB 67, [1969] 2 All ER 127, CA. The onus is on the party applying for such a stay to show that the examination is reasonable in the interest of justice (*Lane v Willis* [1972] 1 All ER 430, [1972] 1 WLR 326, CA), but if the defendant requests that the medical examination be carried out by a particular medical consultant, the onus is on the claimant to show some substantial ground of refusal (eg that the particular doctor is likely to conduct his examination unkindly or make his report unfavourably: *Starr v National Coal Board* [1977] 1 All ER 243, [1977] 1 WLR 63, CA). As to weighing the reasonableness of the defendant's request for an examination and the claimant's refusal see *Aspinall v Sterling Mansell Ltd* (1978) [1981] 3 All ER 866; *Prescott v Bulldog Tools Ltd* [1981] 3 All ER 869. Unless good and substantial reasons are put before it, the court will ordinarily impose a condition that the claimant's doctor should be present at the claimant's medical examination: *Hall v Avon Area Health Authority (Teaching)* [1980] 1 All ER 516, [1980] 1 WLR 481, CA. Indeed, when making an order staying the proceedings unless and until the claimant submits himself to a medical examination on behalf of the defendant, the court will ordinarily make such an order unconditionally, and will not impose a term that the report of the defendant's medical adviser be disclosed to the claimant: *Mearity v DJ Ryan & Sons Ltd* [1980] 2 All ER 832, [1980] 1 WLR 1237, CA, not following and perhaps negating *Clarke v Martlew* [1973] QB 58, [1972] 3 All ER 764, CA, and *McGinley v Burke* [1973] 2 All ER 1010, [1973] 1 WLR 990, CA. On the other hand, it has been held that the court will not order a stay of the action by a widow claiming damages under the Fatal Accidents Act 1976 if she refuses to submit to a medical examination, in the absence of some concrete basis for such examination, such as that she might be suffering from a grave or terminal disease: *Baugh v Delta Water Fittings Ltd* [1971] 3 All ER 258, [1971] 1 WLR 1295; but this is questionable. See also *Whitehead v Avon County Council* (1996) 29 BMLR 152, CA (stay of proceedings where plaintiff refused to submit to psychiatric examination unless allowed to have friend present during examination); and *Smith v Ealing Hammersmith and Hounslow Health Authority* [1997] 8 Med LR 290, CA (application for stay in default of a medical examination refused where the defendant could obtain all it reasonably needed from disclosure of the plaintiff's medical records). Note that in the cases cited in this paragraph which predate the introduction of the new civil procedure, the claimant is referred to as the 'plaintiff': see PARA 18. As to the new civil procedure see PARA 24 et seq.

10 See *La Grange v McAndrew* (1879) 4 QBD 210; *Re Hürter's Trade-Mark* [1887] WN 71; *Whiteley Exerciser Ltd v Gamage* [1898] 2 Ch 405; *Seal and Edgelow v Kingston* [1908] 2 KB 579 at 582, CA. As to security for costs generally PARA 745 et seq. As to costs generally see also PARA 1729 et seq.

11 *McCabe v Bank of Ireland* (1889) 14 App Cas 413, HL. See also *Society of Lloyd's v Jaffray* [1999] 1 All ER (Comm) 354, [1999] Lloyd's Rep IR 182; and *Sinclair v British Telecommunications plc* [2000] 2 All ER 461, [2001] 1 WLR 38, CA. The reasonable exercise of the court's power to stay proceedings on the ground that costs of previous litigation have not been paid does not breach a litigant's right to a fair trial under the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)) art 6: *Stevens v School of Oriental and African Studies* (2001) Times, 2 February.

12 See *Fricker v Van Grutten* [1896] 2 Ch 649, CA, where a plaintiff was added without authority; *Yonge v Toynbee* [1910] 1 KB 215, CA, where a solicitor acted for a mental protected party in ignorance of his unsoundness of mind; *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307, HL, where the plaintiff company was an enemy alien; *Tetlow v Orel Ltd* [1920] 2 Ch 24, where the action was brought in the name of a deceased plaintiff; *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, HL, where the action was brought in the name of a non-existent company. See also *Clay v Oxford* (1866) LR 2 Exch 54; *Deutsche Bank and Disconto Gesellschaft v Banque des Marchands de Moscou* (1932) 158 LT 364, CA. This ground cannot be raised as a defence to the action, but must be raised and dealt with before the trial: *Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse* [1925] AC 112, HL (approving *Richmond v Branson & Son* [1914] 1 Ch 968), applied in *Airways Ltd v Bowen* [1985] BCLC 355, [1985] LS Gaz R 1863, CA; *Banco de Bilbao v Sancha* [1938] 2 KB 176, [1938] 2 All ER 253, CA. A solicitor acting without authority may be ordered to pay the costs thrown away personally: *Yonge v Toynbee* [1910] 1 KB 215, CA.

13 *Law v Garrett* (1878) 8 ChD 26, CA; *Kirchner & Co v Gruban* [1909] 1 Ch 413; *The Eleftheria* [1970] P 94, [1969] 2 All ER 641. See also *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114, [1944] 1 All ER 60, CA. However, the court has a discretion to determine otherwise, eg where the English court has jurisdiction, the parties are strangers to the foreign court and the balance of convenience favours the English court: see *The Fehmarn* [1958] 1 All ER 333, [1958] 1 WLR 159, CA. See also *Radhakrishna Hospitality Service Private Ltd and Eures SA v EIH Ltd* [1999] 2 Lloyd's Rep 249 (stay granted where defendant offered undertaking not to challenge jurisdiction in favour of another court if the proceedings were brought in any one of the available courts within that jurisdiction).

14 *Eden v Naish* (1878) 7 Ch D 781; *Henderson v Underwriting and Agency Association Ltd* (1891) 65 LT 732, CA.

15 See *Geilinger v Gibbs* [1897] 1 Ch 479; *Re Seager Hunt, Silicate Paint Co and JB Orr & Co Ltd v Hunt* [1906] 2 Ch 295; *Re Lord Townshend's Settlement, Lord Townshend v Robins* [1908] 1 Ch 201; *Fernée v Gorlitz* [1915] 1 Ch 177; *Cooper v Dummett* [1930] WN 248.

16 See *Thomson v South Eastern Rly Co* (1882) 9 QBD 320, CA; *Rees v Luxmoore* (1888) 4 TLR 355. In the claim which continues the claimant in the stayed proceedings will be entitled to raise the issues he had raised in the stayed proceedings by way of defence or counterclaim. The stayed proceedings will generally be the proceedings brought against the person on whom the burden of proof lies (see *Thomson v South Eastern Rly Co* (1882) 9 QBD 320, CA; *Rees v Luxmoore* (1888) 4 TLR 355; *Rechnitzer v Samuel* (1906) 95 LT 75), although convenience may be the deciding factor (*Thrutchley & Co Ltd v Sharman* (1917) 143 LT Jo 236).

17 *Hinckley and South Leicestershire Permanent Benefit Building Society v Freeman* [1941] Ch 32, [1940] 4 All ER 212.

18 *Robertson v Cilia* [1956] 3 All ER 651, [1956] 1 WLR 1502.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(6) STAY OF PROCEEDINGS/534. Abuse of process.

534. Abuse of process.

The most important ground on which the court exercises its inherent jurisdiction to stay proceedings is that of abuse of process¹. This power will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity². The applicant for a stay on this ground must show not merely that the claimant might not, or probably would not, succeed, but that he could not possibly succeed on the basis of the pleadings and the facts of the case³.

It is an abuse of process to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings⁴.

A party may be guilty of an abuse of the process of the court even though he may comply with the strict literal terms of an applicable rule of law, where he does so for improper or ulterior motives or purposes⁵.

The court will not stay pending proceedings on the ground that there is prospective legislation before Parliament which might affect the rights of the parties⁶; and if there are concurrent civil and criminal proceedings against the same defendant arising out of the same matter, the court has a discretion whether to stay the civil proceedings pending the conclusion of the criminal proceedings, taking into account all the circumstances⁷.

1 It has been said that this is a power which ought to be exercised sparingly and only in an exceptional case (see *Lawrance v Lord Norreys* (1890) 15 App Cas 210, HL; *Dyson v A-G* [1911] 1 KB 410, CA; and see also *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210, HL; *Salaman v Secretary of State in Council of India* [1906] 1 KB 613, CA), but striking out and summary judgment are now more readily available under the Civil Procedure Rules (see PARA 520 et seq). It is an abuse of process to proceed by way of an ordinary claim where the proper procedure would be an application for judicial review: see *O'Reilly v Mackman* [1983] 2 AC 237, [1982] 3 All ER 1124, HL. See also *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All ER (Comm) 303 (no stay will be ordered where a contractual dispute resolution procedure simply provides for negotiations, as it is not a condition precedent to legal proceedings).

2 See *Dawkins v Prince Edward of Saxe Weimar* (1876) 1 QBD 499 (action (now known as a 'claim': see PARA 18) in respect of acts done in the course of duty by a military board of inquiry); *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210, HL (action by bankrupt for maliciously procuring his bankruptcy); *Willis v Earl Beauchamp* (1886) 11 PD 59, CA (action for revocation of letters of administration granted in 1798); *Reichel v Magrath* (1889) 14 App Cas 665, HL (defence setting up same case as that alleged in earlier dismissed action); *Macdougall v Knight* (1890) 25 QBD 1, CA (res judicata); *Lawrance v Lord Norreys* (1890) 15 App Cas 210, HL (ejectment action based on general allegation of fraud); *Haggard v Pélacier Frères* [1892] AC 61, PC (action against judge of Consular Court of Madagascar for dismissing action); *Chaffers v Goldsmid* [1894] 1 QB 186, DC (action against member of Parliament for refusing to present petition to the House of Commons); *Chatterton v Secretary of State for India in Council* [1895] 2 QB 189, CA (libel action based on communications relating to matters of state made by one officer of state to another); *Remington v Scoles* [1897] 2 Ch 1, CA (defence denying matters admitted on oath in earlier proceedings); *Stephenson v Garnett* [1898] 1 QB 677, CA (action raising same question as that already determined in county court interlocutory proceedings); *Marchioness of Huntly v Gaskell* [1905] 2 Ch 656, CA (whole of embarrassing claim struck out although defendants only sought to strike out parts); *Salaman v Secretary of State in Council of India* [1906] 1 KB 613, CA (acts of state); *Egbert v Short* [1907] 2 Ch 205 (action for negligence against solicitor conducting proceedings in India); *Re Norton's Settlement, Norton v Norton* [1908] 1 Ch 471, CA (action brought in England rather than India in order to obtain undue advantage over defendants); *Burr v Smith* [1909] 2 KB 306, CA (libel action against Official Receiver in respect of observations on the affairs of a company in liquidation); *Roesin v A-G* (1918) 34 TLR 417, CA (action by foreigner for declaration of nationality anticipating liability for military service); *Wright v Bennett* [1948] 1 All ER 227, CA (action on substantially the same ground as earlier dismissed action); *Day v William Hill (Park Lane) Ltd* [1949] 1 KB 632, [1949] 1 All ER 219, CA (action for gambling debts under guise of so-called account stated); *Law v Dearnley* [1950] 1 KB 400, [1950] 1 All ER 124, CA (action for gambling debts on account stated); *First National Bank plc v Walker* [2001] 1 FCR 21, [2001] Fam Law 182, [2000] All ER (D) 1955, CA (mortgagor

prevented from relying on defence of undue influence in possession proceedings where she had acknowledged mortgage liability for purpose of ancillary relief proceedings).

3 *Goodson v Grierson* [1908] 1 KB 761, CA. See also *Republic of Peru v Peruvian Guano Co* (1887) 36 Ch D 489. It is not, however, the function of the court to enter into a minute and protracted examination of the facts and documents of the case in order to determine whether the claimant can show a prima facie cause of action: *Wenlock v Moloney* [1965] 2 All ER 871, [1965] 1 WLR 1238, CA. Note that in this case, and all the cases cited in this paragraph which predate the introduction of the new civil procedure, the claimant is referred to as the 'plaintiff': see PARA 18. As to the new civil procedure see PARA 24.

4 *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, PC; and see *Manson v Vooght* [1999] BPIR 376, [1999] CPLR 133, CA; *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, [2001] 1 All ER 481, HL. It is otherwise if the second claim is brought against a person whom the claimant could but did not join in the earlier claim (*Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54, [1977] 1 WLR 510), and the second claim will not be stayed if the claimant relies on a different contract with different terms (*Hardy v Elphick* [1974] Ch 65, [1973] 2 All ER 914, CA). See also *Sweetman v Shepherd* [2000] All ER (D) 391, [2000] CPLR 378, CA; and *Harris v Society of Lloyd's*, *Adams v Society of Lloyd's* [2008] EWHC 1433 (Comm), [2008] All ER (D) 04 (Jul) (abuse of process to bring fraud action based on the same cause of action and the same documents as previous action).

5 *Castanho v Brown and Root (UK) Ltd* [1981] AC 557, [1981] 1 All ER 143, HL.

6 *Willow Wren Canal Carrying Co Ltd v British Transport Commission* [1956] 1 All ER 567, [1956] 1 WLR 213; cf *Kingcastle Ltd v Owen-Owen* [1999] All ER (D) 174, CA (adjournment pending decision of a point of law in another case by a superior court); and see *Whitbread plc v Falla* [2000] All ER (D) 1861.

Where, however, a claimant has a continuing cause of action, the coming into force of legislation may afford him additional remedies in respect of the defendant's activities after that date: see *Marcic v Thames Water Utilities Ltd* [2001] 3 All ER 698 (continuing nuisance; additional remedies available to the claimant under the Human Rights Act 1998 after 2 October 2000, the date of the implementation of that Act). See also *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2001] EWCA Civ 713, [2002] Ch 51, [2001] 3 All ER 393.

7 *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108, [1979] 1 WLR 898, CA; and see *M v M (contempt: committal)* [1997] 3 FCR 288, [1997] 1 FLR 762, CA (factors to be taken into consideration when deciding whether to stay civil proceedings to enable criminal proceedings to go ahead). Provision for such a stay on the application of a party is also made by *Practice Direction--Applications* PD 23A paras 11A.1-11A.4: see PARA 310.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(6) STAY OF PROCEEDINGS/535. Forum non conveniens.

535. Forum non conveniens.

Although the claimant has the initial choice of forum in which to bring proceedings, the court retains an inherent jurisdiction to stay or dismiss the claim or to transfer¹ it to another forum in England and Wales where this course is available. The principles to be applied in determining whether the court will grant or refuse a stay of proceedings brought in England by a claimant who is not English-based have been expressed as follows:

- 592 (1) mere balance of convenience is not a sufficient ground for depriving a claimant of the advantage of bringing his claim in an English court if it is otherwise properly brought; and
- 593 (2) in order to justify a stay two conditions must be satisfied, one positive and one negative; (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense; and (b) the stay must not deprive the claimant of a legitimate personal or juridical advantage to him if he invoked the jurisdiction of the English court².

Where a claim is brought by an English-based claimant against a foreigner and there is nothing in the claim to connect it with England, the court may stay the proceedings³. Where the court lacks jurisdiction, the fact that due service has been effected on the defendant will not prevent the claim being stayed or dismissed⁴.

1 As to statutory powers of transfer see PARA 66 et seq.

2 *Rockware Glass Ltd v MacShannon* [1978] AC 795, sub nom *MacShannon v Rockware Glass Ltd*, [1978] 1 All ER 625, HL, per Lord Diplock, modifying the principles laid down in *St Pierre v South American Stores (Gath and Chaves) Ltd* [1936] 1 KB 382 at 398, CA, per Scott LJ, and explaining *The Atlantic Star* [1974] AC 436, [1973] 2 All ER 175, HL. These principles were expressly approved and reiterated in *Castanho v Brown and Root (UK) Ltd* [1981] AC 557, [1981] 1 All ER 143, HL. See also *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 All ER 992, [1973] 1 WLR 349, CA (a stay was refused even though there was a jurisdiction clause for submitting disputes to the Spanish courts, and a choice of law clause making Spanish law the proper law); *Trendtex Trading Corp v Crédit Suisse* [1982] AC 679, [1981] 3 All ER 520, HL (a stay was granted where the contract conferred exclusive jurisdiction on the Court of Geneva); *Smith Kline and French Laboratories Ltd v Bloch* [1983] 2 All ER 72, [1983] 1 WLR 730, CA (approving *Rockware Glass Ltd v MacShannon* [1978] AC 795, sub nom *MacShannon v Rockware Glass Ltd*, [1978] 1 All ER 625, HL, and *Castanho v Brown and Root (UK) Ltd* [1981] AC 557, [1981] 1 All ER 143, HL); *The Abidin Daver* [1984] AC 398, [1984] 1 All ER 470, HL (balance of convenience, if sufficiently weighty, may be ground for granting stay); *Equitas Ltd v Allstate Insurance Co* [2008] EWHC 1671 (Comm) [2008] All ER (D) 229 (Jul) (court needed strong or compelling reason to grant stay where contract contained exclusive jurisdiction clause); *Lubbe v Cape plc* [2000] 4 All ER 268, HL (South Africa was a more appropriate forum for an action in respect of injuries sustained there, but nevertheless the House of Lords held in favour of trying the action in England because the claimants were unlikely to obtain state-funded or contingency-based legal representation in South Africa with the result that they would effectively be denied the means of prosecuting their claims there). Note that in all the cases cited in this paragraph which predate the introduction of the new civil procedure, the claimant is referred to as the 'plaintiff': see PARA 18. As to the new civil procedure see PARA 24 et seq.

A stay will normally be granted if the defendant satisfies the court that a forum other than England is the appropriate forum, ie a forum in which the case may be tried more suitably for the interests of all the parties and for the ends of justice; the mere fact that the claimant has a legitimate personal or juridical advantage in proceedings in England cannot be decisive: *Spiliada Maritime Corp v Cansulex Ltd*, *The Spiliada* [1987] AC 460, [1986] 3 All ER 843, HL. See also *Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65; *Bank of Credit & Commerce Hong Kong Ltd (in liquidation) v Sonali Bank*

[1995] 1 Lloyd's Rep 227. In determining whether justice requires that a trial takes place in the English court, the court may consider the question of whether an alternative forum is available, in practical terms, to the plaintiff: *Askin v Absa Bank Ltd* [1999] 13 LS Gaz R 32, (1999) Times, 23 February, CA. Where in a particular foreign forum costs do not follow the event, the English court may reasonably and properly conclude that litigation in that foreign forum would not result in substantial justice being done because in financial terms damages awarded to a successful claimant would necessarily and substantially be diminished by costs which he would have to pay in that foreign forum, but not in England; the court may even allow this factor to tip the balance in favour of litigation in England: see *Roneleigh Ltd v MII Exports Inc* [1989] 1 WLR 619, 133 Sol Jo 485, CA.

As to forum non conveniens in matrimonial proceedings see *D v P (forum conveniens)* [1998] 3 FCR 403, [1998] 2 FLR 25; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 846. The issue of forum non conveniens must be raised at the outset of the proceedings before any steps have been taken or costs incurred: *Mansour v Mansour* [1990] FCR 17, [1989] 1 FLR 418, CA.

3 *Carmel Exporters (Sales) Ltd v Sea-Land Service Inc* [1981] 1 All ER 984, [1981] 1 WLR 1068. See, however, *Maharane Gaekwar of Baroda v Wildenstein* [1972] 2 QB 283, sub nom *Maharane Baroda v Wildenstein* [1972] 2 All ER 689, CA, where service was duly effected in England, although the action had no connection with England, and a stay was refused.

4 *Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corp* [1981] QB 368, [1980] 3 All ER 359, CA. See also *Wilkinson v Barking Corp* [1948] 1 KB 721, [1948] 1 All ER 564, CA.

UPDATE

535 Forum non conveniens

NOTE 2--*Equitas*, cited, reported at [2009] Lloyd's Rep IR 227.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(6) STAY OF PROCEEDINGS/536. *Lis alibi pendens*.

536. *Lis alibi pendens*.

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different contracting states¹, then under the Brussels and Lugano Conventions any court other than the court first seised must of its own motion stay proceedings until such time as the jurisdiction of the court first seised is established². The same rule applies in relation to such proceedings brought in the courts of different member states³; moreover where the jurisdiction of the court first seised is established, any court other than the court first seised must decline jurisdiction in favour of that court⁴.

Where the above provisions do not apply, then the following common law principles have been established. Where a claim is pending in a foreign court, and a second claim is begun in England between the same parties claiming substantially the same remedy or relief, the court may adopt one of three courses:

- 594 (1) it may put the claimant to his election with which claim he will proceed⁵; or
- 595 (2) it may stay all proceedings in England⁶; or
- 596 (3) it may grant an injunction restraining the prosecution of the foreign proceedings⁷.

A claimant should not lightly be denied the right to sue in an English court if jurisdiction is properly founded even in proceedings between foreigners relating to foreign matters, subject to the court's residual power to stay the proceedings⁸. Where there is no risk of injustice to the defendant, the court will not stay a claim against him in England on the ground that he had brought a claim in a foreign court⁹.

Where the claims in the English and the foreign proceedings are not alike or the relief or remedy sought is different, or where the circumstances are such that the claimant will obtain some benefit or advantage in bringing two claims, he will not be put to his election, nor will a stay be granted¹⁰. Where the claimant in the foreign proceedings is the defendant in the English claim, the case against granting a stay is regarded as strong¹¹.

An English claim will be stayed where there is no claim actually pending elsewhere if the cause of action arises out of the jurisdiction and proceedings may be brought where it arises at less trouble and expense to all parties¹²; and the English court will grant an injunction to restrain a person within the jurisdiction from instituting proceedings in a foreign court which would be contrary to equity and good conscience¹³ or from reaping the fruits of a foreign judgment obtained in breach of contract or by fraud¹⁴.

The doctrine of *lis alibi pendens* will not apply when the foreign proceedings are, or are virtually, at an end or halted¹⁵.

It is appropriate to stay proceedings pending the outcome of a decision of the European Court of Justice which will put an end to the matters in issue in the English proceedings¹⁶.

1 As to the meaning of 'contracting state' see PARA 168 note 7; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65.

2 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 127.

3 See EC Council Regulation 44/2001 (OJ L12, 16.1.2001, p 1) (regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) art 27(1). For these purposes, 'member state' does not include Denmark: see art 1(3).

4 See EC Council Regulation 44/2001 (OJ L12, 16.1.2001, p 1) art 27(2). Where related claims are pending in the courts of different member states, any court other than the court first seised may stay its proceedings: see art 28. When claims come within the exclusive jurisdiction of several courts, any court other than the court first seised must decline jurisdiction in favour of that court: see art 29. As to when a court is deemed to be seised see art 30. Article 28 requires an assessment of the degree of connection, and then a value judgment as to the expediency of hearing the two actions together in order to avoid the risk of inconsistent judgments; it does not say that any possibility of inconsistent judgments means that they were inevitably related: see *Research in Motion UK Ltd v Visto Corp* [2008] EWCA Civ 153, [2008] 2 All ER (Comm) 560.

5 *McHenry v Lewis* (1882) 22 ChD 397, CA. The claimant will not be put to his election merely because he is a defendant in a foreign court in proceedings relating to the same subject matter, even though he had originally been the claimant in those proceedings (*The Janera* [1928] P 55; *The Madrid* [1937] P 40, [1937] 1 All ER 216), nor where the second action is in a court in the British dominions (*The London* [1931] P 14).

6 *Jopson v James* (1908) 77 LJ Ch 824, CA; *The Christiansborg* (1885) 10 PD 141, CA, distinguished in *The Mannheim* [1897] P 13; *The Marinero* [1955] P 68, [1955] 1 All ER 676. Cf *Re Bryan's Goods* (1904) 20 TLR 290. See also *Williams and Glyns Bank plc v Astro Dinamico Cia Naviera SA and Georgian Shipping Enterprises SA* [1984] 1 All ER 760, [1984] 1 WLR 438, HL; *New Hampshire Insurance Co v Aerospace Finance Ltd* [1998] 2 Lloyd's Rep 539.

7 *The Tropaioforos (No 2)* [1962] 1 Lloyd's Rep 410. Where the foreign court has jurisdiction to restrain the bringing of a claim in England, the English court will take this fact into account in refusing to stay the claim: *Western Electric Co Inc v Racal-Milgo Ltd* [1979] RPC 501, CA. As a general rule, before an anti-suit injunction can be granted by an English court to restrain a person from pursuing proceedings in a foreign jurisdiction, comity requires that the English forum must have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which such an injunction entails. That principle must not, however, be interpreted too rigidly, and in cases where the conduct of the foreign state exercising jurisdiction is such as to deprive it of the respect normally required by comity, no such limit is required in the exercise of the jurisdiction to grant an anti-suit injunction: *Airbus Industrie GIE v Patel* [1999] 1 AC 119, [1998] 2 All ER 257, HL. The principles applicable to the grant by an English court of an injunction to restrain the commencement or continuance of proceedings in a foreign jurisdiction are not the same as those applicable to the grant of a stay of English proceedings in favour of a more appropriate foreign forum, and where a remedy for a particular wrong is available both in an English court and a foreign court the English court will normally only restrain the claimant from pursuing the foreign proceedings if it would be vexatious or oppressive for him to do so. As a general rule, a decision to grant an injunction restraining foreign proceedings presupposes that the English court will provide the natural forum for the trial of the claim and that, as a matter of justice, the injustice to the defendant if the claimant is allowed to pursue the foreign proceedings outweighs the injustice to the claimant if he is not allowed to do so, since the court will not grant an injunction restraining foreign proceedings if to do so will unjustly deprive the claimant of advantages in the foreign forum: see *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871, [1987] 3 All ER 510, PC.

8 *The Atlantic Star* [1974] AC 436, [1973] 2 All ER 175, HL, as explained in *Rockware Glass Ltd v MacShannon* [1978] AC 795, sub nom *MacShannon v Rockware Glass Ltd* [1978] 1 All ER 625, HL.

9 *St Pierre v South American Stores (Gath and Chaves) Ltd* [1936] 1 KB 382, CA, as modified by *Rockware Glass Ltd v MacShannon* [1978] AC 795, sub nom *MacShannon v Rockware Glass Ltd* [1978] 1 All ER 625, HL, where it was laid down that to justify a stay it is not necessary that the continuance of the proceedings should be oppressive or vexatious. See also *Sealey (otherwise Callan) v Callan* [1953] P 135, [1953] 1 All ER 942.

10 See *McHenry v Lewis* (1882) 22 ChD 397, CA; *Peruvian Guano Co v Bockwoldt* (1883) 23 ChD 225, CA, where the foreign procedure was advantageous; *Baird v Prescott & Co* (1890) 6 TLR 231, CA, where the relief obtainable in the foreign court was not obtainable in England. See also *Hyman v Helm* (1883) 24 ChD 531, CA; *Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399, CA; *The Manar* [1903] P 95; *Re Bonnefoi, Surrey v Perrin* [1912] P 233, CA; *The Soya Margareta* [1960] 2 All ER 756, [1961] 1 WLR 709, where in refusing a stay the court protected the defendants by granting an injunction restraining concurrent proceedings in the foreign court; *Ionian Bank Ltd v Couvreur* [1969] 2 All ER 651, [1969] 1 WLR 781, CA, where proceedings in the foreign court would have been speedier than in England.

11 *Cohen v Rothfield* [1919] 1 KB 410, CA; *Settlement Corp v Hochschild* [1966] Ch 10, [1965] 3 All ER 486.

12 *Logan v Bank of Scotland (No 2)* [1906] 1 KB 141, CA; *Egbert v Short* [1907] 2 Ch 205; *Re Norton's Settlement, Norton v Norton* [1908] 1 Ch 471, CA. See also *Rockware Glass Ltd v MacShannon* [1978] AC 795, sub nom *MacShannon v Rockware Glass Ltd* [1978] 1 All ER 625, HL; and cf *The London* [1931] P 14, where no stay was granted.

- 13 *Carron Iron Co v Maclaren* (1855) 5 HL Cas 416.
- 14 *Ellerman Lines Ltd v Read* [1928] 2 KB 144, CA.
- 15 *Buttes Gas and Oil Co v Hammer* [1971] 3 All ER 1025, CA.
- 16 *Department of Trade and Industry v British Aerospace plc and Rover Group Holdings plc* [1991] 1 CMLR 165.

UPDATE

536 Lis alibi pendens

NOTE 10--See also *JP Morgan Chase Bank, NA v Berliner Verkehrsbetriebe (BVG) Anstalt Des Offentlichen Rechts* [2009] EWHC 1627 (Comm), [2009] All ER (D) 88 (Jul).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/13. DISPOSAL OF PROCEEDINGS WITHOUT TRIAL/(6) STAY OF PROCEEDINGS/537. Two claims or proceedings on the same matter.

537. Two claims or proceedings on the same matter.

Prima facie it is vexatious and oppressive for the claimant to sue concurrently in two English courts or tribunals, and the court will stay the second proceedings¹. A defendant will not be called upon to meet, in substance and in reality, the same claim or charge he has already answered in earlier litigation². If there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will if necessary stay one of the claims³. The same principles apply to proceedings other than claims⁴.

1 *Earl Poulett v Viscount Hill* [1893] 1 Ch 277, CA; *Williams v Hunt* [1905] 1 KB 512, CA.

2 *Wright v Bennett* [1948] 1 All ER 227, CA.

3 *Thames Launches Ltd v Trinity House Corp'n (Deptford Strond)* [1961] Ch 197, [1961] 1 All ER 26; *Royal Bank of Scotland Ltd v Citrusdal Investments Ltd* [1971] 3 All ER 558, [1971] 1 WLR 1469.

4 *The Cap Bon* [1967] 1 Lloyd's Rep 543 (Admiralty action in rem and arbitration proceedings in respect of one claim); *Slough Estates Ltd v Slough Borough Council* [1968] Ch 299, [1967] 2 All ER 270 (High Court summons to determine validity of outline planning permission and appeal to the Secretary of State involving the same determination).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(1) DISCLOSURE AND INSPECTION OF DOCUMENTS/538. Disclosure; in general.

14. DISCLOSURE OF DOCUMENTS

(1) DISCLOSURE AND INSPECTION OF DOCUMENTS

538. Disclosure; in general.

The general rules relating to disclosure and inspection of documents¹ apply to all claims except a claim on the small claims track².

A party discloses a document by stating that the document exists or has existed³. For these purposes, 'document' means anything in which information is recorded and a copy of a document is anything onto which information contained or recorded in the document has been copied by whatever means, whether directly or indirectly⁴. A party need not disclose more than one copy of a document⁵. A copy of a document that contains a modification, obliteration or other marking or feature on which a party intends to rely or which adversely affects his own case or another party's case or supports another party's case must be treated as a separate document⁶.

A party's duty to disclose documents⁷ is limited to documents which are or have been in his control⁸. A party has or has had a document in his control if it is or was in his physical possession⁹, he has or has had a right to possession of it¹⁰ or he has or has had a right to inspect or take copies of it¹¹.

Certain documents are privileged from disclosure¹².

1 I.e. CPR Pt 31: see PARAS 112, 538 et seq. As to the right of inspection see PARA 539; and as to objections to production for inspection see PARA 555 et seq.

2 CPR 31.1(1), (2). As to the small claims track see CPR Pt 27; and PARA 274 et seq.

3 CPR 31.2.

4 CPR 31.4. Electronic documents, including e-mail and other electronic communications, word processed documents and databases are included in the definition and are the subject of special provisions: see *Practice Direction--Disclosure and Inspection* PD 31 paras 2A.1-2A.5; and PARA 545. A video film or recording is a document for these purposes; accordingly where disclosure has been made in accordance with CPR Pt 31, whether as part of standard disclosure under CPR 31.6 (see PARA 542) or the duty of continuing disclosure under CPR 31.11 (see PARA 546), the claimant is deemed to have admitted the authenticity of the film unless he serves a notice that he wishes the document to be proved at trial: *Rall v Hume*[2001] EWCA Civ 146, [2001] 3 All ER 248.

5 CPR 31.9(1).

6 CPR 31.9(2).

7 The duty to disclose documents is a continuing one: see PARA 546.

8 CPR 31.8(1).

9 CPR 31.8(2)(a).

10 CPR 31.8(2)(b).

11 CPR 31.8(2)(c).

12 See PARA 558 et seq. The general right to disclosure in family proceedings may be limited to protect the right to private life of any victim, party or witness whose rights are sufficiently engaged: *Re B (Disclosure to Other Parties)*[2002] 2 FCR 32, [2001] 2 FLR 1017.

UPDATE

538 Disclosure; in general

NOTE 4--See also *Barr v Biffa Waste Services Ltd*[2009] EWHC 1033 (TCC), [2009] All ER (D) 218 (May) (documents necessary for fair disposal of action).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(1) DISCLOSURE AND INSPECTION OF DOCUMENTS/539. Right of inspection of a disclosed document.

539. Right of inspection of a disclosed document.

Subject as follows, a party to whom a document¹ has been disclosed² has a right to inspect that document except where the document is no longer in the control of the party who disclosed it³ or the party disclosing the document has a right or a duty to withhold inspection of it⁴. Where, however, a party considers that it would be disproportionate to the issues in the case to permit inspection of documents within a category or class of document adversely affecting his own or another party's case or supporting another party's case⁵, he is not required to permit inspection of documents within that category or class⁶ but he must state in his disclosure statement⁷ that inspection of those documents will not be permitted on the grounds that to do so would be disproportionate⁸.

A party may apply to the court⁹ for an order for specific inspection of documents¹⁰.

1 As to the meaning of 'document' see PARA 538.

2 As to the meaning of 'disclosure' see PARA 538.

3 CPR 31.3(1)(a). As to when a document is in the control of a party see CPR 31.8; and PARA 538.

4 CPR 31.3(1)(b). As to documents which are privileged from disclosure see PARA 558 et seq; and as to the procedure for claiming a right or duty to withhold inspection see CPR 31.19; and PARA 555.

5 le within a category or class of document disclosed under CPR 31.6(b): see PARA 542.

6 See CPR 31.3(1)(c), (2)(a).

7 As to disclosure statements see CPR 31.10; and PARA 544.

8 See CPR 31.3(1)(c), (2)(b).

9 As to the meaning of 'court' see PARA 22.

10 See CPR 31.12; and PARA 547.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(1) DISCLOSURE AND INSPECTION OF DOCUMENTS/540. Right to inspect documents referred to in statements of case etc.

540. Right to inspect documents referred to in statements of case etc.

A party may inspect a document¹ mentioned in a statement of case², a witness statement³, a witness summary⁴ or an affidavit⁵. A party may also apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed in the proceedings⁶.

1 As to the meaning of 'document' see PARA 538.

2 CPR 31.14(1)(a). As to the meaning of 'statement of case' see PARA 584.

3 CPR 31.14(1)(b). As to witness statements see CPR 32.4(1); and PARA 982. The mere mention of a document in a witness statement does not constitute an automatic waiver of legal privilege: *Rubin v Expandable Ltd* [2008] EWCA Civ 59, [2008] 1 WLR 1099.

4 CPR 31.14(1)(c). As to witness summaries see CPR 32.9(3); and PARA 986.

5 CPR 31.14(1)(d). 'Affidavit' means a written, sworn statement of evidence: see CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31.

6 See CPR 31.14(2). This is subject to CPR 35.10(4) (see PARA 839): CPR 31.14(2). As to experts' reports see CPR Pt 35; and PARA 838 et seq. See *Bennett v Compass Group UK & Ireland Ltd* [2002] EWCA Civ 642, [2002] CPLR 452 (as claimant's medical report referred to general practitioner and hospital notes, defendant had right to inspect such notes pursuant to CPR 31.14(e) (now CPR 31.14(2))).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(1) DISCLOSURE AND INSPECTION OF DOCUMENTS/541. Inspection and copying of documents.

541. Inspection and copying of documents.

Where a party has a right to inspect a document¹:

- 597 (1) that party must give the party who disclosed² the document written notice of his wish to inspect it³;
- 598 (2) the party who disclosed the document must permit inspection not more than seven days after the date on which he received the notice⁴; and
- 599 (3) that party may request a copy⁵ of the document and, if he also undertakes to pay reasonable copying costs, the party who disclosed the document must supply him with a copy not more than seven days after the date on which he received the request⁶.

1 CPR 31.15. As to the meaning of 'document' see PARA 538. As to rights of inspection see CPR 31.3, CPR 31.14; and PARAS 539-540. As to the law relating to documents which are privileged from disclosure so as to give the right to refuse inspection see PARA 555 et seq.

2 As to the meaning of 'disclosure' see PARA 538.

3 CPR 31.15(a).

4 CPR 31.15(b). As to time limits generally see PARA 88 et seq.

5 As to the meaning of 'copy' see PARA 538.

6 CPR 31.15(c).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(1) DISCLOSURE AND INSPECTION OF DOCUMENTS/542. Disclosure limited to standard disclosure.

542. Disclosure limited to standard disclosure.

An order to give disclosure¹ is an order to give standard disclosure unless the court² directs otherwise³. The court may dispense with or limit standard disclosure⁴ and the parties may agree in writing to dispense with or to limit standard disclosure⁵.

Standard disclosure requires a party to disclose only the documents⁶:

- 600 (1) on which he relies⁷;
- 601 (2) which adversely affect his own case⁸;
- 602 (3) which adversely affect another party's case⁹; or
- 603 (4) which support another party's case¹⁰; and
- 604 (5) which he is required to disclose by a relevant practice direction¹¹.

1 As to the meaning of 'disclosure' see PARA 538. The court may make an order requiring standard disclosure under CPR 28.3 (directions in relation to cases on the fast track: see PARA 287) and under CPR 29.2 (case management in relation to cases on the multi-track: see PARA 294). As to pre-action disclosure see PARAS 111-112.

2 As to the meaning of 'court' see PARA 22.

3 CPR 31.5(1).

4 CPR 31.5(2).

5 CPR 31.5(3). Any such written agreement must be lodged with the court: *Practice Direction--Disclosure and Inspection* PD 31 para 1.4.

6 As to the meaning of 'document' see PARA 538.

7 CPR 31.6(a).

8 CPR 31.6(b)(i). In deciding whether to admit fresh evidence on an appeal, the court will have regard to whether it should have been disclosed at trial under CPR 31.6: see eg *Gillingham v Gillingham* [2001] EWCA Civ 906, [2001] 4 CPLR 355. As to appeals see PARA 1657 et seq.

9 CPR 31.6(b)(ii).

10 CPR 31.6(b)(iii).

11 CPR 31.6(c). See eg *Practice Direction--Protocols*; the requirements of the pre-action protocols themselves; and PARAS 108-109.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(1) DISCLOSURE AND INSPECTION OF DOCUMENTS/543. Duty of search.

543. Duty of search.

When giving standard disclosure¹, a party is required to make a reasonable search for documents² which adversely affect his own or another party's case or support another party's case or which he is required to disclose³ by a relevant practice direction⁴. The factors relevant in deciding the reasonableness of a search include the following:

- 605 (1) the number of documents involved⁵;
- 606 (2) the nature and complexity of the proceedings⁶;
- 607 (3) the ease and expense of retrieval of any particular document⁷; and
- 608 (4) the significance of any document which is likely to be located during the search⁸.

The reasonableness of a search is also affected by whether it would be proportionate or disproportionate to the issues in the case⁹. When a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement¹⁰ and identify the category or class of document¹¹.

1 As to standard disclosure see PARA 542; and as to the meaning of 'disclosure' see PARA 538.

2 As to the meaning of 'document' see PARA 538.

3 ie those documents falling within CPR 31.6(b) or (c): see PARA 542.

4 CPR 31.7(1).

5 CPR 31.7(2)(a).

6 CPR 31.7(2)(b).

7 CPR 31.7(2)(c).

8 CPR 31.7(2)(d).

9 See CPR 31.3(2); and PARA 539. The parties must bear in mind the overriding principle of proportionality (see CPR 1.1(2)(c); and PARA 33); eg it may be reasonable to decide not to search for documents coming into existence before some particular date, or to limit the search to documents in some particular place or places, or to documents falling into particular categories: *Practice Direction--Disclosure and Inspection* PD 31 para 2.

10 As to the disclosure statement see CPR 31.10; and PARA 544.

11 CPR 31.7(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(1) DISCLOSURE AND INSPECTION OF DOCUMENTS/544. Procedure for standard disclosure.

544. Procedure for standard disclosure.

The procedure for giving standard disclosure¹ is that each party must make, and serve² on every other party, a list of documents³ in the relevant practice form⁴. The list must identify the documents in a convenient order and manner and as concisely as possible⁵ and must indicate those documents in respect of which the party claims a right or duty to withhold inspection⁶ and those documents which are no longer in the party's control⁷ and what has happened to the latter⁸. The list must include a disclosure statement⁹ to be made by the party disclosing the documents:

- 609 (1) setting out the extent of the search that has been made to locate documents which he is required to disclose¹⁰;
- 610 (2) certifying that he understands the duty to disclose documents¹¹; and
- 611 (3) certifying that to the best of his knowledge he has carried out that duty¹².

Where the party making the disclosure statement is a company, firm, association or other organisation, the statement must also identify the person making the statement¹³ and explain why he is considered an appropriate person to make it¹⁴.

The parties may agree in writing to disclose documents without making a list¹⁵ and to disclose documents without the disclosing party making a disclosure statement¹⁶.

A disclosure statement may be made by a person who is not a party where this is permitted by a relevant practice direction¹⁷.

1 As to standard disclosure see PARA 542; and as to the meaning of 'disclosure' see PARA 538.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'document' see PARA 538.

4 CPR 31.10(1), (2). The practice form is Form N265 in *The Civil Court Practice*: see *Practice Direction--Disclosure and Inspection* PD 31 para 3.1.

5 CPR 31.10(3). It will normally be necessary to list the documents in date order, to number them consecutively and to give each a concise description (eg letter, claimant to defendant). Where there are a large number of documents all falling into a particular category the disclosing party may list those documents as a category rather than individually: see *Practice Direction--Disclosure and Inspection* PD 31 para 3.2.

6 CPR 31.10(4)(a). As to documents which are privileged from disclosure see PARA 555 et seq. He must state in writing the grounds on which he claims that right or duty: see CPR 31.19(3), (4); and PARA 555. The statement must indicate the document, or part of a document, to which the claim relates: see *Practice Direction--Disclosure and Inspection* PD 31 paras 4.5, 4.6.

7 CPR 31.10(4)(b)(i). As to when a document is in a party's control see PARA 538.

8 See CPR 31.10(4)(b)(ii).

9 CPR 31.10(5). For the precise wording of the disclosure statement see *Practice Direction--Disclosure and Inspection* PD 31 para 4.1, Annex.

10 CPR 31.10(6)(a). The disclosure statement should expressly state that the disclosing party believes the extent of the search to have been reasonable in all the circumstances, and, in setting out the extent of the search, draw attention to any particular limitations on the extent of the search which were adopted for proportionality reasons and give the reasons why the limitations were adopted, eg the difficulty or expense that a search not subject to those limitations would have entailed or the marginal relevance of categories of documents omitted from the search: *Practice Direction--Disclosure and Inspection* PD 31 para 4.2.

11 CPR 31.10(6)(b). If the disclosing party has a legal representative acting for him, the legal representative must endeavour to ensure that the person making the disclosure statement, whether the disclosing party or, in the case of a company, firm, association or other organisation, some other person, understands the duty of disclosure under CPR Pt 31: see *Practice Direction--Disclosure and Inspection* PD 31 para 4.4. As to the meaning of 'legal representative' see PARA 1833 note 13. As to the consequences of making a false disclosure statement see CPR 31.23; and PARA 554.

12 CPR 31.10(6)(c).

13 CPR 31.10(7)(a).

14 CPR 31.10(7)(b). The details given in the disclosure statement about the person making the statement must include his name and address and the office or position he holds in the disclosing party or the basis upon which he makes the statement on behalf of the party: *Practice Direction--Disclosure and Inspection* PD 31 para 4.3.

15 CPR 31.10(8)(a).

16 CPR 31.10(8)(b).

17 CPR 31.10(9). An insurer or the Motor Insurers' Bureau may sign a disclosure statement on behalf of a party where the insurer or the Motor Insurers' Bureau has a financial interest in the result of proceedings brought wholly or partially by or against that party: *Practice Direction--Disclosure and Inspection* PD 31 para 4.7. CPR 31.10(7) and *Practice Direction--Disclosure and Inspection* PD 31 para 4.3 (see the text and notes 13-14) apply to the insurer or the Motor Insurers' Bureau making such a statement: para 4.7.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(1) DISCLOSURE AND INSPECTION OF DOCUMENTS/545. Electronic disclosure.

545. Electronic disclosure.

The definition of 'document' in the rules as to disclosure¹ extends to electronic documents, including e-mail and other electronic communications, word processed documents and databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media, the definition covers those documents that are stored on servers and back-up systems and electronic documents that have been 'deleted'. It also extends to additional information stored and associated with electronic documents known as metadata². Such documents require special consideration.

Thus, the parties should, prior to the first case management conference³, discuss any issues that may arise regarding searches for and the preservation of electronic documents⁴. The parties should co-operate at an early stage as to the format in which electronic copy documents are to be provided on inspection⁵. In the case of difficulty or disagreement, the matter should be referred to a judge for directions at the earliest practical date, if possible at the first case management conference⁶.

The existence of electronic documents impacts upon the extent of the reasonable search required for the purposes of standard disclosure⁷. The factors that may be relevant in deciding the reasonableness of a search for electronic documents include (but are not limited to) the following:

- 612 (1) the number of documents involved;
- 613 (2) the nature and complexity of the proceedings;
- 614 (3) the ease and expense of retrieval of any particular document, which include:
- 68
 - 11. (a) the accessibility of electronic documents or data including e-mail communications on computer systems, servers, back-up systems and other electronic devices or media that may contain such documents taking into account alterations or developments in hardware or software systems used by the disclosing party and/or available to enable access to such documents;
 - 12. (b) the location of relevant electronic documents, data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents;
 - 13. (c) the likelihood of locating relevant data;
 - 14. (d) the cost of recovering any electronic documents;
 - 15. (e) the cost of disclosing and providing inspection of any relevant electronic documents;
 - 16. (f) the likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection;
- 69
 - 615 (4) the significance of any document which is likely to be located during the search⁸.

It may be reasonable to search some or all of the parties' electronic storage systems. In some circumstances, it may be reasonable to search for electronic documents by means of keyword searches (agreed as far as possible between the parties) even where a full review of each and

every document would be unreasonable. There may be other forms of electronic search that may be appropriate in particular circumstances⁹.

- 1 le in CPR 31.4: see PARA 538. As to the meaning of 'disclosure' see PARA 538.
- 2 *Practice Direction--Disclosure and Inspection* PD 31 para 2A.1.
- 3 As to case management conferences and pre-trial reviews see PARA 295.
- 4 *Practice Direction--Disclosure and Inspection* PD 31 para 2A.2. This may involve the parties providing information about the categories of electronic documents within their control, the computer systems, electronic devices and media on which any relevant documents may be held, the storage systems maintained by the parties and their document retention policies: para 2A.2.
- 5 *Practice Direction--Disclosure and Inspection* PD 31 para 2A.3.
- 6 *Practice Direction--Disclosure and Inspection* PD 31 paras 2A.2, 2A.3. Electronic disclosure may be circumscribed to ensure it does not become too burdensome and expensive: see eg *Hands v Morrison Construction Services Ltd* [2006] EWHC 2018 (Ch), [2006] All ER (D) 186 (Jun).
- 7 le required by CPR 31.7: see PARA 543.
- 8 *Practice Direction--Disclosure and Inspection* PD 31 para 2A.4.
- 9 *Practice Direction--Disclosure and Inspection* PD 31 para 2A.5.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(1) DISCLOSURE AND INSPECTION OF DOCUMENTS/546. Duty of disclosure continues during proceedings.

546. Duty of disclosure continues during proceedings.

Any duty of disclosure¹ continues until the proceedings are concluded². If documents³ to which that duty extends come to a party's notice at any time during the proceedings, he must immediately notify every other party⁴. If his list of documents has already been prepared and served⁵, he must prepare and serve a supplemental list⁶.

1 As to the meaning of 'disclosure' see PARA 538.

2 CPR 31.11(1). Proceedings are concluded when a final order is made by consent or as a result of a judgment (see CPR Pt 40; and PARA 1137 et seq) or when all parties making claims have served notices of discontinuance (see CPR Pt 38; and PARA 723 et seq).

3 As to the meaning of 'document' see PARA 538.

4 CPR 31.11(2).

5 As to preparation and service of such list see PARA 544.

6 *Practice Direction--Disclosure and Inspection* PD 31 para 3.3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(1) DISCLOSURE AND INSPECTION OF DOCUMENTS/547. Specific disclosure or inspection.

547. Specific disclosure or inspection.

The court¹ may make an order for specific disclosure or specific inspection².

An order for specific disclosure is an order that a party must do one or more of the following things:

- 616 (1) disclose specific documents or classes of documents specified in the order³;
- 617 (2) carry out a search to the extent stated in the order⁴;
- 618 (3) disclose any documents located as a result of that search⁵.

An order for specific inspection is an order that a party permit inspection of specific documents inspection of which he has stated in his disclosure statement he will not permit on the grounds that it would be disproportionate to the issues in the case⁶ do so⁷.

If a party believes that the disclosure of documents given by a disclosing party is inadequate he may make an application for an order for specific disclosure⁸. The application notice must specify the order that the applicant intends to ask the court to make and must be supported by evidence⁹.

In deciding whether or not to make an order for specific disclosure the court will take into account all the circumstances of the case and, in particular, the overriding objective¹⁰. If, however, the court concludes that the party from whom specific disclosure is sought has failed adequately to comply with the obligations imposed by an order for disclosure¹¹ the court will usually make such order as is necessary to ensure that those obligations are properly complied with¹².

1 As to the meaning of 'court' see PARA 22.

2 CPR 31.12(1). As to the meaning of 'disclosure' see PARA 538. An order for specific disclosure may in an appropriate case direct a party to carry out a search for any documents which it is reasonable to suppose may contain information which may enable the party applying for disclosure either to advance his own case or to damage that of the party giving disclosure, or lead to a train of inquiry which has either of those consequences, and to disclose any documents found as a result of that search: see *Practice Direction--Disclosure and Inspection* PD 31 para 5.5.

Where specific disclosure is ordered it must be precise as to its terms; it must not, eg, order the disclosure of 'all documents relating to the party's financial and tax affairs which are necessary to prove the quantum of the counterclaim': *Morgans (a Firm) v Needham* [1999] 44 LS Gaz R 41, CA. Such an order requires stronger justification under CPR Pt 31 than was the case under the previous rules of procedure and must not be made in relation to unpleaded matters: *Amoco (UK) Exploration Co v British American Offshore Ltd* (23 February 2000, unreported) per Longmore J.

3 CPR 31.12(2)(a). Disclosure cannot be ordered of a document that a person has no right to possession or inspection of: *Three Rivers District Council v Bank of England (No 4)* [2002] EWCA Civ 1182, [2002] 4 All ER 881, [2003] 1 WLR 210.

4 CPR 31.12(2)(b). See *Digicel (St Lucia) Ltd v Cable and Wireless plc* [2008] EWHC 2522 (Ch), [2008] All ER (D) 226 (Oct) (application for specific disclosure by the defendants of certain classes of electronic documents, seeking an order that the defendants restore relevant back-up tapes for the purpose of searching for the e-mail accounts of certain former employees; held it was inappropriate to make a simple order pursuant to CPR 31.12(2)(b) that the defendants restore the identified back-up tapes so far as was necessary to identify and

search certain e-mail accounts, as such an order did not address the possibility that restoration might not be possible or that it might emerge that restoration was only possible at an utterly prohibitive level of cost).

5 CPR 31.12(2)(c).

6 If he has refused inspection of those documents in reliance on CPR 31.3(2): see PARA 539. As to disclosure statements see CPR 31.10(6); and PARA 544.

7 CPR 31.12(3).

8 *Practice Direction--Disclosure and Inspection* PD 31 para 5.1.

9 *Practice Direction--Disclosure and Inspection* PD 31 para 5.2. The grounds on which the order is sought may be set out in the application notice itself, but if not there set out must be set out in the evidence filed in support of the application: para 5.3. As to the meaning of 'filing' see PARA 1832 note 8.

10 *Practice Direction--Disclosure and Inspection* PD 31 para 5.4. As to the overriding objective see PARA 33. See *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650, [2007] 2 All ER 273; and *Langbar International Ltd v Rybak* [2007] EWHC 3255 (Ch), [2007] All ER (D) 178 (Aug).

11 If whether by failing to make a sufficient search for documents or otherwise: *Practice Direction--Disclosure and Inspection* PD 31 para 5.4.

12 *Practice Direction--Disclosure and Inspection* PD 31 para 5.4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(1) DISCLOSURE AND INSPECTION OF DOCUMENTS/548. Disclosure in stages.

548. Disclosure in stages.

The parties may agree in writing, or the court¹ may direct, that disclosure² or inspection or both is to take place in stages³.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'disclosure' see PARA 538.

3 CPR 31.13.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(1) DISCLOSURE AND INSPECTION OF DOCUMENTS/549. Disclosure before proceedings start.

549. Disclosure before proceedings start.

Pre-action disclosure¹ is considered elsewhere in this title².

1 As to the meaning of 'disclosure' see PARA 538.

2 See CPR 31.16; and PARA 112.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(1) DISCLOSURE AND INSPECTION OF DOCUMENTS/550. Orders for disclosure against a person not a party.

550. Orders for disclosure against a person not a party.

On the application, in accordance with the following rules, of a party to any proceedings, the High Court and a county court have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of the claim:

- 619 (1) to disclose whether those documents are in his possession, custody or power;
and
- 620 (2) to produce such of those documents as are in his possession, custody or
power to the applicant or, on such conditions as may be specified in the order:
- 70 17. (a) to the applicant's legal advisers; or
- 18. (b) to the applicant's legal advisers and any medical or other professional
adviser of the applicant; or
- 19. (c) if the applicant has no legal adviser, to any medical or other
professional adviser of the applicant¹.
- 71

The relevant court must not, however, make such an order if it considers that compliance with the order, if made, would be likely to be injurious to the public interest².

Where an application is made to the court³ under any Act for disclosure⁴ by a person who is not a party to the proceedings, the application must be supported by evidence⁵. The court may make such an order only where the documents⁶ of which disclosure is sought are likely to support⁷ the case of the applicant or adversely affect the case of one of the other parties to the proceedings and disclosure is necessary in order to dispose fairly of the claim or to save costs⁸. The order must specify the documents or the classes of documents which the respondent must disclose⁹ and require the respondent, when making disclosure, to specify any of those documents which are no longer in his control¹⁰ or in respect of which he claims a right or duty to withhold inspection¹¹. Such an order may also require the respondent to indicate what has happened to any documents which are no longer in his control¹² and specify the time and place for disclosure and inspection¹³.

These provisions do not limit any other power which the court may have to order disclosure against a person who is not a party to proceedings¹⁴.

1 See the Supreme Court Act 1981 s 34(2) (amended by SI 1998/2940); and the County Courts Act 1984 s 53(2) (amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(1), (2); and SI 1998/2940). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. An application for an order under the Supreme Court Act 1981 s 34(2) must be made in accordance with CPR 31.17: see CPR 31.17(1).

2 See the Supreme Court Act 1981 s 35(1); and the County Courts Act 1984 s 54(1).

3 As to the meaning of 'court' see PARA 22.

4 As to the meaning of 'disclosure' see PARA 538.

5 CPR 31.17(1), (2).

6 As to the meaning of 'document' see PARA 538.

7 'Likely to support' means may well support: *Three Rivers District Council v Bank of England (No 4)* [2002] EWCA Civ 1182, [2002] 4 All ER 881, [2003] 1 WLR 210.

8 CPR 31.17(3). See eg *Clark v Ardington Electrical Services* [2001] EWCA Civ 585, [2001] All ER (D) 31 (Apr); *American Home Products Corp v Novartis Pharmaceuticals UK Ltd (No 2)* [2001] EWCA Civ 165, [2001] All ER (D) 141 (Feb), [2001] IP & T 752. Before ordering a bank which is not a party to disclose a class of documents, the court has to be satisfied of the existence of the documents and that each one within the class meets the requirements of CPR 31.17(3): *Re Howglen Ltd* [2001] 1 All ER 376, [2001] 2 BCLC 695 per Pumfrey J. In exercising its discretion whether to order disclosure, the court must balance any competing public interest considerations: *Frankson v Home Office, Johns v Home Office* [2003] EWCA Civ 655, [2003] 1 WLR 1953, [2003] All ER (D) 80 (May). See also *Secretary of State for Transport v Pell Frischmann Consultants, Secretary of State for Transport v Amec Civil Engineering* [2006] EWHC 2909 (TCC), [2007] BLR 46, [2006] All ER (D) 260 (Oct) (inevitable that non-party would become a party in the near future; advantages of non-party having earlier access to documents outweighed by cost and inconvenience of duplicate disclosure when non-party joined in the proceedings).

9 CPR 31.17(4)(a).

10 CPR 31.17(4)(b)(i). As to when documents are in a person's control see PARA 538.

11 CPR 31.17(4)(b)(ii). As to documents which are privileged from disclosure see PARA 558 et seq.

12 CPR 31.17(5)(a).

13 CPR 31.17(5)(b).

14 CPR 31.18(b). See eg the Bankers' Books Evidence Act 1879 s 7; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 907-922; CPR 34.2(4) (power to order, by witness summons, a person who is not a party to the proceedings to produce documents to the court); and PARA 1004. Where a person is not liable for a wrong but has provided facilities for its commission then proceedings for disclosure (alone) may be brought against him: *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, [1973] 2 All ER 943, HL; *CHC Software Care Ltd v Hopkins & Wood* [1993] FSR 241. See also *P v T Ltd* [1997] 4 All ER 200, [1997] 1 WLR 1309; *AXA Equity and Law Life Assurance Society plc v National Westminster Bank plc* [1998] CLC 1177, CA. Disclosure may be ordered against a blameless stranger where it is necessary to establish the location and existence of assets, the subject matter of a proprietary claim: *Arab Monetary Fund v Hashim (No 5)* [1992] 2 All ER 911. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

The remedy is one of last resort: it is not sufficient to show that disclosure is necessary to enable an action to be brought; it must also be established that the information concerned cannot be obtained elsewhere: *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch), [2005] 3 All ER 511, applying *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, [1973] 2 All ER 943, HL.

UPDATE

550 Orders for disclosure against a person not a party

NOTE 8--*Frankson*, cited, applied: *Flood v Times Newspapers Ltd* [2009] EWHC 411 (QB), [2009] EMLR 311 (disclosure against police refused).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(1) DISCLOSURE AND INSPECTION OF DOCUMENTS/551. Restriction on use of a privileged document inadvertently inspected.

551. Restriction on use of a privileged document inadvertently inspected.

Where a party inadvertently allows a privileged¹ document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court². There is therefore no longer a need to seek an injunction to prevent use of inadvertently disclosed privileged documents, but the principles that emerged from cases relating to restraining injunctions may be relevant where an application is made for permission to use such documents³. Thus, for example, a solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived⁴; and where a party has allowed the other party to inspect a privileged document by mistake it will in general be too late for him to claim privilege in order to attempt to correct the mistake⁵. However, the court may prevent the use of such documents where justice requires, for example where inspection of the documents has been procured by fraud or the documents have been made available as a result of an obvious mistake⁶. All will depend upon the particular circumstances, and there are no rigid rules⁷.

¹ 'Privilege' means the right of a party to refuse to disclose a document or to refuse to answer questions on the ground of some special interest recognised by law: see CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31. As to the meanings of 'disclosure' and 'document' see PARA 538. As to documents which are privileged from disclosure see PARA 555 et seq. 'Privilege' in the former rule was held to include irrelevancy: *Ehrmann v Ehrmann* [1896] 2 Ch 826; *Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Rly Co* [1913] 3 KB 850, CA. But the present position is governed by the requirement to give 'standard disclosure': see CPR 31.6; and PARA 542. The court has power to inspect documents for which protection is claimed on any grounds: see CPR 31.19(6)(a); and PARA 555.

² CPR 31.20. As to the meaning of 'court' see PARA 22.

³ The principles were summarised in *Al Fayed v Metropolitan Police Comr* [2002] EWCA Civ 780 at [16], [2002] All ER (D) 450 (May) per Clarke LJ (referring to *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 2 All ER 716, [1987] 1 WLR 1027; *Derby & Co Ltd v Weldon (No 8)* [1990] 3 All ER 762, [1991] 1 WLR 73; *Pizzey v Ford Motor Co* (1993) Times, 8 March; *International Business Machines Corp v Phoenix International (Computers) Ltd* [1955] 1 All ER 413; *Breeze v John Stacey & Sons Ltd* [1999] All ER (D) 648, (1999) Times, 8 July, CA).

⁴ *Al Fayed v Metropolitan Police Comr* [2002] EWCA Civ 780 at [16], [2002] All ER (D) 450 (May); and see *Breeze v John Stacey & Sons Ltd* [1999] All ER (D) 648, (1999) Times, 8 July, CA. See also *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 2 All ER 716, [1987] 1 WLR 1027; *Pizzey v Ford Motor Co* (1993) Times, 8 March.

⁵ *Al Fayed v Metropolitan Police Comr* [2002] EWCA Civ 780 at [16], [2002] All ER (D) 450 (May); and see *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 2 All ER 716, [1987] 1 WLR 1027; *Breeze v John Stacey & Sons Ltd* [1999] All ER (D) 648, (1999) Times, 8 July, CA.

⁶ *Al Fayed v Metropolitan Police Comr* [2002] EWCA Civ 780 at [16], [2002] All ER (D) 450 (May); and see *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 2 All ER 716, [1987] 1 WLR 1027. A mistake is likely to be held to be obvious where the documents are received by a solicitor and (1) the solicitor appreciates that a mistake has been made before making some use of the documents; or (2) it would be obvious to a reasonable solicitor in his position that a mistake has been made: *Al Fayed v Metropolitan Police Comr* [2002] EWCA Civ 780 at [16], [2002] All ER (D) 450 (May); and see *International Business Machines Corp v Phoenix International (Computers) Ltd* [1955] 1 All ER 413. Where a solicitor gives detailed consideration to the question whether the documents have been made available for inspection by mistake and honestly concludes that they have not, that fact will be a relevant (and in many cases an important) pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake had been made, but it is not

conclusive; the decision remains a matter for the court: *Al Fayed v Metropolitan Police Comr* [2002] EWCA Civ 780 at [16], [2002] All ER (D) 450 (May). A solicitor who inspects a privileged document having realised that it was disclosed by mistake may be required to cease representation: see *Ablitt v Mills & Reeve (a firm)* (1995) Times, 25 October; *Webster v James Chapmen & Co (a firm)* [1989] 3 All ER 939.

7 See *Al Fayed v Metropolitan Police Comr* [2002] EWCA Civ 780 at [16], [2002] All ER (D) 450 (May).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(1) DISCLOSURE AND INSPECTION OF DOCUMENTS/552. Consequence of failure to disclose documents or permit inspection.

552. Consequence of failure to disclose documents or permit inspection.

A party may not rely on any document¹ which he fails to disclose² or in respect of which he fails to permit inspection unless the court³ gives permission⁴. It is also possible that a failure to disclose may lead to striking out⁵.

1 As to the meaning of 'document' see PARA 538.

2 As to the meaning of 'disclosure' see PARA 538.

3 As to the meaning of 'court' see PARA 22.

4 CPR 31.21.

5 As to the meaning of 'striking out' see PARA 218 note 2. In a case where there has been a failure to comply with an order for disclosure, a striking out order is not appropriate unless the order was precise as to what was required: *Morgans (a firm) v Needham* [1999] 44 LS Gaz R 41, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(1) DISCLOSURE AND INSPECTION OF DOCUMENTS/553. Subsequent use of disclosed documents.

553. Subsequent use of disclosed documents.

A party to whom a document¹ has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed², except where:

- 621 (1) the document has been read to or by the court³, or referred to, at a hearing which has been held in public⁴;
- 622 (2) the court gives permission⁵; or
- 623 (3) the party who disclosed the document and the person to whom the document belongs agree⁶.

The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public⁷. An application for such an order may be made by a party⁸ or by any person to whom the document belongs⁹.

1 As to the meaning of 'document' see PARA 538.

2 Disclosed documents may be used not only in the action in which the disclosure is made but also for uses that flow from the purpose of the original proceedings: see eg *Crest Homes plc v Marks* [1987] AC 829, [1987] 2 All ER 1074, HL. As to the meaning of 'disclosure' see PARA 538.

3 See *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498, [1999] CPLR 505, CA (documents to be treated as read to the court if read by the judge and referred to in a compendious way in a judicial decision based on them and made in public). As to the meaning of 'court' see PARA 22.

4 CPR 31.22(1)(a).

5 CPR 31.22(1)(b). The public interest in the investigation or prosecution of a specific offence of fraud takes precedence over the general concern of the courts to control the collateral use of compulsorily disclosed documents: *Marlwood Commercial Inc v Kozeny*, *Omega Group Holdings Ltd v Kozeny* [2004] EWCA Civ 798, [2004] 3 All ER 648, [2005] 1 WLR 104. On an application to expand membership of a confidentiality club, the applicant must show that the inclusion of further individuals in the club is necessary for the proper conduct of the litigation: *Halliburton Energy Services Inc v Smith International (North Sea) Ltd* [2004] EWHC 2181 (Pat), [2004] All ER (D) 53 (Sep). See also *McBride v Body Shop International plc* [2007] EWHC 1658 (QB), [2007] All ER (D) 136 (Jul); *British Sky Broadcasting Group plc v Virgin Media Communications Ltd (formerly NTL Communications Ltd)* [2008] EWCA Civ 612, [2008] 4 All ER 1026. The court may permit documents disclosed in a civil claim to be used in criminal proceedings: *A-G for Gibraltar v May* [1999] 1 WLR 998, [1998] All ER (D) 547; *Marlwood Commercial Inc v Kozeny* [2004] EWCA Civ 798, [2004] 3 All ER 648; *C plc v P* [2006] EWHC 1226 (Ch), [2006] Ch 549 (affd [2007] EWCA Civ 493, [2007] 3 All ER 1034). See also *Chase v News Group Newspapers* [2002] EWHC 1101 (QB), [2002] All ER (D) 522 (May).

6 CPR 31.22(1)(c). As to the use of disclosed documents in other proceedings see *Bourns Inc v Raychem Corp* [1999] 3 All ER 154, [2000] CPLR 155, CA. See also *British Sky Broadcasting Group plc v Virgin Media Communications Ltd (formerly NTL Communications Ltd)* [2008] EWCA Civ 612, [2008] 4 All ER 1026.

7 CPR 31.22(2). The restriction may not apply where the document has been disclosed voluntarily: *Cassidy v Hawcroft* [2000] CPLR 624, [2000] All ER (D) 1082, CA. See *Lilly Icos Ltd v Pfizer Ltd (No 2)* [2002] EWCA Civ 02, [2002] 1 All ER 842, [2002] 1 WLR 2253 (document with high commercial sensitivity and given only a fleeting reference). When determining whether to lift an order made under CPR 31.22, the most important consideration is the interests of justice: *Smithkline Beecham plc v Generics (UK) Ltd*, *BASF AG v Smithkline Beecham plc* [2003] EWCA Civ 1109, [2003] 4 All ER 1302, [2004] 1 WLR 1479. See also *HRH Prince of Wales v Associated*

Newspapers Ltd [2006] EWHC 11 (Ch), [2006] IP & T 583 (restraint of publication of matters in relation to personal journals).

8 CPR 31.22(3)(a).

9 CPR 31.22(3)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(1) DISCLOSURE AND INSPECTION OF DOCUMENTS/554. False disclosure statements.

554. False disclosure statements.

Proceedings for contempt of court may be brought against a person who makes, or causes to be made, a false disclosure statement¹, without an honest belief in its truth². Such proceedings may only be brought by the Attorney General³ or with the permission of the court⁴.

1 As to disclosure statements see CPR 31.10(6); and PARA 544.

2 CPR 31.23(1). As to proceedings for contempt see generally **CONTEMPT OF COURT**.

3 CPR 31.23(2)(a).

4 CPR 31.23(2)(b). As to the meaning of 'court' see PARA 22.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(i) In general/555. Claim to withhold inspection or disclosure of a document.

(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION

(i) In general

555. Claim to withhold inspection or disclosure of a document.

A person may apply, without notice, for an order permitting him to withhold disclosure¹ of a document² on the ground that disclosure would damage the public interest³. Unless the court⁴ orders otherwise, such an order of the court must not be served⁵ on any other person⁶ and must not be open to inspection by any person⁷.

A person who wishes to claim that he has a right or a duty to withhold inspection of a document, or part of a document, need not apply to the court⁸ but must state in writing that he has such a right or duty and the grounds on which he claims that right or duty⁹. The statement must be made in the list in which the document is disclosed¹⁰ or, if there is no such list, to the person wishing to inspect the document¹¹. A party may then apply to the court to decide whether a claim so made should be upheld¹².

For the purpose of deciding an application to withhold disclosure or a claim to withhold inspection, the court may require the person seeking to withhold disclosure or inspection of a document to produce that document to the court¹³ and may invite any person, whether or not a party, to make representations¹⁴.

The provisions of the Civil Procedure Rules relating to disclosure¹⁵ do not affect any rule of law which permits or requires a document to be withheld from disclosure or inspection on the ground that its disclosure or inspection would damage the public interest¹⁶.

1 As to the meaning of 'disclosure' see PARA 538.

2 As to the meaning of 'document' see PARA 538.

3 CPR 31.19(1). An application under CPR 31.19(1) or CPR 31.19(5) (see the text and note 12) must be supported by evidence: CPR 31.19(7). As to documents which are privileged from disclosure see PARA 556 et seq. See also *Practice Direction--Disclosure and Inspection* PD 31 para 6.2. See *Harrods Ltd v Times Newspapers Ltd*[2006] EWHC 83 (Ch), [2006] All ER (D) 147 (Jan), where it was said that it would be wrong to order disclosure disproportionate to information reasonably expected to be discovered, although in fact disclosure was ordered in this case and the order was reversed on appeal on other grounds (see *Harrods Ltd v Times Newspapers Ltd*[2006] EWCA Civ 294, [2006] All ER (D) 302 (Feb)).

4 As to the meaning of 'court' see PARA 22.

5 As to the meaning of 'service' see PARA 138 note 2.

6 CPR 31.19(2)(a).

7 CPR 31.19(2)(b).

8 See *Practice Direction--Disclosure and Inspection* PD 31 para 6.1.

9 CPR 31.19(3).

10 le the list provided under CPR 31.10(2): see PARA 544. The statement must be contained in the disclosure statement under CPR 31.10(5): see PARA 544.

11 CPR 31.19(4).

12 CPR 31.19(5). See also note 3.

13 CPR 31.19(6)(a). To this extent the power to inspect mitigates the general principle that the list or any affidavit of documents is conclusive as to the claim of privilege unless there is some reason to cast doubt on it: see *Westminster Airways Ltd v Kuwait Oil Co Ltd*[1951] 1 KB 134, [1950] 2 All ER 596, CA. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

14 CPR 31.19(6)(b).

15 le CPR Pt 31: see PARA 538 et seq.

16 CPR 31.19(8). As to public interest immunity see PARA 802.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(i) In general/556. Documents protected from inspection.

556. Documents protected from inspection.

Although the obligation to produce documents for inspection is co-extensive with the obligation to disclose their existence¹, there are many such documents the existence of which must be disclosed in the list of documents but which are nevertheless protected from production. The grounds on which this protection can be claimed can be classified under the following main heads: (1) legal professional privilege²; (2) that production is contrary to public policy³; (3) that the documents in question may tend to incriminate the party or his spouse⁴; (4) that production is contrary to some statutory provision which imposes secrecy⁵; (5) that production is contrary to some express or implied agreement between the parties⁶; and (6) that production would, in the circumstances of the particular case, be disproportionate to the issues in the case⁷ or (formerly) oppressive⁸. The first four of these grounds⁹ protect documents from disclosure at the trial as well as part of the process of disclosure prior to trial, and may also be grounds for refusal to answer requests for further information¹⁰ or are grounds for refusing to answer questions asked of a witness at the trial¹¹.

None of these grounds, except the last, is now based on the discretionary power of the court¹² and they should not therefore be confused with cases where disclosure is not allowed, or is limited, under that power nor with cases where disclosure is not allowed at all. In exercising its discretion the court must have regard to the overriding objective of the new civil procedure¹³.

On the other hand, a party cannot object to producing a document not covered by legal professional privilege simply because the information contained in it was imparted to him in confidence, for 'confidentiality', as between a party to the litigation and a third party, is not a separate head of privilege though it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest¹⁴.

Moreover, the fact that documents are not in the sole possession or are not the sole property of the party having possession or are in his possession only as agent or on behalf of a person not a party to the proceedings does not by itself now afford a ground for objection to their production, since the test is whether they are or have been in the control of the party¹⁵.

1 See CPR 31.3; and PARA 539. A claim may, however, be made to withhold the disclosure of even the existence of a document, where it is alleged that such disclosure would damage the public interest: see CPR 31.19(1); and PARA 555.

2 See PARA 558 et seq. As to communications made 'without prejudice' see PARA 582.

3 See PARA 802 et seq.

4 See PARA 580.

5 See PARA 581.

6 See PARA 582.

7 See CPR 31.3(2); and PARA 539.

8 See PARA 583.

9 Possibly the fifth ground also: see *La Roche v Armstrong* [1922] 1 KB 485, where a 'without prejudice' letter was held to be inadmissible at the trial. Cf, however, *Somatra Ltd v Sinclair Roche & Temperley* [2000] All

ER (D) 1055, [2000] CPLR 601, CA, where 'without prejudice' material was ruled admissible. As to the meaning of 'without prejudice' see PARA 804 note 4.

10 See PARA 611.

11 See PARA 580.

12 They are either statutory or have become definite rules of law: see PARAS 539, 802 et seq.

13 As to the overriding objective see PARA 33.

14 *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1974] AC 405, [1973] 2 All ER 1169, HL. But see *Science Research Council v Nassé, Leyland Cars (BL Cars Ltd) v Vyas* [1980] AC 1028, sub nom *Science Research Council v Nassé, BL Cars Ltd (formerly Leyland Cars) v Vyas* [1979] 3 All ER 673, HL (in cases of race or sex discrimination, confidential reports should only be ordered to be made available for inspection, where it was decided, after inspection by the chairman of an employment tribunal, that it was essential in the interests of justice that confidentiality should be overridden). See also *Department of Health and Social Security v Sloan* [1981] ICR 313, EAT (disclosure of medical reports not ordered if harmful to mental health of applicant); *R v R (Disclosure to Revenue)* [1998] 1 FCR 597 (confidential information in transcripts of divorce proceedings obtained irregularly by the Inland Revenue and used in income tax assessment; order specifically regularised the Inland Revenue's possession of the transcripts).

15 See CPR 31.8; and PARA 538.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(i) In general/557. Abolition of certain former privileges.

557. Abolition of certain former privileges.

The following former grounds of privilege or objection to the production of documents or to answering any question in any civil proceedings¹ were abrogated by the Civil Evidence Act 1968 and do not afford protection against the disclosure of documents and their production for inspection, namely:

- 624 (1) the old rule that to do so would tend to expose a party to a forfeiture²;
- 625 (2) the old rule whereby a person other than a party to the proceedings could not be compelled to produce any deed or other document relating to his title to any land³;
- 626 (3) the old rule whereby a party to the proceedings could not be compelled to produce any document relating solely to his own case and in no way tending to impeach that case or support the case of any opposing party⁴;
- 627 (4) the old rule whereby a husband or wife could not be compelled to disclose any communication made to him or her by his or her spouse during the marriage⁵;
- 628 (5) the old rule whereby a husband or wife could not be compelled to give evidence to prove that marital intercourse did or did not take place between them during any period⁶;
- 629 (6) the old rule that a witness, including a party, in proceedings instituted in consequence of adultery could not be compelled to answer any question by reason that it tended to show that he or she had been guilty of adultery⁷.

1 In so far as they relate to criminal proceedings, the grounds are unaffected: see the Civil Evidence Act 1968 s 16(1); and notes 5-6.

2 Civil Evidence Act 1968 s 16(1)(a).

3 Civil Evidence Act 1968 s 16(1)(b).

4 Civil Evidence Act 1968 s 16(2).

5 Civil Evidence Act 1968 s 16(3). The former protection was provided by the Evidence (Amendment) Act 1853 s 3 (now repealed). As to compellability in criminal proceedings see the Police and Criminal Evidence Act 1984 s 80; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1405 et seq.

6 See the Civil Evidence Act 1968 s 16(4), which amended the Matrimonial Causes Act 1965 s 43(1) (now repealed). As to compellability in criminal proceedings see note 5.

7 See the Civil Evidence Act 1968 s 16(5) (repealing the Evidence Further Amendment Act 1869 s 3 proviso; and the Matrimonial Causes Act 1965 s 43(2) (in part) (now wholly repealed)); and see *Nast v Nast and Walker* [1972] Fam 142, [1972] 1 All ER 1171, CA; *C v C* [1973] 3 All ER 770, [1973] 1 WLR 568. See also **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 828.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(ii) Legal Professional Privilege/558. The nature of the privilege.

(ii) Legal Professional Privilege

558. The nature of the privilege.

It has been held that, as litigation can only be properly conducted by professional lawyers, it is necessary that a litigant should be able to have recourse to them in circumstances which enable him to place unrestricted confidence in the lawyer whom he consults and that the communications which he makes to that lawyer should be kept secret¹. Thus legal professional privilege has developed to protect communications between client and lawyer². The protection now takes two forms: 'litigation privilege' protects communications between a party and his lawyer, or between the party or his lawyer and a third party, where they are made for the purpose of preparing for legal proceedings; 'advice privilege' protects communications from disclosure where they are made to and from a legal adviser for the purpose of obtaining legal advice³. For these purposes, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context⁴.

The law on this subject is based on the practice gradually evolved in the Court of Chancery⁵ but has received statutory confirmation in a number of instances where a government department is given power to obtain information from a subject but a legal adviser is protected from answering when the privilege exists⁶. Note, however, that a solicitor has a legal obligation to notify the police if he has reason to suspect his client of being involved in money laundering and in those circumstances he has no right to rely on professional privilege as to the communications between himself and his client if they are made with a view to furthering any criminal purpose⁷. Similarly, where words capable of being construed as a threat to kill were made by a client in the course of communications between himself and his solicitor about a conveyancing transaction, those communications were not protected by legal professional privilege⁸. It has been held that the covert surveillance provisions of the Regulation of Investigatory Powers Act 2000⁹ extend to consultations between lawyer and client that are ordinarily protected by legal professional privilege¹⁰.

1 *Anderson v Bank of British Columbia*(1876) 2 ChD 644, CA; and see the cases cited in note 2. A person's legal representative need not, however, necessarily be a qualified barrister or solicitor: see the definition of 'legal representative' in CPR 2.3(1); and PARA 1833 note 13. See also PARA 559.

2 This privilege is quite separate from the defence of privilege which may be raised in an action of defamation in respect of words spoken or written between legal advisers and client: *Minter v Priest*[1930] AC 558, HL; and see also **LIBEL AND SLANDER** vol 28 (Reissue) PARA 99.

The equitable jurisdiction to protect confidence extends to confidential communications which would not be privileged from disclosure in litigation: *GE Capital Commercial Finance Ltd v Sutton, Anglo Petroleum Ltd v GE Capital Commercial Finance Ltd*[2004] EWCA Civ 315, [2004] 2 BCLC 662.

3 'Litigation privilege covers all documents brought into being for the purposes of litigation. Legal advice privilege covers communications between lawyers and their clients whereby legal advice is sought or given': *Three Rivers District Council v Governor and Company of the Bank of England*[2004] UKHL 48 at [10], [2005] 1 AC 610 at [10], [2005] 4 All ER 948 at [10] per Lord Scott of Foscote. See also *Greenough v Gaskell* (1833) 1 My & K 98; *Reid v Langlois* (1849) 1 Mac & G 627; *Anderson v Bank of British Columbia*(1876) 2 ChD 644; *Wheeler v Le Marchant*(1881) 17 ChD 675, CA; *Southwark Water Co v Quick*(1878) 3 QBD 315, CA; *Re Strachan*[1895] 1 Ch 439, CA; *Ainsworth v Wilding*[1900] 2 Ch 315; *Bullivant v A-G for Victoria*[1901] AC 196, HL; *Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Ry Co*[1913] 3 KB 850, CA; *Adam Steamship Co Ltd v London Assurance Corp*[1914] 3 KB 1256, CA; *City of Baroda* (1926) 134 LT 576; *Conlon v Conlons*

Ltd[1952] 2 All ER 462, CA; *Balabel v Air India* [1988] Ch 317, [1988] 2 All ER 246, CA. But see *R v Crown Court at Manchester, ex p Rogers* [1999] 4 All ER 35, [1999] 1 WLR 832 (a record that a client visited his solicitor is not a communication and therefore is not privileged). Presentational advice sought from lawyers by any party who believes himself to be at risk from an inquiry falls within the policy reasons underlying legal advice privilege: *Three Rivers District Council v Governor and Company of the Bank of England*[2004] UKHL 48, [2005] 1 AC 610, [2005] 4 All ER 948. See also *United States of America v Philip Morris Inc* [2004] EWCA Civ 330, [2004] All ER (D) 448 (Mar) (no legal professional privilege found to have arisen); *USP Strategies plc v London General Holdings Ltd*[2004] EWHC 373 (Ch), [2004] All ER (D) 132 (Mar).

4 *Balabel v Air India* [1988] Ch 317, [1988] 2 All ER 246 at 254, CA, per Taylor LJ; *Three Rivers District Council v Governor and Company of the Bank of England*[2004] UKHL 48 at [38], [2005] 1 AC 610 at [38], [2005] 4 All ER 948 at [38].

5 The law has only gradually reached its present broad and reasonable footing: *Minet v Morgan*(1873) 8 Ch App 361 at 366 per Lord Selborne. This must be borne in mind in consulting older Chancery cases. Further, the common law cases on the subject decided under the Common Law Procedure Acts are not authorities so far as they differ from the practice which existed in the Court of Chancery.

6 See eg the Companies Act 1985 s 732(3); and **COMPANIES** vol 15 (2009) PARA 1626; the Access to Justice Act 1999 ss 20(7), 22(1)(a); and **LEGAL AID** vol 65 (2008) PARAS 228, 230.

7 See **LEGAL PROFESSIONS** vol 65 (2008) PARA 740.

8 See *C v C (privilege: criminal communications)*[2001] EWCA Civ 469, [2002] Fam 42, sub nom *C v C (evidence: privilege)*[2001] 1 FCR 756.

9 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 506 et seq.

10 *Re McE*[2009] UKHL 15, [2009] All ER (D) 118 (Mar).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(ii) Legal Professional Privilege/559. Cases in which privilege arises.

559. Cases in which privilege arises.

Legal professional privilege¹ is confined to the legal profession; it extends to barristers, solicitors, licensed conveyancers, recognised bodies and legal executives in their employ, whether in private practice or employed full-time as salaried legal advisers by government departments or by commercial concerns, provided they are acting in their capacity as legal advisers², to the Director of Public Prosecutions³ and to foreign legal advisers⁴. The privilege does not extend to communications between a party and his medical adviser⁵, unless they are for the purpose of preparing for litigation; nor does it generally extend to communications with a spiritual adviser⁶ or non-professional friend or adviser⁷, or an accountant⁸, or a patent or trade mark agent⁹, or a pursuivant of the Herald's College¹⁰, or a society whose aid in the litigation is sought, and by whom the communications are laid before its solicitor for advice¹¹. In the case of a solicitor or counsel acting for a person receiving legal aid or where their fees are to be paid from the Community Legal Service Fund, the privilege is preserved¹².

Even in the case of a legal adviser communications are not privileged when he is consulted merely as a friend and not professionally, even though a desire to obtain the benefit of his professional knowledge prompted the communication¹³. To be protected the communication must be made to or by the legal adviser in that capacity¹⁴ and while the relationship of client and legal adviser subsists¹⁵. In considering these limitations on legal professional privilege the protection now accorded to statements made to persons acting as conciliators in matrimonial disputes should be kept in mind¹⁶.

Communications to and from a legal adviser that are made for the purpose of obtaining legal advice are privileged whether or not litigation is pending or contemplated¹⁷.

In three special cases the protection does not apply¹⁸: (1) when the communications are made for some fraudulent or illegal purpose¹⁹; or (2) when the client waives the privilege and permits disclosure²⁰; or (3) when the communications are made for the purpose of being repeated to the other party, such as an instruction to settle a claim for a specified sum²¹.

1 See PARA 558.

2 See *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1972] 2 QB 102, [1972] 2 All ER 353, CA, per Lord Denning MR. This principle was not challenged on appeal to the House of Lords in the same case: see [1974] AC 405, [1973] 2 All ER 1169. But see *Waugh v British Railways Board* [1980] AC 521, [1979] 2 All ER 1169, HL (report compiled inter alia to enable Board's solicitor to advise on ensuing litigation not privileged in circumstances of the case) and *Secretary of State for Trade and Industry v Baker* [1998] Ch 356, sub nom *Re Barings plc, Secretary of State for Trade and Industry v Baker* [1998] 1 All ER 673 (statutory reports prepared under the Company Directors Disqualification Act 1986 s 7(3) only privileged if a public interest requiring protection is sufficient to override ordinary rights to disclosure can be shown; there is no general privilege attaching to documents brought into existence for the purposes of litigation). As to privilege in relation to licensed conveyancers and authorised bodies see **LEGAL PROFESSIONS** vol 65 (2008) PARAS 719; **LEGAL PROFESSIONS** vol 66 (2009) PARA 1409 respectively; as to legal executives see generally **LEGAL PROFESSIONS** vol 66 (2009) PARA 1463 et seq; as to legal professional privilege in relation to barristers see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1146; and as to legal professional privilege in relation to solicitors see **LEGAL PROFESSIONS** vol 65 (2008) PARA 740; **LEGAL PROFESSIONS** vol 66 (2009) PARA 1032 (communications between solicitor and client and between solicitor and professional agent respectively).

3 *Auten v Rayner (No 2)* [1960] 1 QB 669, [1960] 1 All ER 692; see also *Goodridge v Chief Constable of Hampshire Constabulary* [1999] 1 All ER 896, [1999] 1 WLR 1558 (privilege might be invoked between the police

and the DPP in certain circumstances, but not where the police were acting in accordance with their public duties regulated by statute).

4 *International Business Machines Corp v Phoenix International (Computers) Ltd* [1995] 1 All ER 413; *Re Duncan, Garfield v Fay* [1968] P 306, [1968] 2 All ER 395. See also *Wheeler v Le Marchant* (1881) 17 ChD 675, CA; *Lawrence v Campbell* (1859) 4 Drew 485 (Scots lawyer); *Macfarlan v Rolt* (1872) LR 14 Eq 580 (French lawyer); *Bunbury v Bunbury* (1839) 2 Beav 173 (Dutch lawyer).

5 *W v Edgell* [1990] Ch 359, [1990] 1 All ER 835, CA; and see *Wheeler v Le Marchant* (1881) 17 ChD 675, CA; *Reid v Langlois* (1849) 1 Mac & G 627; *Anderson v Bank of British Columbia* (1876) 2 ChD 644, CA. See also *C v C* [1946] 1 All ER 562.

6 *Normanshaw v Normanshaw and Measham* (1893) 69 LT 468, and see cases cited in note 5.

7 *R v Robinson* [1917] 2 KB 108, CCA; *Smith v Daniell* (1874) LR 18 Eq 649. This includes the opinion of a lawyer, but given as a friend and not given professionally: *Smith v Daniell* (1874) LR 18 Eq 649. See also *Wilson v Rastall* (1792) 4 Term Rep 753.

8 See *Chantrey Martin (a firm) v Martin* [1953] 2 QB 286, [1953] 2 All ER 691, CA.

9 *Moseley v Victoria Rubber Co* (1886) 55 LT 482. On the other hand, in relation to proceedings pending or contemplated before the Comptroller or the Patents Appeal Tribunal, a patent agent is in the same position as a solicitor in relation to proceedings in the High Court: see the Patents Act 1977 s 102A (prospectively repealed by the Legal Services Act 2007 s 210, Sch 23); and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 640; *Re Dormeuil Trade Mark* [1983] RPC 131 (trade mark agent).

10 *Slade v Tucker* (1880) 14 ChD 824.

11 *Jones v Great Central Rly Co* [1910] AC 4, HL.

12 See the Legal Aid Act 1988 s 31(1) (repealed); the Access to Justice Act 1999 ss 20(7), 22(1)(a); and **LEGAL AID** vol 65 (2008) PARAS 228, 230.

13 *Wilson v Rastall* (1792) 4 Term Rep 753; *Greenlaw v King* (1838) 1 Beav 137; *Smith v Daniell* (1874) LR 18 Eq 649; *Greenough v Gaskell* (1833) 1 My & K 98; *Doe d Pritchard v Jauncey* (1837) 8 C & P 99.

14 *Wilson v Rastall* (1792) 4 Term Rep 753; *Bunbury v Bunbury* (1839) 2 Beav 173; *Baugh v Cradocke* (1832) 1 Mood & R 182; *Harris v Harris* [1931] P 10. Communications with the legal adviser of a co-adventurer are within the protection: *Rochefoucauld v Boustead* (1896) 65 LJ Ch 794. See also PARA 561 note 2.

15 *Minter v Priest* [1930] AC 558, HL; *R v Downer* (1880) 14 Cox CC 486, CCR; *Smith v Daniell* (1874) LR 18 Eq 649; *R v Farley and Jones* (1846) 2 Car & Kir 313; *R v Brewer* (1834) 6 C & P 363; *Cuts v Pickering* (1672) 1 Vent 197.

16 See **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 833.

17 *Minet v Morgan* (1873) 8 Ch App 361. Advice privilege protects communications to and from a legal adviser that are made for the purpose of obtaining legal advice even where litigation is not pending or contemplated; litigation privilege protects communications prepared for the purposes of litigation, and extends to communications between client or legal adviser and a third party: see PARA 558.

18 See *Conlon v Conlons Ltd* [1952] 2 All ER 462, CA.

19 See PARA 569.

20 See PARA 571.

21 *Conlon v Conlons Ltd* [1952] 2 All ER 462, CA; and see PARA 566.

UPDATE

559 Cases in which privilege arises

NOTE 8--See also *R (on the application of Prudential plc) v Special Comr of Income Tax* [2009] EWHC 2494 (Admin), [2010] 1 All ER 1113.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(ii) Legal Professional Privilege/560. Extent of privilege.

560. Extent of privilege.

Legal professional privilege does not extend to statements or documents which are in the public domain¹, such as shorthand or other notes of a hearing held in public or in open court², or in private³, or before an arbitrator⁴, or depositions filed in the course of proceedings⁵. A collection of copies or extracts of public records or documents, however, which is made or obtained by a solicitor for the purposes of legal proceedings, and is the result of his professional knowledge, research and skill, may be the subject of litigation privilege⁶.

Inspection may be ordered of a privileged document referred to in a statement of case⁷, and secondary evidence may be given of a privileged document despite the privilege attaching to the original⁸, although, if a copy is obtained improperly, an injunction may be granted restraining the use of that copy; and if inspection of a document is given inadvertently, then it may be used only with the court's permission⁹.

The privilege is the privilege of the client and his successor in title¹⁰ but a solicitor cannot claim privilege from disclosing the name of his client¹¹. He may, however, in some circumstances refuse disclosure of his client's address when communicated confidentially to him¹².

Documents that exist independently of legal advice do not become privileged merely by being given to the lawyer¹³: he cannot refuse to produce a deed unless his client was entitled to resist production¹⁴; nor can he refuse to state when he parted with it and to whom¹⁵, nor is he precluded from giving evidence as to who was present when a deed was executed¹⁶.

A statutory power which provides for the inspection of any documents in a solicitor's possession does not apply to a document in which legal professional privilege subsists¹⁷.

1 See *Nicholl v Jones* (1865) 2 Hem & M 588; *Goldstone v Williams, Deacon & Co* [1899] 1 Ch 47.

2 *Re Worswick, Robson v Worswick* (1888) 38 ChD 370. A transcript of shorthand notes of the proceedings in open court on the trial of a prior action is merely the reproduction in a physical form of material which was in the public domain and is not privileged: *Lambert v Home* [1914] 3 KB 86, CA.

3 *Ainsworth v Wilding* [1900] 2 Ch 315.

4 *Rawstone v Preston Corpn* (1885) 30 ChD 116.

5 *Goldstone v Williams, Deacon & Co* [1899] 1 Ch 47. Exhibits to the depositions if already privileged remain so. The transcript of shorthand notes taken at an examination under the equivalent of the Insolvency Act 1986 has been held to be privileged: see *Learoyd v Halifax Joint Stock Banking Co* [1893] 1 Ch 686; see also *Fenton v Queen's Ferry Wire Co Ltd* (1869) 38 LJ Ch 263.

6 *Lyell v Kennedy (No 3)* (1884) 27 ChD 1, CA. A transcript of shorthand notes of the proceedings in open court does not involve any such 'professional knowledge, research and skill' as is referred to in *Lyell v Kennedy (No 3)*: *Lambert v Home* [1914] 3 KB 86, CA.

7 See CPR 31.14; and PARA 540; and see *Milbank v Milbank* [1900] 1 Ch 376, CA. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2. As to statements of case see PARA 584 et seq.

8 *Goddard v Nationwide Building Society* [1987] QB 670, [1986] 3 All ER 264, CA; *Calcraft v Guest* [1898] 1 QB 759, CA; *Lloyd v Mostyn* (1842) 10 M & W 478.

9 See CPR 31.20; and PARA 551; and see *Lord Ashburton v Pape* [1913] 2 Ch 469, CA (applied in *ISTIL Group Inc v Zahoor* [2003] EWHC 165 (Ch), [2003] 2 All ER 252 (injunction refused on public policy grounds)); *Davies v Clough* (1837) 8 Sim 262; *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 2 All ER 716, [1987] 1 WLR 1027, CA; *Derby & Co Ltd v Weldon (No 8)* [1990] 3 All ER 762, [1991] 1 WLR 73, CA (where the party to whom disclosure is made must have known that a mistake has occurred, the documents so disclosed, and all copies of them, must be returned, and the court will restrain by injunction the use of information contained in or derived from them); *Black & Decker Inc v Flymo* [1991] 3 All ER 158, [1991] 1 WLR 753 (once documents have been disclosed (it seems, otherwise than by mistake) privilege no longer applies); *Pizzey v Ford Motor Co Ltd* [1993] 17 LS Gaz R 46, CA (inadvertently disclosed documents may be used if it was reasonable for the party to whom they were disclosed to believe that they were disclosed intentionally); *International Business Machines Corp v Phoenix International (Computers) Ltd* [1995] 1 All ER 413 (an injunction to prevent the use of documents disclosed by mistake will only be granted if the mistake should have been obvious to a reasonable solicitor, the onus of proof being on the party claiming the injunction). As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules, however, see PARA 33 text and note 2.

10 *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch 553, [1971] 3 All ER 1192; and see PARA 569.

11 *Bursill v Tanner* (1885) 16 QBD 1, CA; *Re Cathcart, ex p Campbell* (1870) 5 Ch App 703.

12 *Re Arnott, ex p Chief Official Receiver* (1888) 60 LT 109; see *Re Cathcart, ex p Campbell* (1870) 5 Ch App 703. But see *Re B (abduction: disclosure)* [1995] 2 FCR 601, [1995] 1 FLR 774, CA (solicitor ordered to disclose whereabouts of client who abducted his own children).

13 *R v Board of Inland Revenue, ex p Goldberg* [1989] QB 267, [1998] 3 All ER 248 (referring to *Anderson v Bank of British Columbia* (1876) 2 ChD 644, CA).

14 *Bursill v Tanner* (1885) 16 QBD 1, CA.

15 *Banner v Jackson* (1847) 1 De G & Sm 472.

16 *Crawcour v Salter* (1881) 18 ChD 30, CA.

17 *B v Auckland District Law Society* [2003] UKPC 38, [2003] 2 AC 736, [2004] 4 All ER 269 (New Zealand statute).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(ii) Legal Professional Privilege/561. Communications between client and legal adviser directly.

561. Communications between client and legal adviser directly.

Any communications, verbal or written, passing between a party or his predecessors in title¹ and his or their solicitors² or other legal professional advisers³ are privileged from production for inspection, provided they are confidential and spoken or written to or by the legal adviser in his professional capacity and for the purpose of getting or giving legal advice or assistance⁴, but not otherwise⁵. A document coming into existence under these conditions is privileged even though it is not in fact communicated⁶. The fact that a letter within the privilege contains statements of facts as to matters in the public domain does not take it out of the privilege⁷.

Bills of costs rendered by a solicitor, relating to litigation, actual or in contemplation, are also privileged⁸, so far as they do not extend to (1) what took place in the presence of the opposite party; (2) communications with the opposite party; (3) matters of fact which are in the public domain⁹.

1 This does not apply in cases of testamentary disposition by the client as between different parties all of whom claim under him, eg the privilege does not belong to executors as against the next of kin: *Russell v Jackson* (1851) 9 Hare 387. See also *Reeves Bros Inc v Lewis Reed & Co Ltd* [1971] RPC 355 (licensing arrangement with party to original litigation is not equivalent to a succession in title).

2 This includes a person who has been a solicitor, but who at the time of the communications had ceased to be one but not to the knowledge of the client: *Calley v Richards* (1854) 19 Beav 401.

3 As to the meaning of 'legal representative' for the purposes of the Civil Procedure Rules see PARA 1833 note 13.

4 *Minet v Morgan* (1873) 8 Ch App 361; *Gardner v Irvin* (1878) 4 ExD 49, CA; *Wheeler v Le Marchant* (1881) 17 ChD 675, CA; *Kennedy v Lyell* (1883) 23 ChD 387, CA; affd on appeal sub nom *Lyell v Kennedy* (No 2) (1883) 9 App Cas 81, HL; *Viscount Gort v Rowney* (1884) 28 Sol Jo 533; *O'Shea v Wood* [1891] P 286, CA; *Collins v London General Omnibus Co* (1893) 68 LT 831; *Smith v Daniell* (1874) LR 18 Eq 649; *Mostyn v West Mostyn Coal and Iron Co Ltd* (1876) 34 LT 531; *Bristol Corp v Cox* (1884) 26 ChD 678. See also *Knight v Marquess of Waterford* (1836) 2 Y & C Ex 22; *Clagett v Phillips* (1842) 2 Y & C Ch Cas 82; *Warde v Warde* (1851) 3 Mac & G 365; *Nias v Northern and Eastern Rly Co* (1838) 7 LJ Ch 170; *Willson v Leonard* (1838) 7 LJ Ch 242; *Pearse v Pearse* (1846) 1 De G & Sm 12; *Lord Walsingham v Goodricke* (1843) 3 Hare 122; *Jenkyns v Bushby* (1866) LR 2 Eq 547; *Enthoven v Cobb* (1852) 2 De GM & G 632, CA (case for opinion of counsel, counsel's brief, notes etc); *Garland v Scott* (1830) 3 Sim 396; *Flight v Robinson* (1844) 8 Beav 22; *Wilson v Northampton and Banbury Junction Rly Co* (1872) LR 14 Eq 477; *Lord Walsingham v Goodricke* (1843) 3 Hare 122; *Friend v London, Chatham and Dover Rly Co* (1877) 2 ExD 437, CA (communications between solicitor and client); *Thomas v Rawlings* (1859) 27 Beav 140; *Marsh v Keith* (1860) 1 Drew & Sm 342; *Watson v Cammell Laird & Co (Shipbuilders and Engineers) Ltd* [1959] 2 All ER 757, [1957] 1 WLR 702, CA (copy of hospital case notes prepared by solicitor for purposes of action). The privilege does not apply where the residence of a ward is concealed from the court, and the information must be disclosed by the solicitor though communicated to him by his client in the course of his professional employment: *Ramsbotham v Senior* (1869) LR 8 Eq 575 and see *Re B (abduction: disclosure)* [1995] 2 FCR 601, [1995] 1 FLR 774, CA (solicitor ordered to disclose whereabouts of client who abducted his own children). As to privilege when the disclosure is sought to be obtained from the town clerk of a corporation in his capacity as such, and he is also solicitor to the corporation, see *Swansea Corp v Quirk* (1879) 5 CPD 106; *Salford Corp v Lever* (1890) 24 QBD 695; *Blackpool Corp v Locker* [1948] 1 KB 349, [1948] 1 All ER 85, CA.

5 *Moseley v Victoria Rubber Co* (1886) 55 LT 482; *Smith v Daniell* (1874) LR 18 Eq 649; *Walker v Wildman* (1821) 6 Madd 47; *Wilson v Rastall* (1792) 4 Term Rep 753; *R v Godstone RDC* [1911] 2 KB 465; and see *Rose v Chesham UDC* (1913) 77 JP Jo 184. See also *Ventouris v Mountain* [1991] 3 All ER 472, [1991] 1 WLR 607, CA (document existing before litigation contemplated obtained by solicitor for the purposes of the litigation not privileged from inspection unless it betrayed advice given by solicitor to client); *Lubrizol Corp v Esso Petroleum*

Co Ltd [1992] 1 WLR 957 (privilege does not attach to documents in possession of both parties to an action (now known as a 'claim': see PARA 18), unless they would tend to show that advice might be sought or the advice given); *R v Crown Court at Manchester, ex p Rogers* [1999] 4 All ER 35, [1999] 1 WLR 832 (record that client visited his solicitor is not a communication and therefore not privileged). It is not a breach of legal professional privilege for a person's solicitor to give evidence as to the identity of that person at his trial; nor is a file note covered by privilege as it is not a communication between solicitor and client: *R (on the application of Howe) v South Durham Magistrates' Court* [2004] EWHC 362 (Admin), [2005] RTR 55, DC.

6 *Southwark Water Co v Quick* (1878) 3 QBD 315, CA. Thus, privilege can ordinarily be claimed for documents prepared for the purpose of the litigation even though they are in the maker's possession, and not that of the party or his solicitor, but such privilege does not apply to statements of attesting witnesses in probate claims, because they are witnesses of the court: see *Re Fuld's Estate (No 2)*, *Hartley v Fuld* [1965] P 405, [1965] 2 All ER 657. Note that litigation privilege will attach to documents prepared for litigation even where the party is a litigant in person: see PARA 573.

7 *Ainsworth v Wilding* [1900] 2 Ch 315; and see PARA 560.

8 *Chant v Brown* (1852) 9 Hare 790; *Turton v Barber* (1874) LR 17 Eq 329; but see *Burton v Dodd* (1890) 35 Sol Jo 39, where production of a bill of costs was ordered on the ground that it would throw light on the question whether the client had, as she alleged, no independent advice. See also *Daily Express (1908) Ltd v Mountain* (1916) 32 TLR 592, CA (although a bill of costs was privileged, particulars of items in the bill were ordered in an action claiming a sum which included those items).

9 *Ainsworth v Wilding* [1900] 2 Ch 315.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(ii) Legal Professional Privilege/562. Communications between client and legal adviser through agent.

562. Communications between client and legal adviser through agent.

Legal professional privilege applies to communications made through a clerk or agent in the employment of the client¹ or of the solicitor², and to communications between a solicitor and his partner³ or professional agent⁴ or counsel⁵. Communications between solicitors for opposite parties, or the solicitor for one party and the opposite party himself, are not privileged, as they are not confidential⁶, except by agreement⁷.

1 *Reid v Langlois* (1849) 1 Mac & G 627; *Hooper v Gumm* (1862) 2 John & H 602; *Bunbury v Bunbury* (1839) 2 Beav 173; *Russell v Jackson* (1851) 9 Hare 387; *Macfarlan v Rolt* (1872) LR 14 Eq 580; *Anderson v Bank of British Columbia* (1876) 2 ChD 644, CA; *Wheeler v Le Marchant* (1881) 17 ChD 675, CA; *Lafone v Falkland Islands Co* (1857) 4 K & J 34.

2 *Wheeler v Le Marchant* (1881) 17 ChD 675, CA.

3 *Mostyn v West Mostyn Coal and Iron Co Ltd* (1876) 34 LT 531.

4 Eg a country or town agent (*Hughes v Biddulph* (1827) 4 Russ 190; *Bolton v Liverpool Corpn* (1833) 1 My & K 88; *Catt v Tourle* (1870) 23 LT 485); or agent to act in the Mayor's and City of London Court (*Goodall v Little* (1851) 1 Sim NS 155); or an agent abroad (*Macfarlan v Rolt* (1872) LR 14 Eq 580).

5 *Mostyn v West Mostyn Coal and Iron Co* (1876) 34 LT 531; *Bristol Corpn v Cox* (1884) 26 ChD 678; *Lowden v Blakey* (1889) 23 QBD 332; *Knight v Marquess of Waterford* (1836) 2 Y & C Ex 22; *Pearse v Pearse* (1846) 1 De G & Sm 12; *Bolton v Liverpool Corpn* (1833) 1 My & K 88; *Enthoven v Cobb* (1852) 2 De GM & G 632, CA; *Warde v Warde* (1851) 3 Mac & G 365; *Manser v Dix* (1855) 1 K & J 451; *Lamb v Orton* (1853) 1 Drew 414; *Greenlaw v King* (1838) 1 Beav 137; *Curtis v Beaney* [1911] P 181; *Vigneron-Dahl (British and Colonial) Ltd v Pettit* (1925) 69 Sol Jo 693.

6 *Gore v Bowser* (1851) 5 De G & Sm 30; *Ford v Tennant (No 2)* (1863) 32 Beav 162; *Kennedy v Lyell* (1883) 23 ChD 387, CA, and cases there cited; affd sub nom *Lyell v Kennedy (No 2)* (1883) 9 App Cas 81, HL. Where a solicitor has acted for both parties before litigation, communications made to him by one party are privileged from disclosure to the other (*Eadie v Addison* (1882) 52 LJ Ch 80; see also *Re Ubsdell, ex p Assignees etc* (1872) 27 LT 460); but in *Macfarlan v Rolt* (1872) LR 14 Eq 580, the communications were ordered to be disclosed.

7 See PARA 582.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(ii) Legal Professional Privilege/563. Communications with counsel.

563. Communications with counsel.

Legal professional privilege extends to instructions and briefs to counsel¹, and cases for counsel's opinion, together with his opinion thereon, drafts and notes made by counsel, and documents settled by him²; memoranda or minutes made by the client of the communications between himself and the solicitor³, or entries in a solicitor's diary of similar communications⁴; a statement of facts drawn up by the client or at his direction for submission to his solicitor⁵, but not indorsements on counsel's brief of the result of an application or trial⁶.

1 See *Hobbs v Hobbs and Cousens* [1960] P 112, [1959] 3 All ER 827; in certain exceptional cases these may be disclosed for the purposes of process of assessment of costs: see *Goldman v Hesper* [1988] 3 All ER 97, [1988] 1 WLR 1238, CA; *Pamplin v Express Newspapers Ltd* [1985] 2 All ER 185, [1985] 1 WLR 689. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

2 See the cases cited in PARA 561 note 5. See also **LEGAL PROFESSIONS** vol 66 (2009) PARA 1146.

3 *Woolley v North London Rly Co* (1869) LR 4 CP 602.

4 *Ward v Marshall* (1887) 3 TLR 578.

5 *Southwark Water Co v Quick* (1878) 3 QBD 315, CA; see also *Feuerheerd v London General Omnibus Co* [1918] 2 KB 565, CA (statement made and signed, under misapprehension, by plaintiff (now 'claimant') and given to agent of opposite party, held privileged).

6 *Walsham v Stainton* (1863) 2 Hem & M 1; *Nicholl v Jones* (1865) 2 Hem & M 588.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(ii) Legal Professional Privilege/564. Communications between solicitor and non-professional agent or third party.

564. Communications between solicitor and non-professional agent or third party.

Litigation privilege can extend to communications between a lawyer or the lawyer's client and a third party where they are prepared for the purposes of litigation¹. Thus any communications passing, directly or through an agent², between a solicitor and a non-professional agent or a third party³ which come into existence after litigation is contemplated or commenced, and which are made with a view to such litigation, either for the purpose of obtaining advice as to the litigation or of obtaining evidence to be used in it, or of obtaining information which might lead to the obtaining of such evidence, are privileged⁴. So are documents obtained or prepared, confidentially, under like circumstances⁵, other than copies of unprivileged documents⁶. There is no rule of law that litigation cannot be contemplated or anticipated until a cause of action or part of it has arisen, and it is therefore sufficient if the communication is made in the bona fide belief or under a reasonable apprehension that litigation may ensue, and for that purpose⁷, but a mere vague apprehension of litigation is not sufficient⁸.

¹ See *Three Rivers District Council v Bank of England* [2004] UKHL 48, [2005] 4 All ER 948 (mainly discussing advice privilege); and see also eg *Re L (minors) (police investigation: privilege)* [1997] AC 16, [1996] 2 All ER 78, HL; *ISTIL Group Inc v Zahoor* [2003] EWHC 165 (Ch), [2003] 2 All ER 252. As to litigation privilege see PARA 558.

² *Anderson v Bank of British Columbia* (1876) 2 ChD 644, CA.

³ Where the agent or third party is merely the medium of communication between the solicitor and his client the communications are privileged whether there is pending litigation or not: see PARA 562.

⁴ *Anderson v Bank of British Columbia* (1876) 2 ChD 644, CA; *Steele v Stewart* (1843) 13 Sim 533 (affd (1844) 1 Ph 471); *Walsham v Stainton* (1863) 2 Hem & M 1; *Original Hartlepool Collieries Co v Moon* (1874) 30 LT 585; *M'Corquodale v Bell* (1876) 45 LJQB 329; *Simpson v Brown* (1864) 33 Beav 482; *Wilson v Northampton and Banbury Junction Rly Co* (1872) LR 14 Eq 477; *Chartered Bank of India, Australia and China v Rich* (1863) 4 B & S 73; *Learoyd v Halifax Joint Stock Banking Co* [1893] 1 Ch 686; *Kennedy v Lyell* (1883) 23 ChD 387, CA (affd sub nom *Lyell v Kennedy (No 2)* (1883) 9 App Cas 81, HL); *Lowden v Blakey* (1889) 23 QBD 332; *Calcraft v Guest* [1898] 1 QB 759, CA; cf *Page v Ward* (1869) 20 LT 518. See *Patch v United Bristol Hospitals Board* [1959] 3 All ER 876, [1959] 1 WLR 955 (statements made by surgeon and other hospital staff because something had gone wrong with treatment of patient (protected party), held privileged as having been made in reasonable anticipation of litigation). See also the cases cited in note 1.

⁵ *Learoyd v Halifax Joint Stock Banking Co* [1893] 1 Ch 686 (cf *North Australian Territory Co v Goldsborough, Mort & Co* [1893] 2 Ch 381, CA); *Southwark Water Co v Quick* (1878) 3 QBD 315, CA; *Anderson v Bank of British Columbia* (1876) 2 ChD 644, CA; *Wheeler v Le Marchant* (1881) 17 ChD 675, CA; *Sammon v Bennett* (1892) 8 TLR 235; *The Palermo* (1883) 9 PD 6, CA; *Re Holloway, Young v Holloway* (1887) 12 PD 167, CA (anonymous letters sent to counsel and solicitor). See also *Ankin v London and North Eastern Rly Co* [1930] 1 KB 527, CA.

⁶ *Chadwick v Bowman* (1886) 16 QBD 561; *Lyell v Kennedy (No 3)* (1884) 27 ChD 1, CA.

⁷ *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1974] AC 405, [1973] 2 All ER 1169, HL.

⁸ Letters written two years before the institution of a suit by a country solicitor to a member of the firm acting as his town agents were held not privileged, though the firm afterwards acted as the solicitors in a suit which involved the subject matter of the letters: *Hampson v Hampson* (1857) 26 LJ Ch 612. So also letters written 18 years before a suit was commenced, but brought into existence in case a certain transaction then entered into should subsequently be impeached and passed between a legal adviser and his client, were held not privileged when the suit was brought subsequently against a third party: *Greenlaw v King* (1838) 1 Beav

137. As to when proceedings are 'anticipated' see *Jarman v Lambert and Cooke (Contractors) Ltd* [1951] 2 KB 937, [1951] 2 All ER 255, CA. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(ii) Legal Professional Privilege/565. Communications between party and non-professional agent, employee or third party.

565. Communications between party and non-professional agent, employee or third party.

Litigation privilege can extend to communications between a lawyer or the lawyer's client and a third party where they are prepared for the purposes of litigation¹. Communications between a party and a non-professional agent or employee or third party are only privileged if they are made both (1) in answer to inquiries made by the party as the agent for or at the request or suggestion of his solicitor², or without any such request, but for the purpose of being laid before a solicitor or counsel for the purpose of obtaining his advice or of enabling him to prosecute or defend an action³, or prepare a brief⁴; and (2) for the purposes of litigation existing or in contemplation at the time⁵. Both these conditions must be fulfilled in order that privilege may exist⁶.

In certain cases decided under the Common Law Procedure Acts⁷ a distinction was drawn between reports made by agents or employees of a party in the ordinary course of duty which were held not to be privileged, and reports specially obtained from experts, such as scientists or medical men, with a view to litigation which were held to be privileged, although it does not appear that the reports in question were obtained for the purpose of being laid before the party's legal adviser⁸. These cases are no longer authoritative⁹.

Documents prepared in relation to intended proceedings, whether at the request of a solicitor or not, and whether ultimately laid before the solicitor or not, are privileged, provided they are prepared with a bona fide intention of being laid before him for the purpose of taking his advice¹⁰. It is not necessary that the list or affidavit claiming privilege should state that the information was obtained solely or primarily for the solicitor, if it was obtained for him in the sense of being procured as materials upon which professional advice should be taken in proceedings pending or threatened or anticipated; if it was so obtained, it is nonetheless protected, even though the client intends to settle the case without recourse to the solicitor if he is able to¹¹.

Where documents are obtained for two or more separate purposes, they will only attract privilege from production for inspection if the dominant purpose for which they were prepared was for submission to a legal adviser¹².

Where, however, documents are already in existence in circumstances not in themselves giving rise to privilege, the mere fact of their being handed to the solicitor for the purposes of litigation does not create a privilege¹³.

1 See *Three Rivers District Council v Bank of England* [2004] UKHL 48, [2005] 4 All ER 948 (mainly discussing advice privilege); and see also eg *Re L (minors) (police investigation: privilege)* [1997] AC 16, [1996] 2 All ER 78, HL; *ISTIL Group Inc v Zahoor* [2003] EWHC 165 (Ch), [2003] 2 All ER 252. As to litigation privilege see PARA 558.

2 *Anderson v Bank of British Columbia* (1876) 2 ChD 644, CA; *Friend v London, Chatham and Dover Rly Co* (1877) 2 ExD 437, CA; *Lafone v Falkland Islands Co* (1857) 4 K & J 34; *Wheeler v Le Marchant* (1881) 17 ChD 675, CA; *Jones v Great Central Rly Co* [1910] AC 4, HL.

3 Privilege attaches to a letter written by an insured to his insurer, as required by his policy of insurance, where it is the insurer's purpose to obtain legal advice, whatever the intention or purpose of the insured: *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 2 All ER 716, [1987] 1 WLR 1027, CA; and

see also *Southwark Water Co v Quick* (1878) 3 QBD 315, CA; *Anderson v Bank of British Columbia* (1876) 2 ChD 644, CA; *Bunbury v Bunbury* (1839) 2 Beav 173; *Reece v Trye* (1846) 9 Beav 316; *Coombe v London Corp* (1842) 6 Jur 571; affd (1845) 15 LJ Ch 80; *Penrudduck v Hammond* (1847) 11 Beav 59; *Willson v Leonard* (1838) 7 LJ Ch 242; *Phillips v Routh* (1872) LR 7 CP 287.

4 *Anderson v Bank of British Columbia* (1876) 2 ChD 644, CA; *Southwark Water Co v Quick* (1878) 3 QBD 315, CA.

5 *Wheeler v Le Marchant* (1881) 17 ChD 675, CA; *Collins v London General Omnibus Co* (1893) 68 LT 831; see also *The City of Baroda* (1926) 134 LT 576 (proceedings not contemplated). In *W Dennis & Sons Ltd v West Norfolk Farmers' Manure and Chemical Co-operative Co Ltd* [1943] Ch 220, [1943] 2 All ER 94, the question was left open whether a document is privileged which comes into existence after litigation has been started although it had been asked for by the party concerned before he contemplated litigation.

6 *Paddon v Winch* (1870) LR 9 Eq 666 (correspondence between defendant's solicitors and third party); *English v Tottie* (1875) 1 QBD 141 (action for non-delivery of goods; correspondence between vendor and person from whom he purchased goods); *Bustros v White* (1876) 1 QBD 423, CA (letter to party from mercantile agent); *Anderson v Bank of British Columbia* (1876) 2 ChD 644, CA (explaining *Ross v Gibbs* (1869) LR 8 Eq 522) (letter to principal from agent); *Martin v Butchard* (1877) 36 LT 732 (survey of ship; contrast *The Theodor Körner* (1878) 3 PD 162, as reported in 47 LJP 85, where it appears that the surveys were for the purpose of submission to the party's solicitor); *Webb v East* (1880) 5 ExD 108, CA (letter in reply to inquiries as to servant's character); *Westinghouse v Midland Rly Co* (1883) 48 LT 462, CA (letters between officers of company and between them and third persons); *Worthington v Dublin, Wicklow and Wexford Rly Co* (1888) 22 LR Ir 310 (report of company's engineer); *Kerry County Council v Liverpool Salvage Association and T Ensor & Son* [1905] 2 IR 38, CA (reports etc made or obtained by defendants as agents of party in earlier litigation). Where the communications are made to a society with a view to obtaining its help in litigation they are not privileged, though they are laid by the society before its solicitor for his advice: *Jones v Great Central Rly Co* [1910] AC 4, HL. See also *Woods v Martins Bank Ltd* [1959] 1 QB 55, [1958] 3 All ER 166 (bank's internal memoranda and correspondence between bank manager and district head office not privileged in action against bank for negligent advice).

7 See the Common Law Procedure Act 1854 ss 50-54 (repealed).

8 *Woolley v North London Rly Co* (1869) LR 4 CP 602; *Parr v London, Chatham and Dover Rly Co* (1871) 24 LT 558; *Cossey v London, Brighton and South Coast Rly Co* (1870) LR 5 CP 146. See, however, *Fenner v London and South Eastern Rly Co* (1872) LR 7 QB 767 (not approved in *Skinner v Great Northern Rly Co* (1874) LR 9 Exch 298); *Baker v London and South Western Rly Co* (1867) LR 3 QB 91. Older Chancery cases where the privilege was less extensive are *Lord Walsingham v Goodricke* (1843) 3 Hare 122; *Glyn v Caulfeild* (1851) 3 Mac & G 463; *Kerr v Gillespie* (1844) 7 Beav 572.

9 See the text and notes 1-5.

10 *Southwark Water Co v Quick* (1878) 3 QBD 315, CA (communications between chairman and officers of company); *Ross v Gibbs* (1869) LR 8 Eq 522 (letters from agent sent to consult with legal advisers abroad and to report and obtain evidence in suit); *Pacey v London Tramways Co* (1876) 2 ExD 440, CA; *Friend v London, Chatham and Dover Rly Co* (1877) 2 ExD 437, CA (medical reports in accident cases); *Haslam Foundry and Engineering Co v Hall* (1887) 3 TLR 776 (reports and papers in earlier litigation); *Collins v London General Omnibus Co* (1893) 63 LJB 428 (report on accident made by defendants' employee). In the case of *Re Holloway*, *Young v Holloway* (1887) 12 PD 167, CA, anonymous letters addressed to the solicitor and counsel engaged in the suit were held to be privileged, but not those sent to the party, there being nothing to show that they were sent for communication to the solicitor. See also *R v Godstone RDC* [1911] 2 KB 465 (cited in PARA 561 note 5); *Birmingham and Midland Motor Omnibus Co v London and North Western Rly Co* [1913] 3 KB 850, CA (form of affidavit claiming privilege (see text and note 12)); *Adam Steamship Co Ltd v London Assurance Corp* [1914] 3 KB 1256, CA (cables and letters sent after the parties were at arm's length, and obtained for use in litigation, which was in contemplation); *Tobakin v Dublin Southern Districts Tramways Co* [1905] 2 IR 58, CA; *The Hopper No 13* [1925] P 52 (master's report); cf *Polurrian Steamship Co Ltd v Young* (1913) 109 LT 901; affd on the facts [1915] 1 KB 922, CA; *Ankin v London and North Eastern Rly Co* [1930] 1 KB 527, CA (communications between officers of defendant company and between those officers and third parties); *Westminster Airways Ltd v Kuwait Oil Co Ltd* [1951] 1 KB 134, [1950] 2 All ER 596, CA (correspondence of defendants with insurance brokers and insurers before formal claim for damages made; if prima facie case of privilege made out, court should accept affidavit without inspecting documents); *Lee v South West Thames Regional Health Authority* [1985] 2 All ER 385, [1985] 1 WLR 845, CA.

11 *Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Rly Co* [1913] 3 KB 850, CA, approved in *Ogden v London Electric Rly Co* (1933) 149 LT 476, CA.

12 *Waugh v British Railways Board* [1980] AC 521, [1979] 2 All ER 1169, HL.

13 *Pearce v Foster* (1885) 15 QBD 114, CA, per Brett MR; *Chadwick v Bowman* (1886) 16 QBD 561; *Land Corpn of Canada v Puleston* [1884] WN 1; *Graham v Bogle and Mills* [1924] 1 IR 68. It has been said that where documents created before the litigation was contemplated are copied, and such copies are made for the purpose of obtaining legal advice, those copies are privileged even though the originals would not be (see *R v Board of Inland Revenue, ex p Goldberg* [1989] QB 267, [1988] 3 All ER 248, DC), but this is now doubtful (see *Lubrizol Corpn v Esso Petroleum Co Ltd* [1992] 1 WLR 957).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(ii) Legal Professional Privilege/566. Communications relating to a compromise.

566. Communications relating to a compromise.

A communication made by a party to his legal adviser for the purpose of being repeated to the other side is not privileged if the authority of the adviser to compromise a case is in question¹. A compromise by one party of a previous claim between himself and a third party is not privileged as such², but inspection may be refused on the ground that the third party has an interest in the document³. Documents which came into existence as a result of 'without prejudice' negotiations for a settlement may also be protected from disclosure⁴.

1 *Conlon v Conlons Ltd* [1952] 2 All ER 462, CA.

2 *Hutchinson v Glover* (1875) 1 QBD 138; affd (1876) 33 LT 834, CA. See observations on this case in *Kearsley v Philips* (1883) 10 QBD 36; on appeal 10 QBD 465, CA.

3 *Warrick v Queen's College, Oxford (No 2)* (1867) LR 4 Eq 254.

4 See PARA 582. As to settlement see further PARA 505. As to the meaning of 'without prejudice' see PARA 804 note 4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(ii) Legal Professional Privilege/567. Reports made by agents or employees to employer.

567. Reports made by agents or employees to employer.

Reports made by employees to their employers or by agents to their principals are not privileged unless they satisfy, and are privileged if they do satisfy, the conditions already set out, that is to say they must be reports made for the purpose of being laid before the party's legal adviser for the purpose of obtaining his advice in connection with the anticipated or pending litigation¹. In other words, litigation privilege may apply to such communications, but not legal advice privilege².

¹ See *Three Rivers District Council v Bank of England* [2003] EWCA Civ 474, [2003] QB 1556; and PARAS 564-565. This case opened the question in relation to companies or corporations as to who exactly constitutes the client, whether employees of the client are in fact third parties, and whether communications between the lawyer and the client's employees are privileged: the Court of Appeal held that such communications were not protected by legal advice privilege; on appeal the House of Lords declined the invitation to express a view on this point (see *Three Rivers District Council v Governor and Company of the Bank of England* [2004] UKHL 48 at [46]-[48], [2005] 1 AC 610 at [46]-[48], [2005] 4 All ER 948 at [46]-[48]).

² As to litigation privilege and advice privilege see PARA 558.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(ii) Legal Professional Privilege/568. Communications between parties to litigation.

568. Communications between parties to litigation.

It has been held that communications between co-plaintiffs (now known as co-claimants)¹ or co-defendants stand on the same footing as communications between a party and non-professional agents, and are privileged only under the same circumstances², but communications between one co-adventurer with the solicitors for another co-adventurer are treated as if they had been between a party and his own solicitor³. If one of several trustees is a solicitor, communications between him and his co-trustees which would have been privileged if he were not a co-trustee are privileged⁴.

On the other hand communications passing between opposite parties or made by or on behalf of the opposite party cannot be confidential, and are accordingly liable to disclosure⁵ unless they attract the protection of 'without prejudice' negotiations⁶.

1 See PARA 18.

2 *Hutt v Governors of Haileybury College* (1888) 4 TLR 277, CA; *Hamilton v Nott* (1873) LR 16 Eq 112; *Jenkyns v Bushby* (1866) LR 2 Eq 547; *Betts v Menzies* (1857) 3 Jur NS 885; *Goodall v Little* (1851) 1 Sim NS 155. See also *Whitbread v Gurney* (1832) You 541; *Sankey v Alexander* (1874) 8 IR Eq 241. See PARA 564.

3 *Rochefoucauld v Boustead* (1896) 65 LJ Ch 794.

4 See *O'Rourke v Darbishire* [1920] AC 581, HL.

5 See *Kennedy v Lyell* (1883) 23 ChD 387, CA, per Cotton LJ; *Ainsworth v Wilding* [1900] 2 Ch 315; *Spenceley v Schulenburg* (1806) 7 East 357; *Desborough v Rawlins* (1838) 3 My & Cr 515; *Baker v London and South Western Rly Co* (1867) LR 3 QB 91; *Gore v Bowser* (1851) 5 De G & Sm 30; *Ford v Tennant (No 2)* (1863) 32 Beav 162; *Tobakin v Dublin Southern Districts Tramways Co* [1905] 2 IR 58, CA; but see the cases of *Feuerheerd v London General Omnibus Co* [1918] 2 KB 565, CA, where a statement made and signed by the plaintiff and obtained from her by the defendants' claims inspector for the purpose of being laid before the defendants' solicitor was held privileged, and *Britten v F H Pilcher & Sons* [1969] 1 All ER 491, where the statement made by the plaintiff to his employers' insurers and headed to the effect that it was intended for their use in connection with litigation already commenced or anticipated was held not to be liable to disclosure.

6 See PARA 582.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(ii) Legal Professional Privilege/569. Communications for a fraudulent or illegal purpose.

569. Communications for a fraudulent or illegal purpose.

Confidential communications between a client and his legal adviser are not privileged if made for the purpose of committing a fraud or crime, or, a fortiori, when both are engaged in the commission of some wrongful act¹. In order that the protection may obtain there must be both professional confidence and professional employment. There can be no professional confidence as to the disclosure of communications of this nature, and the furtherance of a fraud, or assistance given for the purpose of wrongfully evading the law, is not part of the duty of a legal adviser towards his client². It has also been held that the protection does not apply where the communications relate to the subject matter of the fraud alleged and the advice is being sought for the client's guidance in the commission of the fraud, even though the solicitor is ignorant of that fact³. The rule does not apply merely because fraud, fraudulent misrepresentation, or the like is alleged in an action and privilege is only lost by the fraudulent party, not by a victim of it⁴. Privilege cannot be overcome merely by making a charge of fraud; there must be some prima facie evidence that the allegation has a foundation in fact⁵.

On the other hand, although fraud for this purpose includes not only the tort of deceit but all forms of fraud and dishonesty, it does not extend to the tort of inducing breach of contract or conspiracy to induce breach of contract⁶.

1 *Follett v Jefferyes* (1850) 1 Sim NS 3; *R v Hayward* (1846) 2 Car & Kir 234; *R v Jones* (1846) 1 Den 166; *R v Avery* (1838) 8 C & P 596; *Russell v Jackson* (1851) 9 Hare 387; *Gartside v Outram* (1856) 3 Jur NS 39; *R v Brown* (1862) 9 Cox CC 281; *R v Cox and Railton* (1884) 14 QBD 153, CCR (where the former cases are reviewed); *Re Postlethwaite, Re Rickman, Postlethwaite v Rickman* (1887) 35 ChD 722; *Re Arnott, ex p Chief Official Receiver* (1888) 60 LT 109; *Williams v Quebrada Rly Land and Copper Co* [1895] 2 Ch 751; *R v Bullivant* [1900] 2 QB 163, CA; revsd sub nom *Bullivant v A-G for Victoria* [1901] AC 196, HL, but on the ground that there was no specific allegation of fraud or illegality (see *Bullivant v A-G for Victoria* [1901] AC 196, HL); cf *Greenough v Gaskell* (1833) 1 My & K 98; *Charlton v Coombes* (1863) 4 Giff 372. See also *O'Rourke v Darbishire* [1920] AC 581, HL. See also *R v Central Criminal Court, ex p Francis & Francis* [1989] AC 346, sub nom *Francis & Francis (a firm) v Central Criminal Court* [1988] 3 All ER 775, HL (it is immaterial whether the fraud is that of the client, his adviser or of a third party involving an innocent client); *Derby & Co Ltd v Weldon (No 7)* [1990] 3 All ER 161, [1990] 1 WLR 1156; *Dubai Aluminium Co Ltd v Al Alawi* [1999] 1 All ER 703, [1999] 1 WLR 1964. The 'fraud exception' applies to both litigation privilege and legal advice privilege: *Kuwait Airways Corp v Iraqi Airways Co (No 6)* [2005] EWCA Civ 286, [2005] 1 WLR 2734. See also PARA 558 text and notes 7-9.

2 *R v Cox and Railton* (1884) 14 QBD 153, CCR; *Russell v Jackson* (1851) 9 Hare 387; *Gartside v Outram* (1856) 3 Jur NS 39.

3 *Williams v Quebrada Rly Land and Copper Co* [1895] 2 Ch 751; see, contra, *Charlton v Coombes* (1863) 4 Giff 372.

4 See eg *Leitch v Abbott* (1886) 31 ChD 374, CA; *Edelston v Russell* (1888) 57 LT 927; *Sachs v Spielman* (1887) 37 ChD 295; *Whyte v Ahrens* (1884) 26 ChD 717, CA (actions by principals against agents; fraud or fraudulent misrepresentation alleged); *Great Western Colliery Co v Tucker* (1874) 9 Ch App 376; *Waynes Merthyr Co v Radford & Co* [1896] 1 Ch 29; *Mahony v Widows' Life Assurance Fund Ltd* (1871) LR 6 CP 252; *O'Rourke v Darbishire* [1920] AC 581, HL; *Banque Kayser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1986] 1 Lloyd's Rep 336 CA.

5 *O'Rourke v Darbishire* [1920] AC 581, HL.

6 *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch 553, [1971] 3 All ER 1192.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(ii) Legal Professional Privilege/570. Privilege claimed by persons in fiduciary capacity.

570. Privilege claimed by persons in fiduciary capacity.

When a fiduciary relationship exists, such as between a trustee and a beneficiary of the trust¹, or any analogous position², legal professional privilege cannot be claimed by the trustee, except in respect of communications and documents brought into existence by the trustee for the purpose of litigation against him by the beneficiary³. When there is a dispute between two beneficiaries in respect of the trust matters and the trustee acts as solicitor for one of them, communications between the trustee as solicitor and the beneficiary who is his client are not privileged against the other beneficiary⁴, but communications between one trustee and a co-trustee, who is a solicitor, are privileged against a beneficiary if made to obtain legal advice⁵.

1 *Re Mason, Mason v Cattley* (1883) 22 ChD 609; *Re Postlethwaite, Re Rickman, Postlethwaite v Rickman* (1887) 35 ChD 722; *Talbot v Marshfield* (1865) 2 Drew & Sm 549; *Wynne v Humberston* (1858) 27 Beav 421; *Devaynes v Robinson* (1855) 20 Beav 42; see also *O'Rourke v Darbishire* [1920] AC 581, HL.

2 *Gouraud v Edison Gower Bell Telephone Co of Europe* (1888) 57 LJ Ch 498; cf *Bristol Corp'n v Cox* (1884) 26 ChD 678 (member of a corporate body suing or being sued by the body, so far as regards inspection of documents which have been obtained by means of payment of money out of its funds); and see *R v Godstone RDC* [1911] 2 KB 465. Where a company obtains advice in the common interest and pays for it out of the common fund, a shareholder has a right to see it but this does not apply where the interests of the company and shareholders are adverse: *Woodhouse & Co Ltd v Woodhouse* (1914) 30 TLR 559, CA. See also *W Dennis & Sons Ltd v West Norfolk Farmers' Manure and Chemical Co-operative Co Ltd* [1943] Ch 220, [1943] 2 All ER 94 (accountants' report asked for by board of directors before litigation contemplated not privileged against a shareholder).

3 *Talbot v Marshfield* (1865) 2 Drew & Sm 549; *Wynne v Humberston* (1858) 27 Beav 421; *Re Mason, Mason v Cattley* (1883) 22 ChD 609; *Thomas v Secretary of State for India in Council* (1870) 18 WR 312. See also *Farrer v Hutchinson* (1839) 3 Y & C Ex 692 (where the trustee was ordered to produce certain leaves abstracted from an account book relating to trust matters which were stated to have been abstracted because they related only to private affairs; and also documents relating to a purchase of an estate by him alleged to have been purchased out of trust money, which documents (according to the trustees) proved that the purchase had been made out of private money).

4 *Tugwell v Hooper* (1847) 10 Beav 348.

5 *O'Rourke v Darbishire* [1920] AC 581, HL.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(ii) Legal Professional Privilege/571. Waiver of the privilege.

571. Waiver of the privilege.

Where legal professional privilege exists it may be waived by the client¹ (whose privilege it is² and who can restrain the solicitor from disclosure³), but not by the solicitor or other legal adviser⁴. In the case of documents for which privilege can be claimed and which are brought into existence for the purpose of a claim which is ultimately not proceeded with, the privilege does not cease and can be claimed in a subsequent action⁵, for the general principle is that a document once privileged is always privileged⁶. The mere fact that documents used in previous litigation are preserved and not destroyed does not amount to a waiver of the privilege⁷. Until the client has waived the privilege, it is the duty of the solicitor to claim it⁸. The death of the client does not put an end to the privilege⁹ which can be claimed by his successor in title¹⁰.

Although a report prepared in contemplation of litigation may be privileged from production by the defendant in the litigation for whom it was prepared, the report will not be privileged in a subsequent claim for libel in respect of passages in the report brought by the same claimant against the person who prepared it¹¹.

However, there are certain circumstances where the waiver of privilege may be implied, such as: (1) the inadvertent production of privileged documents¹²; (2) the deliberate introduction at a trial of part of a privileged document impliedly waives privilege as to the whole¹³; (3) in a claim against a solicitor for negligence in one of a series of related transactions, there is an implied waiver of privilege in respect of documents relating to the whole series¹⁴.

Proceedings relating to the care of a child are so far removed from normal claims that legal professional privilege has no place in relation to reports obtained by a party which could not have been prepared without the court giving leave to disclose documents already filed at court or to examine the child¹⁵.

1 *Kershaw v Whelan* [1996] 2 All ER 404, [1996] 1 WLR 358, DC; *Minter v Priest* [1930] AC 558, HL; *A-G v Mulholland* [1963] 2 QB 477 at 489, [1963] 1 All ER 767 at 771, CA, per Lord Denning MR (the privilege is that of the client not that of the lawyer). See also *Merle v More* (1826) 2 C & P 275; *Lea v Wheatley* (1678) 20 State Tr 574n; *Baillie's Case* (1779) 21 State Tr 1359; *Calcraft v Guest* [1898] 1 QB 759, CA. Waiver may be total or partial: *Lyell v Kennedy (No 3)* (1884) 27 ChD 1, CA; and see PARA 572.

2 *Knight v Marquess of Waterford* (1836) 2 Y & C Ex 22; *Herring v Cloberry* (1842) 11 LJ Ch 149; *Gresley v Mousley* (1856) 2 K & J 288; *Anderson v Bank of British Columbia* (1876) 2 ChD 644, CA; *Procter v Smiles* (1886) 55 LJQB 527, CA. As to state documents see *Anthony v Anthony* (1919) 35 TLR 559.

3 *Carter v Palmer* (1841) 8 Cl & Fin 657, HL; *Beer v Ward* (1821) Jac 77; *Davies v Clough* (1837) 8 Sim 262; *Mellor v Thompson* (1885) 31 ChD 55, CA; and see **LEGAL PROFESSIONS** vol 65 (2008) PARA 740. The mere fact that a party to proceedings has waived the privilege between client and solicitor does not result in the waiver of the further privilege which protects documents brought into existence for the purpose of litigation: *George Doland Ltd v Blackburn, Robson, Coates & Co (a firm)* [1972] 3 All ER 959, [1972] 1 WLR 1338; and see CPR 31.20 for the position where a privileged document has been inadvertently produced for inspection; and PARA 551.

4 *Anderson v Bank of British Columbia* (1876) 2 ChD 644, CA; *Procter v Smiles* (1886) 55 LJQB 527; *Greenough v Gaskell* (1833) 1 My & K 98; *Bate v Kinsey* (1834) 1 Cr M & R 38. The mere use of a privileged document in an action without its becoming in the public domain does not constitute waiver: *Goldstone v Williams, Deacon & Co* [1899] 1 Ch 47; *Roberts v Oppenheim* (1884) 26 ChD 724, CA; *Lyell v Kennedy (No 3)* (1884) 27 ChD 1, CA. There is no presumption of fact against a party who refuses to allow his solicitor to disclose professional communications; see *Wentworth v Lloyd* (1864) 10 HL Cas 589.

5 *Hughes v Garnons* (1843) 6 Beav 352; *Holmes v Baddeley* (1844) 1 Ph 476; *Pearce v Foster* (1885) 15 QBD 114, CA, following *Bullock v Corry* (1878) 3 QBD 356; *Goldstone v Williams, Deacon & Co* [1899] 1 Ch 47. Cf *Getty v Getty* [1907] P 334.

6 *Hobbs v Hobbs and Cousens* [1960] P 112, [1959] 3 All ER 827. See also *Calcraft v Guest* [1898] 1 QB 759, CA; *Goldstone v Williams, Deacon & Co* [1899] 1 Ch 47; *Bullock v Cory* (1878) 3 QBD 356.

7 *Calcraft v Guest* [1898] 1 QB 759, CA.

8 See *Beer v Ward* (1821) Jac 77; but see CPR 31.20 for the position where a privileged document has been inadvertently produced for inspection; and PARA 551.

9 *Bullivant v A-G for Victoria* [1901] AC 196, HL; *Curtis v Beaney* [1911] P 181.

10 *Calcraft v Guest* [1898] 1 QB 759, CA, following *Minet v Morgan* (1873) 8 Ch App 361, as explained in *Schneider v Leigh* [1955] 2 QB 195, [1955] 2 All ER 173, CA.

11 *Schneider v Leigh* [1955] 2 QB 195, [1955] 2 All ER 173, CA (medical report prepared for a defendant and disclosed by his solicitors in correspondence; privilege belonged to defendant not to the doctor, who was not a successor in title of the defendant and was under no duty to assert the right of the defendant to resist production). As to disclosure of medical reports under the relevant pre-action protocols see *Carlson v Townsend* [2001] EWCA Civ 511, [2001] 3 All ER 663, [2001] 1 WLR 2415 (cited in PARA 107 note 3).

12 See CPR 31.20 for the position where a privileged document has been inadvertently produced for inspection; and PARA 551. See also *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 2 All ER 716, [1987] 1 WLR 1027, CA; *Derby & Co Ltd v Weldon (No 8)* [1990] 3 All ER 762, [1991] 1 WLR 73, CA (where the party to whom disclosure is made must have known that a mistake has occurred, the documents so disclosed, and all copies of them, must be returned, and the court will restrain by injunction the use of information contained in or derived from them); *Black & Decker Inc v Flymo* [1991] 3 All ER 158, [1991] 1 WLR 753 (once documents have been disclosed (seem other than by mistake) privilege no longer applies); *Pizzey v Ford Motor Co Ltd* [1993] 17 LS Gaz R 46, CA (inadvertently disclosed documents may be used if it was reasonable for the party to whom they were disclosed to believe that they were disclosed intentionally); *International Business Machines Corp v Phoenix International (Computers) Ltd* [1995] 1 All ER 413 (an injunction to prevent the use of documents disclosed by mistake will only be granted if the mistake should have been obvious to a reasonable solicitor, the onus of proof being on the party claiming the injunction). As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2. Inadvertent disclosure amounts to waiver unless it is obvious that the disclosure was a mistake; it is not sufficient that the mistake is apparent after further inquiries: *MMI Research Ltd v Cellxion Ltd* [2007] All ER (D) 142 (Sep).

13 *Great Atlantic Insurance Co v Home Insurance Co* [1981] 2 All ER 485, [1981] 1 WLR 529, CA.

14 *Lillicrap v Nadler & Son* [1993] 1 All ER 724, [1993] 1 WLR 94, CA; and for examples of instances where there was no implied waiver see *General Accident Fire and Life Assurance Ltd v Tanter* [1984] 1 All ER 35, [1984] 1 WLR 100; *British Coal Corp v Dennis Rye Ltd (No 2)* [1988] 3 All ER 816, [1988] 1 WLR 1113, CA; *Paragon Finance plc (formerly National Home Loans Corp plc) v Freshfields (a firm)* [1999] 1 WLR 1183, CA. See also *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones* [2006] EWHC 158 (Ch), [2006] 2 All ER 599.

15 *Re L (minors) (police investigation, privilege)* [1997] AC 16, [1996] 2 All ER 78, HL.

UPDATE

571 Waiver of the privilege

NOTE 14--See also *Dore v Leicestershire CC* [2010] EWHC 34 (Ch), [2010] All ER (D) 62 (Feb) (waiver of privilege in respect of document did not extend to surrounding documents or circumstances).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(ii) Legal Professional Privilege/572. Limited waiver of the privilege.

572. Limited waiver of the privilege.

Although generally once legal professional privilege has been waived it cannot be re-asserted¹, there may in certain circumstances be a limited waiver. Thus in taxation proceedings, where it may be necessary to disclose certain privileged information in order to reach a fair determination as to costs, it has been held that disclosure for the purpose of taxation of costs does not amount to waiver of the privilege in any other context².

Provided that it is not likely to mislead or cause injustice, a party may waive privilege in respect of part of a document whilst retaining it in respect of other parts³; however, the general assumption is that by revealing part of a privileged document a party has waived privilege in respect of the whole document, unless the rest of the document is clearly irrelevant and its non-disclosure will not distort the facts or otherwise cause injustice⁴.

¹ See eg *Minter v Priest* [1930] AC 558; *Derby & Co Ltd v Weldon (No 10)* [1991] 2 All ER 908, [1991] 1 WLR 660.

² See *Pamplin v Express Newspapers Ltd* [1985] 2 All ER 185, [1985] 1 WLR 689; *Goldman v Hesper* [1988] 3 All ER 97, [1988] 1 WLR 1238, CA; *Bourns Inc v Raychem Corp* [1999] 3 All ER 154, CA.

In *Bourns Inc v Raychem Corp*, Aldous LJ said (at 162) that it 'is possible to waive privilege for a specific purpose and in a specific context without waiving it for any other purpose or in any other context'. This case was concerned with documents disclosed in taxation proceedings, but it is possible to find support for this as a general principle: see eg *British Coal Corp v Dennis Rye Ltd (No 2)* [1988] 3 All ER 816, [1988] 1 WLR 1113 (disclosure in criminal proceedings is not to be construed as waiver of the privilege; the documents remain privileged and may not be used in civil proceedings), although it is arguable that the point at issue in this case was a matter of admissibility rather than privilege. See also *General Mediterranean Holdings SA v Patel* [1999] 3 All ER 673, [2000] 1 WLR 272; *B v Auckland District Law Society* [2003] UKPC 38, [2004] 4 All ER 269, (2003) Times, 21 May.

³ *Lyell v Kennedy* (1884) 27 ChD 1, CA; *Nea Karteria Maritime Co v Atlantic and Great Lakes Steamship Co (No 2)* [1981] Com LR 138.

⁴ *Derby & Co Ltd v Weldon (No 10)* [1991] 2 All ER 908, [1991] 1 WLR 660; *R v Secretary of State for Transport, ex p Factortame Ltd (Discovery)* (1997) 9 Admin LR 591 (QB), (1997) Times, 16 May.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(ii) Legal Professional Privilege/573. Litigant in person.

573. Litigant in person.

It used to be said that when the litigation is conducted by the litigant in person it is doubtful whether there is any privilege for documents coming into existence as materials for or relating to the evidence of intended witnesses or otherwise for the purpose of the claim¹, but it has more recently been said that it must not be assumed that a litigant in person is denied, in preparing his litigation, the protection of secrecy which is enjoyed by a litigant who instructs a lawyer². If a litigant in person obtains advice from a legal representative³ in respect of the litigation, then any communications between them for that purpose would be privileged⁴.

1 In *Kyshe v Holt, Childs and Brotherton* [1888] WN 128 (which came before a divisional court consisting of Cave and AL Smith JJ), the judges differed. Cave J considered that there was no privilege, relying on *Wheeler v Le Marchant* (1881) 17 ChD 675, CA; AL Smith J considered that the privilege might obtain, relying on the judgment of Mellish LJ in *Anderson v Bank of British Columbia* (1876) 2 ChD 644, CA; but see *Re Holloway, Young v Holloway* (1887) 12 PD 167, CA, per Cotton LJ; also *Jones v Great Central Rly Co* [1910] AC 4, HL. In *Rabin v Mendoza & Co* [1954] 1 All ER 247, [1954] 1 WLR 271, CA, privilege was accorded to documents obtained by a party acting in person as a result of 'without prejudice' negotiation with the solicitor for the other party (see PARA 582).

2 *Ventouris v Mountain, The Italia Express* [1991] 3 All ER 472 at 475, [1991] 1 WLR 607 at 611 per Bingham LJ. See also *S County Council v B* [2000] Fam 76 at 84, [2000] 3 WLR 53 at 61 per Charles J; *R (on the application of Kelly) v Warley Magistrates' Court* [2007] EWHC 1836 (Admin) at [18], [2007] All ER (D) 506 (Jul) at [18] per Laws LJ.

3 As to the meaning of 'legal representative' see PARA 1833 note 13.

4 See CPR 48.6(3)(b), which envisages such a situation and provides for the recovery of any costs incurred; and see *The Civil Court Practice*. As to costs generally see also PARA 1729 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(iii) Public Interest Immunity/574. In general.

(iii) Public Interest Immunity

574. In general.

It is a general rule of law founded on public policy and recognised by Parliament¹ that any documentary evidence may be withheld or an answer to any question may be refused on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest². The rule is a rule of substantive law and may be described as a principle of constitutional law; it is not a mere matter of practice or procedure³. Accordingly, the liability of the Crown in civil proceedings to disclose documents and to produce them for inspection is without prejudice to the rule of law which authorises or requires the withholding of any document on the ground that its disclosure would be injurious to the public interest⁴. This right to withhold the disclosure and production of documents was formerly called 'Crown privilege', though perhaps erroneously⁵ since there is no question of any privilege in the ordinary sense of the word, and is now referred to as 'public interest immunity'. The fundamental problem is one of balancing or reconciling the two kinds of public interest which may clash; on the one hand, there is the public interest that harm should not be done to the nation or the public service by the disclosure of certain documents, and on the other hand, there is the public interest that the administration of justice should not be frustrated by the withholding of documents which must be produced in evidence if justice is to be done⁶.

¹ See the Crown Proceedings Act 1947 s 28(1) proviso; and see CPR 31.19(1); and PARA 555. There is the further exceptional statutory provision that even the existence of a document need not be disclosed if, in the opinion of a minister of the Crown, it would be injurious to the public interest to disclose its existence: see the Crown Proceedings Act 1947 s 28(2).

² *Conway v Rimmer*[1968] AC 910, [1968] 1 All ER 874, HL (where the cases are reviewed); revsg [1967] 2 All ER 1260, [1967] 1 WLR 1031, CA; and overruling the dicta of Viscount Simon LC in *Duncan v Cammell Laird & Co Ltd*[1942] AC 624, [1942] 1 All ER 587, HL, that an objection validly taken by the Crown is conclusive and precluded the court from inspecting the document. See also *Norwich Pharmacal Co v Customs and Excise Comrs*[1974] AC 133, [1973] 2 All ER 943, HL; *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)*[1974] AC 405, [1973] 2 All ER 1169, HL; *Rogers v Secretary of State for Home Department*[1973] AC 388, [1972] 2 All ER 1057, HL. All the cases decided before *Conway v Rimmer*[1968] AC 910, [1968] 1 All ER 874, HL, must now be read and examined in the light of that case. See *Merricks v Nott-Bower*[1965] 1 QB 57, [1964] 1 All ER 717, CA; *Re Grosvenor Hotel, London*[1964] Ch 464, [1964] 1 All ER 92, CA; *Re Grosvenor Hotel, London (No 2)*[1965] Ch 1210, [1964] 3 All ER 354, CA; *Wednesbury Corp'n v Ministry of Housing and Local Government*[1965] 1 All ER 186, [1965] 1 WLR 261, CA.

See also *Ellis v Home Office*[1953] 2 QB 135, [1953] 2 All ER 149, CA; *Broome v Broome (Edmundson cited)* [1955] P 190, [1955] 1 All ER 201; *Earl v Vass* (1882) 1 Sh Sc App 229; *Beatson v Skene* (1860) 5 H & N 838; *Hennessy v Wright*(1888) 21 QBD 509, and the cases cited there (in this case *Beatson v Skene* (1860) 5 H & N 838 and *Kain v Farrer* (1877) 37 LT 469 were discussed); *Hughes v Vargas* (1893) 9 TLR 551, CA, following *Beatson v Skene* (1860) 5 H & N 838; *Chatterton v Secretary of State for India in Council*[1895] 2 QB 189, CA; *Wright & Co v Mills* (1890) 62 LT 558; *Re Joseph Hargreaves Ltd*[1900] 1 Ch 347, CA; *Ford v Blest* (1890) 6 TLR 295; *A-G v Nottingham Corp'n* as reported in (1904) 20 TLR 257; *Williams v Star Newspaper Co Ltd* (1908) 24 TLR 297, approving *Latter v Goolden* (1894), cited in 24 TLR 297, CA; cf *Marks v Beyfus* (1890) 6 TLR 350 (on appeal 25 QBD 494, CA); *HMS Bellerophon* (1874) 44 LJ Adm 5; *Wadeer v East India Co* (1856) 8 De GM & G 182. The court has refused to order production of a letter written to a senior military officer by his subordinate (*Ford v Blest* (1890) 6 TLR 295); of documents deposited with a surveyor of income tax which the Board of Inland Revenue objected to produce (*Re Joseph Hargreaves Ltd*[1900] 1 Ch 347, CA; *Fitzgibbon v Greer*(1875) IR 9 CL 294; *Moodalay v Morton and East India Co* (1785) 1 Bro CC 469); of the army medical history sheets of a party to divorce proceedings (*Anthony v Anthony* (1919) 35 TLR 559), and of the statutory return of a railway accident to the Ministry of Transport (*Ankin v London and North Eastern Rly Co*[1930] 1 KB 527, CA; and see

Local Government Board v Arlidge[1915] AC 120, HL). See also *Glasgow Corp v Central Land Board* 1955 SLT 155 (where the position in Scots law is considered); and *M'Kie v West Scottish Motor Traction Co Ltd* 1952 SC 206 (production of a police report refused on the Lord Advocate claiming protection for it). For criticism of an attempt by the Crown to extend the ambit of privilege which failed on procedural grounds see *Broome v Broome (Edmundson cited)*[1955] P 190, [1955] 1 All ER 201. See also *Chief Constable of Greater Manchester v McNally*[2002] EWCA Civ 14, [2002] 2 Cr App Rep 617.

3 See *Grosvenor Hotel, London (No 2)*[1965] Ch 1210, [1964] 3 All ER 354, CA, where on this ground the former RSC Ord XXIV r 15 was held to be ultra vires in so far as it provided, presumably on the basis of *Duncan v Cammell Laird & Co Ltd*[1942] AC 624, [1942] 1 All ER 587, HL (see note 2), that the court should not make an order for production of documents for inspection by a party or to the court and should not itself inspect a document 'if a statement is duly made on behalf of the Crown that the production of the document to the court or as the case may be, for inspection would be injurious to the public interest'.

4 See CPR 31.19(1); and PARA 555.

5 See *Duncan v Cammell Laird & Co Ltd*[1942] AC 624 at 641, [1942] 1 All ER 587 at 595, HL, per Lord Simon ('Crown privilege is not a happy expression'); and *Rogers v Secretary of State for Home Department*[1973] AC 388 at 400, [1972] 2 All ER 1057 at 1060, HL, per Lord Reid ('I think that that expression (ie Crown privilege) is wrong and may be misleading'). Cf *Science Research Council v Nassé* [1980] AC 1028 at 1087, [1979] 3 All ER 673 at 697, HL, per Lord Scarman ('For myself, I regret the passing of the currently rejected term 'Crown privilege'. It at least emphasised the very restricted area of public interest immunity').

6 *Conway v Rimmer*[1968] AC 910 at 940, [1968] 1 All ER 874 at 880, HL, per Lord Reid.

UPDATE

574 In general

TEXT AND NOTES--The closed material procedure used in criminal proceedings cannot be adopted in a civil claim for damages: *Al Rawi v Security Service*[2010] EWCA Civ 482, [2010] All ER (D) 03 (May).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(iii) Public Interest Immunity/575. Circumstances in which public interest immunity may arise.

575. Circumstances in which public interest immunity may arise.

The claim to withhold documents from production for inspection or to refuse to answer any question on the ground of public interest immunity may arise in proceedings in which the Crown is a party¹, or in proceedings between private individuals in which the Crown is not a party²; it may arise at any stage before the trial by way of objection to the disclosure or inspection of documents³, or setting aside a witness summons⁴ or otherwise, or at the trial⁵; it may arise in relation to oral as well as to documentary evidence⁶; it may arise because of the contents of a particular document⁷ or (in the case of immunity claimed by non-governmental bodies) because the document belongs to a class which on the grounds of public interest must as a class be withheld from production⁸. Public interest immunity may thus apply to documents in the possession of a private individual as well as to documents in the possession of the Crown⁹ and can attach irrespective of where a document originates or in whose custody it reposes provided that it has properly either emanated from or come into possession of some servant or agent of the Crown¹⁰.

However it arises, public interest immunity can only be claimed¹¹ by the authority of the Crown and not by the authority of the person to whom the document relates¹². Secondary evidence may not be given of documents for which this immunity is established¹³; nor may a witness refresh his memory from such documents¹⁴. An objection on similar grounds to answering a request for further information will clearly be valid; and the opinion has been expressed that the same principle must apply to the exclusion of oral evidence which, if given, would jeopardise the interest of the community¹⁵. The extent of public interest immunity in relation to oral evidence is not clear; it may be within the competence of a minister to object to a witness giving evidence on a particular set or class of facts, but it is wrong to adopt a procedure which would prevent a witness who may be able to give other relevant evidence from giving any evidence at all; and the court will not entertain an application on behalf of the Crown to set aside the witness summons in such a case¹⁶.

1 See *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1974] AC 405, [1973] 2 All ER 1169, HL. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 note 2.

2 See eg *Duncan v Cammell Laird & Co* [1942] AC 624, [1942] 1 All ER 587, HL; *Asiatic Petroleum Co Ltd v Anglo-Persian Oil Co Ltd* [1916] 1 KB 822, CA; *Ankin v London and North Eastern Rly Co* [1930] 1 KB 527, CA. As to the duty of the parties to draw the attention of the Crown to the possibility that the disclosure or production of documents would or might be injurious to the public interest see PARA 577.

3 See under CPR 31.19: see PARA 555.

4 See *Auten v Rayner (No 2)* [1960] 1 QB 669, [1960] 1 All ER 692; *Rogers v Secretary of State for Home Department* [1973] AC 388, [1972] 2 All ER 1057, HL.

5 See *Re Grosvenor Hotel, London (No 2)* [1965] Ch 1210, [1964] 3 All ER 354, CA; and see *Duncan v Cammell Laird & Co Ltd* [1942] AC 624, [1942] 1 All ER 587, HL. See also *Auten v Rayner (No 2)* [1960] 1 QB 669, [1960] 1 All ER 692, where a claim to Crown privilege was raised in the sixth week of the trial.

6 *Gain v Gain* [1962] 1 All ER 63, [1961] 1 WLR 1469.

7 *Duncan v Cammell Laird & Co Ltd* [1942] AC 624, [1942] 1 All ER 587, HL.

- 8 *Rogers v Secretary of State for Home Department* [1973] AC 388, [1972] 2 All ER 1057, HL.
- 9 See note 2.
- 10 *Broome v Broome (Edmundson cited)* [1955] 1 All ER 201.
- 11 See *Blackpool Corpn v Locker* [1948] 1 KB 349, [1948] 1 All ER 85, CA.
- 12 *Anthony v Anthony* (1919) 35 TLR 559 (army medical history sheets).
- 13 *Home v Bentinck* (1820) 2 Brod & Bing 130; *Hennessy v Wright* (1888) 21 QBD 509; *Chatterton v Secretary of State for India in Council* [1895] 2 QB 189, CA; and see *Ellis v Home Office* [1953] 2 QB 135 at 137, [1953] 2 All ER 149 at 155, CA, citing the judgment of Devlin J in the court below ('documents must be treated as obliterated from everyone's memory').
- 14 *Gain v Gain* [1962] 1 All ER 63, [1961] 1 WLR 1469.
- 15 *Duncan v Cammell Laird & Co Ltd* [1942] AC 624, [1942] 1 All ER 587, HL.
- 16 *Broome v Broome (Edmundson cited)* [1955] P 190, [1955] 1 All ER 201. See also *Iwi v Montesole* [1955] Crim LR 313 (privilege claimed for both oral and written communications between members of local bench of justices, the Lord Chancellor's Department and his advisory committee).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(iii) Public Interest Immunity/576. Extent of public interest immunity; documents and sources of information.

576. Extent of public interest immunity; documents and sources of information.

Public interest immunity may be claimed:

- 630 (1) in the interests of national security, good diplomatic relations and international comity¹;
- 631 (2) to protect the identity of informants in criminal cases and sources of criminal intelligence generally²;
- 632 (3) where confidentiality is essential to the administration of justice³;
- 633 (4) in the interests of the proper functioning of the public service⁴; and
- 634 (5) in order to safeguard confidentiality where there is no compelling public interest in ordering the disclosure of the relevant information⁵.

Journalistic sources are afforded protection under the Contempt of Court Act 1981 which provides that no court may require a person to disclose the source of information contained in a publication⁶ for which he is responsible unless it is established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime; further, subject to the same exceptions, refusal to disclose the source of such information is not a contempt of court⁷. This statutory protection is now fortified by the right to freedom of expression, which includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority, and which is given more direct effect in domestic law by the Human Rights Act 1998. The exercise of this freedom is, however, subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary⁸.

Objection based on public interest immunity should not be taken and will not be allowed to withhold the disclosure or production for inspection of documents on the ground that they are 'state documents' or 'official' or are marked 'confidential', or that, if they were produced, the consequences might involve the department or government in parliamentary discussion or in public criticism or might necessitate the attendance of witnesses or otherwise of officials who have pressing duties elsewhere, or that their production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. The production of documents should only be withheld where the public interest would otherwise be damnified⁹.

Public interest immunity was frequently claimed for particular classes of documents, and many of the authorities are decisions on such class claims¹⁰. However, in 1996 the Lord Chancellor announced that the division between class and content claims would be brought to an end with respect to government documents and that in future ministers would focus on the damage that disclosure would cause, only claiming immunity when they believed that disclosure would cause real damage or harm to the public interest. It was said that damage will normally have to take the form of direct or immediate threat to the safety of an individual or the nation's

economic interests or relations with a foreign state, although in some cases, such as damage to a regulatory process, the anticipated damage might be indirect or longer term. In any event the nature of the harm will need to be clearly explained and ministers will no longer be able to claim immunity for internal advice or national security by reference to the general nature of the document¹¹.

Once the court has decided that documents are protected by public interest immunity, the protection continues though they may have passed into the possession of another person¹². There is, however, judicial authority to the effect that public interest immunity is provided against the disclosure of documents or their contents and is not, in the absence of exceptional circumstances, an immunity against the use of knowledge obtained from the documents¹³.

1 See *Balfour v Foreign and Commonwealth Office* [1994] 2 All ER 588, [1994] 1 WLR 681, CA (documents in the possession of the Foreign Office, which the appellant claimed were relevant to his claim for unfair dismissal, contained material relating to the security and intelligence services); and see eg *Asiatic Petroleum Co Ltd v Anglo-Persian Oil Co Ltd* [1916] 1 KB 822, CA (letter containing information about government plans in respect of a wartime campaign); *Duncan v Cammell Laird & Co Ltd* [1942] AC 624, [1942] 1 All ER 587, HL (documents containing information about the design of a new submarine); *Home v Bentinck* (1820) 2 Brod & Bing 130 (report of military court of inquiry concerning conduct of an officer); *Hennessey v Wright* (1888) 21 QBD 509 (communications between governor of a colony and Colonial Secretary); *Chatterton v Secretary of State for India in Council* [1895] 2 QB 189, CA (communications between commander-in-chief of forces overseas and government); *M Isacacs & Sons Ltd v Cook* [1925] 2 KB 391 (diplomatic dispatches); *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin), [2009] All ER (D) 64 (Feb) (suspected terrorist claiming to have been tortured during detention abroad; judicial review of decision by the Foreign Secretary not to disclose certain information which assisted in the applicant's defence).

It is also in the public interest that the contents of confidential documents addressed to, or emanating from, foreign sovereign states or concerning their interests in relation to international territorial disputes between them, should not be ordered by the English courts to be disclosed by a private litigant without the consent of the states in question: *Buttes Gas & Oil Co v Hammer (No 3)* [1982] AC 888, [1981] 3 All ER 616, HL. International comity requires that an inter-departmental memorandum prepared and circulated in the London embassy of a friendly foreign state should not be admitted as the foundation of a claim for libel: *Fayed v Al-Tajir* [1988] QB 712, [1987] 2 All ER 396. Further, the comity of nations justifies an English court in the exercise of its discretion in refusing to authorise the issue of letters of request inviting the courts of a friendly foreign state to use their powers to assist in the obtaining of evidence, from witnesses resident in that or another friendly state, in order to show that the motives of the government of the friendly foreign state, in promulgating a particular law, were such that the law is unenforceable in the United Kingdom: *Settebello Ltd v Banco Totta and Acores* [1985] 2 All ER 1025, [1985] 1 WLR 1050, CA. As to letters of request see PARA 1055.

2 Witnesses for the Crown in criminal prosecutions undertaken by the government are privileged from disclosing the channel through which they have communicated or obtained information: *R v Hardy* (1794) 24 State Tr 199; *R v Watson* (1817) 32 State Tr 1; *R v Richardson* (1863) 3 F & F 693; *A-G v Briant* (1846) 15 M & W 169; *Marks v Beyfus* (1890) 25 QBD 494, CA. It has, however, been held that a detective cannot refuse on grounds of public policy to answer a question as to where he was secreted (*Webb v Catchlove* (1886) 3 TLR 159) but this decision was disapproved in *R v Rankine* [1986] QB 861, [1986] 2 All ER 566, CA. See also *Duncan v Cammell Laird & Co Ltd* [1942] AC 624, [1942] 1 All ER 587, HL; *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, [1977] 1 All ER 589, HL; *Buckley v Law Society (No 2)* [1984] 3 All ER 313, [1984] 1 WLR 1101; *R v Farrell* [2002] EWCA Crim 1223, [2002] All ER (D) 451 (May).

It has been held that if a police informer wishes to sacrifice his own anonymity, he may do so: see *Savage v Chief Constable of Hampshire Constabulary* [1997] 2 All ER 631, [1997] 1 WLR 1061, CA (appellant was entitled to state in open court that he was a police informer).

3 See *Iwi v Montesole* [1955] Crim LR 313 (communications between magistrates and the Lord Chancellor). A judge cannot be compelled to give evidence of those matters of which he became aware relating to and as a result of the performance of his judicial functions, as opposed to some collateral matter such as a crime committed in the face of the court; he is, however, competent to give such evidence: see *Warren v Warren* [1997] QB 488, [1996] 4 All ER 664, CA. A jury's verdict cannot be questioned on the ground of anything that happened in the jury room: see eg *R v Roads* [1967] 2 QB 108, [1967] 2 All ER 84, CA (juror not allowed to prove that she disagreed with the verdict). See also *R v Thompson* [1962] 1 All ER 65, 46 Cr App Rep 72, CCA (Court of Criminal Appeal refused to hear evidence that a juror had read a list of the accused's convictions which had not been revealed in evidence); *R v Bean* [1991] Crim LR 843, CA (allegation of undue judicial pressure to reach verdict); *R v Lucas* [1991] Crim LR 844, CA (allegation of undue pressure on one juror by the others).

4 See eg *Duncan v Cammell Laird & Co Ltd* [1942] AC 624, [1942] 1 All ER 587, HL. 'Public service' should not be construed narrowly: *Rogers v Secretary of State for Home Department* [1973] AC 388 at 401, [1972] 2 All ER 1057 at 1060, HL, per Lord Reid (confidential inquiries by the Gaming Board from the police regarding applications for certificates for consent in relation to bingo clubs protected); *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1974] AC 405, [1973] 2 All ER 1169, HL (confidential information obtained by Crown for valuing goods for tax purposes protected). The fact that information was communicated in confidence to the Crown is a very material consideration (*Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1974] AC 405, [1973] 2 All ER 1169, HL); nevertheless, the court may conclude that the public interest in such confidentiality is outweighed by the public interest that it should be disclosed in the administration of justice (*Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, [1973] 2 All ER 943, HL). As to whether documents in the hands of the Inland Revenue relating to a taxpayer's tax affairs are protected by public interest immunity see *Lonrho plc v Fayed (No 4)* [1994] QB 775, [1994] 1 All ER 870, CA.

It has been held that public officials need not disclose the source of information that has been communicated to them: *West v West* (1911) 27 TLR 476, CA (verbal communication to Lord Chamberlain). Cf *Wyatt v Gore* (1816) Holt NP 299 (communications between colonial governor and Attorney General protected); *Blake v Pilfold* (1832) 1 Mood & R 198 (letter from member of the public to Postmaster General not protected); *Leigh v Gladstone* (1909) 26 TLR 139 (report from prison doctor to governor not protected).

5 Confidentiality is never a sufficient ground for immunity absent any additional consideration: *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1974] AC 405, [1973] 2 All ER 1169, HL; and see *Re Barlow Clowes Gilt Managers Ltd* [1992] Ch 208, [1991] 4 All ER 385. For an example of where the disclosure of confidential information was ordered see *British Steel Corp v Granada Television Ltd* [1981] AC 1096, [1981] 1 All ER 417, HL.

6 Including the publication of photographs: *Handmade Films (Productions) Ltd v Express Newspapers* [1986] FSR 463.

7 See the Contempt of Court Act 1981 s 10; *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, [1990] 2 All ER 1, HL; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, [1999] 4 All ER 609, HL; *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 4 All ER 193, [2002] 1 WLR 2033; *Financial Times v Interbrew SA* [2002] EWCA Civ 274, [2002] 2 Lloyd's Rep 229, [2002] All ER (D) 106 (Mar); and see further **CONTEMPT OF COURT; PRESS, PRINTING AND PUBLISHING**.

8 See the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) art 10, now given direct effect in domestic law by the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 10; PARA 792; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

9 *Duncan v Cammell Laird & Co Ltd* [1942] AC 624, [1942] 1 All ER 587, HL, per Viscount Simon LC.

10 See eg *Conway v Rimmer* [1968] AC 910, [1968] 1 All ER 874, HL, per Lord Reid; applied in *Balfour v Foreign and Commonwealth Office* [1994] 2 All ER 588, [1994] 1 WLR 681, CA; and see *Choudry v A-G (No 2)* [2000] 2 LRC 453, NZCA. See also *A-G v Jonathan Cape Ltd*, *A-G v Times Newspapers Ltd* [1976] QB 752, [1975] 3 All ER 484 (the 'Crossman Diaries' case); and as to the test to be applied in class claims see *Re Grosvenor Hotel, London (No 2)* [1965] Ch 1210, [1964] 3 All ER 354, CA.

11 See 157 HL Official Report (5th series), 18 December 1996, cols 1507-1517.

12 *Auten v Rayner (No 2)* [1960] 1 QB 669, [1960] 1 All ER 692.

13 *R v Chief Constable of the West Midlands Police, ex p Wiley* [1995] 1 AC 274, [1994] 3 All ER 420, HL.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(iii) Public Interest Immunity/577. Right and duty of litigant to protect public interest.

577. Right and duty of litigant to protect public interest.

Although the privilege can only be claimed by the authority of the Crown, it is always open to any person to raise the objection that the production of documents for inspection will be injurious to the public interest¹. In litigation between private individuals it is the duty of the parties to draw the attention of the Crown to the possibility that the disclosure or production of documents would or might be injurious to the public interest, and if the Crown learns, whether from a party or otherwise, that such privileged documents may be disclosed or produced, the Treasury Solicitor or the solicitor for the appropriate department will direct the party likely to make or be called upon to make the disclosure or production to claim privilege on the ground that such disclosure or production would be injurious to the public interest, whereupon it will become that party's duty forthwith to raise the objection². If the opposite party should contest the claim for privilege by applying for an order for the production of documents³ the Crown may, if necessary, be allowed to intervene in the proceedings in order to be heard on the question and to support its objection to disclosure or production⁴. Indeed, in the last resort, the judge himself can and should take the objection, for the rule that the public interest must not be put in jeopardy by the production of documents which would injure it is one upon which the court should, if necessary, insist, even though no objection has been taken by any government department⁵.

1 See *Rogers v Secretary of State for Home Department* [1973] AC 388, [1972] 2 All ER 1057, HL. It has been suggested that, where there are a large number of relevant documents within the ambit of privilege which may or may not become of real materiality to the case as it develops, a counsel or solicitor on the government side or official of the department concerned should be present and invested with authority to consider claims of privilege and to waive them in particular cases: *Ellis v Home Office* [1953] 2 QB 135, [1953] 2 All ER 149, CA. This suggestion, however, relates only to the waiver of privilege after privilege has been established; where a certificate had been given by the head of a government department stating that it was not in the public interest that a witness should give evidence but it was not possible to ascertain from the certificate the nature of the evidence for which privilege was claimed, the court declined to allow counsel for the Crown to listen to each question and to take objection if he desired: *Broome v Broome (Edmundson cited)* [1955] P 190, [1955] 1 All ER 201. As to the circumstances in which public interest immunity may arise see PARA 575.

2 See *Duncan v Cammell Laird & Co Ltd* [1942] AC 624, [1942] 1 All ER 587, HL.

3 See under CPR 31.19: see PARA 555.

4 See *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1972] 2 QB 102, [1972] 2 All ER 353, CA; *Rogers v Secretary of State for Home Department* [1973] AC 388, [1972] 2 All ER 1057, HL. See also *Adams v Adams* [1971] P 188, [1970] 3 All ER 572; *Auten v Rayner (No 2)* [1960] 1 QB 669, [1960] 1 All ER 692.

5 *Duncan v Cammell Laird & Co Ltd* [1942] AC 624, [1942] 1 All ER 587, HL; and see eg *Anderson v Hamilton* (1816) 2 Brod & Bing 156n; *Home v Bentink* (1820) 2 Brod & Bing 130 (cases where objection was taken by defendants' counsel); *Hennesy v Wright* (1888) 21 QBD 509; *Chatterton v Secretary of State for India in Council* [1895] 2 QB 189, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(iii) Public Interest Immunity/578. Procedure on claim to public interest immunity.

578. Procedure on claim to public interest immunity.

The claim to public interest immunity must be made by the minister who is the political head of the department concerned or where it is not convenient or practicable for the political minister to act, because he may be out of reach or ill or the department is one where the effective head is the permanent official, it is reasonable for the claim to be made by the permanent head¹, such as the Chairman of the Commissioners for Revenue and Customs². The claim must be made in a proper form, whether in the form of an affidavit of the political minister or permanent head of the appropriate department or, as is the usual practice, in the ordinary run of cases, by a certificate signed by him personally³. The court, however, can request his personal attendance, though this is a rare practice⁴. The essential matter is that the decision to object should be taken by the political minister himself and that he should himself have seen and considered the documents and himself have formed the view that on grounds of public interest they ought not to be produced⁵. He cannot, however, be cross-examined⁶, though he may be given the opportunity to make or file a further certificate or affidavit setting out the claim with greater particularity⁷.

Such a claim usually arises at the disclosure stage of litigation⁸. It is apprehended that the principle of public interest immunity cannot be used to prevent a department of state from disclosing documents which the Secretary of State of that department considers it appropriate to disclose⁹.

¹ *Duncan v Cammell Laird & Co Ltd* [1942] AC 624 at 638, [1942] 1 All ER 587 at 593, HL, per Viscount Simon LC.

² *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1972] 2 QB 102, [1972] 2 All ER 353, CA; affd [1974] AC 405, [1973] 2 All ER 1169, HL.

³ See *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1972] 1 QB 102, [1972] 2 All ER 353, CA, where the claim was first made in a certificate. In *Auten v Rayner (No 2)* [1960] 1 QB 669, [1960] 1 All ER 692, the court accepted the claim to Crown privilege made by the Attorney General 'in face of the court' without an affidavit; but see now the procedure provided for in CPR 31.19; and PARA 555.

⁴ See *Duncan v Cammell Laird & Co Ltd* [1942] AC 624, [1942] 1 All ER 587, HL.

⁵ *Duncan v Cammell Laird & Co Ltd* [1942] AC 624, [1942] 1 All ER 587, HL; and see *Re Grosvenor Hotel, London* [1964] Ch 464, [1963] 3 All ER 426 (where it was conceded that the minister did not himself examine the documents until after the objection had been raised). It is desirable that each document should be examined by the political minister or head of department before a claim of Crown privilege is made and inspection should be permitted of all documents which cannot harm the public interest: *Ellis v Home Office* [1953] 2 QB 135, [1953] 2 All ER 149, CA.

⁶ *Re Grosvenor Hotel, London* [1964] Ch 464, [1963] 3 All ER 426.

⁷ *Re Grosvenor Hotel, London* [1964] Ch 464, [1963] 3 All ER 426; *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs* [1971] 2 All ER 843.

⁸ As to disclosure of documents see PARA 963; and PARA 538 et seq.

⁹ See *R v Chief Constable of the West Midlands Police, ex p Wiley* [1995] 1 AC 274, [1994] 3 All ER 420, HL.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(iii) Public Interest Immunity/579. Powers of court.

579. Powers of court.

The decision whether to allow or reject the claim to public interest immunity, and if so to what extent¹, is and remains the decision of the court²; and the view of the political minister that the production or disclosure of documents or information should be withheld is not conclusive³, although the court will give full weight to the view of the minister in every case and must examine the objection and the grounds raised by the minister to support his view that production would be injurious to the public interest. If, in spite of the certificate or affidavit of the minister, the court is satisfied that the objection is not taken bona fide or that the grounds relied on by the minister are insufficient or misconceived or not clearly expressed or that there are no reasonable grounds for apprehending danger to the public interest, the court has power to override the objection⁴. For this purpose, the court is entitled to see the documents before ordering production⁵, and the court can see the documents without their being shown to the parties, but the minister should have a right to appeal before the documents are in fact produced⁶.

Less harmful consequences are likely to flow from a successful claim to public interest immunity if the proceedings are conducted in as normal a manner as possible and the court and the parties do their best to limit the prejudice to the party deprived of disclosure of the documents by giving him so far as is possible information which is necessary by other means⁷.

1 In *Conway v Rimmer* [1968] AC 910 at 943-944, [1968] 1 All ER 874 at 882, HL, Lord Reid stated that a question might arise whether it would be possible to separate those parts of a document of which disclosure would be innocuous from those parts which ought not to be made public.

2 *Duncan v Cammell Laird & Co Ltd* [1942] AC 624 at 642, [1942] 1 All ER 587 at 595, HL, per Viscount Simon LC.

3 *Conway v Rimmer* [1968] AC 910, [1968] 1 All ER 874, HL; and see *Robinson v South Australia State (No 2)* [1931] AC 704, PC; *Glasgow Corp v Central Land Board* 1956 SC (HL) 1; *Re Grosvenor Hotel, London (No 2)* [1965] Ch 1210, [1964] 3 All ER 354, CA.

4 *Re Grosvenor Hotel, London (No 2)* [1965] Ch 1210, [1964] 3 All ER 354, CA; and see *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, [1973] 2 All ER 943, HL. For the earlier cases where inspection had taken place or been considered to be proper see *Robinson v South Australia State (No 2)* [1931] AC 704, PC; *Hennessy v Wright* (1888) 21 QBD 509, DC; *Asiatic Petroleum Co Ltd v Anglo Persian Oil Co Ltd* [1916] 1 KB 822, CA; and *Spigelman v Hocken* (1933) 150 LT 256. The following cases where the decision of the minister was held conclusive must now be treated as no longer good law: *Beatson v Skene* (1860) 5 H & N 838; *Hughes v Vargas* (1893) 9 TLR 551, CA; *Williams v Star Newspaper Co Ltd* (1908) 24 TLR 297; *Chatterton v Secretary of State for India in Council* [1895] 2 QB 189, CA; and *Admiralty Comrs v Aberdeen Steam Trawling and Fishing Co Ltd* 1909 SC 335.

5 *Conway v Rimmer* [1968] AC 910, [1968] 1 All ER 874, HL (where the House of Lords inspected the documents and ordered them to be produced); and see [1968] 2 All ER 304n, HL; *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1972] 2 QB 102, [1972] 2 All ER 353, CA; affd [1974] AC 405, [1973] 2 All ER 1169, HL.

6 *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1972] 2 QB 102, [1972] 2 All ER 353, CA.

7 See *R v Chief Constable of the West Midlands Police, ex p Wiley* [1995] 1 AC 274, [1994] 3 All ER 420, HL.

UPDATE

579 Powers of court

NOTE 4--The court must be able to rely absolutely on the integrity of public interest immunity certificates and the schedules attached to them: *R (on the application of Al-Sweady) v Secretary of State for Defence* [2009] EWHC 1687 (Admin), (2009) Times, 3 August.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/ (iv) Privilege against Self-incrimination/580. Privilege against incrimination of self or spouse or civil partner.

(iv) Privilege against Self-incrimination

580. Privilege against incrimination of self or spouse or civil partner.

There is a general rule of evidence that a person should not be compelled to say anything which might tend to bring him into the peril and possibility of being convicted of a criminal offence¹. Hence in any civil proceeding, any person, whether a party or not, cannot be compelled to produce any document or thing for inspection or to answer any question, if to do so would tend to expose that person, or his spouse or civil partner², to proceedings for an offence or for the recovery of a penalty, but this rule applies only as regards criminal offences³ under the law of any part of the United Kingdom and penalties provided for by such law, and does not extend to criminal offences under foreign law⁴. The rule applies even if a negative answer will not imperil the person concerned⁵, but the fact that a document contains matter which would or might tend to incriminate the party giving disclosure does not entitle him to refuse to include the document in his list of documents⁶. The proper course is to disclose the document in the list and therein raise the ground of objection to produce it⁷. So far as disclosure is concerned, the rule has a number of statutory exceptions⁸. A party is not necessarily obliged to state his belief that the production would incriminate him; it is sufficient to state or to swear that it may tend to do so⁹. The fact that a party states or swears that his answer would tend to incriminate him is not conclusive and the court may compel him to answer where the objection is plainly made in bad faith or where it is not made to appear that there is reasonable ground to apprehend danger¹⁰. Disclosure must, however, be given if by reason of pardon¹¹, lapse of time¹², or waiver¹³, all danger of punishment has passed. Further, where there is an admission that the penalties have been incurred, disclosure as to the matters referred to in the admission cannot be resisted¹⁴. When an action is brought for breach of copyright of an unpublished work the court will not allow the claimant to refuse to disclose the work and at the same time to proceed to trial; he must either elect to have the work produced or have the action dismissed¹⁵.

The privilege against self-incrimination may only be invoked so as to refuse disclosure of documents or things which are ordinarily discoverable, and does not extend to independent matters coming to light in the execution of a court order¹⁶.

A mere danger of disgrace or opprobrium does not enable a party to escape from the obligation of giving disclosure¹⁷, though where disclosure is calculated to discredit the party it may be resisted as being scandalous¹⁸.

The protection only extends to the party, and his spouse in the case of a criminal charge or penal proceeding¹⁹, and not to any other person²⁰; thus an agent cannot resist disclosure on the ground that it will incriminate his principal, except in so far as it would also affect him personally²¹.

¹ *Lamb v Munster* (1882) 10 QBD 110, approved in *Triplex Safety Glass Co v Lancegaye Safety Glass* (1934) Ltd [1939] 2 KB 395, [1939] 2 All ER 613, CA; and see PARA 974. The substance of the test as to the standard of proof is that there must be grounds to apprehend danger to the witness, and the grounds must be reasonable, rather than fanciful: *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310, [1990] 3 All ER 283, CA.

2 Civil Evidence Act 1968 s 14(1)(b) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 30(a)).

3 The privilege has been held to apply where the possible charge was one of theft (*Cartwright v Green* (1803) 8 Ves 405); incest (*Claridge v Hoare* (1807) 14 Ves 59); subornation of perjury (*Baker v Pritchard (alias Hosier)* (1742) 2 Atk 387; *Selby v Crew* (1794) 2 Anst 504); assault and false imprisonment (*Glynn v Houston* (1836) 1 Keen 329); forgery (see *Lloyd v Passingham* (1809) 16 Ves 59); embezzlement (*Waters v Earl of Shaftesbury* (1865) 14 WR 259); fraud (*Maccallum v Turton* (1828) 2 Y & J 183), but not in every case (see *Chadwick v Chadwick* (1852) 16 Jur 1060; *Stickland v Aldridge* (1804) 9 Ves 516; *Dixon v Olmius* (1787) 1 Cox Eq Cas 414); conspiracy (*Lee v Read* (1842) 5 Beav 381; *Re Reynolds, ex p Reynolds* (1882) 20 ChD 294, CA), but not in every case (see *Dummer v Chippenham Corp* (1807) 14 Ves 245); libel (*Triplex Safety Glass Co v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395, [1939] 2 All ER 613, CA; and cf *Webb v East* (1880) 5 ExD 108, CA). The rule also applies to the inspection of entries in bankers' books: *Waterhouse v Barker* [1924] 2 KB 759, CA. As to the privilege against self-incrimination in respect of civil proceedings for fraud see also *AT & T Istel Ltd v Tully* [1993] AC 45, [1992] 3 All ER 523, HL. See also *Practice Direction--Applications* PD 23A para 11A, which provides that any party or a prosecutor or defendant in the criminal proceedings may apply to the court for a stay of the civil proceedings; and PARA 310.

4 Civil Evidence Act 1968 s 14(1)(a), negating *United States of America v McRae* (1867) 3 Ch App 79. The Civil Procedure Rules do not permit a litigant to avoid an order for inspection where compliance involves breaching the law of a foreign jurisdiction: *Morris v Banque Arabe et Internationale d'Investissement SA* [2000] 01 LS Gaz R 24, (1999) Times, 23 December.

5 *East India Co v Campbell* (1749) 1 Ves Sen 246; *Mitchell v Koecker* (1849) 11 Beav 380.

6 *Allhusen v Labouchere* (1878) 3 QBD 654; *Fisher v Owen* (1878) 8 ChD 645, CA; *Spokes v Grosvenor and West End Railway Terminus Hotel Co Ltd* [1897] 2 QB 124, CA; *National Association of Operative Plasterers v Smithies* [1906] AC 434, HL; *Paxton v Douglas* (1809) 16 Ves 239; *Ex p Symes* (1805) 11 Ves 521; *Claridge v Hoare* (1807) 14 Ves 59; *Lee v Read* (1842) 5 Beav 381; *Earl of Lichfield v Bond* (1843) 12 LJ Ch 329; *Glynn v Houston* (1836) 6 LJ Ch 129; cf *Dummer v Chippenham Corp* (1807) 14 Ves 245; *King of Two Sicilies v Willcox* (1851) 1 Sim NS 301; *French v Macale* (1842) 4 I Eq R 574; *Jones v Green* (1829) 3 Y & J 298; *Harvey v Lovekin* (1884) 10 PD 122, CA; and see *Hill v Campbell* (1875) LR 10 CP 222.

7 *Spokes v Grosvenor and West End Railway Terminus Hotel Co Ltd* [1897] 2 QB 124, CA; *National Association of Operative Plasterers v Smithies* [1906] AC 434, HL. Similarly the fact that the answer to a request for further information may tend to incriminate is no objection to making the request, but the requirement under CPR Pt 18 to give further information is subject to any rule of law to the contrary: see CPR 18.1(2); and PARA 611.

8 See the Crown Proceedings Act 1947 s 14 (amended by the Finance Act 1972 s 55(1), (7); the Finance Act 1975 s 52(1), Sch 12 paras 2, 8; and the Inheritance Tax Act 1984 ss 274, 276, Sch 8 para 2); and *Customs and Excise Comrs v Ingram* [1948] 1 All ER 927 at 929, CA, where Lord Goddard CJ said that the rule did not apply as an answer to claims by the Crown under legislation designed to protect the revenue of the Crown. Some statutes provide that the liability to criminal prosecution is not to constitute an objection to giving discovery (now 'disclosure') in civil proceedings, but that the disclosure so obtained is not to be used in any other proceeding against the party giving it: see eg the Newspapers, Printers and Reading Rooms Repeal Act 1869 s 1, Sch 2, continuing the Stamp Duties on Newspapers Act 1836 s 19 (publication of libels in newspapers); and see *Ramsden v Brearley* (1875) 33 LT 322; *Lefroy v Burnside* (1879) 41 LT 199; *Carter v Leeds Daily News Co and Jackson* (1876) 20 Sol Jo 218; *Wilton v Brignell* [1875] WN 239; and **LIBEL AND SLANDER** vol 28 (Reissue) PARA 215. Another statutory provision depriving a party of this ground of objection in certain proceedings is the Theft Act 1968 s 31(1): see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1477. The privilege against self-incrimination of a person or his spouse has been withdrawn in respect of intellectual property proceedings: see the Supreme Court Act 1981 s 72; and PARA 319. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to the abrogation of the privilege against self-incrimination by the provisions of the Companies Act 1985 and the Insolvency Act 1986 relating to investigations into a company's affairs see *Re London United Investments plc* [1992] Ch 578, [1992] 2 All ER 842, CA; *Bishopsgate Investment Management Ltd (in provisional liquidation) v Maxwell* [1993] Ch 1, [1992] 2 All ER 856, CA; *Re Jeffrey S Levitt Ltd* [1992] Ch 457, [1992] 2 All ER 509. The Banking Act 1987 s 42(1) (repealed) provided by implication that a person subject to an order made under it had a duty to disclose the specified documents, regardless of the fact that the result may show a contravention of any criminal law provision: *Bank of England v Riley* [1992] Ch 475, [1992] 1 All ER 769, CA.

9 *Lamb v Munster* (1881) 10 QBD 110. See also *Webb v East* (188) 5 Ex D 108, CA; and *Harrison v Southcote and Moreland* (1751) 1 Atk 528.

10 *Triplex Safety Glass Co v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395, [1939] 2 All ER 613, CA; but see *Sitwell v Sun Engraving Co Ltd* [1937] 4 All ER 366 at 369, CA, per Lord Greene MR ('his oath to that effect')

(ie that a document would incriminate) 'is a thing which must be taken as conclusive and the court will not inquire into it').

11 *R v Boyes* (1861) 1 B & S 311; *Parkhurst v Lowten* (1816) 1 Mer 391. In *Stewart v Smith* (1867) LR 2 CP 293, an action for malicious prosecution for theft of books, after the plaintiff had been tried and acquitted, the defendant was allowed to interrogate him as to whether some of the books were not in his possession, and when, where, and from whom he bought them, and the price he paid for them.

12 *A-G v Cunard Steamship Co* (1887) 4 TLR 177; *Williams v Farrington* (1789) 2 Cox Eq Cas 202; *Roberts v Allatt* (1828) Mood & M 192; *Trinity House Corp v Burge* (1828) 2 Sim 411; *Davis v Reid* (1832) 5 Sim 443.

13 Mitford, pleadings 195, 307; Hare, Discovery of Evidence (2nd Edn) 110; *East India Co v Atkyns* (1720) 1 Com 346; *R v Charlesworth* (1860) 2 F & F 326; *Ex p Fernandez* (1861) 10 CBNS 3; and see *Lord Uxbridge v Staveland* (1747) 1 Ves Sen 56.

14 *Ewing v Osbaldiston* (1834) 6 Sim 608. See *Fisher v Price* (1849) 11 Beav 194.

15 *Sitwell v Sun Engraving Co Ltd* [1937] 4 All ER 366, CA.

16 *C plc v P* [2007] EWCA Civ 493, [2007] 3 All ER 1034.

17 See *Chetwynd v Lindon* (1752) 2 Ves Sen 450; *Parkhurst v Lowten* (1816) 1 Mer 391; *Williams v Trye* (1854) 18 Beav 366; *Benyon v Nettlefold* (1850) 3 Mac & G 94.

18 This point generally arises in connection with requests for further information, as to which see PARA 611.

19 Civil Evidence Act 1968 s 14(1); and see *Cartwright v Green* (1803) 8 Ves 405.

20 *King of the Two Sicilies v Willcox* (1851) 1 Sim NS 301; *Parkhurst v Lowten* (1816) 1 Mer 391; *Gibbons v Waterloo Bridge Co* (1818) 5 Price 491.

21 *McFadzen v Liverpool Corp* (1868) LR 3 Exch 279.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(v) Other Grounds of Objection to Production for Inspection/581. Statutory secrecy.

(v) Other Grounds of Objection to Production for Inspection

581. Statutory secrecy.

In a number of cases disclosure of information is forbidden by statute. Thus under the Agricultural Marketing Act 1958 a person who discloses information obtained by him in the exercise of a power conferred by the Act, save for the purpose of legal proceedings under the Act or for some other purpose authorised by the Act, is liable to imprisonment or a fine¹. Hence, in proceedings which are not under the Act, an official of a marketing board can object to disclosing returns made by a farmer even though he is served with a witness summons². Other instances of legislation restricting disclosure of information relate to certain records concerning adopted children³, to census information and statistics of population⁴, information furnished in connection with funding of legal services for an individual⁵, information relating to certain trades or businesses obtained under statutory powers⁶ and information affecting national security⁷.

¹ See the Agricultural Marketing Act 1958 s 47(2), (3); and **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1101.

² *Rowell v Pratt* [1938] AC 101, [1937] 3 All ER 660, HL; and see further **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1101.

³ See the Adoption Agencies Regulations 1983, SI 1983/1964, reg 15; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 449. Information contained in such records must, however, be disclosed to a court having power to make an adoption order and to certain other bodies and persons: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 449.

⁴ See the Population (Statistics) Act 1938 s 4(2); the Statistics and Registration Service Act 2007 s 39(1); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 634.

⁵ See the Access to Justice Act 1999 s 20; and **LEGAL AID** vol 65 (2009) PARA 228.

⁶ See eg the Water Industry Act 1991 s 206; the Water Resources Act 1991 s 204(1); and **WATER AND WATERWAYS** vol 100 (2009) PARA 183.

⁷ See eg the Atomic Energy Act 1946 s 11; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 499. As to offences in respect of official secrets see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 478 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(v) Other Grounds of Objection to Production for Inspection/582. Agreement not to disclose.

582. Agreement not to disclose.

An agreement between the parties not to disclose a particular document or information is a ground for refusing disclosure of that document or information¹. Such an agreement may be express or implied. Where communications are expressed to be 'without prejudice' and are made as part of negotiations in an attempt to compromise the proceedings they are subject to privilege from disclosure to the court by either party². An article in a company's articles of association providing that the directors were not bound to disclose their grounds for refusing to register a transfer precluded further information as to those grounds³. The privilege attaching to statements made to persons acting as conciliators in matrimonial disputes⁴ is also based on an implied agreement that such statements are made 'without prejudice'⁵. A landlord seeking to enforce an agreement to grant a lease, which did not give the other party a right to call for the title to the freehold, was not liable to produce his deeds for inspection, unless some specific objection to the title was taken⁶.

¹ *Rabin v Mendoza & Co* [1954] 1 All ER 247, [1954] 1 WLR 271, CA; *Berry and Stewart v Tottenham Hotspur Football and Athletic Co Ltd* [1935] Ch 718; *Whiffen v Hartwright* (1848) 11 Beav 111; *Turney v Bayley* (1864) 4 De GJ & Sm 332.

² As to the meaning of 'without prejudice' see PARA 804 note 4. Strictly this privilege is a rule of evidence, rather than a matter relating to disclosure of documents, since any 'without prejudice' document will necessarily have been sent to the other party and thus both disclosed and inspected as between them. It is a rule of evidence, since it precludes the court from knowing the terms of negotiations between the parties. The rule is based on the public policy of assisting and encouraging parties to settle disputes if possible without resorting to litigation: see generally PARA 804. The court also has a duty as part of its active case management powers to help the parties to settle the whole or part of a case: see CPR 1.4(f); and PARA 246. But, where such documents are brought into existence in negotiations between two parties and litigation ensues between one of them and a third party, considerations of disclosure in that subsequent litigation are involved: *Rabin v Mendoza & Co* [1954] 1 All ER 247, [1954] 1 WLR 271, CA (surveyor's report obtained as a result of negotiations undertaken 'without prejudice' between the parties not ordered to be produced for inspection). A solicitor when sued by a third party, may also claim protection for 'without prejudice' letters written by him: *La Roche v Armstrong* [1922] 1 KB 485; cf *Schneider v Leigh* [1955] 2 QB 195, [1955] 2 All ER 713, CA, cited in PARA 571 text and note 11; *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, [1988] 3 All ER 737, HL (admission made as between two parties to litigation, not admissible as between one of them and another party to the same litigation).

³ *Berry and Stewart v Tottenham Hotspur Football and Athletic Co Ltd* [1935] Ch 718. Cf *Cartland v Houston and British and South American Steam Navigation Co Ltd* [1912] WN 110.

⁴ See **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 833.

⁵ *Mole v Mole* [1951] P 21, [1950] 2 All ER 328, CA.

⁶ See *Jones v Watts* (1889) 43 ChD 574, CA. In that case the contract was governed by the Vendor and Purchaser Act 1874 s 2 (repealed: see now the Law of Property Act 1925 s 44(2), (11); and **SALE OF LAND** vol 42 (Reissue) PARA 140), which precluded calling for the title unless there was a stipulation to the contrary in the contract.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/14. DISCLOSURE OF DOCUMENTS/(2) EXCEPTIONS TO THE OBLIGATION TO PRODUCE DOCUMENTS FOR INSPECTION/(v) Other Grounds of Objection to Production for Inspection/583. Inspection disproportionate.

583. Inspection disproportionate.

Before the Civil Procedure Rules came into force¹, the court could refuse to order inspection of certain documents or classes of documents on the grounds that it would be unduly oppressive to the party giving discovery (now known as 'disclosure')². What was unduly oppressive depended upon the particular circumstances of each case. The position under the Civil Procedure Rules is similar, in that where a party considers that it would be disproportionate to the issues in the case to permit inspection of documents within a certain specified category or class of document, he is not required to permit inspection of documents within that category or class; but he must state in his disclosure statement that inspection of those documents will not be permitted on the grounds that to do so would be disproportionate³. A party may, however, apply to the court for an order for specific inspection of such documents⁴.

1 CPR Pt 31 (disclosure: see PARA 538 et seq) came into force on 26 April 1999: see PARA 30.

2 ie under RSC Ord 24 rr 2(5), 3(3), 8 (revoked).

3 See CPR 31.3(2); and PARA 539.

4 See CPR 31.12(3); and PARA 547.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/584. In general.

15. PLEADINGS AND STATEMENTS OF CASE

(1) STATEMENTS OF CASE

584. In general.

'Statement of case' means a claim form¹, particulars of claim² where these are not included in a claim form, defence³, Part 20 claim form⁴, or reply to defence and includes any further information given in relation to them⁵ voluntarily or by court order⁶. The general rules about statements of case⁷ do not apply where the claimant⁸ uses the alternative procedure for claims (the Part 8 procedure)⁹. A subsequent statement of case must not contradict or be inconsistent with an earlier one¹⁰. A party may:

- 635 (1) refer in his statement of case to any point of law on which his claim or defence, as the case may be, is based;
- 636 (2) give in his statement of case the name of any witness he proposes to call; and
- 637 (3) attach to or serve¹¹ with his statement of case a copy of any document¹² which he considers is necessary to his claim or defence, as the case may be¹³.

In relation to particular types of proceedings¹⁴ in respect of which special provisions for statements of case are made by the rules and practice directions applicable to those types of proceedings, the general provisions relating to statements of case¹⁵ apply only to the extent that they are not inconsistent with those rules and practice directions¹⁶.

1 Ie Form N1 in *The Civil Court Practice*. For the contents of the claim form see CPR16.2; and PARA 585. As to claim forms see also CPR Pt 7; and PARA 116 et seq.

2 See CPR 16.4; and PARA 587.

3 As to the contents of a defence see CPR 16.5; and PARA 599. As to filing a defence see PARA 199 et seq. As to the meaning of 'filing' see PARA 1832 note 8.

4 Ie Form N211 in *The Civil Court Practice*. A 'Part 20 claim' is now known as an additional claim: see PARA 618 note 1; and as to additional claims see PARA 618 et seq.

5 Ie further information given under CPR 18.1: see PARA 611.

6 CPR 2.3(1). As to replying to the defence see PARA 604.

7 Ie CPR Pt 16: see PARA 584 et seq.

8 As to the meaning of 'claimant' see PARA 18.

9 CPR 16.1. As to the meaning of 'Part 8 procedure' see PARA 127 note 2; and as to using that procedure see PARA 127 et seq.

10 *Practice Direction--Statements of Case* PD 16 para 9.2. Eg a reply to a defence must not bring in a new claim. Where new matters have come to light the appropriate course may be to seek the court's permission to amend the statement of case: para 9.2.

11 As to the meaning of 'service' see PARA 138 note 2.

12 le including any expert's report to be filed in accordance with CPR Pt 35 (see PARA 838 et seq): *Practice Direction--Statements of Case* PD 16 para 13.3(3).

13 *Practice Direction--Statements of Case* PD 16 para 13.3.

14 Types of proceedings with special provisions about statements of case include (1) defamation claims (CPR Pt 53); (2) possession claims (CPR Pt 55); and (3) probate claims (CPR Pt 57): *Practice Direction--Statements of Case* PD 16 para 1.3.

15 le CPR Pt 16 and *Practice Direction--Statements of Case* PD 16: see the text and notes 1-14; and PARA 585 et seq.

16 *Practice Direction--Statements of Case* PD 16 para 1.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/585. Contents of the claim form.

585. Contents of the claim form.

The claim form¹ must:

- 638 (1) contain a concise statement of the nature of the claim²;
- 639 (2) specify the remedy which the claimant seeks³;
- 640 (3) where the claimant is making a claim for money, contain a statement of value⁴;
- 641 (4) where the claimant's only claim is for a specified sum, contain a statement of the interest accrued on that sum⁵; and
- 642 (5) contain such other matters as may be set out in a practice direction⁶.

In civil proceedings against the Crown⁷, the claim form must also contain (a) the names of the government departments and officers of the Crown concerned; and (b) brief details of the circumstances in which it is alleged that the liability of the Crown arose⁸.

If the particulars of claim⁹ are not contained in or are not served with the claim form, the claimant must state on the claim form that the particulars of claim will follow¹⁰. If the claimant is claiming in a representative capacity, the claim form must state what that capacity is¹¹ and if the defendant is sued in a representative capacity, the claim form must state what that capacity is¹².

The court¹³ may grant any remedy to which the claimant is entitled even if that remedy is not specified in the claim form¹⁴.

If the claimant is seeking to recover an additional liability¹⁵ in respect of a funding arrangement¹⁶, he must provide information to the defendant concerning the funding arrangement¹⁷.

The claim form must be verified by a statement of truth¹⁸.

1 See Form N1 in *The Civil Court Practice*. As to serving the claim form see PARA 120. As to the meaning of 'service' see PARA 138 note 2.

2 CPR 16.2(1)(a). See *Nomura International plc v Granada Group Ltd* [2007] EWHC 642 (Comm), [2007] 2 All ER (Comm) 878.

3 CPR 16.2(1)(b). As to the meaning of 'claimant' see PARA 18.

4 Ie in accordance with CPR 16.3 (see PARA 586): see CPR 16.2(1)(c).

5 CPR 16.2(1)(cc).

6 CPR 16.2(1)(d). The claimant must include an address at which the claimant resides or carries on business, even though the claimant's address for service is the business address of his solicitor: *Practice Direction--Statements of Case* PD 16 para 2.2. Where the defendant is an individual, the claimant must, if he is able to do so, include in the claim form an address at which the defendant resides or carries on business, even though the defendant's solicitors have agreed to accept service on the defendant's behalf: para 2.3. In a claim for damages for libel the publication the subject of the claim must be identified in the claim form and in a claim for slander the claim form must so far as possible contain the words complained of, and identify the person to whom they were spoken and when: see *Practice Direction--Defamation Claims* PD 53 para 2.2; and see **LIBEL AND SLANDER**. As to the meaning of 'service' see PARA 138 note 2. As to the meaning of 'defendant' see PARA 18.

- 7 As defined in CPR 66.1(2): see PARA 1239 note 8.
- 8 CPR 16.2(1A).
- 9 As to the contents of the particulars of claim see CPR 16.4; and PARA 587.
- 10 CPR 16.2(2).
- 11 CPR 16.2(3). As to representative claims see PARAS 229-231.
- 12 CPR 16.2(4).
- 13 As to the meaning of 'court' see PARA 22.
- 14 CPR 16.2(5); and see *Ajou v Stern* [2001] All ER (D) 132 (Feb).
- 15 As to the meaning of 'additional liability' see PARA 1830 note 20.
- 16 As to the meaning of 'funding arrangement' see PARA 1830. As to funding arrangements see PARA 1830 et seq.
- 17 See CPR 44.15; *Practice Direction about Costs* PD 43-48 para 19; and PARA 1832. The information is to be given in Form N251 in *The Civil Court Practice* and is required to include the nature of the funding arrangement, although not the amount of any success fee or percentage increase: see *Practice Direction about Costs* PD 43-48 paras 19.1(1), 19.4(1). As to costs generally see also PARA 1729 et seq.
- 18 See CPR Pt 22; and PARA 613.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/586. Statement of value to be included in the claim form.

586. Statement of value to be included in the claim form.

Where the claimant¹ is making a claim for money² he must state, in the claim form:

- 643 (1) the amount of money claimed³;
- 644 (2) that he expects to recover either not more than £5,000⁴, or more than £5,000 but not more than £25,000⁵, or more than £25,000⁶; or
- 645 (3) that he cannot say how much is likely to be recovered⁷.

In a claim for personal injuries⁸, the claimant must also state in the claim form whether the amount which he expects to recover as general damages for pain, suffering and loss of amenity is not more than £1,000⁹ or more than £1,000¹⁰. In a claim which includes a claim by a tenant of residential premises against a landlord where the tenant is seeking an order requiring the landlord to carry out repairs or other work to the premises, the claimant must also state in the claim form:

- 646 (a) whether the estimated cost of those repairs or other work is not more than £1,000¹¹ or more than £1,000¹²; and
- 647 (b) whether the value of any other claim for damages is not more than £1,000¹³ or more than £1,000¹⁴.

If the claim form is to be issued in the High Court it must, where this rule applies:

- 648 (i) state that the claimant expects to recover more than £25,000¹⁵;
- 649 (ii) state that some other enactment provides that the claim may be commenced only in the High Court and specify that enactment¹⁶;
- 650 (iii) if the claim is a claim for personal injuries state that the claimant expects to recover £50,000 or more¹⁷; or
- 651 (iv) state that the claim is to be in one of the specialist High Court lists¹⁸ and state which list¹⁹.

When calculating how much he expects to recover, the claimant must disregard any possibility that the court may make an award of interest²⁰ and costs²¹. He must also disregard any possibility that the court may make a finding of contributory negligence²², that the defendant²³ may make a counterclaim²⁴ or that the defence may include a set-off²⁵ or that the defendant may be liable to pay an amount of money which the court awards to the claimant to the Secretary of State for Social Security²⁶ under the Social Security (Recovery of Benefits) Act 1997²⁷.

The statement of value in the claim form does not limit the power of the court to give judgment for the amount which it finds the claimant is entitled to²⁸.

1 As to the meaning of 'claimant' see PARA 18.

2 See CPR 16.3(1). Where a claim is for a sum of money expressed in a foreign currency it must expressly state (1) that the claim is for payment in a specified foreign currency; (2) why it is for payment in that currency;

(3) the sterling equivalent of the sum at the date of the claim; and (4) the source of the exchange rate relied on to calculate the sterling equivalent: *Practice Direction--Statements of Case* PD 16 para 9.1.

3 CPR 16.3(2)(a).

4 CPR 16.3(2)(b)(i). Such a claim may be suitable for allocation to the small claims track: see PARA 267.

5 CPR 16.3(2)(b)(ii). Such a claim may be suitable for allocation to the fast track: see PARA 268.

6 CPR 16.3(2)(b)(iii). Such a claim may be suitable for allocation to the multi-track: see PARA 469.

7 CPR 16.3(2)(c).

8 As to the meaning of 'claim for personal injuries' see PARA 19.

9 CPR 16.3(3)(a). Such a personal injury claim may be suitable for allocation to the small claims track: see CPR 26.6(1)(a); and PARA 267. As to the meaning of 'damages' see PARA 37 note 1.

10 CPR 16.3(3)(b). See generally **DAMAGES**.

11 CPR 16.3(4)(a)(i).

12 CPR 16.3(4)(a)(ii).

13 CPR 16.3(4)(b)(i).

14 CPR 16.3(4)(b)(ii). A housing repair claim where neither the estimated cost of repairs nor the financial value of any claim for damages exceeds £1,000 may be suitable for allocation to the small claims track: see CPR 26.6(1)(b); and PARA 267. Landlord and tenant claims must, however, normally be started by a modified form of the Part 8 procedure (to which the rules relating to statements of case do not apply): see CPR Pt 56; and PARA 127 et seq. See further **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 468.

15 CPR 16.3(5)(a). This is in order to comply with *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 2.1 which provides that proceedings (whether for damages or for a specified sum) may not be started in the High Court if the claim is for more than £15,000: see PARA 116.

16 CPR 16.3(5)(b). For examples of such claims see PARA 116 the text and notes 9-11.

17 CPR 16.3(5)(c). This is in order to comply with *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 2.2; and the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 9: see PARA 116 text and note 5.

18 As to the meaning of 'specialist list' see PARA 67 note 8; and as to specialist proceedings see PARA 1536 et seq.

19 CPR 16.3(5)(d). As to specialist proceedings see CPR Pt 49; and PARA 1536 et seq.

20 CPR 16.3(6)(a)(i).

21 CPR 16.3(6)(a)(ii).

22 CPR 16.3(6)(b).

23 As to the meaning of 'defendant' see PARA 18.

24 As to the meaning of 'counterclaim' see PARA 618 note 3.

25 CPR 16.3(6)(c).

26 Ie under the Social Security (Recovery of Benefits) Act 1997 s 6 (recoupment of benefits): see **DAMAGES** vol 12(1) (Reissue) PARA 915.

27 CPR 16.3(6)(d).

28 CPR 16.3(7).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/587. Contents of the particulars of claim; in general.

587. Contents of the particulars of claim; in general.

Particulars of claim¹ must include:

- 652 (1) a concise statement of the facts on which the claimant relies²;
- 653 (2) if the claimant is seeking interest, a statement to that effect and the details set out below³;
- 654 (3) if the claimant is seeking aggravated damages⁴ or exemplary damages⁵, a statement to that effect and his grounds for claiming them⁶;
- 655 (4) if the claimant is seeking provisional damages, a statement to that effect and his grounds for claiming them⁷; and
- 656 (5) such other matters as may be set out in a practice direction⁸.

If the claimant is seeking interest he must:

- 657 (a) state whether he is doing so under the terms of a contract⁹, under an enactment (and if so which)¹⁰ or on some other basis and, if so, what that basis is¹¹; and
- 658 (b) if the claim is for a specified amount of money, state:
 - 72 20. (i) the percentage rate at which interest is claimed¹²;
 - 21. (ii) the date from which it is claimed¹³;
 - 22. (iii) the date to which it is calculated, which must not be later than the date on which the claim form is issued¹⁴;
 - 23. (iv) the total amount of interest claimed to the date of calculation¹⁵; and
 - 24. (v) the daily rate at which interest accrues after that date¹⁶.

73

Particulars of claim served separately from the claim form must also contain the name of the court in which the claim is proceeding, the claim number, the title of the proceedings and the claimant's address for service¹⁷.

Particulars of claim must be verified by a statement of truth¹⁸.

1 Particulars of claim, if not included in the claim form, must be served with it or within 14 days after service of the claim form (see CPR 7.4(1)(b); and PARA 123) and, in any event, no later than the latest time for serving the claim form (see CPR 7.4(2); and PARA 123), ie within four months of issue if for service in the jurisdiction (see CPR 7.5(2); and PARA 120) or within six months of issue if for service out of the jurisdiction (see CPR 7.5(3); and PARA 120). As to the meaning of 'service' see PARA 138 note 2.

2 CPR 16.4(1)(a). As to the meaning of 'claimant' see PARA 18. The court cannot require a claimant to include in his claim all of the losses he has sustained: *Khiaban v Beard* [2003] EWCA Civ 358, [2003] 3 All ER 362, [2008] 1 WLR 419. A claim included in a claim form but omitted from the particulars of claim is not deemed to have been irretrievably abandoned: *British Credit Trust Holdings v UK Insurance Ltd* [2003] EWHC 2404 (Comm), [2004] 1 All ER (Comm) 444.

3 CPR 16.4(1)(b). See heads (a), (b) in the text.

4 'Aggravated damages' are additional damages which the court may award as compensation for the defendant's objectionable behaviour: see CPR 2.2, Glossary. As to the effect of a description in the Glossary see

PARA 31. As to the meaning of 'damages' see PARA 37 note 1; as to the meaning of 'court' see PARA 22; and as to the meaning of 'defendant' see PARA 18. See generally **DAMAGES**.

5 'Exemplary damages' are damages which go beyond compensating for actual loss and are awarded to show the court's disapproval of the defendant's behaviour: see CPR 2.2, Glossary.

6 CPR 16.4(1)(c).

7 CPR 16.4(1)(d).

8 CPR 16.4(1)(e). See further PARA 587 et seq.

9 CPR 16.4(2)(a)(i). As to claims based on a contract see further PARA 590.

10 CPR 16.4(2)(a)(ii).

11 CPR 16.4(2)(a)(iii).

12 CPR 16.4(2)(b)(i).

13 CPR 16.4(2)(b)(ii).

14 CPR 16.4(2)(b)(iii).

15 CPR 16.4(2)(b)(iv).

16 CPR 16.4(2)(b)(v).

17 *Practice Direction--Statements of Case* PD 16 para 3.8. As to separate service of the particulars of claim see PARA 123.

18 See CPR Pt 22; and PARA 613. Where the particulars of claim are not included in the claim form, the form of the statement of truth is as follows: '[I believe][the claimant believes] that the facts stated in these particulars of claim are true.': *Practice Direction--Statements of Case* PD 16 para 3.4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/588. Other miscellaneous matters to be contained in particulars of claim.

588. Other miscellaneous matters to be contained in particulars of claim.

Where a claim is made for an injunction¹ or declaration in respect of or relating to any land or the possession, occupation, use or enjoyment of any land the particulars of claim must state whether or not the injunction or declaration relates to residential premises and identify the land (by reference to a plan where necessary)².

Where a claim is brought to enforce a right to recover possession of goods the particulars of claim must contain a statement showing the value of the goods³.

In clinical negligence claims, the words 'clinical negligence' should be inserted at the top of every statement of case, including the particulars of claim⁴.

A claimant in a claim for wrongful interference with goods must, in the particulars of claim, state the name and address of every person who, to his knowledge, has or claims an interest in the goods and who is not a party to the claim⁵.

1 As to the meaning of 'injunction' see PARA 315 note 2.

2 *Practice Direction--Statements of Case* PD 16 para 7.1. As to particulars of possession claims see PARA 593. Landlord and tenant claims must normally be started by a modified form of the Part 8 procedure (to which the rules relating to statements of case do not apply): see CPR Pt 56; and PARA 127 et seq. See further **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 468.

3 *Practice Direction--Statements of Case* PD 16 para 7.2.

4 *Practice Direction--Statements of Case* PD 16 para 9.3.

5 CPR 19.5A(1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/589. Matters relied on which must be specifically set out in particulars of claim.

589. Matters relied on which must be specifically set out in particulars of claim.

A claimant¹ who wishes to rely on evidence of a conviction of an offence² or on evidence of a finding or adjudication of adultery or paternity³ must include in his particulars of claim a statement to that effect and give the following details:

- 659 (1) the type of conviction, finding or adjudication and its date;
- 660 (2) the court or court-martial which made the conviction, finding or adjudication;
and
- 661 (3) the issue in the claim to which it relates⁴.

Furthermore, the claimant must specifically set out the following matters in his particulars of claim where he wishes to rely on them in support of his claim:

- 662 (a) any allegation of fraud;
- 663 (b) the fact of any illegality;
- 664 (c) details of any misrepresentation;
- 665 (d) details of all breaches of trust;
- 666 (e) notice or knowledge of a fact;
- 667 (f) details of unsoundness of mind or undue influence;
- 668 (g) details of wilful default; and
- 669 (h) any facts relating to mitigation of loss or damage⁵.

1 As to the meaning of 'claimant' see PARA 18.

2 Ie under the Civil Evidence Act 1968 s 11 (convictions as evidence in civil proceedings): see PARA 1208.

3 Ie under the Civil Evidence Act 1968 s 12 (findings of adultery and paternity as evidence in civil proceedings): see PARA 1211.

4 *Practice Direction--Statements of Case* PD 16 para 8.1.

5 *Practice Direction--Statements of Case* PD 16 para 8.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/590. Particulars of claim based upon contract.

590. Particulars of claim based upon contract.

Where a claim is based upon a written agreement, a copy of the contract or documents constituting the agreement should be attached to or served¹ with the particulars of claim and the original(s) should be available at the hearing². Any general conditions of sale incorporated in the contract should also be attached³.

Where a claim is based upon an oral agreement, the particulars of claim should set out the contractual words used and state by whom, to whom, when and where they were spoken⁴.

Where a claim is based upon an agreement by conduct, the particulars of claim must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done⁵.

In a claim issued in the High Court relating to a consumer credit agreement, the particulars of claim must contain a statement that the claim is not one which is required by statute⁶ to be brought in the county court⁷.

1 As to the meaning of 'service' see PARA 138 note 2.

2 *Practice Direction--Statements of Case* PD 16 para 7.3(1). Where, however, the contract is, or the documents constituting the agreement are, bulky, this requirement is complied with by attaching or serving only the relevant parts of the contract or documents: para 7.3.

3 *Practice Direction--Statements of Case* PD 16 para 7.3(2); and see note 2.

4 *Practice Direction--Statements of Case* PD 16 para 7.4.

5 *Practice Direction--Statements of Case* PD 16 para 7.5.

6 Ie it is not a claim to which the Consumer Credit Act 1974 s 141 applies: see **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 288-289. As to the meaning of 'consumer credit agreement' see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 81.

7 *Practice Direction--Statements of Case* PD 16 para 7.6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/591. Particulars of personal injury claim.

591. Particulars of personal injury claim.

In personal injury claims¹, the particulars of claim must contain the claimant's date of birth and brief details of the claimant's personal injuries². A schedule of details of any past and future expenses and losses claimed must be attached to the particulars of claim³. Where the claimant is relying on the evidence of a medical practitioner a report from the medical practitioner giving details of the personal injuries which he alleges he suffered must also be attached to or served with the particulars of claim⁴.

In a case where provisional damages⁵ are claimed, the claimant must in his particulars of claim:

- 670 (1) state that he is seeking an award of provisional damages under the relevant statutory provision⁶;
- 671 (2) state that there is a chance that at some future time the claimant will develop some serious disease or suffer some serious deterioration in his physical or mental condition; and
- 672 (3) specify the disease or type of deterioration in respect of which an application may be made at a future date⁷.

1 As to the meaning of 'claim for personal injuries' see PARA 19.

2 *Practice Direction--Statements of Case* PD 16 para 4.1.

3 See *Practice Direction--Statements of Case* PD 16 para 4.2.

4 See *Practice Direction--Statements of Case* PD 16 para 4.3.

5 As to provisional damages see CPR Pt 41; and PARAS 1217-1221. Provisional damages may be awarded under either the Supreme Court Act 1981 s 32A or the County Courts Act 1984 s 51 where there is a chance that at some future time the claimant will develop some serious disease or suffer some serious deterioration in his physical or mental condition, as a result of the act or omission which gave rise to the cause of action the subject matter of the claim. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. See further **DAMAGES** vol 12(1) (Reissue) PARAS 930, 1154.

6 Ie under either the Supreme Court Act 1981 s 32A or the County Courts Act 1984 s 51: see note 5.

7 *Practice Direction--Statements of Case* PD 16 para 4.4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/592. Particulars of fatal accident claim.

592. Particulars of fatal accident claim.

In a fatal accident claim the claimant¹ must state in his particulars of claim:

- 673 (1) that it is brought under the Fatal Accidents Act 1976;
- 674 (2) the dependants on whose behalf the claim is made;
- 675 (3) the date of birth of each dependant; and
- 676 (4) details of the nature of the dependency claim².

A fatal accident claim may include a claim for damages for bereavement³. In a fatal accident claim the claimant may also bring a claim on behalf of the estate of the deceased⁴.

1 As to the meaning of 'claimant' see PARA 18.

2 *Practice Direction--Statements of Case* PD 16 para 5.1. As to dependency claims see **DAMAGES** vol 12(1) (Reissue) PARA 934.

3 *Practice Direction--Statements of Case* PD 16 para 5.2. As to bereavement claims see **DAMAGES** vol 12(1) (Reissue) PARA 938.

4 *Practice Direction--Statements of Case* PD 16 para 5.3. See **DAMAGES** vol 12(1) (Reissue) PARA 939.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/593. Particulars of claim for the recovery of land.

593. Particulars of claim for the recovery of land.

The following provisions do not apply where the special procedure for accelerated claims for possession of property let on an assured shorthold tenancy¹ is used² or, except where the court orders otherwise or the rules so provide, where the claimant³ seeks an interim possession order⁴. Subject to that, in a possession claim⁵ the particulars of claim must identify the land to which the claim relates and state whether the claim relates to residential premises⁶. They must also state the ground on which possession is claimed, give full details about any mortgage or tenancy agreement and give details of every person who, to the best of the claimant's knowledge, is in possession of the property⁷.

If the claim relates to residential premises let on a tenancy and includes a claim for non-payment of rent, the particulars of claim must set out:

- 677 (1) the amount due at the start of the proceedings;
- 678 (2) in schedule form, the dates and amounts of all payments due and payments made under the tenancy agreement for a period of two years⁸ immediately preceding the date of issue, or if the first date of default occurred less than two years before the date of issue from the first date of default and a running total of the arrears;
- 679 (3) the daily rate of any rent and interest;
- 680 (4) any previous steps taken to recover the arrears of rent with full details of any court proceedings; and
- 681 (5) any relevant information about the defendant's circumstances, in particular whether the defendant is in receipt of social security benefits and whether any payments are made on his behalf directly to the claimant under the Social Security Contributions and Benefits Act 1992⁹.

If the claim for possession relates to the conduct of the tenant, the particulars of claim must state details of the conduct alleged¹⁰, and if the possession claim relies on a statutory ground or grounds for possession, the particulars of claim must specify the ground or grounds relied on¹¹. In a case where the claimant knows of any person entitled to claim relief against forfeiture as underlessee¹², including a mortgagee, the particulars of claim must state the name and address of that person and the claimant must file a copy of the particulars of claim for service on him¹³.

If the claim is a possession claim against trespassers, the particulars of claim must state the claimant's interest in the land or the basis of his right to claim possession and the circumstances in which it has been occupied without licence or consent¹⁴. Additional requirements are specified if the claim is a possession claim by a mortgagee¹⁵ or is a possession claim in relation to a demoted tenancy where the landlord is a housing action trust or a local housing authority¹⁶.

1 As to assured shorthold tenancies see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1051 et seq.

2 See CPR 55.2(2)(b). As to the procedure relating to such accelerated possession claims see CPR 55.11-CPR 55.19; and **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1129 et seq.

3 As to the meaning of 'claimant' see PARA 18.

4 See CPR 55.2(2)(c). As to the procedure relating to interim possession orders against squatters see CPR 55.20-CPR 55.28: and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 659.

5 'Possession claim' means a claim for the recovery of possession of land (including buildings or parts of buildings): CPR 55.1(a).

6 *Practice Direction--Possession Claims* PD 55 para 2.1(1), (2); CPR 55.4.

7 *Practice Direction--Possession Claims* PD 55 para 2.1(3)-(5).

8 If the claimant wishes to rely on a history of arrears which is longer than two years, he should state this in his particulars and exhibit a full (or longer) schedule to a witness statement: *Practice Direction--Possession Claims* PD 55 para 2.3A.

9 *Practice Direction--Possession Claims* PD 55 paras 2.2, 2.3. The particulars of claim must be filed and served with the claim form: CPR 55.4. As to the meaning of 'filing' see PARA 1832 note 8; and as to the meaning of 'service' see PARA 138 note 2. As to payment of social security benefits directly to a person's landlord see **HOUSING** vol 22 (2006 Reissue) PARA 163.

10 *Practice Direction--Possession Claims* PD 55 para 2.4A.

11 *Practice Direction--Possession Claims* PD 55 para 2.4B.

12 If under the Law of Property Act 1925 s 146(4) or in accordance with the Supreme Court Act 1981 s 38 or the County Courts Act 1984 s 138(9C): see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 628-629. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

13 *Practice Direction--Possession Claims* PD 55 para 2.4.

14 *Practice Direction--Possession Claims* PD 55 para 2.6.

15 See *Practice Direction--Possession Claims* PD 55 paras 2.5, 2.5A; and **MORTGAGE** vol 77 (2010) PARA 548.

16 See *Practice Direction--Possession Claims* PD 55 para 2.7; and **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1382. As to the meaning of 'demoted tenancy' see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1376.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/594. Particulars of hire purchase or conditional sale agreement claim.

594. Particulars of hire purchase or conditional sale agreement claim.

Where the claim is for the delivery of goods let under a hire-purchase agreement or conditional sale agreement¹ to a person other than a company or other corporation, the claimant² must state in the particulars of claim:

- 682 (1) the date of the agreement;
- 683 (2) the parties to the agreement;
- 684 (3) the number or other identification of the agreement;
- 685 (4) where the claimant was not one of the original parties to the agreement, the means by which the rights and duties of the creditor passed to him;
- 686 (5) whether the agreement is a regulated agreement³, and if it is not a regulated agreement, the reason why;
- 687 (6) the place where the agreement was signed by the defendant⁴;
- 688 (7) the goods claimed;
- 689 (8) the total price of the goods;
- 690 (9) the paid-up sum;
- 691 (10) the unpaid balance of the total price;
- 692 (11) whether a default notice⁵ or a notice before taking action⁶ or notice to terminate⁷ has been served⁸ on the defendant, and if it has, the date and method of service;
- 693 (12) the date when the right to demand delivery of the goods accrued;
- 694 (13) the amount (if any) claimed as an alternative to the delivery of goods; and
- 695 (14) the amount (if any) claimed in addition to the delivery of the goods or any claim under head (13) above,

with the grounds of each claim⁹.

Where the claim is not for the delivery of goods, the claimant must state in his particulars of claim:

- 696 (a) the matters set out in heads (1) to (6) above;
- 697 (b) the goods let under the agreement;
- 698 (c) the amount of the total price;
- 699 (d) the paid-up sum;
- 700 (e) the amount (if any) claimed as being due and unpaid in respect of any instalment or instalments of the total price; and
- 701 (f) the nature and amount of any other claim and how it arises¹⁰.

1 Is an agreement to which the Consumer Credit Act 1974 applies: see generally **CONSUMER CREDIT**. As to the meaning of 'hire purchase agreement' and 'conditional sale agreement' see **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 23, 45.

2 As to the meaning of 'claimant' see PARA 18.

3 As to the meaning of 'regulated agreement' see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 79. For the special procedure relating to regulated agreements see *Practice Direction--Consumer Credit Act 2006--Unfair*

relationships PD 7B. The county court has exclusive jurisdiction over such agreements: see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 288.

4 As to the meaning of 'defendant' see PARA 18.

5 As to the meaning of 'default notice' see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 263.

6 Is a notice under the Consumer Credit Act 1974 s 76(1) (notice before taking certain action in non-default cases): see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 234.

7 Is a notice under the Consumer Credit Act 1974 s 98(1) (notice to terminate in non-default cases): see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 262.

8 As to the meaning of 'service' see PARA 138 note 2.

9 *Practice Direction--Statements of Case* PD 16 para 6.1.

10 *Practice Direction--Statements of Case* PD 16 para 6.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/595. Particulars of defamation claim.

595. Particulars of defamation claim.

Statements of case in defamation claims should be confined to the information necessary to inform the other party of the nature of the case he has to meet. Such information should be set out concisely and in a manner proportionate to the subject matter of the claim¹. The claimant² must specify in the particulars of claim the defamatory meaning which he alleges that the words or matters complained of conveyed, both as to their natural and ordinary meaning and as to any innuendo³ meaning⁴. In the case of an innuendo meaning, the claimant must also identify the relevant extraneous facts⁵.

In a claim for slander the precise words used and the names of the persons to whom they were spoken and when must, so far as possible, be set out in the particulars of claim, if not already contained in the claim form⁶.

1 *Practice Direction--Defamation Claims* PD 53 para 2.1.

2 As to the meaning of 'claimant' see PARA 18.

3 The meaning alleged to be conveyed to some person by reason of his knowing facts extraneous to the words complained of: *Practice Direction--Defamation Claims* PD 53 para 2.3(1)(b). As to innuendo see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 47.

4 *Practice Direction--Defamation Claims* PD 53 para 2.3(1).

5 *Practice Direction--Defamation Claims* PD 53 para 2.3(2).

6 *Practice Direction--Defamation Claims* PD 53 para 2.4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/596. Contents of statement of case in human rights claim.

596. Contents of statement of case in human rights claim.

A party who seeks to rely on any provision of, or right arising under, the Human Rights Act 1998 or seeks a remedy available under that Act must state that fact in his statement of case and must, in his statement of case:

- 702 (1) give precise details of the Convention right¹ which it is alleged has been infringed and details of the alleged infringement;
- 703 (2) specify the relief sought;
- 704 (3) state if the relief sought includes a declaration of incompatibility² or damages in respect of a judicial act³;
- 705 (4) where the relief sought includes a declaration of incompatibility, give precise details of the legislative provision alleged to be incompatible and details of the alleged incompatibility;
- 706 (5) where the claim is founded on a finding of unlawfulness by another court or tribunal, give details of the finding; and
- 707 (6) where the claim is founded on a judicial act which is alleged to have infringed a Convention right of the party⁴, give details of the judicial act complained of and the court or tribunal which is alleged to have made it⁵.

A party who seeks to amend his statement of case to include any such matters must, unless the court⁶ orders otherwise, do so as soon as possible⁷.

1 As to the meaning of 'Convention rights' see the Human Rights Act 1998 s 1; and **JUDICIAL REVIEW** vol 61 (2010) PARA 651; **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

2 In accordance with the Human Rights Act 1998 s 4: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. No such declaration may be made unless 21 days' notice, or such other period of notice as the court directs, has been given to the Crown: CPR 19.4A(1). Where such notice has been given, a minister or other person permitted by the Human Rights Act 1998 must be joined as a party on giving notice to the court: CPR 19.4A(2). Where the appropriate person has not applied to be joined as a party within 21 days, or such other period as the court directs, after the notice is served, the court may join the appropriate person as a party: CPR 19.4A(4). Such notice must be served on the person named in the list published under the Crown Proceedings Act 1947 s 17 and annexed to *Practice Direction--Crown Proceedings* PD 66: *Practice Direction--Addition and Substitution of Parties* PD 19A para 6.4(1). The court may consider at any time whether notice should be given to the Crown and give directions for the content and service of the notice, but will normally do so at the case management conference: paras 6.1, 6.2. As to the meaning of 'service' see PARA 138 note 2.

3 In relation to which the Human Rights Act 1998 s 9(3) applies: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. See also CPR 19.4A(3)(a). Notice must be given to the Crown: CPR 19.4A(3)(b). Such notice must be given to the Lord Chancellor and served on the Treasury Solicitor on his behalf, unless the judicial act is of a court-martial when the appropriate person is the Secretary of State for Defence and the notice must be served on the Treasury Solicitor on his behalf: *Practice Direction--Addition and Substitution of Parties* PD 19A para 6.6(2).

4 In accordance with the Human Rights Act 1998 s 9: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. See also note 3.

5 *Practice Direction--Statements of Case* PD 16 para 15.1.

6 As to the meaning of 'court' see PARA 22.

7 *Practice Direction--Statements of Case* PD 16 para 15.2. Where a party amends his statement of case to include any such matter, then the court will consider whether notice should be given to the Crown and give

directions for the content and service of the notice: *Practice Direction--Addition and Substitution of Parties* PD 19A para 6.3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/597. Statement of case where party wishes to rely on finding made by Office of Fair Trading.

597. Statement of case where party wishes to rely on finding made by Office of Fair Trading.

A party who wishes to rely on a finding of the Office of Fair Trading as provided by the Competition Act 1998¹ must include in his statement of case a statement to that effect and identify the Office's finding on which he seeks to rely².

1 le as provided by the Competition Act 1999 s 58: see **COMPETITION** vol 18 (2009) PARA 148.

2 *Practice Direction--Statements of Case* PD 16 para 14.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/598. Statement of case in probate claim.

598. Statement of case in probate claim.

The claim form in a probate claim¹ must contain a statement of the nature of the interest of the claimant and of each defendant in the estate². If a party disputes another party's interest in the estate he must state this in his statement of case and set out his reasons³.

Any party who contends that at the time when a will⁴ was executed the testator did not know of and approve its contents must give particulars of the facts and matters relied on⁵.

Any party who wishes to contend that:

- 708 (1) a will was not duly executed;
- 709 (2) at the time of the execution of a will the testator lacked testamentary capacity; or
- 710 (3) the execution of a will was obtained by undue influence or fraud,

must set out the contention specifically and give particulars of the facts and matters relied on⁶.

A defendant may give notice in his defence that he does not raise any positive case, but insists on the will being proved in solemn form and, for that purpose, will cross-examine the witnesses who attested the will⁷. If he gives such a notice, the court will not make an order for costs against him unless it considers that there was no reasonable ground for opposing the will⁸.

1 For these purposes, 'probate claim' means a claim for (1) the grant of probate of the will, or letters of administration of the estate, of a deceased person; (2) the revocation of such a grant; or (3) a decree pronouncing for or against the validity of an alleged will, not being a claim which is non-contentious (or common form) probate business as defined in the Supreme Court Act 1981 s 128 (ie the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administrations through the High Court in contentious cases where the contest has been terminated, all business of a non-contentious nature in matters of testacy and intestacy not being proceedings in any claim, and the business of lodging caveats against the grant of probate or administration): CPR 57.1(2)(a). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. See *O'Brien v Seagrave* [2007] EWHC 788 (Ch), [2007] 3 All ER 633, [2007] 1 WLR 2002; and see **EXECUTORS AND ADMINISTRATORS**.

2 CPR 57.7(1). As to the meanings of 'claimant' and 'defendant' see PARA 18.

3 CPR 57.7(2).

4 'Will' includes a codicil: CPR 57.1(2)(d). See further **WILLS** vol 50 (2005 Reissue) PARA 251.

5 CPR 57.7(3).

6 CPR 57.7(4).

7 CPR 57.7(5)(a). As to the meaning of 'cross-examination' see PARA 50 note 4.

8 CPR 57.7(5)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/599. Contents of defence; in general.

599. Contents of defence; in general.

In his defence, the defendant¹ must state:

- 711 (1) which of the allegations in the particulars of claim he denies²;
- 712 (2) which allegations he is unable to admit or deny, but which he requires the claimant³ to prove⁴; and
- 713 (3) which allegations he admits⁵.

Where the defendant denies an allegation he must state his reasons for doing so⁶ and if he intends to put forward a different version of events from that given by the claimant, he must state his own version⁷.

Subject as follows, a defendant who fails to deal with an allegation is to be taken to admit that allegation⁸. A defendant who fails to deal with an allegation, but has set out in his defence the nature of his case in relation to the issue to which that allegation is relevant, must be taken to require that allegation to be proved⁹. Where the claim includes a money claim, a defendant must be taken to require that any allegation relating to the amount of money claimed be proved, unless he expressly admits the allegation¹⁰.

If the defendant disputes the claimant's statement of value¹¹ he must state why he disputes it¹² and, if he is able, give his own statement of the value of the claim¹³. If he is defending in a representative capacity, he must state what that capacity is¹⁴ and if he has not filed¹⁵ an acknowledgment of service¹⁶, he must give an address for service¹⁷. He must also give details of the expiry of any relevant limitation period relied on¹⁸. Where a defendant is an individual, he must provide his date of birth (if known) in the defence¹⁹.

A defence must be verified by a statement of truth²⁰.

1 As to the meaning of 'defendant' see PARA 18.

2 CPR 16.5(1)(a).

3 As to the meaning of 'claimant' see PARA 18.

4 CPR 16.5(1)(b).

5 CPR 16.5(1)(c).

6 CPR 16.5(2)(a).

7 CPR 16.5(2)(b).

8 CPR 16.5(5).

9 CPR 16.5(3).

10 CPR 16.5(4).

11 Ie under CPR 16.3: see PARA 586.

12 CPR 16.5(6)(a).

13 CPR 16.5(6)(b).

14 CPR 16.5(7). As to representative parties see PARAS 229-231.

15 As to the meaning of 'filing' see PARA 1832 note 8.

16 Ie under CPR Pt 10: see PARAS 184, 186.

17 CPR 16.5(8). An address for service must be within the United Kingdom: see CPR 6.23; and PARA 143. Where the defendant is an individual, and the claim form does not contain an address at which he resides or carries on business, or contains an incorrect address, the defendant must provide such an address in the defence: *Practice Direction--Statements of Case* PD 16 para 10.4. He must still provide the address so required if his address for service is not where he resides or carries on business: see para 10.5. Any address which is provided for the purpose of these provisions must include a postcode, unless the court orders otherwise: para 10.6. As to the meaning of 'service' see PARA 138 note 2.

18 *Practice Direction--Statements of Case* PD 16 para 14.1. As to limitation periods see generally **LIMITATION PERIODS**.

19 *Practice Direction--Statements of Case* PD 16 para 10.7. He must also provide the date of birth in the acknowledgment of service, admission, defence and counterclaim, reply or other response: para 10.7.

20 See CPR Pt 22; and PARA 613. The form of the statement of truth is as follows: '[I believe][the defendant believes] that the facts stated in the defence are true.': *Practice Direction--Statements of Case* PD 16 para 12.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/600. Defence of tender before claim.

600. Defence of tender before claim.

Where a defendant wishes to rely on a defence of tender before claim¹ he must make a payment into court of the amount he says was tendered². If the defendant does not make a payment into court the defence of tender before claim will not be available to him until he does so³.

1 'Defence of tender before claim' is a defence that, before the claimant started proceedings, the defendant unconditionally offered to the claimant the amount due or, if no specified amount is claimed, an amount sufficient to satisfy the claim: CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31. As to the meanings of 'claimant' and 'defendant' see PARA 18.

2 CPR 37.2(1).

3 CPR 37.2(2). As to CPR Pt 37 see PARA 1553 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/601. Defence of set-off.

601. Defence of set-off.

Where a defendant¹ contends he is entitled to money from the claimant² and relies on this as a defence to the whole or part of the claim, the contention may be included in the defence and set off against the claim³.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'claimant' see PARA 18.

3 CPR 16.6. This applies whether or not the defence is also an additional claim: CPR 16.6. As to the meaning of 'additional claim' see PARA 618; and as to such claims see PARA 618 et seq. As to set-off in general see PARA 634 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/602. Contents of defence in personal injury claim.

602. Contents of defence in personal injury claim.

Where the claim is for personal injuries¹ and the claimant² has attached a medical report in respect of his alleged injuries³, the defendant⁴ must:

- 714 (1) state in his defence whether he agrees, disputes, or neither agrees nor disputes but has no knowledge of, the matters contained in the medical report;
- 715 (2) where he disputes any part of the medical report, give in his defence his reasons for doing so; and
- 716 (3) where he has obtained his own medical report on which he intends to rely, attach it to his defence⁵.

Where the claim is for personal injuries and the claimant has included a schedule of past and future expenses and losses⁶, the defendant must include in or attach to his defence a counter-schedule stating which of those items he agrees, disputes, or neither agrees nor disputes but has no knowledge of and, where any items are disputed, supplying alternative figures where appropriate⁷.

1 As to the meaning of 'claim for personal injuries' see PARA 19.

2 As to the meaning of 'claimant' see PARA 18.

3 le as required by *Practice Direction--Statements of Case* PD 16 para 4.3: see PARA 591 text and note 4.

4 As to the meaning of 'defendant' see PARA 18.

5 *Practice Direction--Statements of Case* PD 16 para 12.1.

6 le as required by *Practice Direction--Statements of Case* PD 16 para 4.2: see PARA 591 text and note 3.

7 *Practice Direction--Statements of Case* PD 16 para 12.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/603. Contents of defence in defamation claim.

603. Contents of defence in defamation claim.

Where a defendant¹ alleges:

- 717 (1) that the words complained of are true, he must specify the defamatory meanings he seeks to justify and give details of the matters on which he relies in support of that allegation²;
- 718 (2) that the words complained of are fair comment on a matter of public interest, he must specify the defamatory meaning he seeks to defend as fair comment on a matter of public interest and give details of the matters on which he relies in support of that allegation³;
- 719 (3) that the words complained of were published on a privileged occasion, he must specify the circumstances he relies on in support of that contention⁴.

A defendant who relies on an offer to make amends⁵ as his defence must state in his defence that he is relying on the offer⁶ and that it has not been withdrawn by him or been accepted⁷. He must attach a copy of the offer he made with his defence⁸.

1 As to the meaning of 'defendant' see PARA 18.

2 *Practice Direction--Defamation Claims* PD 53 para 2.5. As to the defence of justification see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 82 et seq.

3 *Practice Direction--Defamation Claims* PD 53 para 2.6. As to the defence of fair comment see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 135 et seq.

4 *Practice Direction--Defamation Claims* PD 53 para 2.7. As to the defences of absolute privilege and qualified privilege see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 94 et seq.

5 *Id* under the Defamation Act 1996 s 2: see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 160.

6 *Id* in accordance with the Defamation Act 1996 s 2 s 4: see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 163.

7 *Practice Direction--Defamation Claims* PD 53 para 2.11(1).

8 *Practice Direction--Defamation Claims* PD 53 para 2.11(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/604. Reply to defence.

604. Reply to defence.

A claimant¹ who does not file² a reply to the defence will not be taken to admit the matters raised in the defence³. A claimant who files a reply to a defence but fails to deal with a matter raised in the defence will be taken to require that matter to be proved⁴.

If a claimant files a reply to the defence, he must file his reply when he files his allocation questionnaire and serve his reply on the other parties at the same time as he files it⁵.

A reply must be verified by a statement of truth⁶.

A party may not file or serve any statement of case after a reply without the permission of the court⁷.

1 As to the meaning of 'claimant' see PARA 18.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 CPR 16.7(1).

4 CPR 16.7(2).

5 CPR 15.8. As to filing allocation questionnaires and the period for doing so see CPR 26.3(6); and PARA 263. As to the meaning of 'service' see PARA 138 note 2.

6 See CPR Pt 22; and PARA 613 et seq.

7 CPR 15.9. As to the meaning of 'court' see PARA 22.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/605. Contents of reply in defamation claim.

605. Contents of reply in defamation claim.

Where a defendant¹ alleges that the words complained of are true², or are fair comment on a matter of public interest³, the claimant⁴ must serve a reply specifically admitting or denying the allegation and giving the facts on which he relies⁵. If the defendant contends that any of the words or matters are fair comment on a matter of public interest, or were published on a privileged occasion⁶, and the claimant intends to allege that the defendant acted with malice⁷, the claimant must serve a reply giving details of the facts or matters relied on⁸.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the defence of justification see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 82 et seq.

3 As to the defence of fair comment see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 135 et seq.

4 As to the meaning of 'claimant' see PARA 18.

5 *Practice Direction--Defamation Claims* PD 53 para 2.8. As to the meaning of 'service' see PARA 138 note 2.

6 As to the defences of absolute privilege and qualified privilege see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 94 et seq.

7 As to defences defeated by malice see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 149 et seq.

8 *Practice Direction--Defamation Claims* PD 53 para 2.9.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(1) STATEMENTS OF CASE/606. Court's power to dispense with statements of case.

606. Court's power to dispense with statements of case.

If a claim form has been issued¹ and served², the court³ may make an order that the claim will continue without any other statement of case⁴.

1 In accordance with CPR 7.2: see PARA 118.

2 In accordance with CPR 7.5: see PARA 120. As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'court' see PARA 22.

4 CPR 16.8.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(2) AMENDMENTS TO STATEMENTS OF CASE/607. Amendments to statements of case; in general.

(2) AMENDMENTS TO STATEMENTS OF CASE

607. Amendments to statements of case; in general.

A party may amend his statement of case¹ at any time before it has been served² on any other party³. If his statement of case has been served, a party may amend it only with the written consent of all the other parties⁴ or with the permission of the court⁵.

Amendments to a statement of case must be verified by a statement of truth unless the court orders otherwise⁶.

1 Amendments to statements of case must be indorsed with a statement as to any necessary permission: see *Practice Direction--Amendments to Statements of Case* PD 17 para 2.1. The statement of case in its amended form need not show the original text. However, where the court thinks it desirable for both the original text and the amendments to be shown, the court may direct that the amendments should be shown either (1) by coloured amendments, either manuscript or computer generated; or (2) by use of a numerical code in a monochrome computer generated document: para 2.2. Where colour is used, the text to be deleted should be struck through in colour and any text replacing it should be inserted or underlined in the same colour: para 2.3. The order of colours to be used for successive amendments is: (a) red; (b) green; (c) violet; and (d) yellow: para 2.4.

2 As to the meaning of 'service' see PARA 138 note 2.

3 CPR 17.1(1).

4 CPR 17.1(2)(a).

5 CPR 17.1(2)(b). As to the meaning of 'court' see PARA 22. If a statement of case has been served, an application to amend it by removing, adding or substituting a party must be made in accordance with CPR 19.4 (see PARA 214): CPR 17.1(3). As to when an appeal may be granted against a refusal to amend a statement of case where some of the proposed amendments have been adjudicated on and some have not see *Convergence Group plc v Chantrey Vellacott (a firm)*[2005] EWCA Civ 290, (2005) Times, 25 April. In deciding whether to grant permission to amend a statement of case where the effect of the amendment sought would be to withdraw an admission made in an earlier statement of case, the court should have regard to the relative prejudice which would be suffered by each party if the admission was (or was not) withdrawn: *White (for and on behalf of the members of Equity Red Star Syndicate No 0218 at Lloyds) v Greensand Homes Ltd*[2007] EWCA Civ 643, [2007] BLR 313. As to refusal of leave to amend see eg *Les Laboratoires Servier v Apotex Inc*[2008] EWHC 2347 (Ch), [2008] All ER (D) 79 (Oct).

6 See CPR Pt 22; and PARA 613.

UPDATE

607 Amendments to statements of case; in general

NOTE 5--*Apotex*, cited, reported at [2009] IP & T 600.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(2) AMENDMENTS TO STATEMENTS OF CASE/608. Court's power to disallow amendments made without permission.

608. Court's power to disallow amendments made without permission.

If a party has amended his statement of case¹ where permission of the court was not required², the court may disallow the amendment³. A party may apply to the court for an order under this provision within 14 days of service⁴ of a copy of the amended statement of case on him⁵.

1 As to the meaning of 'statement of case' see PARA 584.

2 This may be done at any time before the statement of case is served on any other party, or afterwards with the agreement of all parties: see PARA 607. As to the meaning of 'court' see PARA 22.

3 CPR 17.2(1).

4 As to the meaning of 'service' see PARA 138 note 2. As to time limits generally see PARA 88 et seq.

5 CPR 17.2(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(2) AMENDMENTS TO STATEMENTS OF CASE/609. Amendments to statements of case with court's permission.

609. Amendments to statements of case with court's permission.

When making an application to amend a statement of case¹, the applicant must file with the court² the application notice and a copy of the statement of case with the proposed amendments³. The application may be dealt with either at or without⁴ a hearing⁵.

Where the court gives permission for a party to amend his statement of case, it may give directions as to amendments to be made to any other statement of case and as to service of any amended statement of case⁶. Where permission to amend has been given, the applicant must file with the court the amended statement of case within 14 days⁷ of the date of the order, or within such other period as the court may direct⁸. A copy of the order and the amended statement of case must be served on every party to the proceedings, unless the court orders otherwise⁹.

If the substance of the statement of case is changed by reason of the amendment, the statement of case must be re-verified by a statement of truth¹⁰.

1 Such application is required if the amendment is sought after the statement of case has been served on another party and all the parties do not agree to the proposed amendment: see PARA 607. As to the meaning of 'service' see PARA 138 note 2. A claimant may at the court's discretion be permitted to make an amendment to a statement of case in the form of the resurrection of a claim included in the claim form but omitted from the particulars of claim: *British Credit Trust Holdings v UK Insurance Ltd* [2003] EWHC 2404 (Comm), [2004] 1 All ER (Comm) 444.

2 As to the meaning of 'court' see PARA 22. As to the meaning of 'filing' see PARA 1832 note 8.

3 *Practice Direction--Amendments to Statements of Case* PD 17 para 1.2.

4 Ie if CPR 23.8 (see PARA 308) applies: *Practice Direction--Amendments to Statements of Case* PD 17 para 1.1.

5 *Practice Direction--Amendments to Statements of Case* PD 17 para 1.1.

6 CPR 17.3(1). Conditions were imposed on permission to amend a claim under this provision in eg *SX Holdings Ltd v Synchronet Ltd* [2000] All ER (D) 1330, CA. Amendment was permitted and upheld where a claim had been brought under the wrong statutory provisions in *Thurrock Borough Council v Secretary of State for the Environment, Transport and the Regions* [2000] All ER (D) 2258, (2000) Times, 20 December, CA. Application to amend a defence under this provision was refused in eg *Strongway Nominees Ltd v Pallett* [2000] All ER (D) 314. The court's power to give permission under CPR 17.3 is subject to (1) CPR 19.1 (change of parties; general: see PARA 210); (2) CPR 19.4 (special provisions about adding or substituting parties after the end of a relevant limitation period: see PARA 214); and (3) CPR 17.4 (amendments of statement of case after the end of a relevant limitation period: see PARA 610): CPR 17.3(2). As to the meaning of 'limitation period' see PARA 213 note 1.

7 As to time limits generally see PARA 88 et seq.

8 *Practice Direction--Amendments to Statements of Case* PD 17 para 1.3.

9 *Practice Direction--Amendments to Statements of Case* PD 17 para 1.5.

10 *Practice Direction--Amendments to Statements of Case* PD 17 para 1.4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(2) AMENDMENTS TO STATEMENTS OF CASE/610. Amendments to statements of case after the end of the limitation period.

610. Amendments to statements of case after the end of the limitation period.

Where a party applies to amend his statement of case¹ in one of the ways mentioned below² and a period of limitation³ has expired⁴, the court⁵ may allow an amendment:

- 720 (1) whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings⁶;
- 721 (2) to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question⁷;
- 722 (3) to alter the capacity in which a party claims, if the new capacity is one which that party had when the proceedings started or has since acquired⁸.

¹ As to the meaning of 'statement of case' see PARA 584. As to applications to amend the statement of case see PARA 609.

² ie in one of the ways mentioned in CPR 17.4(2)-(4): see heads (1)-(3) in the text.

³ As to the meaning of 'limitation period' see PARA 213 note 1.

⁴ ie under the Limitation Act 1980, the Foreign Limitation Periods Act 1984 or any other enactment which allows such an amendment, or under which such an amendment is allowed: CPR 17.4(1)(b). See generally **LIMITATION PERIODS**.

⁵ As to the meaning of 'court' see PARA 22.

⁶ CPR 17.4(1), (2). Amendment was permitted under this provision in eg *Kuwait Airways Corp v Iraqi Airways Co* [2001] All ER (D) 184 (May) by Langley J but refused in eg *First Roodhill Leasing Ltd v Gillingham Operating Co Ltd* [2001] NPC 109, [2001] All ER (D) 65 (Jul) by Lightman J. In deciding whether an amendment actually constitutes a new cause of action, it is necessary to compare pleadings before and after the amendment: *Savings and Investment Bank Ltd (in liquidation) v Fincken* [2001] EWCA Civ 1639, (2001) Times, 15 November. See also *P & O Nedlloyd BV v Arab Metals Co*, *The UB Tiger* [2006] EWCA Civ 1300, [2007] 1 WLR 2483; and *ED & F Man Sugar Ltd v Lendoudis* [2007] EWHC 2268 (Comm), [2008] 1 All ER 952. For an interpretation of CPR 17.4(2) in the light of the Human Rights Act 1998 s 3(1) see *Goode v Martin* [2001] EWCA Civ 1899, [2002] 1 All ER 620, [2002] 1 WLR 1828.

⁷ CPR 17.4(1), (3). The judge's permission to amend a statement of case under this provision was upheld in eg *Gregson v Channel Four Television Corp* [2000] All ER (D) 956, (2000) Times, 11 August, CA; applied in *Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd* [2005] EWCA Civ 134, [2005] 3 All ER 135, [2005] 1 WLR 2557 (see PARA 215). See also *ABB Asea Brown Boveri Ltd v Hiscox Dedicated Corporate Member Ltd*, *ABB Asea Brown Boveri Ltd v Jardine Lloyd Thompson Ltd* [2007] EWHC 1150 (Comm), [2007] All ER (D) 259 (May). Where the nature of a claim is wrongly inserted on a claim form caused by a pure administrative error, the court may exercise its general discretion in order to achieve justice, even where the limitation period has expired: *Evans v CIG Mon Cymru Ltd* [2008] EWCA Civ 390, [2008] 1 WLR 2675, [2008] PIQR P312.

⁸ CPR 17.4(1), (4). Where a claimant had cured a defect in her standing to bring proceedings by taking an assignment of her trustee in bankruptcy's interest and right in the cause of action, this was not an alteration in capacity so as to bring her within CPR 17.4(4), since she brought the claim in her personal capacity both before and after the assignment: see *Haq v Singh* [2001] EWCA Civ 957, [2001] 1 WLR 1594, CA. As to the circumstances in which the court may allow a new party to be added or substituted after the end of a relevant limitation period see CPR 19.5; and PARA 215.

UPDATE

610 Amendments to statements of case after the end of the limitation period

NOTE 6--See also *Lombard North Central plc v Automobile World (UK) Ltd* [2010] EWCA Civ 20, [2010] All ER (D) 166 (Jan) (amendment to case put forward only in final submissions deemed to late).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(3) FURTHER INFORMATION/611. Obtaining further information.

(3) FURTHER INFORMATION

611. Obtaining further information.

Subject to any rule of law to the contrary¹, the court² may at any time order a party to clarify any matter which is in dispute in the proceedings or give additional information in relation to any such matter, whether or not the matter is contained, or referred to, in a statement of case³.

Before applying for such an order, the party seeking clarification or information should first serve on the party from whom it is sought a written request for that clarification or information stating a date by which the response to the request should be served; the date must allow the second party a reasonable time to respond⁴. The request should be concise and strictly confined to matters which are reasonably necessary and proportionate in order to enable the requesting party to prepare his case or to understand the case he has to meet⁵.

A response to a request must be in writing, dated and signed by the party from whom the information is sought or his legal representative⁶. Where the request is made in a letter the response may be given by letter or in a formal reply⁷. A second or supplementary response to a request must identify itself as such in its heading⁸. The party responding must, when he serves his response on the party who made the request, serve on every other party and file with the court a copy of the request and of his response⁹.

A response must be verified by a statement of truth¹⁰.

If the party requested to provide the information objects to complying with the request or part of it or is unable to do so at all or within the time stated in the request he must inform the first party promptly and in any event within that time¹¹. Where a party requested to provide information considers that the request can only be complied with at disproportionate expense and objects to complying for that reason he should say so in his reply and explain briefly why he has taken that view¹². It is then for the requesting party to apply to the court for an order requiring the other party to provide the further information¹³.

An application notice for an order under these provisions must set out or have attached to it the text of the order sought and in particular must specify the matter or matters in respect of which the clarification or information is sought¹⁴. If a request for the information or clarification has not been made, the application notice must, in addition, explain why not¹⁵, while if such a request has been made, the application notice or the evidence in support should describe the response, if any¹⁶. Both the requesting party and the responding party must consider whether evidence in support of or in opposition to the application is required¹⁷.

Where the party from whom the information was requested has made no response to a request served on him, the requesting party need not serve the application notice on him, and the court may deal with the application without a hearing¹⁸. Otherwise the application notice must be served on that party and on all other parties to the claim¹⁹.

Where the court makes such an order, the party against whom it is made must file his response and serve it on the other parties, within the time specified by the court²⁰.

¹ Eg under the Contempt of Court Act 1981, no court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in

the interests of justice or national security or for the prevention of disorder or crime: see s 10; and **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 408. See also note 3.

2 As to the meaning of 'court' see PARA 22.

3 CPR 18.1(1), (2). In defamation claims, however, unless the court orders otherwise, a party will not be required to provide further information about the defendant's sources of information: see CPR 53.3.

4 See *Practice Direction--Further Information* PD 18 para 1.1. As to the meaning of 'service' see PARA 138 note 2. Subject to the provisions of CPR 6.23(5), (6) and *Practice Direction--Service* PD 6A paras 4.1-4.3 (see PARA 144), a request should be served by e-mail if reasonably practicable: *Practice Direction--Further Information* PD 18 para 1.7.

5 *Practice Direction--Further Information* PD 18 para 1.2. Requests must be made as far as possible in a single comprehensive document and not piecemeal: para 1.3. A request may be made by letter if the text of the request is brief and the reply is likely to be brief; otherwise the request should be made in a separate document: para 1.4. If a request is made in a letter, the letter must, in order to distinguish it from any other that might routinely be written in the course of a case, state that it contains a request made under CPR Pt 18, and deal with no matters other than the request: *Practice Direction--Further Information* PD 18 para 1.5. A request which is not in the form of a letter may, if convenient, be prepared in such a way that the response may be given on the same document, with the numbered paragraphs of the request on the left hand half of each sheet so that the paragraphs of the response may then appear on the right. Where a request is prepared in this form an extra copy should be served for the use of the party from whom the information is sought: para 1.6(2). Whether made by letter or in a separate document, a request must (1) be headed with the name of the court and the title and number of the claim; (2) in its heading state that it is a request made under CPR Pt 18, identify the first party and the second party and state the date on which it is made; (3) set out in a separate numbered paragraph each request for information or clarification; (4) where a request relates to a document, identify that document and (if relevant) the paragraph or words to which it relates; and (5) state the date by which the requesting party expects a response to the request: para 1.6(1).

6 *Practice Direction--Further Information* PD 18 para 2.1. As to the meaning of 'legal representative' see PARA 1833 note 13.

7 See *Practice Direction--Further Information* PD 18 para 2.2(1). Such a letter should identify itself as a response to the request and deal with no other matters than the response: para 2.2(2). Unless the request is in the format described in para 1.6(2) (see note 5) and the party responding uses the document supplied for the purpose, a response must (1) be headed with the name of the court and the title and number of the claim; (2) in its heading identify itself as a response to that request; (3) repeat the text of each separate paragraph of the request and set out under each paragraph the response to it; and (4) refer to and have attached to it a copy of any document not already in the possession of the party requesting the information which forms part of the response: see para 2.3(1).

8 *Practice Direction--Further Information* PD 18 para 2.3(2).

9 *Practice Direction--Further Information* PD 18 para 2.4. As to the meaning of 'filing' see PARA 1832 note 8.

10 See *Practice Direction--Further Information* PD 18 para 3; CPR Pt 22; and PARA 613.

11 See *Practice Direction--Further Information* PD 18 para 4.1(1). He may do so in a letter or in a separate document (a formal response), but in either case he must give reasons and, where relevant, give a date by which he expects to be able to comply: para 4.1(2). There is no need for him to apply to the court in these circumstances: para 4.2(1).

12 See *Practice Direction--Further Information* PD 18 para 4.2(2).

13 See *Practice Direction--Further Information* PD 18 para 5.

14 *Practice Direction--Further Information* PD 18 para 5.2.

15 *Practice Direction--Further Information* PD 18 para 5.3(1).

16 *Practice Direction--Further Information* PD 18 para 5.3(2).

17 See *Practice Direction--Further Information* PD 18 para 5.4.

18 See *Practice Direction--Further Information* PD 18 para 5.5(1). This applies only if at least 14 days have passed since the request was served and the time stated in it for a response has expired: para 5.5(2).

19 *Practice Direction--Further Information* PD 18 para 5.6.

20 CPR 18.1(3). The response must be verified by a statement of truth: see the text and note 10. The judge's exercise of his discretion under CPR 18(1) will only rarely be reviewable on appeal: see *Toussaint v Mattis* [2000] All ER (D) 709, CA. Where the court makes an order which does not mention costs (1) the general rule is that no party is entitled to costs or to seek an order under the Legal Services Act 2007 s 194(3) for a payment to the prescribed charity in respect of pro bono representation (see PARA 1824) relating to the order; but (2) this does not affect any entitlement of a party to recover costs out of a fund held by that party as trustee or personal representative, or pursuant to any lease, mortgage or other security: CPR 44.13(1); *Practice Direction--Further Information* PD 18 para 5.8(2). 'Pro bono representation' means legal representation provided free of charge (CPR 43.2(1)(q)); 'free of charge' has the same meaning as in the Legal Services Act 2007 s 194(10) (ie otherwise than for or in expectation of fee, gain or reward) (CPR 43.2(1)(p)); and 'prescribed charity' has the same meaning as in the Legal Services Act 2007 s 194(8) (ie the charity prescribed by order made by the Lord Chancellor) (CPR 43.2(1)(r)). Where the court makes (a) an order granting permission to appeal; (b) an order granting permission to apply for judicial review; or (c) any other order or direction sought by a party on an application without notice, and its order does not mention costs, it will be deemed to include an order for applicant's costs in the case: CPR 44.13(1A). Any party affected by a deemed order for costs under CPR 44.13(1A) may apply at any time to vary the order: CPR 44.13(1B).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(3) FURTHER INFORMATION/612. Restriction on the use of further information.

612. Restriction on the use of further information.

The court¹ may direct that information provided by a party to another party² must not be used for any purpose except for that of the proceedings in which it is given³.

1 As to the meaning of 'court' see PARA 22.

2 Ie whether given voluntarily or following an order made under CPR 18.1 (see PARA 611): see CPR 18.2.

3 CPR 18.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(4) STATEMENTS OF TRUTH/613. Documents to be verified by a statement of truth.

(4) STATEMENTS OF TRUTH

613. Documents to be verified by a statement of truth.

The following documents must be verified by a statement of truth:

- 723 (1) a statement of case¹;
- 724 (2) a response complying with an order² to provide further information³;
- 725 (3) a witness statement⁴;
- 726 (4) an acknowledgment of service in a claim begun by way of the Part 8 procedure⁵;
- 727 (5) a certificate stating the reasons for bringing a possession claim or a landlord and tenant claim in the High Court⁶;
- 728 (6) a certificate of service⁷;
- 729 (7) any other document where a rule or practice direction requires⁸;
- 730 (8) an application notice, if an applicant wishes to rely on matters set out therein as evidence⁹;
- 731 (9) an expert's report¹⁰;
- 732 (10) a notice of objections to an account being taken by the court, unless the notice is verified by an affidavit or a witness statement¹¹; and
- 733 (11) a schedule or counter-schedule of expenses and losses in a personal injury claim, and any amendments to such a schedule or counter-schedule, whether or not they are contained in a statement of case¹².

Where a statement of case is amended, the amendments must be verified by a statement of truth unless the court orders otherwise¹³.

Subject as follows, a statement of truth is a statement that the party putting forward the document or, in the case of a witness statement, the maker of the witness statement or, in the case of a certificate of service, the person who signs the certificate, believes the facts stated in the document are true¹⁴. If a party is conducting proceedings with a litigation friend¹⁵, the statement of truth in a statement of case, a response or an application notice is a statement that the litigation friend believes the facts stated in the document being verified are true¹⁶.

The statement of truth may be contained in the document it verifies or it may be in a separate document served subsequently, in which case it must clearly identify the document to which it relates¹⁷. The statement of truth must be signed:

- 734 (a) in the case of a statement of case, a response or an application, by the party or litigation friend or the legal representative¹⁸ on behalf of the party or litigation friend¹⁹;
- 735 (b) in the case of a witness statement, by the maker of the statement²⁰; and
- 736 (c) in the case of a notice of objections to an account, by the objecting party or his legal representative²¹.

A statement of truth in a statement of case may be made by a person who is not a party, or by two parties jointly, where this is permitted by a relevant practice direction²². Special provision is

made for where a document containing a statement of truth is to be signed by a person who is unable to read or sign the document²³.

- 1 CPR 22.1(1)(a). As to the documents contained in a statement of case see PARA 584. The form of a statement of truth verifying a statement of case, a response, an application notice or a notice of objections (see heads (1), (2), (6), (8) in the text) must be: 'I believe'[the (*claimant or as the case may be*) believes] that the facts stated in this (*name document being verified*) are true.': *Practice Direction--Statements of Truth* PD 22 para 2.1. A claimant may not verify a claim which includes inconsistent statements, but may amend a statement of case to present alternative claims: *Clarke v Marlborough Fine Art (London) Ltd* [2002] 1 WLR 1731; approved in *Binks v Securicor Omega Express Ltd* [2003] EWCA Civ 993, [2003] 1 WLR 2557.
- 2 Ie under CPR 18.1: see PARA 611.
- 3 CPR 22.1(1)(b).
- 4 CPR 22.1(1)(c). The form of a statement of truth verifying a witness statement must be: 'I believe that facts stated in this witness statement are true.': *Practice Direction--Statements of Truth* PD 22 para 2.2. As to witness statements see CPR 32.4(1); and PARA 982.
- 5 CPR 22.1(1)(d). As to the Part 8 procedure (the alternative procedure for claims) see PARA 127 et seq.
- 6 Ie in accordance with CPR 55.3(2) and 56.2(2): CPR 22.1(1)(e). See **LANDLORD AND TENANT**.
- 7 CPR 22.1(1)(f). As to certificates of service see PARA 154.
- 8 CPR 22.1(1)(g).
- 9 CPR 22.1(3); *Practice Direction--Statements of Truth* PD 22 para 1.2. In addition the application notice for a third party debt order (see CPR 72.3; and PARA 1417), a hardship payment order (see CPR 72.7; and PARA 1423), or a charging order (see CPR 73.3; and PARA 1472) must be verified by a statement of truth: *Practice Direction--Statements of Truth* PD 22 para 1.4(1). See Forms N244 Pt C, PF244 Pt C in *The Civil Court Practice*.
- 10 See *Practice Direction--Statements of Truth* PD 22 para 1.3; CPR Pt 35; and PARA 839.
- 11 See *Practice Direction--Statements of Truth* PD 22 para 1.4(2); *Practice Direction--Accounts, Inquiries etc* PD 40A para 3.3; and PARA 1526. As to the meaning of 'court' see PARA 22.
- 12 See *Practice Direction--Statements of Truth* PD 22 para 1.4(3).
- 13 CPR 22.1(2). As to amendments to statements of case see CPR Pt 17; and PARAS 607-610.
- 14 CPR 22.1(4).
- 15 As to the meaning of 'litigation friend' see PARA 222.
- 16 CPR 22.1(5).
- 17 See CPR 22.1(7); *Practice Direction--Statements of Truth* PD 22 para 1.5. Where the form to be used includes a jurat for the content to be verified by an affidavit then a statement of truth is not required in addition: para 1.6. Where the statement of truth is contained in a separate document, the document containing the statement of truth must be headed with the title of the proceedings and the claim number: para 2.3. As to the method by which the document being verified must be identified in the statement of truth see para 2.3(1)-(5).
- 18 The statement signed by the legal representative will refer to the client's belief, not his own. In signing he must state the capacity in which he signs and the name of his firm where appropriate: *Practice Direction--Statements of Truth* PD 22 para 3.7. His signature will be taken by the court as his statement (1) that the client on whose behalf he has signed had authorised him to do so; (2) that before signing he had explained to the client that in signing the statement of truth he would be confirming the client's belief that the facts stated in the document were true; and (3) that before signing he had informed the client of the possible consequences to the client if it should subsequently appear that the client did not have an honest belief in the truth of those facts (see CPR 32.14; and PARAS 988): *Practice Direction--Statements of Truth* PD 22 para 3.8. A legal representative who signs a statement of truth must sign in his own name and not that of his firm or employer: para 3.10. In the case of a company or corporation, the position regarding in-house legal representatives is as follows: a legal representative employed by a party may sign a statement of truth; however a person who is not a solicitor, barrister or other authorised litigator, but who is employed by the company and is managed by such a person, is not employed by that person and so cannot sign a statement of truth (unlike the employee of a solicitor in

private practice who would come within the statutory definition of legal representative), but such a person may be a manager and able to sign the statement on behalf of the company in that capacity: see para 3.11. See further note 15. As to the meaning of 'legal representative' see PARA 1833 note 13.

19 CPR 22.1(6)(a). Where a document is to be verified on behalf of a company or other corporation, then subject to *Practice Direction--Statements of Truth* PD 22 para 3.7 (see note 14), the statement of truth must be signed by a person holding a senior position in the company or corporation. That person must state the office or position he holds: para 3.4. Each of the following persons is a person holding a senior position for these purposes: (1) in respect of a registered company or corporation, a director, the treasurer, secretary, chief executive, manager or other officer of the company or corporation; and (2) in respect of a corporation which is not a registered company, in addition to those persons set out in head (1), the mayor, chairman, president or town clerk or other similar officer of the corporation: para 3.5. Such persons are expected to have personal knowledge of the content of the document or to be responsible for managing those who have that knowledge: see para 3.11. Where the document is to be verified on behalf of a partnership, those who may sign the statement of truth are (a) any of the partners; or (b) a person having the control or management of the partnership business: para 3.6. An insurer or the Motor Insurers' Bureau may sign a statement of truth in a statement of case on behalf of a party where the insurer or the Motor Insurers' Bureau has a financial interest in the result of proceedings brought wholly or partially by or against that party: para 3.6A. For examples of how these rules might be applied in practice see para 3.11, which is not, however, an indication of how a court might apply the practice direction to a specific situation. If insurers are conducting proceedings on behalf of many claimants or defendants a statement of truth in a statement of case may be signed by a senior person responsible for the case at a lead insurer, but (i) the person signing must specify the capacity in which he signs; (ii) the statement of truth must be a statement that the lead insurer believes that the facts stated in the document are true; and (iii) the court may order that a statement of truth also be signed by one or more of the parties: para 3.6B.

The individual who signs a statement of truth must print his full name clearly beneath his signature: para 3.9.

As to the importance of statements of truth see the concluding observations of Ferris J in *WPP Group plc v Reichmann*[2000] All ER (D) 1409.

20 CPR 22.1(6)(b).

21 *Practice Direction--Statements of Truth* PD 22 para 3.3.

22 CPR 22.1(8); and see notes 16-17.

23 See *Practice Direction--Statements of Truth* PD 22 para 3.A.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(4) STATEMENTS OF TRUTH/614. Failure to verify a statement of case.

614. Failure to verify a statement of case.

If a party fails to verify his statement of case¹ by a statement of truth² the statement of case will remain effective unless struck out³ but the party may not rely on the statement of case as evidence of any of the matters set out in it⁴. The court⁵ may strike out a statement of case which is not verified by a statement of truth⁶ and any party may apply for such an order striking out the statement of case unless it is verified by the service⁷ of a statement of truth within such period as the court may specify⁸.

1 As to the meaning of 'statement of case' see PARA 584.

2 As to statements of truth see PARA 613.

3 CPR 22.2(1)(a). As to the meaning of 'striking out' see PARA 218 note 2. As to striking out a statement of case see further PARA 520.

4 CPR 22.2(1)(b).

5 As to the meaning of 'court' see PARA 22.

6 CPR 22.2(2).

7 As to the meaning of 'service' see PARA 138 note 2.

8 CPR 22.2(3); *Practice Direction--Statements of Truth* PD 22 para 4.2. The usual order for the costs of such an application will be that the costs be paid by the party who had failed to verify in any event and forthwith: para 4.3. As to costs generally see also PARA 1729 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(4) STATEMENTS OF TRUTH/615. Failure to verify a witness statement.

615. Failure to verify a witness statement.

If the maker of a witness statement¹ fails to verify the witness statement by a statement of truth² the court³ may direct that it is not to be admissible as evidence⁴.

1 As to witness statements see CPR 32.4(1); and PARA 982.

2 As to statements of truth see PARA 613.

3 As to the meaning of 'court' see PARA 22.

4 CPR 22.3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(4) STATEMENTS OF TRUTH/616. Power of the court to require a document to be verified.

616. Power of the court to require a document to be verified.

The court¹ may order a person who has failed to verify a document by a statement of truth² to verify the document³. Any party may apply for such an order⁴.

1 As to the meaning of 'court' see PARA 22.

2 Ie in accordance with CPR 22.1: see PARA 613.

3 CPR 22.4(1).

4 CPR 22.4(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(5) SET-OFF/617. Set-off in general.

(5) SET-OFF

617. Set-off in general.

Where the defendant¹ claims that the claimant² is indebted to him, he may be entitled to raise the defence of set-off³. Thus, where the defendant's cross-claim consists of a money claim, he may be entitled to deduct the amount of his cross-claim from the claim, or to extinguish the claim altogether, or to establish a right to an excess over the claim. The right of set-off is dealt with elsewhere in this title⁴.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'claimant' see PARA 18.

3 See CPR 16.6; and PARA 601.

4 See PARA 634 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(6) ADDITIONAL CLAIMS AND COUNTERCLAIMS/618. Counterclaims and other additional claims; in general.

(6) ADDITIONAL CLAIMS AND COUNTERCLAIMS

618. Counterclaims and other additional claims; in general.

An additional claim (formerly known as a 'Part 20 claim'¹) is any claim other than a claim made by a claimant against a defendant² and includes:

- 737 (1) a counterclaim³ by a defendant against the claimant or against the claimant and some other person⁴;
- 738 (2) an additional claim by a defendant against any person (whether or not already a party) for a contribution⁵ or an indemnity⁶ or some other remedy⁷; and
- 739 (3) where an additional claim has been made against a person who is not already a party, any claim made by that person against any other person (whether or not already a party)⁸.

The purpose of Part 20 of the Civil Procedure Rules is to enable counterclaims and other additional claims to be managed in the most convenient and effective manner⁹.

¹ le before the substitution of CPR Pt 20 by the Civil Procedure (Amendment) (No 4) Rules 2005, SI 2005/3515. There are still some references to Part 20 claims in the Civil Procedure Rules and in some forms.

² CPR 20.2(2)(a). Unless the context requires otherwise, references to a claimant or defendant include a party bringing or defending an additional claim: CPR 20.2(2)(b).

³ A counterclaim is a claim brought by a defendant in response to the claimant's claim, which is included in the same proceedings as the claimant's claim: CPR 2.2, Glossary. As to the meanings of 'claimant' and 'defendant' see PARA 18; and as to the effect of a description in the Glossary see PARA 31.

⁴ CPR 20.2(1)(a).

⁵ 'Contribution' is a right of someone to recover from a third person all or part of the amount which he himself is liable to pay: CPR 2.2, Glossary.

⁶ As to the meaning of 'indemnity' see PARA 232 note 33.

⁷ CPR 20.2(1)(b).

⁸ CPR 20.2(1)(c).

⁹ CPR 20.1. See *Arkin v Borchard Lines Ltd* [2003] EWHC 3088 (Comm), [2004] 1 Lloyd's Rep 636.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(6) ADDITIONAL CLAIMS AND COUNTERCLAIMS/619. Application of Civil Procedure Rules to additional claims.

619. Application of Civil Procedure Rules to additional claims.

An additional claim¹ must be treated as if it were a claim for the purposes of the Civil Procedure Rules, except as provided by Part 20².

The following rules do not apply to additional claims:

- 740 (1) the rules relating to the time within which a claim form may be served³;
- 741 (2) the rule requiring a statement of value where a claim is to be issued in the High Court⁴; and
- 742 (3) the rules relating to the preliminary stage⁵ of case management⁶.

The rules relating to default judgment⁷ apply to an additional claim only if it is a counterclaim⁸.

The rules providing that a party may admit the truth of another party's case in writing⁹ and the rule providing that where such an admission is made, any other party may apply for judgment on the admission¹⁰, apply to all additional claims, but otherwise the rules relating to admissions¹¹ apply to such a claim only if it is a counterclaim¹².

Parties must be aware that the provisions relating to failure to respond to a claim apply to additional claims¹³.

The contents of an additional claim must be verified by a statement of truth¹⁴.

The relevant practice direction makes provision for the titles of proceedings where there are additional claims¹⁵.

1 As to the meaning of 'additional claim' see PARA 618.

2 CPR 20.3(1).

3 Ie CPR 7.5, 7.6: see PARAS 120-121.

4 Ie CPR 16.3(5): see PARA 586.

5 Ie CPR Pt 26: see PARA 260 et seq.

6 See CPR 20.3(2).

7 Ie the provisions of CPR Pt 12: see PARA 506 et seq.

8 CPR 20.3(3). As to the meaning of 'counterclaim' see PARA 618 note 3.

9 Ie CPR 14.1(1), (2): see PARA 187.

10 Ie CPR 14.3: see PARA 190.

11 Ie CPR Pt 14: see PARA 187.

12 See CPR 20.3(4). As to obtaining judgment in default of defence where the additional claim is a counterclaim against the claimant see CPR 12.3(2); and PARA 507; and as to special provision for default judgment in some categories of additional claims see CPR 20.11; and PARA 515.

13 See *Practice Direction--Counterclaims and other Additional Claims* PD 20 para 3.

14 See *Practice Direction--Counterclaims and other Additional Claims* PD 20 para 4.1. The form of the statement of truth should be as follows: '[I believe][the [Part 20 claimant] believes] that the facts stated in this statement of case are true': para 4.2. As to statements of truth see generally PARA 613 et seq.

15 See *Practice Direction--Counterclaims and other Additional Claims* PD 20 paras 7.1-7.11.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(6) ADDITIONAL CLAIMS AND COUNTERCLAIMS/620. Proceedings by or against the Crown.

620. Proceedings by or against the Crown.

In a claim by the Crown for taxes, duties or penalties, the defendant¹ cannot make a counterclaim² or other Part 20 claim³ or raise a defence of set-off⁴. In any other claim by the Crown, the defendant cannot make a counterclaim or other Part 20 claim or raise a defence of set-off which is based on a claim for repayment of taxes, duties or penalties⁵.

In proceedings by or against the Crown in the name of the Attorney General, no counterclaim or other Part 20 claim can be made or defence of set-off raised without the permission of the court⁶. In proceedings by or against the Crown in the name of a government department, no counterclaim or other Part 20 claim can be made or defence of set-off raised without the permission of the court unless the subject matter relates to that government department⁷.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'counterclaim' see PARA 618 note 3.

3 As to the meaning of 'Part 20 claim' see PARA 618.

4 CPR 66.4(1). As to set-off see PARA 634 et seq. As to Crown proceedings see **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 117 et seq.

5 CPR 66.4(2).

6 CPR 66.4(3).

7 CPR 66.4(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(6) ADDITIONAL CLAIMS AND COUNTERCLAIMS/621. Defendant's counterclaim against the claimant.

621. Defendant's counterclaim against the claimant.

A defendant¹ may make a counterclaim² against a claimant³ by filing⁴ particulars of the counterclaim⁵. He may make such a counterclaim without the court's⁶ permission if he files it with his defence⁷ or at any other time with the court's permission⁸.

An application for permission to make an additional claim must be supported by evidence stating:

- 743 (1) the stage which the proceedings have reached;
- 744 (2) the nature of the additional claim to be made or details of the question or issue which needs to be decided;
- 745 (3) a summary of the facts on which the additional claim is based; and
- 746 (4) the name and address of any proposed additional party⁹.

Where delay has been a factor contributing to the need to apply for permission to make an additional claim an explanation of the delay should be given in evidence¹⁰. Where possible the applicant should provide a timetable of the proceedings to date¹¹.

The rules relating to acknowledgment of service¹² do not apply to a claimant who wishes to defend a counterclaim¹³.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'counterclaim' see PARA 618 note 3.

3 As to the meaning of 'claimant' see PARA 18.

4 As to the meaning of 'filing' see PARA 1832 note 8.

5 CPR 20.4(1). The defence and counterclaim should normally form one document with the counterclaim following on from the defence: see *Practice Direction--Counterclaims and other Additional Claims* PD 20 para 6.1.

6 As to the meaning of 'court' see PARA 22.

7 CPR 20.4(2)(a).

8 CPR 20.4(2)(b). CPR Pt 15 (defence to a claim: see PARA 199 et seq) applies to a defence to a counterclaim: see CPR 20.3(1); and PARA 619.

9 See *Practice Direction--Counterclaims and other Additional Claims* PD 20 para 2.1. As to evidence see also CPR Pt 32; and PARA 749 et seq.

10 *Practice Direction--Counterclaims and other Additional Claims* PD 20 para 2.2.

11 See *Practice Direction--Counterclaims and other Additional Claims* PD 20 para 2.3.

12 Ie CPR Pt 10: see PARAS 184, 186.

13 CPR 20.4(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(6) ADDITIONAL CLAIMS AND COUNTERCLAIMS/622. Counterclaim against a person other than the claimant.

622. Counterclaim against a person other than the claimant.

A defendant¹ who wishes to counterclaim² against a person other than the claimant³ must apply to the court⁴ for an order that that person be added as an additional party⁵. An application for such an order may be made without notice unless the court directs otherwise⁶. Where the court makes such an order, it will give directions as to the management of the case⁷.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'counterclaim' see PARA 618 note 3.

3 As to the meaning of 'claimant' see PARA 18.

4 As to the meaning of 'court' see PARA 22.

5 CPR 20.5(1). As to the procedure for such an application see PARA 621.

6 CPR 20.5(2).

7 CPR 20.5(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(6) ADDITIONAL CLAIMS AND COUNTERCLAIMS/623. Defendant's claim for contribution or indemnity from co-defendant.

623. Defendant's claim for contribution or indemnity from co-defendant.

A defendant¹ who has filed² an acknowledgment of service or a defence may make an additional claim³ for contribution⁴ or indemnity⁵ against a person who is already a party to the proceedings by filing a notice containing a statement of the nature and grounds of his additional claim⁶ and serving⁷ the notice on that party⁸.

A defendant may file and serve the notice (1) without the court's permission, if he files and serves it with his defence or if his additional claim for contribution or indemnity is against a party added to the claim later, within 28 days after that party files his defence⁹; or (2) at any other time with the court's permission¹⁰.

- 1 As to the meaning of 'defendant' see PARA 18.
- 2 As to the meaning of 'filing' see PARA 1832 note 8.
- 3 As to the meaning of 'additional claim' see PARA 618.
- 4 As to the meaning of 'contribution' see PARA 618 note 5.
- 5 As to the meaning of 'indemnity' see PARA 232 note 33.
- 6 CPR 20.6(1)(a).
- 7 As to the meaning of 'service' see PARA 138 note 2.
- 8 CPR 20.6(1)(b).
- 9 CPR 20.6(2)(a).
- 10 CPR 20.6(2)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(6) ADDITIONAL CLAIMS AND COUNTERCLAIMS/624. Procedure for making any other additional claim.

624. Procedure for making any other additional claim.

An additional claim¹, except a counterclaim² only against an existing party and a claim for contribution³ or indemnity⁴ from another party⁵, is made when the court issues the appropriate claim form⁶. A defendant⁷ may make an additional claim without the court's permission if the additional claim is issued before or at the same time as he files⁸ his defence⁹ or at any other time with the court's permission¹⁰. An application for such permission may be made without notice, unless the court directs otherwise¹¹.

Particulars of an additional claim must be contained in or served with the additional claim¹².

1 As to the meaning of 'additional claim' see PARA 618.

2 As to the meaning of 'counterclaim' see PARA 618 note 3.

3 As to the meaning of 'contribution' see PARA 618 note 5.

4 As to the meaning of 'indemnity' see PARA 232 note 33.

5 I.e. a claim for contribution or indemnity made in accordance with CPR 20.6: see PARA 623.

6 CPR 20.7(1), (2). See Form N211 'Part 20 Claim Form' in *The Civil Court Practice*. As to the meaning of 'court' see PARA 22. See also CPR 7.2(2), which provides that a claim form is issued on the date entered on the form by the court: see PARA 118.

7 As to the meaning of 'defendant' see PARA 18.

8 As to the meaning of 'filing' see PARA 1832 note 8.

9 CPR 20.7(3)(a). As to the period for filing a defence see CPR 15.4; and PARA 201.

10 CPR 20.7(3)(b).

11 CPR 20.7(5). As to the procedure for making such an application see PARA 621.

12 CPR 20.7(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(6) ADDITIONAL CLAIMS AND COUNTERCLAIMS/625. Separation of additional claim from main claim; relevant matters.

625. Separation of additional claim from main claim; relevant matters.

Where the court¹ is considering whether to permit an additional claim² to be made³, or to dismiss an additional claim⁴, or to require an additional claim to be dealt with separately from the claim made by the claimant⁵ against the defendant⁶, the matters to which the court may have regard include:

- 747 (1) the connection between the additional claim and the claim made by the claimant against the defendant⁷;
 - 748 (2) whether the additional claimant is seeking substantially the same remedy which some other party is claiming from him⁸; and
 - 749 (3) whether the additional claimant wants the court to decide any question connected with the subject matter of the proceedings:
- 74
- 25. (a) not only between the existing parties but also between the existing parties and a person not already a party⁹; or
 - 26. (b) against an existing party not only in a capacity in which he is already a party but also in some further capacity¹⁰.
- 75

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'additional claim' see PARA 618.

3 CPR 20.9(1)(a).

4 CPR 20.9(1)(b).

5 As to the meaning of 'claimant' see PARA 18.

6 CPR 20.9(1)(c). See also CPR 3.1(2)(e), (j) (court's power to order that part of proceedings be dealt with as separate proceedings and to decide the order in which issues are to be tried); and PARA 247. As to the meaning of 'defendant' see PARA 18.

7 CPR 20.9(1), (2)(a).

8 CPR 20.9(1), (2)(b).

9 CPR 20.9(1), (2)(c)(i).

10 CPR 20.9(1), (2)(c)(ii).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(6) ADDITIONAL CLAIMS AND COUNTERCLAIMS/626. Service of claim form for additional claim.

626. Service of claim form for additional claim.

Where an additional claim¹ may be made without the court's permission², and if that claim is a counterclaim³ against an additional party only, the claim form must be served⁴ on every other party when a copy of the defence is served⁵. In the case of any other additional claim which may be made without the court's permission⁶, except a claim for contribution⁷ or indemnity⁸ from another party⁹, the claim form must be served on the person against whom the claim is made within 14 days after the date on which the additional claim is issued by the court¹⁰.

Where the court gives permission to make an additional claim it will at the same time give directions as to its service¹¹.

1 As to the meaning of 'additional claim' see PARA 618.

2 Ie under CPR 20.4(2)(a): see PARA 621.

3 As to the meaning of 'counterclaim' see PARA 618 note 3.

4 As to the meaning of 'service' see PARA 138 note 2.

5 CPR 20.8(1)(a).

6 Ie under CPR 20.7(3)(a): see PARA 624.

7 As to the meaning of 'contribution' see PARA 618 note 5.

8 As to the meaning of 'indemnity' see PARA 232 note 33.

9 Claims for contribution or indemnity from another party are made under CPR 20.6: see PARA 623.

10 CPR 20.8(1)(b), (2). As to the meaning of 'filing' see PARA 1832 note 8.

11 CPR 20.8(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(6) ADDITIONAL CLAIMS AND COUNTERCLAIMS/627. Procedural steps on service of additional claim form on a non-party.

627. Procedural steps on service of additional claim form on a non-party.

Where an additional claim¹ form is served² on a person who is not already a party it must be accompanied by:

- 750 (1) a form for defending the claim³;
- 751 (2) a form for admitting the claim⁴;
- 752 (3) a form for acknowledging service⁵; and
- 753 (4) a copy of every statement of case⁶ which has already been served in the proceedings⁷ and such other documents as the court⁸ may direct⁹.

A copy of the additional claim form must be served on every existing party¹⁰.

1 As to the meaning of 'additional claim' see PARA 618.

2 As to the meaning of 'service' see PARA 138 note 2.

3 CPR 20.12(1)(a). See Forms N9 and N211A, N211C 'Response Pack' in *The Civil Court Practice*.

4 CPR 20.12(1)(b). As to the relevant forms see note 3.

5 CPR 20.12(1)(c). See Form N213 'Part 20 Acknowledgment of Service' in *The Civil Court Practice*.

6 As to the meaning of 'statement of case' see PARA 584.

7 CPR 20.12(1)(d)(i).

8 As to the meaning of 'court' see PARA 22.

9 CPR 20.12(1)(d)(ii).

10 CPR 20.12(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(6) ADDITIONAL CLAIMS AND COUNTERCLAIMS/628. Effect of service of additional claim.

628. Effect of service of additional claim.

A person on whom an additional claim¹ is served² becomes a party to the proceedings if he is not a party already³. When an additional claim is served on an existing party for the purpose of requiring the court⁴ to decide a question against that party in a further capacity, that party also becomes a party in the further capacity specified in the additional claim⁵.

1 As to the meaning of 'additional claim' see PARA 618.

2 As to the meaning of 'service' see PARA 138 note 2.

3 CPR 20.10(1).

4 As to the meaning of 'court' see PARA 22.

5 CPR 20.10(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(6) ADDITIONAL CLAIMS AND COUNTERCLAIMS/629. Case management where a defence to an additional claim is filed.

629. Case management where a defence to an additional claim is filed.

Where a defence is filed¹ to an additional claim² the court³ must consider the future conduct of the proceedings and give appropriate directions⁴. In giving such directions the court must ensure that, so far as practicable, the original claim and all additional claims are managed together⁵.

Where the defendant to an additional claim files a defence, other than to a counterclaim, the court will arrange a hearing to consider case management of the additional claim⁶ and will give notice of the hearing to each party likely to be affected by any order made at the hearing⁷. At the hearing the court may:

- 754 (1) treat the hearing as a summary judgment hearing;
- 755 (2) order that the additional claim be dismissed;
- 756 (3) give directions about the way any claim, question or issue set out in or arising from the additional claim should be dealt with;
- 757 (4) give directions as to the part, if any, the additional defendant will take at the trial of the claim;
- 758 (5) give directions about the extent to which the additional defendant is to be bound by any judgment or decision to be made in the claim⁸.

1 As to the meaning of 'filing' see PARA 1832 note 8.

2 As to the meaning of 'additional claim' see PARA 618. Where a claimant serves a reply and a defence to counterclaim, the reply and the defence to counterclaim should normally form one document with the defence to counterclaim following on from the reply: *Practice Direction--Counterclaims and other Additional Claims* PD 20 para 6.2. As to the meaning of 'claimant' see PARA 18. As to the meaning of 'counterclaim' see PARA 618 note 5.

3 As to the meaning of 'court' see PARA 22.

4 CPR 20.13(1).

5 CPR 20.13(2). Where permission is required to issue the additional claim, the court will have considered the matters set out in CPR 20.9(2) (see PARA 625) when deciding whether the additional claim should be dealt with or tried with the claim made by the claimant against the defendant.

6 *Practice Direction--Counterclaims and other Additional Claims* PD 20 para 5.1. This will normally be at the same time as a case management hearing for the original claim and any other additional claims: para 5.1.

7 *Practice Direction--Counterclaims and other Additional Claims* PD 20 para 5.2.

8 *Practice Direction--Counterclaims and other Additional Claims* PD 20 para 5.3. The court may make any of the orders in heads (1)-(5) in the text either before or after any judgment in the claim has been entered by the claimant against the defendant: para 5.4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(6) ADDITIONAL CLAIMS AND COUNTERCLAIMS/630. Grounds for striking out a counterclaim.

630. Grounds for striking out a counterclaim.

A counterclaim is for most purposes a claim in its own right, and the grounds for striking out a statement of case are the same with regard to counterclaims as to any other claim¹.

If a defendant does not attend a trial, the court may strike out his defence or counterclaim (or both)². If the claimant³ does not attend, the court may strike out his claim and any defence to counterclaim⁴.

1 See PARA 252.

2 CPR 39.3(1)(c). As to the court's power to restore proceedings see CPR 39.3(2); and PARA 1129.

3 As to the meaning of 'claimant' see PARA 18.

4 CPR 39.3(1)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(6) ADDITIONAL CLAIMS AND COUNTERCLAIMS/631. Stay on submission to arbitration.

631. Stay on submission to arbitration.

A counterclaim in respect of a matter which the parties have agreed to submit to arbitration¹ may be stayed².

1 See the Arbitration Act 1996 s 9; and **ARBITRATION** vol 2 (2008) PARA 1222.

2 See *Chappell v North* [1891] 2 QB 252, DC; and **ARBITRATION** vol 2 (2008) PARAS 1222, 1223. The plaintiff must not have taken a step in the proceedings to answer the substantive claim since the counterclaim was served: Arbitration Act 1996 s 9(3); see **ARBITRATION** vol 2 (2008) PARA 1222. Merely applying for leave to defend and counterclaim does not constitute a step in the proceedings: *Patel v Patel* (1999) Times, 9 April, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(6) ADDITIONAL CLAIMS AND COUNTERCLAIMS/632. Execution.

632. Execution.

Where a claimant¹ obtains judgment on his claim and a defendant² on the counterclaim, there are two judgments for all purposes except execution. Execution may not issue for more than the balance, and for this purpose it is immaterial whether judgment has been entered in the one or the other of these forms³.

1 As to the meaning of 'claimant' see PARA 18.

2 As to the meaning of 'defendant' see PARA 18.

3 *Stumore v Campbell & Co* [1892] 1 QB 314, CA. Where judgment was entered for the plaintiffs (claimants) with costs on the claim, and judgment for the plaintiffs and other persons (added as defendants to the counterclaim) with costs on the counterclaim, it was held that the judgment debts were separate and could not be the subject of one bankruptcy notice: *Re A Bankruptcy Notice* (1906) 96 LT 133, CA. The claim and counterclaim are treated as one action for the purpose of determining the sum on which a solicitor has a charging order for his costs: *Westacott v Bevan* [1891] 1 QB 774. As to such charging orders see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1014.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/15. PLEADINGS AND STATEMENTS OF CASE/(6) ADDITIONAL CLAIMS AND COUNTERCLAIMS/633. Offers and payments into court.

633. Offers and payments into court.

Where a party makes an offer to settle (a 'Part 36 offer')¹, the offer must state whether it takes into account any counterclaim². Where a Part 36 offer is accepted within the relevant period the claimant's costs include any costs incurred in dealing with the defendant's counterclaim if the Part 36 offer states that it takes into account the counterclaim³.

1 CPR 36.2(1). As to offers to settle and payments into court generally see CPR Pt 36; and PARA 729 et seq. An offer to settle an action made under CPR Pt 36 can be withdrawn at any time prior to acceptance: *Scammell v Dicker* [2001] 1 WLR 631, CA.

2 CPR 36.2(1)(e).

3 CPR 36.10(6).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(i) Introduction/(A) IN GENERAL/634. Scope and significance of set-off.

16. SET-OFF

(1) THE RIGHT OF SET-OFF

(i) Introduction

(A) IN GENERAL

634. Scope and significance of set-off.

This part of the title is concerned with the situation where A has a claim against B and B has a cross-claim against A¹. It deals with the following situations:

- 759 (1) B's right, where his cross-claim consists of a money claim, to deduct from the amount paid to A a sum representing his cross-claim²; and
- 760 (2) B's right to raise legitimately and successfully such a cross-claim in a claim brought by A, so as to reduce or extinguish A's claim and to establish any right of B to an excess over A's claim³.

Whilst much of the jurisprudence applicable to this part of the title appears to bear a procedural hallmark, the doctrines of abatement and set-off represent, to some extent, rules of substantive law: the substantial advantage which B derives from the relevant doctrines is that he may defer meeting A's claim, wholly or in part, until a court has adjudicated on his own cross-claim⁴. Typically, the doctrines of set-off, counterclaim and abatement are concerned with deductions made by B. If these are permissible and B has a triable cross-claim, then B is entitled to withhold payment, wholly or proportionately, until his cross-claim has been resolved by the court. If the deductions are impermissible, B may at best have to meet A's claim at once, the trial of his cross-claim being deferred to a later hearing⁵; at worst, B may have placed himself in breach of a continuing contract thereby entitling A to repudiate⁶, or may be met by an applicable time-bar in his later action⁷.

1 See eg **CONTRACT** vol 9(1) (Reissue) PARA 1073.

2 See eg the Sale of Goods Act 1979 s 53(1)(a) (breach of warranty). As to abatement generally see PARA 643 et seq.

3 CPR Pt 20 deals with counterclaims and other additional claims, ie any claim other than a claim made by a claimant against a defendant: see PARA 618 et seq. As to the meanings of 'claimant' and 'defendant' see PARA 18. A set-off may be included in the defence and set off against the claim, whether or not it is also a claim under CPR Pt 20: CPR 16.6. The value and complexity of a counterclaim or other Part 20 claim must be taken into consideration in deciding which track to allocate a claim to: CPR 26.8(1)(e). As to the allocation of claims to the small claims track, the fast track or the multi-track see CPR Pt 26. See also CPR Pts 27-29.

4 See eg PARA 635.

5 An example is where A has already obtained summary judgment against B, which has been satisfied, and B is then not entitled to counterclaim: *CSI International Co Ltd v Archway Personnel (Middle East) Ltd*[1980] 3 All ER 215, [1980] 1 WLR 1069, CA.

6 Eg a rescission of the contract for an inadequate reason: see **CONTRACT** vol 9(1) (Reissue) PARA 1007.

7 As to the limitation of actions as it affects set-off see PARAS 644, 656, 666; and **LIMITATION PERIODS** vol 68 (2008) PARA 944.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(i) Introduction/(A) IN GENERAL/635. Summary judgment.

635. Summary judgment.

In relation to proceedings begun before 26 April 1999¹, where A sought summary judgment and B demonstrated a triable cross-claim by way of abatement² or set-off³, the court could give B leave to defend, wholly or in part⁴. Under the Civil Procedure Rules, the court may give summary judgment against a claimant or defendant if it considers that the claimant or defendant has no real prospect of succeeding on, or as the case may be, successfully defending, the claim or issue, and there is no other compelling reason why the case or issue should be disposed of at a trial⁵.

1 le the date on which the CPR came into operation: see PARA 30.

2 As to abatement see PARA 643 et seq.

3 As to set-off generally see PARA 652 et seq.

4 See RSC Ord 14 r 4(3) (revoked).

5 CPR 24.2; and see PARA 524. As to the matters which the court has considered in determining whether a set-off or counterclaim will provide sufficient reason for refusing summary judgment see *Esso Petroleum Co Ltd v Milton* [1997] 2 All ER 593, [1997] 1 WLR 938, CA. See, however, as to the citation of cases decided before the commencement of the CPR, PARA 33 text and note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(i) Introduction/(A) IN GENERAL/636. Limitation periods.

636. Limitation periods.

In some cases a period of limitation¹ affecting B's cross-claim may prevent him from relying on the relevant doctrines², so that he must meet A's claim at once, his cross-claim being remitted to separate proceedings which A can meet by pleading the limitation period. A period of limitation may apply because English statute law so provides³ or because the parties to a contract have agreed on a time-limit for initiating proceedings on the cross-claim⁴.

1 For the purposes of the Limitation Act 1980, a claim by way of set-off or counterclaim is deemed to be a separate action which commenced on the same date as the original action: s 35(1)(b), (2).

2 As to the situation where B's cross-claim is a true defence see PARAS 638, 643 et seq; and **LIMITATION PERIODS** vol 68 (2008) PARA 944.

3 See the Limitation Act 1980 s 35; and PARA 645.

4 See PARAS 645, 648.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(i) Introduction/(A) IN GENERAL/637. Rules of court.

637. Rules of court.

Rules of court do not define or determine the juridical nature of set-off¹, which is a matter of law for the courts².

1 As to set-off see CPR 16.6; and PARA 639. See also PARA 634 note 3.

2 The question as to what is a set-off is to be determined as a matter of law and is not in any way governed or influenced by the language used by the parties in their pleadings: *Hanak v Green* [1958] 2 QB 9 at 26, [1958] 2 All ER 141 at 152, CA, per Morris LJ.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(i) Introduction/(B) DEFINITIONS/638. Abatement at common law.

(B) DEFINITIONS

638. Abatement at common law.

Subject to certain exceptions¹, where A has a claim for a sum of money against B for the price of goods or services and B has a cross-claim for a sum of money, whether liquidated or unliquidated, against A, arising out of deficiencies in those goods or services, the general rule is that B is entitled to deduct the amount of his cross-claim and set it up as a true defence at common law in an action by A². This defence is unaffected by any English statute of limitation³.

1 As to the exceptions to the abatement rule see PARA 645 et seq.

2 See PARA 643.

3 See PARA 644; and **LIMITATION PERIODS** vol 68 (2008) PARA 944.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(i) Introduction/(B) DEFINITIONS/639. Meaning of 'set-off'.

639. Meaning of 'set-off'.

Where A has a claim for a sum of money against B and B has a cross-claim for a sum of money against A¹ such that B is, to the extent of his cross-claim, entitled to be absolved from payment of A's claim, and to plead his cross-claim as a defence to an action by A for the enforcement of his claim², then B is said to have a right of set-off against A to the extent of his cross-claim³.

1 The claim may be for an unascertained amount: CPR 16.6 (which does not limit the right of set-off to an ascertained amount).

2 CPR 16.6.

3 See PARA 652 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(i) Introduction/(B) DEFINITIONS/640. Distinction between abatement and set-off.

640. Distinction between abatement and set-off.

Abatement is a right at common law¹, and is distinct from set-off at law which originated in statute² and equitable set-off (or defence)³.

1 See *Mondel v Steel* (1841) 8 M & W 858; and PARA 643.

2 See the Statutes of Set-off (2 Geo 2 c 22 (Insolvent Debtors Relief) (1728), and 8 Geo 2 c 24 (Set-off) (1734)) (both repealed); and PARA 658.

3 See PARA 658.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(i) Introduction/(B) DEFINITIONS/641. Distinction between set-off and counterclaim.

641. Distinction between set-off and counterclaim.

Set-off is distinguishable from counterclaim both in its application and in its effect. In its application set-off is limited to money claims¹, whereas counterclaim is not so limited. Any claim in respect of which the defendant could bring an independent claim against the claimant may be enforced by counterclaim subject only to the limitation that it must be such as can conveniently be tried with the claimant's claim². Thus not only claims for money, but also other claims such as a claim for an injunction or for specific performance or for a declaration may be the subject of a counterclaim.

In its effect set-off is essentially different from counterclaim in that set-off is a ground of defence, a shield and not a sword³, which, if established, affords an answer to the claimant's claim wholly or pro tanto, whereas counterclaim as such affords no defence to the claimant's claim, but is a weapon of offence which enables a defendant to enforce a claim against the claimant as effectually as in an independent action⁴. Where facts pleaded by way of counterclaim constitute a set-off they may be additionally pleaded as such⁵.

1 See CPR 16.6; and PARA 652 et seq. See also PARA 634 et seq.

2 See CPR Pt 20; PARA 618 et seq.

3 *Stooke v Taylor* (1880) 5 QBD 569 at 575-576, DC, per Cockburn CJ.

4 *Stooke v Taylor* (1880) 5 QBD 569, DC; applied in *BICC v Burndy Corpn* [1985] Ch 232, [1985] 1 All ER 417, CA; *Re Stahlwerk Becker Akt's Patent* [1917] 2 Ch 272; *Sociedad Financiera de Bienes Raices SA v Agrimpex Hungarian Trading Co for Agricultural Products* [1961] AC 135, [1960] 2 All ER 578, HL. For a modern case in which the distinction between set-off and counterclaim has been considered in a bankruptcy context see *Hofer v Strawson* (1999) Times, 17 April. As to set-off in bankruptcy generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 547 et seq.

5 See CPR 16.6; and PARA 715.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(i) Introduction/(B) DEFINITIONS/642. Distinction between set-off and payment.

642. Distinction between set-off and payment.

Set-off is entirely distinct from payment. Payment is satisfaction of a claim made by or on behalf of a person against whom the claim is brought. The person paying performs the obligation in respect of which the claim arises, which thereby becomes extinguished. Set-off exempts a person entitled to it from making any satisfaction of a claim brought against him, or of so much of the claim as equals the amount which he is entitled to set off, and thus to the extent of his set-off he is discharged from performance of the obligation in respect of which the claim arises¹.

Where there has been payment, the party against whom the claim is brought pleads payment or accord and satisfaction², which in effect alleges that the claim no longer exists. On the other hand, a plea of set-off in effect admits the existence of the claim, and sets up a cross-claim as being ground on which the person against whom the claim is brought is excused from payment and entitled to judgment on the claimant's claim. Until judgment in favour of the defendant on the ground of set-off has been given, the claimant's claim is not extinguished³.

Payment is a good answer to set-off, and a payment made by an unauthorised agent and not ratified until after set-off has been pleaded may be pleaded in defence to a set-off⁴.

1 See *Ribblesdale v Forbes* (1916) 140 LT Jo 483, CA. Tender of the balance of a debt due after setting off a sum due from the creditor, without his consent, is not strictly a legal tender, although the same consequences as to costs may follow. See **CONTRACT** vol 9(1) (Reissue) PARA 974. As to costs see PARA 1729 et seq. A defendant who pays into court the difference between the amount of the claim and the set-off he succeeds in establishing is in the same position as a defendant who has paid into court the whole amount recovered.

2 As to accord and satisfaction see **CONTRACT** vol 9(1) (Reissue) PARAS 1043-1051.

3 *Re Hiram Maxim Lamp Co* [1903] 1 Ch 70. If there is a doubt whether the facts show payment or set-off, both payment and set-off should be pleaded as alternative defences. Both defences must be specially pleaded: see *Fidgett v Penny* (1834) 1 Cr M & R 108; *Cooper v Morecraft* (1838) 3 M & W 500; *Thomas v Cross* (1852) 7 Exch 728.

4 *Eyton v Littledale* (1849) 7 Dow & L 55; *Simpson v Eggington* (1855) 10 Exch 845. This defence must be specially pleaded.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(ii) Abatement at Common Law/(A) THE RULE/643. Origins and nature of abatement.

(ii) Abatement at Common Law

(A) THE RULE

643. Origins and nature of abatement.

From the early nineteenth century, when A sued B for the cost of goods or for work and labour, B was permitted to deduct from the amount due to A a sum representing the diminution in the value of the goods or services caused by A's breach of contract¹. This would also give B a true defence at law to A's claim. In the case of breach of warranty on the sale of goods, the defence is now confirmed by statute². Such a defence may, and usually does, rely on an unliquidated cross-claim for damages³. Being a true defence it is unaffected by English statutes of limitation⁴. The rule is confined to contracts for the sale of goods and for work and labour⁵, and does not extend to contracts generally⁶. For a party to rely on the right of abatement he must establish that the breach of contract directly affected and reduced the actual value of the goods or work, so that any other loss or damage, if it is to be relied on as an answer to a claim for the price, will arise from the principle of equitable set-off⁷.

1 The term 'abatement' originated in *Mondel v Steel* (1841) 8 M & W 858 at 871 per Parke B, and was adopted in *Aries Tanker Corp v Total Transport Ltd* [1977] 1 All ER 398 at 404, [1977] 1 WLR 185 at 190, HL, per Lord Wilberforce, and at 405 and at 192 per Lord Simon of Glaisdale. In early editions of this work the subject was not treated under this title. See also PARA 665.

2 See the Sale of Goods Act 1979 s 53(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 307.

3 *Basten v Butter* (1806) 7 East 479; *Farnsworth v Garrard* (1807) 1 Camp 38; *Mondel v Steel* (1841) 8 M & W 858; *Bright v Rogers* [1917] 1 KB 917; *Hanak v Green* [1958] 2 QB 9, [1958] 2 All ER 141, CA; *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL; *Henriksens Rederi A/S v PHZ Rolimpex, The Brede* [1974] QB 233, [1973] 3 All ER 589, CA; *Aries Tanker Corp v Total Transport Ltd* [1977] 1 All ER 398, [1977] 1 WLR 185, HL.

4 See PARA 644; and **LIMITATION PERIODS** vol 68 (2008) PARA 944.

5 As to contracts of employment see *Sagar v H Ridehalgh & Son Ltd* [1931] 1 Ch 310, CA; and PARA 700.

6 See *Aries Tanker Corp v Total Transport Ltd* [1977] 1 All ER 398, [1977] 1 WLR 185, HL.

7 *Mellowes Archital Ltd v Bell Properties Ltd* (1997) 87 BLR 26, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(ii) Abatement at Common Law/(A) THE RULE/644. Abatement and limitation.

644. Abatement and limitation.

The general statutory provisions relating to limitation of actions provide that any claim by way of set-off or counterclaim is to be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded¹. Since the defence of abatement is a true defence rather than a set-off or counterclaim it is not subject to that provision².

1 See the Limitation Act 1980 s 35(1). The Limitation Act 1980 does not apply where a period of limitation is prescribed by or under any other enactment: s 39. The Act applies to arbitrations: see the Arbitration Act 1996 ss 13, 14; and **ARBITRATION** vol 2 (2008) PARAS 1220-1221. As to international carriage by land or air see PARA 648; and **CARRIAGE AND CARRIERS** vol 7 (2008) PARAS 121 et seq, 650 et seq. As to the carriage of goods by sea see the amended Hague Rules art III para 6, set out in the Schedule to the Carriage of Goods by Sea Act 1971; PARA 645; and **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 205 et seq.

2 See the cases cited in PARA 643 note 3, especially *Henriksens Rederi A/S v PHZ Rolimpex, The Brede* [1974] QB 233, [1973] 3 All ER 589, CA; and see **LIMITATION PERIODS** vol 68 (2008) PARA 944. As to limitation as it affects exceptions to the abatement rule see PARA 645 note 5.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(ii) Abatement at Common Law/(B) ESTABLISHED AND POSSIBLE EXCEPTIONS/645. The freight exception (voyage charter).

(B) ESTABLISHED AND POSSIBLE EXCEPTIONS

645. The freight exception (voyage charter).

It has long been accepted as law, and has now been confirmed¹, that a claim to freight under a voyage charter, where the charterer has a cross-claim concerning deficiencies in the services performed, constitutes an exception to the rule of abatement. Hence, in principle, the charterer cannot deduct anything from the amount due, or raise his cross-claim by way of abatement, but must meet the claim to freight in full, and then raise his cross-claim in a separate action². However, since the cross-claim ranks as a counterclaim, and having regard to the practice and procedure in relation to counterclaim³, it is rare for the charterer to suffer any disadvantage in practice⁴, although where there is a time-limit affecting his cross-claim the exception may result in the charterer being debarred from a remedy⁵. Equity follows the law in applying the freight exception equally to an equitable defence⁶.

The freight exception applies to an agent who collects freight on behalf of the ship-owner or charterer. The agent must account for it without deduction or set-off⁷. The exception applies also to an assignee of the right to freight, to advance freight and to freight payable on delivery of goods at the port of discharge⁸.

1 See *Aries Tanker Corp v Total Transport Ltd*[1977] 1 All ER 398, [1977] 1 WLR 185, HL.

2 See *Shields v Davis* (1815) 6 Taunt 65 (previous proceedings sub nom *Sheels v Davies* (1814) 4 Camp 119); *Mondel v Steel* (1841) 8 M & W 858; *Dakin v Oxley* (1864) 15 CBNS 646; *Meyer v Dresser* (1864) 16 CBNS 646; *Henriksens Rederi A/S v PHZ Rolimpex, The Brede*[1974] QB 233, [1973] 3 All ER 589, CA. See also *Kish v Taylor*[1912] AC 604, HL; *Bede Steam Shipping Co Ltd v Bunge y Born* (1927) 27 Ll L Rep 410.

3 See PARA 618 et seq. The CPR apply to Admiralty and commercial actions: see CPR Pt 58 (Commercial Court) and CPR 61 (Admiralty claims).

4 Where the charterer has a triable counterclaim unaffected by a time-bar, the proper order is 'judgment on the claim; stay of execution pending trial of counterclaim'. This has been a practice in the Commercial Court. Hence, in most cases, the question will not arise. See *Henriksens Rederi A/S v PHZ Rolimpex, The Brede*[1974] QB 233, [1973] 3 All ER 589, CA.

5 Where the only applicable period of limitation is to be found in the Limitation Act 1980 s 35(1) (see PARA 644), the exception is unlikely to have practical effect since the charterer has six years in which to initiate his cross-complaint (s 5), and perhaps longer, if he can invoke s 35(1) and date back the initiation of his action to the commencement of the claimant's claim. However, where the parties have agreed in the charterparty that complaints by the charterer must be initiated within a certain period, the exception may come into play. For example, the amended Hague Rules art III para 6 (set out in the Carriage of Goods by Sea Act 1971 Schedule), provides that in any event the carrier and the ship are to be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. If, therefore, the claimant does not bring proceedings within one year, a counterclaim by the charterer is not assisted by the Limitation Act 1980 s 35(1), as his counterclaim is still outside the one-year limit to which he has agreed. Since his cross-complaint does not constitute a defence and since it is out of time, his cross-action must fail: *Henriksens Rederi A/S v PHZ Rolimpex, The Brede*[1974] QB 233, [1973] 3 All ER 589, CA; *Aries Tanker Corp v Total Transport Ltd*[1977] 1 All ER 398, [1977] 1 WLR 185, HL. Furthermore, the provisions of the Hague Rules (unlike some other statutes of limitation, including the Limitation Act 1980), when incorporated in a contract, operate as a contractual time-bar to the rights of the charterer as well as the remedy. This was the first ground on which the charterers failed in *Aries Tanker Corp v Total Transport Ltd*[1977] 1 All ER 398, [1977] 1 WLR 185, HL, the second being general in nature, relying on the exception: see PARA 650. In the case of international carriage of goods by road, the Convention on the Contract for the

International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956; TS 90 (1967); Cmnd 3455), art 32, provides a time-limit for claims by the customer and, by art 32(4), a right of action which has become barred by lapse of time may not be exercised by way of counterclaim or set-off. The convention is set out in the Carriage of Goods by Road Act 1965, Schedule. See **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 650 et seq. As to international carriage by air see the Carriage by Air Act 1961 s 1(1), Sch 1 Pt I art 29, Sch 1A art 29 (Sch 1 substituted as from a day to be appointed by the Carriage by Air and Road Act 1979 s 1(1), Sch 1; Carriage by Air Act 1961 Sch 1A added by SI 1999/1312); and **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 164. See also PARA 648.

6 *Henriksens Rederi A/S v PHZ Rolimpex, The Brede* [1974] QB 233, [1973] 3 All ER 589, CA; *Aries Tanker Corp v Total Transport Ltd* [1977] 1 All ER 398, [1977] 1 WLR 185, HL; *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] AC 1056, [1989] 1 All ER 545, HL. See also PARA 658.

7 *James & Co Scheepvaart en Handelsmij BV v Chincrest Ltd* [1979] 1 Lloyd's Rep 126, CA, but cf *Samuel v West Hartlepool Steam Navigation Co* (1906) 11 Com Cas 115, 12 Com Cas 203, and see *Colonial Bank v European Grain and Shipping Ltd, The Dominique* [1987] 1 Lloyd's Rep 239 (affd sub nom *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] AC 1056, [1989] 1 All ER 545, HL); *Wehner v Dene Shipping Co* [1905] 2 KB 92.

8 *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] AC 1056, [1989] 1 All ER 545, HL.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(ii) Abatement at Common Law/(B) ESTABLISHED AND POSSIBLE EXCEPTIONS/646. Bills of exchange.

646. Bills of exchange.

An unliquidated cross-claim¹ cannot be relied upon as an extinguishing set-off against a claim on a bill of exchange². However, as between the immediate parties, a partial failure of consideration may be relied on as a pro tanto defence provided that the amount involved is ascertained and liquidated³.

¹ I.e. a cross-claim by way of abatement or equitable defence, as to which see PARA 663.

² See *James Lamont & Co Ltd v Hyland Ltd* [1950] 1 KB 585, [1950] 1 All ER 341, CA; *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 2 All ER 463, [1977] 1 WLR 713, HL; considered in *Esso Petroleum Ltd v Milton* [1997] 2 All ER 593, [1997] 1 WLR 938, CA; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1599.

³ *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 2 All ER 463, [1977] 1 WLR 713, HL, considered in *Esso Petroleum Ltd v Milton* [1997] 2 All ER 593, [1997] 1 WLR 938, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(ii) Abatement at Common Law/(B) ESTABLISHED AND POSSIBLE EXCEPTIONS/647. Time charters: a partial exception.

647. Time charters: a partial exception.

Since payment under a time charter partakes of hire, the withholding of payment is not necessarily governed by the same principles as apply to a voyage charter¹. A wrongful deduction from payment by the charterer may entitle the owner to repudiate²; conversely, such a deduction correctly made, to which the owner wrongly reacts by claiming that the contract has been repudiated, entitles the charterer to damages for repudiation by the owner. Where the owner wrongly deprives the charterer of the use of the vessel, or prejudices him in the use of it, the charterer is entitled to deduct the appropriate amount by way of abatement without untoward consequences, but it seems that no such right exists in the case of damage to cargo due to the negligence of the crew. This situation therefore constitutes a partial exception to the abatement rule³.

1 As to voyage charters see PARA 645; and **SHIPPING AND MARITIME LAW**.

2 As to the repudiation of contracts generally see **CONTRACT** vol 9(1) (Reissue) PARA 997 et seq.

3 *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927, [1978] 3 All ER 1066, CA (affd on other grounds [1979] AC 757, [1979] 1 All ER 307, HL). The many cases considered in this decision are not cited here, because the results of the decision are more apt for consideration of their substantive effect on the law of contract, especially charterparties (see **SHIPPING AND MARITIME LAW**), and because the case was debated under the rubric of equitable estoppel (see PARA 658). However, the decision does have an impact on the predominantly procedural matters considered in this title, and in suitable cases the partial exception could be significant. See also *SL Sethia Lines Ltd v Naviagro Maritime Corpn, The Kostas Melas* [1981] 1 Lloyd's Rep 18.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(ii) Abatement at Common Law/(B) ESTABLISHED AND POSSIBLE EXCEPTIONS/648. Carriage by land or air.

648. Carriage by land or air.

The freight exception¹ applies to a contract for the carriage of goods by road made subject to the Convention on the Contract for the International Carriage of Goods by Road, although certain provisions² contemplate the possibility of a set-off or counterclaim³. It has been held that the exception applies also to a domestic contract for carriage by land⁴. Otherwise, contracts of carriage by land⁵ or air⁶ have not yet been placed authoritatively either in the category of contracts falling within the abatement rule or within the freight exception⁷. These contracts may, therefore, be considered further in future cases on this subject⁸.

¹ See PARA 645.

² I.e. the Convention on the Contract for the International Carriage of Goods by Road, Schedule arts 32(4), 36; see PARA 645 note 5.

³ *RH & D International Ltd v IAS Animal Air Services Ltd* [1984] 2 All ER 203, [1984] 1 WLR 573. See also *Impex Transport Aktieselskabet v A G Thames Holdings Ltd* [1982] 1 All ER 897 at 901-902, [1981] 1 WLR 1547 at 1551-1553, where Robert Goff J assumed that a set-off is possible in contracts for the carriage of goods by road, at least when they are subject to the Convention.

⁴ *United Carriers Ltd v Heritage Food Group (UK) Ltd* [1995] 4 All ER 95 at 102, [1996] 1 WLR 371 at 378, where May J so held 'with unconcealed reluctance'.

⁵ As to carriage by road and rail generally see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 101.

⁶ As to carriage of goods by air generally see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 94 et seq.

⁷ As to these categories see PARA 645.

⁸ This caveat is made necessary by an observation of Lord Wilberforce in *Aries Tanker Corp v Total Transport Ltd* [1977] 1 All ER 398, [1977] 1 WLR 185, HL, that there is no case of the rule of abatement having been extended to contracts of any kind of carriage, and that the rule against deduction in cases of carriage by sea is, in fact, as well settled as any common law rule can be. Lord Wilberforce thus kept open all contracts of carriage for further consideration.

In the case of international carriage, if the application or incorporation of a statute or rules bars the right as well as the remedy, the rule in *Aries Tanker Corp v Total Transport Ltd* [1977] 1 All ER 398, [1977] 1 WLR 185, HL, would presumably apply: see PARA 645 note 5. When rules or standard terms are incorporated into a contract they are to be construed as part of the contract: *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] QB 933, [1976] 2 All ER 842, CA; *Consolidated Investment and Contracting Co v Saponaria Shipping Co Ltd, The Virgo* [1978] 3 All ER 988, [1978] 1 WLR 968, CA. In an arbitration, whether the incorporated contractual clause affects the right or the remedy, the court retains jurisdiction to extend time under the Arbitration Act 1996 s 12: see *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] QB 933, [1976] 2 All ER 842, CA; *Consolidated Investment and Contracting Co v Saponaria Shipping Co Ltd, The Virgo* [1978] 3 All ER 988, [1978] 1 WLR 968, CA; and **ARBITRATION** vol 2 (2008) PARA 1221; **LIMITATION PERIODS** vol 68 (2008) PARAS 915, 917.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(ii) Abatement at Common Law/(B) ESTABLISHED AND POSSIBLE EXCEPTIONS/649. Rent.

649. Rent.

In answer to a claim for rent, a tenant has an ancient common law right¹ to set up by way of defence any sum of money actually expended by him on repairs which the landlord, in breach of covenant, has failed to carry out, or any sum of money actually expended by him at the landlord's request to fulfil the landlord's obligations in respect of the land or to protect the tenant's occupation². Ordinarily the common law right cannot be exercised before the landlord has notice of the want of repair³, though in cases of emergency it may be that the tenant can effect the repairs and recoup the expense from the rent despite lack of notice⁴. The right is a right of recoupment apart from being a defence to an action for rent and, if the rent has been paid, the right may constitute an answer to a claim to distrain⁵. The right is exercisable against arrears of rent as well as future rent⁶. However, the common law right extends no further, and it is said that it does not include cross-claims for an uncertain or unliquidated sum⁷.

¹ See *Lee-Parker v Izzet* [1971] 3 All ER 1099, [1971] 1 WLR 1688; *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 4 All ER 834, [1994] 1 WLR 501, CA. See also *Waters v Weigall* (1795) 2 Anst 575.

² *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927, [1978] 3 All ER 1066, CA (affd [1979] AC 757, [1979] 1 All ER 307, HL); *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137, [1979] 2 All ER 1063, applying *Taylor v Beal* (1591) Cro Eliz 222, considering *Waters v Weigall* (1795) 2 Anst 575, and following *Lee-Parker v Izzet* [1971] 3 All ER 1099, [1971] 1 WLR 1688. See also *Carter v Carter* (1829) 5 Bing 406 (payment of mesne landlord's ground rent); *Doe v Hare* (1833) 2 Cr & M 145; *Johnson v Jones* (1839) 9 Ad & El 809 (payment of rent to mortgagee); *Boodle v Campbell* (1844) 2 Dow & L 66.

³ *Lee-Parker v Izzet* [1971] 3 All ER 1099, [1971] 1 WLR 1688; *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137, [1979] 2 All ER 1063.

⁴ See SR Derham *Set-Off* (2nd Edn, 1996) p 119.

⁵ *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 4 All ER 834, [1994] 1 WLR 501, CA; see also *Lee-Parker v Izzet* [1971] 3 All ER 1099, [1971] 1 WLR 1688.

⁶ *Asco Developments Ltd v Gordon* [1978] 2 EGLR 41, 248 Estates Gazette 683.

⁷ See *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137 at 148, [1979] 2 All ER 1063 at 1070, obiter per Forbes J; and PARA 697.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(ii) Abatement at Common Law/(B) ESTABLISHED AND POSSIBLE EXCEPTIONS/650. Contracting out from right to set off, deduct or abate.

650. Contracting out from right to set off, deduct or abate.

Parties may contract out of the right to set off, deduct or abate, but this can only be done by clear and unequivocal words ¹ or at least a clear implication².

1 *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL. See *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd* [1975] 2 Lloyd's Rep 197, (1974) 118 Sol Jo 808, HL (in which the contract was held to exclude abatement). For instances of strict insistence on clear words see *Acsim (Southern) Ltd v Danish Contracting and Development Co Ltd* (1989) 47 BLR 55, CA; *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 4 All ER 834, [1994] 1 WLR 501, CA; *The Teno* [1977] 2 Lloyd's Rep 289. But a clause excluding set-off is not subject to the requirement that set-off be specifically excluded; such a clause does not exclude liability in the way that a clause excluding liability for negligence does: see *Continental Illinois National Bank & Trust Co of Chicago v Papanicolaou* [1986] 2 Lloyd's Rep 441, 83 LS Gaz R 2569, CA. For instances of 'no set-off' clauses and the application to them of the Unfair Contract Terms Act 1977 s 3 see *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] QB 600, [1992] 2 All ER 257, CA; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, [1983] 1 All ER 108, CA (affd [1983] 2 AC 803, [1983] 2 All ER 737, HL) (clause held to be unfair and unreasonable); *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep 498, CA (clause held to be reasonable); *RW Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep 602 (clause held to be reasonable); *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164, [1988] 1 FTLR 442 (clause held to be fair and reasonable). As to contracts imposing a time-limit for cross-complaints see PARA 645 note 5; and as to similar principles affecting an equitable defence see PARAS 664-665.

2 *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL. See also *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 4 All ER 834, [1994] 1 WLR 501, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(ii) Abatement at Common Law/(B) ESTABLISHED AND POSSIBLE EXCEPTIONS/651. The contemporary significance of the right of abatement.

651. The contemporary significance of the right of abatement.

It may still be essential to prove a right of abatement at common law in at least two cases: (1) where an equitable defence (set-off) is unavailable because the facts do not disclose the necessary 'equity' in the defendant¹; and (2) when an equitable defence (set-off) is time-barred by reason of the Limitation Act 1980².

1 As to the equitable defence see PARA 658 et seq. The necessary equity in the defendant may be lacking because he has contractually agreed to a time-limit on his cross-claim: *Aries Tanker Corp v Total Transport Ltd* [1977] 1 All ER 398, [1977] 1 WLR 185, HL, where it was held that, if anything, the equity lay with the ship-owner, having regard to the terms of the contract; see PARAS 663, 665. It appears to follow that if, for example, a contract of carriage by land is in issue, and it contains a time-limit on a claim by the customer, it may be essential to prove that such a contract is within the rule of abatement, since the necessary equity may be lacking for equitable defence: see the discussion in PARA 665.

2 *Henriksens Rederi A/S v PHZ Rolimpex, The Brede* [1974] QB 233 at 246, [1973] 3 All ER 589, CA, where Lord Denning MR held (obiter) that what is now the Limitation Act 1980 s 35 did not apply to equitable set-off, in which case the point mentioned in the text does not arise. This was a minority view; as to the implications of the contrary view see PARA 666 note 3. It is sufficient to note here that if the contrary view prevailed, there would be cases where proof of a common law right of abatement would be essential.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(iii) Set-off at Law/652. Origin of the right.

(iii) Set-off at Law

652. Origin of the right.

Set-off at law was the creature of two statutes¹ early in the eighteenth century designed to prevent the imprisonment as a debtor of a person not truly indebted because there was a mutual debt owing by his creditor. Although now repealed, their effect has been preserved².

¹ The original enabling statutes were 2 Geo 2 c 22 (Insolvent Debtors Relief) (1728), and 8 Geo 2 c 24 (Set-off) (1734) (both repealed), known as the Statutes of Set-off.

² The Statutes of Set-off were repealed by the Civil Procedure Acts Repeal Act 1879 (repealed), and the Statute Law Revision and Civil Procedure Act 1883 (repealed), but the rights conferred by them were preserved by the Supreme Court of Judicature (Consolidation) Act 1925 s 39(1)(a) (repealed). See now the Supreme Court Act 1981 ss 49(2), 84(2) (s 84(2) amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 4 para 26(1), (2); at the date at which this title states the law, no such day had been appointed). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. See also the County Courts Act 1984 s 38 (substituted by the Courts and Legal Services Act 1990 s 3; and amended by the Constitutional Reform Act 2005 ss 12(2), 15(1), 146, Sch 1 Pt 2 para 17, Sch 4 Pt 1 paras 160, 167, Sch 18 Pt 1).

UPDATE

652 Origin of the right

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(iii) Set-off at Law/653. Nature of the right.

653. Nature of the right.

The right conferred by the Statutes of Set-off¹ was a right to set off mutual debts² arising from transactions of a different nature³ which were due and payable⁴ and could be ascertained with certainty at the time of pleading⁵. Thus no legal set-off could exist against a claim which sounded in unliquidated or uncertain damages⁶, nor could a claim which sounded in such damages be set off at law against a claimant's claim⁷. The fact that a claim was framed in damages precluded the raising of a set-off at law, notwithstanding that the claim might have been differently framed in a way which would have permitted such a set-off⁸. Where a claim for a liquidated debt was joined by a claimant with a claim for damages, set-off at law might only be pleaded in defence to the former claim⁹. Set-off at law operates as a defence¹⁰.

1 As to these statutes see PARA 652 notes 1-2.

2 Mutuality does not require that the debts arise at the same time: *Day & Dent Constructions Pty Ltd v North Australian Properties Pty Ltd* (1986) 150 CLR 85. Mutuality requires that the demands be between the same parties and in the same right or interest: *Inca Hall Rolling Mills Co Ltd v Douglas Forge Co* (1882) 8 QBD 179, 183. The suggestion by Lord Denning in the Court of Appeal that the nature of the arrangements may be so special as to deny mutuality (*Halesowen Presswork and Assemblies Ltd v National Westminster Bank* [1971] 1 QB 1 at 36) was criticised on appeal sub nom *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785 at 812 per Lord Cross of Chelsea; cf at 806 per Viscount Dilhorne, [1972] 1 All ER 641 at 654-655, cf 650.

3 Where there was a running account of connected transactions, the common law regarded the balance as the debt so no question of set-off arose: *Green v Farmer* (1768) 4 Burr 2214 per Lord Mansfield. The third edition of this work gave the impression that Lord Mansfield was referring to a cross-complaint arising out of the transaction which was the subject of the plaintiff's claim, and the passage was adopted in *Henriksens Rederi A/S v PHZ Rolimpex, The Brede* [1974] QB 233, [1973] 3 All ER 589, CA, by Lord Denning MR, who took Lord Mansfield and the learned editor to be distinguishing set-off at law (necessarily separate transactions) from abatement (the same transaction: see PARA 643). It is respectfully submitted that this was not the case. Abatement was not recognised until later (see PARA 643) and Lord Mansfield was dealing with separate but connected transactions at common law, and separate but unconnected transactions under the statutes, which permitted set-off 'notwithstanding that such debts are deemed in law to be of a different nature'. It is submitted that if any defendant ever wished to avail himself of a liquidated set-off at law arising out of the transaction on which the plaintiff sues, he is entitled to do so. It is further submitted that the conclusion of Lord Denning MR, that 'set-off' in what is now the Limitation Act 1980 s 35 is confined to set-off at law, is unaffected by the foregoing analysis. See PARAS 654, 663.

4 *Stein v Blake* [1996] AC 243, [1995] 2 All ER 961, HL, per Lord Hoffmann. The traditional view was that the mutual debts should be due and payable at the date of commencement of the action: *Pilgrim v Kinder* (1744) 7 Mod Rep 463; *Richards v James* (1848) 2 Exch 471. But now, as a result of rules of court, a right of set-off arising after the action has commenced may be relied upon as a defence: *Stein v Blake* [1996] AC 243, [1995] 2 All ER 961, HL.

5 See *Hanak v Green* [1958] 2 QB 9, [1958] 2 All ER 141, CA. Such claims include the amount of a judgment debt or of a verdict for which judgment has not been entered: *Baskerville v Brown* (1761) 2 Burr 1229; *Hawkins v Baynes* (1823) 1 LJOSKB 167; *Russell v May* (1828) 7 LJOSKB 88.

6 *Stooke v Taylor* (1880) 5 QBD 569 at 575 per Cockburn CJ (the plea 'is available only where the claims on both sides are in respect of liquidated debt, or money demands which can be readily and without difficulty ascertained'). If an indemnity is given in respect of a liquidated demand, the liability under the indemnity is liquidated and may be set-off under the Statutes of Set-Off: see *Attwooll v Attwooll* (1853) 2 E & B 23, explained in *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 2 All ER 163, [1992] 1 WLR 270, CA; *Crawford v Stirling* (1802) 4 Esp 207; *Cooper v Robinson* (1818) 2 Chit 161; *Morley v Inglis* (1837) 4 Bing NC 58; *Williams v Flight* (1842) 2 Dowl NS 11; *Hutchinson v Sydney* (1854) 10 Exch 438; *Brown v Tibbits* (1862) 11 CBNS 855; *Pellas v Neptune Marine Insurance Co* (1879) 5 CPD 34, CA. The reference in *Stooke v Taylor* (1880) 5 QBD 569

at 575 to 'money demands' is to demands analogous to debts which can be readily ascertained: *Aectra Refining & Manufacturing Inc v Exmar NV* [1994] 1 WLR 1634 at 1647, [1995] 1 Lloyd's Rep 191 at 199, CA, per Hirst LJ. To generate a set-off, it now seems that the claim and cross-claim need not be debts strictly so called, but may sound in damages: *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 2 All ER 163, [1992] 1 WLR 270 at 272, CA, per Leggatt LJ, cited with evident approval in *B Hargreaves Ltd v Action 2000 Ltd* [1993] BCLC 1111 at 1113, CA, per Balcombe LJ. A sum specified as payable by way of demurrage and liquidated damages could ground a set-off: *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 2 All ER 163, [1992] 1 WLR 270, CA. But cf *Seager v Duthie* (1860) 8 CBNS 45 (where a claim for delay in loading a ship was not within the demurrage clause and could not ground a set-off).

7 *Freeman v Hyett* (1762) 1 Wm Bl 394; *Howlet v Strickland* (1774) 1 Cowp 56 (non-delivery of goods); *Weigall v Waters* (1795) 6 Term Rep 488; *Morley v Inglis* (1837) 4 Bing NC 58; *Williams v Flight* (1842) 2 Dowl NS 11; *Newfoundland Government v Newfoundland Rly Co* (1888) 13 App Cas 199, PC.

8 *Cooper v Robinson* (1818) 2 Chit 161; *Hardcastle v Netherwood* (1821) 5 B & Ald 93; *Thorpe v Thorpe* (1832) 3 B & Ad 580.

9 *Birch v Depeyster* (1816) 4 Camp 385; *Crampton v Walker* (1860) 3 E & E 321.

10 *Re Bankruptcy Notice (No 171 of 1934)* [1934] Ch 431, CA, cited in *Hanak v Green* [1958] 2 QB 9 at 16, [1958] 2 All ER 141 at 145, CA, per Morris LJ.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(iii) Set-off at Law/654. Set-off generated by a claim based on a guarantee.

654. Set-off generated by a claim based on a guarantee.

The traditional view was that a claim based on a guarantee cannot give rise to a set-off. This was because it was thought that the obligation undertaken by a guarantor under a contract of guarantee is to see that the debtor performs his obligation to the principal creditor¹. So even if the guarantee is of the payment of a debt, the creditor's remedy against the guarantor is an action for damages for breach of contract². But now that legal set-off is not confined to debts strictly so called, it is doubtful that the traditional view would prevail. In comparable jurisdictions at least it seems that the guarantor can be sued for the sum which the debtor has failed to pay³ and, accordingly, that a claim based on a guarantee can give rise to a set-off⁴. In any event, a guarantee may be expressed as a conditional agreement to pay in which event the liability arising upon breach would ground a set-off⁵. It has been held that a guarantor can avail himself of any right of set-off held by the debtor against the creditor⁶.

1 *Moschi v Lep Air Services* [1973] AC 331, [1972] 2 All ER 393, HL.

2 *Moreley v Inglis* (1837) 4 Bing NC 58.

3 *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245; *Hawkins v Bank of China* (1992) 26 NSWLR 562.

4 See *National Bank of Australia v Swan* (1872) 3 VR(L) 168; and text and note 6.

5 *Moschi v Lep Air Services* [1973] AC 331, [1972] 2 All ER 393, HL; *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245. See also *The Raven* [1980] 2 Lloyd's Rep 266.

6 *BOC Group plc v Centeon LLC* [1999] 1 All ER (Comm) 53.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(iii) Set-off at Law/655. Claim upon an indemnity as the subject of a set-off.

655. Claim upon an indemnity as the subject of a set-off.

As an indemnity, unlike a guarantee, creates a primary not a secondary liability¹, if the principal obligation is capable of generating a set-off, then so is the indemnity. The critical question is whether the amount of the indemnity is ascertainable with precision at the time of pleading². So, if the indemnity is given in respect of a liquidated demand, liability may be legally set off³, but not otherwise⁴.

An indemnity in respect of a loss arising out of the occurrence of a particular event can give rise to a set-off, if the loss is ascertainable with precision⁵. It is otherwise in the case of claims on policies of indemnity insurance because they are held to be claims for unliquidated damages⁶, even when the loss has been adjusted⁷. However, the correctness of this approach has been doubted⁸.

In the case of non-indemnity insurance, it seems that a set-off is available when the liability relates to a liquidated sum due under the contract⁹.

¹ *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289 at 296, CA, citing *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294, [1961] 1 WLR 828, CA.

² *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 2 All ER 163, [1992] 1 WLR 270, CA.

³ *Hutchinson v Sydney* (1854) 10 Exch 438.

⁴ *Cooper v Robinson* (1818) 2 Chit 161; *Hardcastle v Netherwood* (1821) 5 B & Ald 93.

⁵ *Hutchinson v Sydney* (1854) 10 Exch 438.

⁶ *Pellas v Neptune Marine Insurance Co* (1879) 5 CPD 34, CA; *William Pickersgill & Sons Ltd v London and Provincial Marine and General Insurance Co Ltd* [1912] 3 KB 614; *Jabbour v Custodian of Israeli Absentee Property* [1954] 1 All ER 145, [1954] 1 WLR 139; *Chandris v Argo Insurance Co Ltd* [1963] 2 Lloyd's Rep 65, *Edmunds v Lloyd's Italico* [1986] 2 All ER 249, [1986] 1 WLR 492.

⁷ *Luckie v Bushby* (1853) 13 B & C 864; *Jabbour v Custodian of Israeli Absentee Property* [1954] 1 All ER 145, [1954] 1 WLR 139.

⁸ See SR Derham *Set Off* (2nd Edn, 1996) p 18.

⁹ *Blackley v National Mutual Life Association (No 2)* [1973] 1 NZLR 668.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(iii) Set-off at Law/656. Statutes of limitation.

656. Statutes of limitation.

A set-off at law is deemed to be a separate action and to have been commenced on the same date as the action in which it is pleaded¹. But where a set-off is based on a debt which arose after the commencement of the action, enforceability would be determined when set-off is pleaded².

¹ Limitation Act 1980 s 35(1)(b), (2), which refers to 'set-off' without further description. It is established that this phrase refers to set-off at law: *Henriksens Rederi A/S v PHZ Rolimpex, The Brede* [1974] QB 233, [1973] 3 All ER 589, CA. A set-off cannot be based on an unenforceable debt: *Walker v Clements* (1850) 15 QB 1046; *Aectra Refining & Manufacturing Inc v Exmar NV* [1994] 1 WLR 1634, 1650-1651 CA ('the cross-claim has to be actionable'). See PARA 653. As to whether the statute refers to equitable defence see PARA 663.

² See SR Derham *Set-off* (2nd Edn, 1996) p 27 n 130.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(iii) Set-off at Law/657. Bankruptcy.

657. Bankruptcy.

Bankruptcy may have constituted an exception to principles of common law limiting the right to set off¹. Set-off in bankruptcy is now governed by special statutory principles².

¹ *Anon* (1676) 1 Mod Rep 215 per North CJ; *Chapman v Derby* (1689) 2 Vern 117; *Green v Farmer* (1768) 4 Burr 2214.

² See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 547 et seq. For a modern case in which the distinction between set-off and counterclaim has been considered in a bankruptcy context see *Hofer v Strawson* [1999] 2 BCLC 336, (1999) Times, 17 April.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(iv) Equitable Defence/(A) THE RIGHT/658. History of the right.

(iv) Equitable Defence

(A) THE RIGHT

658. History of the right.

The traditional view is that equitable set-off pre-dated the Statutes of Set-off¹. But it is difficult to find instances of equitable set-off before 1728². Prior to the Judicature Acts³, courts of equity admitted cross-complaints by way of defence in actions proceeding in Chancery and would also restrain a claimant in an action at law from proceeding or levying execution where there was an equity which went to impeach the title to the legal demand⁴. The right was then usually referred to as 'equitable set-off'. Since 1873, however, the right of equitable set-off previously available in Chancery has been available as a defence to an action at law⁵. That is not to say that the legislation of that date, which brought about the fusion of law and equity, extended the right of set-off to cases where it had not previously existed; rather it equated the procedure by which these hitherto separate remedies might henceforth be employed, so that an equitable defence is now available in all circumstances in which before 1873 it might have been raised either in equity as a defence or to restrain an action at law⁶. However, whilst the courts will derive general principles from the practice of the former courts of equity⁷, it appears that in making a practical application of principle the courts today are prepared to develop the fused system independently of an inquiry into what might have been done in the nineteenth century in a Court of Chancery⁸.

1 *Ex p Stephens* (1805) 11 Ves 24, 32 ER 996 per Lord Eldon LC.

2 The cases are discussed in Meagher, Gummow & Lehane *Equity--Doctrines and Remedies* (4th Edn, 2002).

3 I.e. the Supreme Court of Judicature Act 1873, and the Supreme Court of Judicature Act 1875.

4 *Rawson v Samuel* (1841) Cr & Ph 161 at 178-179 per Lord Cottenham LC, cited by Lord Denning MR in *Federal Commerce Ltd v Molena Alpha Inc* [1978] QB 927 at 974, [1978] 3 All ER 1066 at 1078, CA.

5 See the Supreme Court Act 1981 s 49(2)(a), which specifically refers to 'equitable defences'. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. In this title 'equitable set-off' and 'equitable defence' are used indiscriminately, as in the decided cases. See also *Coca-Cola Financial Corp'n v Finsat International Ltd* [1998] QB 43, [1996] 2 Lloyd's Rep 274, CA.

6 The Judicature Acts did not alter the rights of parties; they only affected procedure: *Stumore v Campbell & Co* [1892] 1 QB 314 at 316, CA, per Lord Esher MR. See also, however, *Bankes v Jarvis* [1903] 1 KB 549, DC, and the cases cited in notes 7-8.

7 *Aries Tanker Corp'n v Total Transport Ltd* [1977] 1 All ER 398, [1977] 1 WLR 185, HL; *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927, [1978] 3 All ER 1066, CA (affd on another point [1979] AC 757, [1979] 1 All ER 307, HL).

8 *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927 at 974, [1978] 3 All ER 1066 at 1078, CA, per Lord Denning MR: 'These grounds [of equitable set-off] were never precisely formulated before the Judicature Act 1873. It is now far too late to search through the old books and dig them out . . . the streams of common law and equity have flown together and combined so as to be indistinguishable . . . we have to ask ourselves: what should we do now so as to ensure fair dealing between the parties?'. Cf *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 924, [1977] 2 All ER 62 at 68, HL, per Lord Diplock; and see also **EQUITY** vol 16(2) (Reissue) PARA 901 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(iv) Equitable Defence/(A) THE RIGHT/659. Nature of the right.

659. Nature of the right.

Where a right of set-off exists at law, it will be recognised in equity, unless reliance on it is inequitable¹. Apart from the recognition of a legal set-off, there are now three kinds of equitable set-off: (1) an equitable set-off existing by an analogy with a legal set-off; (2) an equitable set-off arising by agreement; and (3) general equitable set-off, which is much more comprehensive in its scope and arises where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand².

1 See *Re Whitehouse & Co* (1878) ChD 595; *Sankey Brook Coal Co Ltd v Marsh* (1871) LR 6 Exch 185.

2 *Rawson v Samuel* (1841) Cr & Ph 161.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(iv) Equitable Defence/(A) THE RIGHT/660. Analogy with set-off at common law.

660. Analogy with set-off at common law.

Equity developed its jurisdiction by analogy with set-off at common law¹. Where there are cross-claims of such a nature that if both were reasonable at law they would be the subject of a legal set-off, if either of the claims is equitable only, a set-off will be allowed in equity², so when there are mutual liquidated cross-claims one of which is cognisable in equity, an additional equity is not required to support a set-off³. But a set-off will not be allowed if special circumstances make it inequitable to do so⁴.

1 As to set-off at common law see PARA 652 et seq.

2 *Clark v Cort* (1840) Cr & Ph 154, *Thornton v Maynard* (1875) LR 10 CP 695; *Ex p Mariar* (1879) 12 ChD 491. See also *Tony Lee Motors Ltd v MS MacDonald & Son (1974) Ltd* [1981] 2 NZLR 281 at 286-288 (approving the statement of principle in Meagher, Gummow & Lehane *Equity Doctrines and Remedies* (3rd Edn, 1992) para 3707); but cf *Middleton v Pollock, ex p Nugee* (1875) LR 20 Eq 29.

3 See *Tony Lee Motors Ltd v MS MacDonald & Son (1974) Ltd* [1981] 2 NZLR 281; but cf *Middleton v Pollock, ex p Nugee* (1875) LR 20 Eq 29.

4 See Spry *Equitable Remedies* (4th Edn, 1990) pp 172-173.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(iv) Equitable Defence/(A) THE RIGHT/661. Equitable set-off arising from agreement.

661. Equitable set-off arising from agreement.

A right of set-off may be created by agreement, and on this ground there may be a set-off of a debt which could not otherwise be so pleaded¹. Equitable set-off was initially based on an express or implied agreement to that effect², though the jurisdiction has been exercised when there was no such agreement³. The court has been willing to imply an agreement from slight foundations⁴, but there must generally be some evidence on which the court can find an agreement, express or implied⁵. A course of dealing between the parties by which mutual debts have been set off is evidence from which the court will imply such an agreement⁶, but a set-off cannot be based on a custom of which the claimant was not aware⁷. Set-off by agreement is not allowed if there is no consideration to support the agreement⁸.

1 *Wood v Akers* (1797) 2 Esp 594 (claim by husband and set-off of debt owed by wife before marriage); *Kinnerley v Hossack* (1809) 2 Taunt 170.

2 *Downam v Matthews* (1721) Prec Ch 580; *Hawkins v Freeman* (1723) 2 Eq Cas Abr 10.

3 *Arnold v Richardson* (1699) 1 Eq Cas Abr 8.

4 *Jeffer v Wood* (1723) 2 P Wms 128; *Ex p Prescott* (1753) 1 Atk 230. See also *Downam v Matthews* (1721) Prec Ch 580; *Cuxon v Chadley* (1824) 5 Dow & Ry KB 417 (agreement binding though not in writing); *Unity Joint-Stock Mutual Banking Association v King* (1858) 25 Beav 72.

5 *Freeman v Lomas* (1851) 9 Hare 109; *Hunt v Jessel* (1854) 18 Beav 100.

6 *Jeffer v Wood* (1723) 2 P Wms 128; *Bamford v Harris* (1816) 1 Stark 343. See also **CONTRACT** vol 9(1) (Reissue) PARA 944.

7 *Blackburn v Mason* (1893) 68 LT 510, CA.

8 *Birkbeck Building Society v Birkbeck* (1913) 29 TLR 218, DC.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(iv) Equitable Defence/(A) THE RIGHT/662. General equitable set-off.

662. General equitable set-off.

Where a cross-claim for a sum of money is so closely connected with the claim that it goes to impeach the claimant's title to be paid and raises an equity in the defendant, making it unfair that he should pay the claimant without deduction, the general rule is that the defendant may deduct with impunity the amount of the cross-claim, or raise it by way of equitable defence when sued¹. The element of impeachment requires, in the absence of an independent equitable ground, a sufficiently close connection between the claims. This is not necessarily to be equated with a requirement that the claims arose out of the same transactions, though there is some support for such a proposition². If the cross-claims arise out of separate transactions, they may not be sufficiently connected³. It is not enough that the claims arise out of the same contract⁴. Nor is it necessarily enough that the cross-claim is related to the transaction on which the claim is based⁵. It has been said that the cross-claim must go to the root of the claimant's claim⁶ or that it must question, impugn or disparage the title to the claim⁷ or that the claims must be interdependent⁸. There is some support for the proposition that equitable set-off is available whenever the cross-claim arises out of the same transaction as the claim or out of a transaction that is closely related to the claim⁹. But the impeachment test was subsequently confirmed at the highest level¹⁰, though it has been linked subsequently to the notion that the cross-claim will impeach the claimant's claim if the cross-claim is so closely connected with the claim that it would be unfair not to allow a set-off¹¹. Because the impeachment test is unfamiliar to modern lawyers, the House of Lords has re-stated the test so that an equitable set-off may arise if there is a cross-claim flowing out of and inseparably connected with the dealings and transactions which also give rise to the claim¹².

The cross-claim must be for a sum of money, whether liquidated or unliquidated¹³. As to the claim, it is probable that set-off can only be raised in defence to a money claim¹⁴, and uncertain whether it may be raised only in defence to a liquidated money claim¹⁵.

1 *Piggott v Williams* (1821) 6 Madd 95; *Rawson v Samuel* (1841) Cr & Ph 161; *Young v Kitchin* (1878) 3 ExD 127; *Newfoundland Government v Newfoundland Rly Co* (1888) 13 App Cas 199, PC; *Banks v Jarvis* [1903] 1 KB 549; *Morgan & Son Ltd v S Martin Johnson & Co Ltd* [1949] 1 KB 107, [1948] 2 All ER 196, CA; *Hanak v Green* [1958] 2 QB 9, [1958] 2 All ER 141, CA; *Henriksens Rederi A/S v THZ Rolimpex, The Brede* [1974] QB 233, [1973] 3 All ER 589, CA; *Aries Tanker Corp v Total Transport Ltd* [1977] 1 All ER 398, [1977] 1 WLR 185, HL; *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927, [1978] 3 All ER 1066, CA (affd on another point [1979] AC 757, [1979] 1 All ER 307, HL); *Sim v Rotherham Metropolitan Borough Council* [1987] Ch 216, [1986] 3 All ER 387; *Dole Dried Fruit and Nut Co v Trustin Kerwood Ltd* [1990] 2 Lloyd's Rep 309, CA. See also *Khan v Islington London Borough Council* (1999) 32 HLR 534, [1999] EGCS 87, CA (set-off of tenant's rent arrears by local authority landlord against home loss payment); and *Benford v Lopecan SL* [2004] EWHC 1897 (Comm), [2005] 2 BCLC 258.

2 *Bank of Boston Connecticut v European Grain & Shipping Ltd* [1989] AC 1056, [1989] 1 All ER 545, HL. Cf *Bim Kemi AB v Blackburn Chemicals Ltd* [2001] EWCA Civ 457, [2001] 2 Lloyd's Rep 93 (it is not necessary for a cross-claim to arise out of the same transaction as the principal claim for an inseparable connection to be established between them).

3 *Re Convere Pty Ltd* [1976] VR 345.

4 *Rawson v Samuel* (1841) Cr & Ph 161.

5 *Hanak v Green* [1958] 2 QB 9, [1958] 2 All ER 141, CA.

6 *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137.

7 *MEK Nominees Pty Ltd v Billboard Entertainments Pty Ltd* (1993) Conv R 54-468.

8 *Grant v NZMC Ltd* [1989] 1 NZLR 8. The fact that the plaintiff (now claimant) is insolvent is not enough for a set-off: *Rawson v Samuel* (1841) Cr & Ph 161.

9 *Henriksens Rederi A/S v PHZ Rolimpex, The Brede* [1974] QB 233 at 248, citing *Morgan & Son Ltd v S Martin Johnson & Co Ltd* [1949] 1 KB 107, [1948] 2 All ER 196, CA, and *Hanak v Green* [1958] 2 QB 9, [1958] 2 All ER 141, CA. In *Henriksens Rederi A/S v PHZ Rolimpex, The Brede* [1974] QB 233 at 249, CA, Lord Denning MR asserted 'with any breach by the plaintiff of the self-same contract, the defendant can in equity set up his loan in diminution or extinction of the contract price'. See also *Box v Midland Bank Ltd* [1981] 1 Lloyd's Rep 434, CA.

10 *Aries Tanker Corp v Total Transport Ltd* [1977] 1 All ER 398, [1977] 1 WLR 185 HL. See also *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927, [1978] 3 All ER 1066, CA (where Lord Denning MR finally acknowledged that there must be an equitable ground to impeach the plaintiff's claim and went on to ask at 974 and 1078 'what should we do now so as to ensure fair dealing between the parties?'); *AB Contractors Ltd v Flaherty Bros Ltd* (1978) 16 BLR 8, CA.

11 *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927, [1978] 3 All ER 1066, CA; *The Teno* [1977] 2 Lloyd's Rep 289; *Dole Dried Fruit and Nut Co v Trustin Kerwood Ltd* [1990] 2 Lloyd's Rep 309, CA; *National Westminster Bank plc v Skelton* [1993] 1 All ER 242, [1993] 1 WLR 72n, CA; *SL Sethia Liners Ltd v Naviagro Maritime Corp*, *The Kostas Melas* [1981] 1 Lloyd's Rep 18; *BICC v Burndy Corp* [1985] Ch 232, [1985] 1 All ER 417, CA; *Sim v Rotherham Metropolitan Borough Council* [1987] Ch 216, [1986] 3 All ER 387.

12 *Bank of Boston Connecticut v European Grain & Shipping Ltd* [1989] AC 1056, [1989] 1 All ER 545, HL; *Dole Dried Fruit and Nut Co v Trustin Kerwood Ltd* [1990] 2 Lloyd's Rep 309, CA (where a counterclaim was allowed for damages for breach of agency sales contracts); *Eso Petroleum Ltd v Milton* [1997] 2 All ER 593, [1997] 1 WLR 938, CA (where counterclaim by motor fuel retailer for future loss arising from oil company's repudiation of contract was held not to be sufficiently connected with oil company's claim for payment for past deliveries); see also *Guinness plc v Saunders* [1988] 2 All ER 940 [1988] 1 WLR 863, CA; *Zemco Ltd v Jerrom-Pugh* [1993] BCC 275; *The Aditya Vaibhav* [1991] 1 Lloyd's Rep 573. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

13 This is the essential nature of set-off and equitable defence: see CPR 16.6; and PARA 634. Other cross-complaints can be raised by way of counterclaim, as to which see PARA 618 et seq. The view expressed by Dixon J in *MacDonnell & East Ltd v McGregor* (1936) 56 CLR 50 at 62 that an unliquidated demand cannot support a set-off does not apply to an equitable set-off. See *Beasley v Darcy* (1800) 2 Sch & Lef at 403n, HL; *Galambas & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10; *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137, [1979] 2 All ER 1063.

14 See eg PARA 675.

15 See *Hanak v Green* [1958] 2 QB 9, [1958] 2 All ER 141, CA, where a customer sued a builder in respect of allegedly defective work (a claim for unliquidated damages in which she recovered much less than the sum claimed) and the builder set up by way of defence the fact that various sums were owing to him. There was a balance due to the builder, and the Court of Appeal awarded him all the costs of the action. It is submitted that the implication that equitable defence lies against unliquidated claims is sound and consistent with principle, although the contrary was decided in *McCreagh v Judd* [1923] WN 174, DC (not cited in *Hanak v Green* [1958] 2 QB 9, [1958] 2 All ER 141, CA). See also *Rawson v Samuel* (1841) Cr & Ph 161; and *Gathercole v Smith* (1881) 7 QBD 626, CA. It is also submitted that in general a defendant should be permitted an equitable set-off against an unliquidated money claim. If he is permitted to deduct and defend in respect of a merely triable and unliquidated cross-claim against a claimant's otherwise cast-iron liquidated claim, the equities would appear to be still more in his favour if the claimant's claim is unliquidated and the defendant's is liquidated and cast-iron. Both *Hanak v Green* [1958] 2 QB 9, [1958] 2 All ER 141, CA, and *McCreagh v Judd* [1923] WN 174, DC, concerned the effect of the doctrine on costs. The former result appears just, and the latter indefensible. See also PARA 721. See also *BICC v Burndy Corp* [1985] Ch 232, [1985] 1 All ER 417, CA; *Aectra Refining & Manufacturing Inc v Exmar NV* [1995] 1 All ER 641, [1994] 1 WLR 1634, CA (claim under charterparty for stipulated rate of daily hire in respect of specific off-hire periods is a liquidated debt capable of constituting a legal set-off).

UPDATE

662 General equitable set-off

NOTE 12--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(iv) Equitable Defence/(A) THE RIGHT/663. Analogy with abatement.

663. Analogy with abatement.

In certain cases where the common law would not permit abatement¹ equity follows the law by recognising similar exceptions². However, in other cases equity supplements the law by allowing an equitable defence³.

¹ See PARA 645 et seq.

² As to the freight exception (voyage charter) see PARA 645 text and notes 5-6. In the cases there cited it was held that the freight exception operated on an equitable defence as well as on the common law defence of abatement: see especially *Aries Tanker Corp v Total Transport Ltd* [1977] 1 All ER 398, [1977] 1 WLR 185, HL; *Henriksens Rederi A/S v PHZ Rolimpex, The Brede* [1974] QB 233, [1973] 3 All ER 589, CA. See also PARA 651 note 1. As to bills of exchange see PARA 646. As to time-charters see PARA 647. See also *Santiren Shipping Ltd v Unimarine SA, The Chrysovalandou-Dyo* [1981] 1 All ER 340. As to other contracts of carriage see PARA 648. It is submitted that whatever may be the status of contracts of carriage generally in relation to abatement, equitable set-off should be generally available: see *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927, [1978] 3 All ER 1066, CA (on appeal on other points [1979] AC 757, [1979] 1 All ER 307, HL); and PARA 658. However, where there is a relevant time-limit for a defendant to bring his claim, difficult considerations may arise: see PARA 665. As to contracting out from a right to deduct or abate see PARA 650; and *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL. Although this case was concerned partly with construction of a contract and partly with abatement, it would seem to follow that a defendant may by clear words contractually agree to give up a right to an equitable defence. See PARAS 664-665.

³ As to cross-claims against claims for rent at law see PARA 649. As to the current position by way of equitable defence see eg PARA 697. For the general principle see the observations of Lord Denning MR cited in PARA 658 note 8.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(iv) Equitable Defence/(B) CONTRACTUAL TERMS AFFECTING THE RIGHT/664. Contracting out of right to deduct.

(B) CONTRACTUAL TERMS AFFECTING THE RIGHT

664. Contracting out of right to deduct.

Parties may contract out of the equitable right of set-off, but this can only be done by clear and unequivocal words¹ or a clear implication². A clause which excludes a right of set-off is not subject to the same rule of construction that applies to clauses excluding liability for negligence³. It has been suggested that an agreement to submit disputes to arbitration (including the cross-claim) may possibly constitute an agreement to exclude equitable set-off⁴. The suggestion is problematic and depends in any event on the terms of the contract⁵. The Unfair Contract Terms Act 1977 may operate to restrict or exclude a right of set-off in respect of a liability arising under a contract⁶.

1 *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL (this was concerned with the interpretation of a contract and abatement at common law). See also *The Teno* [1977] 2 Lloyd's Rep 289; *BICC plc v Burndy Corp* [1985] Ch 232, [1985] 1 All ER 417, CA; *CM Pillings & Co Ltd v Kent Investments Ltd* (1985) 30 BLR 80, CA; *NEI Thompson Ltd v Wimpey Construction UK Ltd* (1987) 39 BLR 65, (1987) 4 Const LJ 46; *Accsim (Southern) Ltd v Danish Contracting & Development Co Ltd* (1989) 47 BLR 55, CA; *Rosehaugh Stanhope (Broadgate Phase 6) plc v Redpath Dorman Long Ltd* (1990) 50 BLR 69, 26 Con LR 80, CA; *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 4 All ER 834, [1994] 1 WLR 501, CA. See also *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp* [2000] 1 All ER (Comm) 474, CA (contract did not prevent set-off of liability of affiliate when actual contracting party had not defaulted). As to the overriding effect of clear contractual words see PARA 665.

2 *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL; *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 4 All ER 834, [1994] 1 WLR 501, CA (where a lease provided that rent was to be paid 'without any deduction' and it was held that the expression would not ordinarily exclude a right of equitable set-off arising from the party's own breach of contract); *The Teno* [1977] 2 Lloyd's Rep 289 (where a provision in a time charter that fine was to be paid 'without discount' was held not to exclude an equitable set-off). See also *BOC Group plc v Centeon LLC* [1999] 1 All ER (Comm) 53 (defendant's obligations expressed to be unaffected by '... any other matter whatsoever'; those words did not exclude the right of set-off).

3 *Continental Illinois National Bank & Trust Company of Chicago v Papanicolaou* [1986] 2 Lloyd's Rep 441, 83 LS Gaz R 2569, CA; *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd* [1975] 2 Lloyd's Rep 197, HL.

4 *Wood English and International Set-off* (1989) p 691.

5 See SR Derham *Set-off* (2nd Edn, 1996) pp 140-144; and *Glencore Grain Ltd v Agros Trading Co Ltd, Agros Trading Co Ltd v Glencore Grain Ltd* [1999] 2 All ER (Comm) 288, CA. As to withholding payment in relation to construction contracts see the Housing Grants, Construction and Regeneration Act 1996 Pt II (ss 104-117); the Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649; and **BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS** vol 4(3) (Reissue) PARAS 157, 160.

6 See the Unfair Contract Terms Act 1977 s 13; *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] QB 600, [1992] 2 All ER 257, CA (where it was held that, in the circumstances of the case, the term was unreasonable). See also *Electricity Supply Nominees Ltd v IAF Group Ltd* [1993] 3 All ER 372, [1993] 1 WLR 1059.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(iv) Equitable Defence/(B) CONTRACTUAL TERMS AFFECTING THE RIGHT/665. Contractual time-bar.

665. Contractual time-bar.

The existence of a contractual time-bar is one of the features which renders this subject somewhat complex. Where the defendant has, by the contract, undertaken that any cross-action will be commenced within a certain time, it is a matter of construction whether he has abandoned all right to deduct¹. If the words are clear and unequivocal in extinguishing his rights, the defendant loses all right to deduct once the period has expired². If, however, the words used are appropriate only to bar the remedy, the defendant may deduct if the general rule of abatement at common law applies³. If the rule of abatement does not apply⁴ it is uncertain whether the defendant can rely on the equitable defence to allow him to deduct once the period has expired⁵.

1 See *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL.

2 See *Aries Tanker Corp v Total Transport Ltd* [1977] 1 All ER 398, [1977] 1 WLR 185, HL; and PARA 645 note 5.

3 If the time-limit only goes to the remedy this will affect the defendant if, for example, his cross-action is greater than the claimant's claim.

4 Eg if the freight exception (as to which see PARAS 645, 648) operates.

5 The existence of the time-bar will affect the defendant's 'equities': see *Aries Tanker Corp v Total Transport Ltd* [1977] 1 All ER 398, [1977] 1 WLR 185, HL. However, that case may, arguably, be limited to the situation where the freight exception applies or where the contractual time-bar goes to the cross-claim itself and not merely to the remedy. Where the time-bar applies to the remedy only, there should be no equity against the defendant to prevent him exercising his right to deduct. Reference in that case to 'equities' may, it is submitted, be limited to the two primary findings in that case, that the construction in the text to note 2 applied, and that the freight exception applied. If the construction in the text to note 3 applies, there would appear to be no equity at all against the defendant. Where the defendant claims in time, whether by separate action or by counterclaim, no problem arises, since a proper order in summary judgment proceedings is 'judgment on the claim; stay pending counterclaim': see PARAS 648, 650-651.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(iv) Equitable Defence/(C) EQUITABLE DEFENCE AND LIMITATION/666. English statutes of limitation.

(C) EQUITABLE DEFENCE AND LIMITATION

666. English statutes of limitation.

It is uncertain whether the equitable defence of set-off operates as a true defence unaffected by the Limitation Act 1980 or whether it is within the description 'set-off' in that Act¹, in which case it is deemed to be a separate action commenced on the same date as the action in which it is pleaded². In the latter case the equitable defence might in some cases become statute-barred³.

1 See the Limitation Act 1980 s 35(2). As to abatement as a true defence, unaffected by statute, see PARA 644. As to set-off at law and limitation see PARA 656.

2 Limitation Act 1980 s 35(1)(b).

3 See *Henriksens Rederi A/S v PHZ Rolimpex, The Brede* [1974] QB 233, [1973] 3 All ER 589, CA; and PARA 651 note 2. In that case Lord Denning MR (obiter) held that equitable defence was not a 'set-off' within the Limitation Act 1939 s 28 (now the Limitation Act 1980 s 35), and was a defence unaffected by the statute. Cairns LJ (obiter) did not accede to this interpretation and Roskill LJ (obiter and without expressing a final opinion) disagreed. See *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927, [1978] 3 All ER 1066, CA (affd [1979] AC 757, [1979] 1 All ER 307); *Westdeutsche Landesbank v Islington Borough Council* [1994] 4 All ER 890, (1993) 91 LGR 323. See also *Aries Tanker Corp v Total Transport Ltd* [1977] 1 All ER 398, [1977] 1 WLR 185, HL. It is submitted that the former view is preferable. Unlike legal set-off, equitable set-off is a substantive defence which would seem to be affected by those statutes which simply bar the remedy but leave the substantive right on foot. By 1939 the nature of equitable set-off as a defence was well recognised (see PARAS 658, 662) and the courts had established a limitation period for set-off at law: *Walker v Clements* (1850) 15 QB 1046; see PARA 654. It is submitted that in 1939 it was unlikely that Parliament, in a procedural statute, would have intended to affect adversely the judicial status of equitable defence, but was more likely to be enacting the decision in *Walker v Clements* (1850) 15 QB 1046, relating to set-off at law. It is also incongruous to 'deem' equitable defence to be a separate action, since at least in the Courts of Chancery it had always availed as a defence. As to limitation accepted by contract see PARA 665.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(A) IN GENERAL/667. When set-off is available.

(v) The Modern Right of Set-off

(A) IN GENERAL

667. When set-off is available.

A set-off¹ is available to a defendant only when the rules of procedure of the court in which the claimant brings his action allow a set-off to be pleaded², and the mode in which a plea of set-off is to be raised is also determined by those rules³.

A defendant cannot be compelled to plead a set-off; he can, if he wishes, enforce his claim by independent action⁴.

1 In this paragraph and in PARAS 668-711, unless specifically stated, no distinction is drawn between authorities based on set-off at law and those based on equitable defence. As to this distinction see PARAS 653, 658.

2 See CPR 16.6; and PARAS 634 note 3, 712 et seq.

3 This is part of the general rule that the pleadings in a court are governed by the rules of procedure of that court.

4 *Laing v Chatham* (1808) 1 Camp 252; *Jenner v Morris* (1861) 3 De GF & J 45; *Davis v Hedges* (1871) LR 6 QB 687; *Re Sturmeys Motors Ltd, Rattray v Sturmeys Motors Ltd* [1913] 1 Ch 16.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(A) IN GENERAL/668. Set-off in Crown proceedings.

668. Set-off in Crown proceedings.

In a claim by the Crown for taxes, duties or penalties, the defendant cannot make a counterclaim¹ or other Part 20 claim² or raise a defence of set-off³. In any other claim by the Crown, the defendant cannot make a counterclaim or other Part 20 claim or raise a defence of set-off which is based on a claim for repayment of taxes, duties or penalties⁴.

In proceedings by or against the Crown in the name of the Attorney-General, no counterclaim or other Part 20 claim can be made or defence of set-off raised without the permission of the court⁵. In proceedings by or against the Crown in the name of a government department, no counterclaim or other Part 20 claim can be made or defence of set-off raised without the permission of the court unless the subject matter relates to that government department⁶.

1 As to the meaning of 'counterclaim' see PARA 618 note 3.

2 As to the meaning of 'Part 20 claim' see PARA 618.

3 CPR 66.4(1). As to proceedings by the Crown generally see **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARAS 107-109.

4 CPR 66.4(2).

5 CPR 66.4(3).

6 CPR 66.4(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(A) IN GENERAL/669. Set-off: waiver and estoppel.

669. Set-off: waiver and estoppel.

Old authorities support the view that the right of set-off under the Statutes of Set-off cannot be waived¹. But, in principle, there is a strong argument that a defendant should be entitled to waive the benefit of a set-off². The modern view is that a person can contract out of the right of set-off³. If it is possible to contract out of the right of equitable set-off, then it would seem possible to waive the right to equitable set-off and set-off under the Statutes⁴.

A defendant may be estopped by his conduct from relying on a set-off. Thus a defendant to whom the plaintiff (now claimant) had produced an account which the defendant admitted to be correct was not allowed, when sued for a sum debited in the account after a long period of acquiescence, to claim a set-off in respect of a loss as to which he had admitted he had no claim⁵. Similarly, where a defendant, due to a mistake, had given credit in an account with the plaintiff, and, after discovering the mistake, had allowed the plaintiff to remain in ignorance of it, he was not allowed to set off the sum for which credit had been so given when sued by the plaintiff⁶.

1 *Lechmere v Hawkins* (1798) 2 Esp 625; *Taylor v Okey* (1896) 13 Ves 180; *McGillivray v Simson* (1826) 9 Dow & Ry KB 35. There are also old cases in which a debtor has been allowed a set-off, although he has contracted to pay in money: *Eland v Karr* (1801) 1 East 375; *Cornforth v Rivett* (1814) 2 M & S 510. As to the Statutes of Set-off see PARA 652.

2 If the Statutes of Set-off were enacted for the benefit of defendants rather than in the public interest, then there is no strong reason why a defendant should not be entitled to waive the benefit.

3 *Hong Kong & Shanghai Banking Corp'n v Kloeckner & Co AG* [1990] 2 QB 514, [1989] 3 All ER 513, applied in *Coca-Cola Financial Corp'n v Finsat International Ltd* [1998] QB 43, [1996] 2 Lloyd's Rep 274, CA, and not following *Taylor v Okey* (1806) 13 Ves 180 and *Lechmere v Hawkins* (1798) 2 Esp 625. See also *BICC plc v Burndy Corp'n* [1985] Ch 232, [1985] 1 All ER 417, CA; and Farrar 'Contracting Out of Set-off' (1970) NLJ 771.

4 *BICC v Burndy Corp'n* [1985] Ch 232, [1985] 1 All ER 417, CA.

5 *Baker v Langhorn* (1816) 6 Taunt 519.

6 *Skyring v Greenwood* (1825) 4 B & C 281, and cf *R v Blenkinsop* [1892] 1 QB 43. See also **ESTOPPEL** vol 16(2) (Reissue) PARAS 1057, 1059.

UPDATE

669 Set-off: waiver and estoppel

NOTE 3--See *Re Kaupthing Singer and Friedlander Ltd; Newcastle Building Society v Mill* [2009] EWHC 740 (Ch), [2009] 2 BCLC 137.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(A) IN GENERAL/670. Claims must arise in the same right.

670. Claims must arise in the same right.

Subject to certain exceptions¹, a set-off may only be maintained where the claims to be set off against each other exist between the same parties and in the same right².

¹ For these exceptions see PARA 679 et seq.

² See the Statutes of Set-off (2 Geo 2 c 22 (Insolvent Debtors Relief) (1728) s 13; 8 Geo 2 c 24 (Set-off) (1734) s 5 (both repealed)), and PARAS 652, 653. See also *Freeman v Lomas* (1851) 9 Hare 109; *Richardson v Richardson* (1867) LR 3 Eq 686; *Stammers v Elliott* (1867) LR 4 Eq 675 (on appeal (1868) 3 Ch App 195); *Middleton v Pollock, ex p Nugee* (1875) LR 20 Eq 29; *NW Robbie & Co Ltd v Witney Warehouse Co Ltd* [1963] 3 All ER 613, [1963] 1 WLR 1324, CA; *Rother Iron Works Ltd v Canterbury Precision Engineers Ltd* [1974] QB 1, [1973] 1 All ER 394, CA. For example, where a municipal corporation opened three separate accounts with the plaintiff's bank, the first as the corporation, the second as managers of public baths and washhouses, and the third as the local board of health, and was sued for a balance due on the first account, it was held that it could set off sums due to it on the second and third accounts: *Pedder v Preston Corpn* (1862) 12 CBNS 535. However, where a trustee for creditors of a firm to whom an assignment of debts due to the firm had been made sued for a debt owing to him in respect of the business which had accrued since the assignment, it was held that the defendant could not set off a pre-existing debt due from the firm: *Hunt v Jessel* (1854) 18 Beav 100. As to set-off at law and in equity see PARA 667 note 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(A) IN GENERAL/671. Inalienable claims.

671. Inalienable claims.

Where a claim is based upon a statutory right which, by the terms of the statute, is not transferable to any person other than the claimant, a debt due from the claimant may not be set off against it¹.

¹ *Gathercole v Smith* (1881) 17 ChD 1, CA (claim for a pension created by the Incumbents Resignation Act 1871 (repealed)). See also *Gathercole v Smith* (1881) 7 QBD 626, CA. It may be that the decision in this case disallowing set-off turns on the view that allowance of a set-off would have frustrated the object of the statute. As to the transfer and assignment of pensions see **CHOSER IN ACTION** vol 13 (2009) PARAS 94, 96.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(A) IN GENERAL/672. Debt due to or by the claimant jointly with others.

672. Debt due to or by the claimant jointly with others.

A joint debt and a several debt cannot be set off against each other¹. Thus in an action for a debt due from the defendant to the claimant² separately, the defendant cannot set off a debt due from the claimant jointly with others who are not co-claimants in the action³. However, he may set off a debt due from the claimant severally as well as jointly with others⁴.

A defendant sued for a debt by two or more claimants jointly cannot set off a debt from one of the claimants separately⁵, even though the joint debt was contracted owing to fraud⁶.

1 *Ex p Twogood* (1805) 11 Ves 517. This rule applies where the joint debt is a partnership debt, unless one partner has been held out as sole partner: see PARA 702.

2 As to the meanings of 'defendant' and 'claimant' see PARA 18.

3 *Arnold v Bainbrigge* (1853) 9 Exch 153. But if a course of business is shown in which such debts have been set off, then, if the facts are strong enough to raise a presumption of an agreement to set off, the set-off is allowed: *Downam v Matthews* (1721) Prec Ch 580; *Vulliamy v Noble* (1817) 3 Mer 593. See also *Middleton v Pollock, ex p Knight and Raymond* (1875) LR 20 Eq 515. See also PARA 662. Cf *Re Pennington and Owen Ltd* [1925] Ch 825, CA, where the liquidator in the winding up of a company was not allowed to set off a debt of a partnership firm against a separate debt due by the company to one of the partners. As to set-off at law and in equity see PARA 667 note 1.

4 *Fletcher v Dyche* (1787) 2 Term Rep 32; *Owen v Wilkinson* (1858) 5 CBNS 526.

5 *Crawford v Stirling* (1802) 4 Esp 207; *Gordon v Ellis* (1846) 2 CB 821; *Piercy v Fynney* (1871) LR 12 Eq 69.

6 *Middleton v Pollock, ex p Knight and Raymond* (1875) LR 20 Eq 515.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(A) IN GENERAL/673. Debt due by or to the defendant jointly with others.

673. Debt due by or to the defendant jointly with others.

If two defendants are sued for a joint debt they cannot set off a debt due to one of them separately¹, and, if a defendant is sued for a separate debt, he cannot set off a debt due to himself and another jointly².

A defendant who is sued alone as one of several joint debtors may plead that the debt is due from himself jointly with others, and that he and his co-debtors are entitled to a set-off in respect of a debt owed by the claimant to them jointly³, but he cannot set off a debt due to one of the co-debtors separately, even though the co-debtor has assigned a share of the debt to him⁴.

1 *Jones v Fleeming* (1827) 7 B & C 217; *Watts v Christie* (1849) 11 Beav 546.

2 *Ex p Riley* (1731) Kel W 24; *Kinnerley v Hossack* (1809) 2 Taunt 170; *Re Fisher, ex p Ross* (1817) Buck 125; *Toplis v Grane* (1839) 5 Bing NC 636; *Re Willis, Percival & Co, ex p Morier* (1879) 12 ChD 491, CA; and see *Loughnan v O'Sullivan* [1922] 1 IR 103 (Ir CA) (affd [1922] 1 IR 160 (High Court of Appeal)). If the other person is dead the defendant as sole surviving creditor may set off the debt: *Slipper v Stidstone* (1794) 5 Term Rep 493. As to set-off at law and in equity see PARA 667 note 1.

3 *Stackwood v Dunn* (1842) 3 QB 822.

4 *Bowyear v Pawson* (1881) 6 QBD 540.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(A) IN GENERAL/674. Set-off as affected by the character in which the claims are made.

674. Set-off as affected by the character in which the claims are made.

The Statutes of Set-off applied to cross-debts at law between the parties to an action at law¹. If there is a lack of mutuality at law, but there is in equity, equity by analogy with the legal right of set-off under the Statutes may allow a set-off². On the other hand, where there is mutuality at law, if one of the debts has been assigned in equity or held in trust for a third party, equity would generally not allow a set-off on the ground that it would be unconscionable to do so³.

The general rule is that an equitable assignee takes subject to the debtor's right of set-off against the assignor before the debtor receives notice of the assignment⁴. But no set-off is available in relation to a debt arising after notice⁵.

1 See *Isberg v Bowden* (1853) 8 Exch 852, discussed in *Watkins v Clark* (1862) 12 CBNS 277 at 281-282 per Keating J ('the Statutes of Set-off are confined to legal debts set between the parties'); *Wilson v Gabriel* (1863) 8 LT 502; *Bankes v Jarvis* [1903] 1 KB 549, DC. As to set-off at law and in equity see PARA 667 note 1. As to the Statutes of Set-off see PARA 652.

2 *Freeman v Lomas* (1851) 9 Hare 109; *Cavendish v Geaves* (1857) 24 Beav 163; *Cochrane v Green* (1860) 9 CBNS 448; *Agra and Masterman's Bank Ltd v Leighton* (1866) LR 2 Exch 56; *Barclay's Bank Ltd v Aschaffenburg Zellstoffwerke AG* [1967] 1 Lloyd's Rep 387, CA. See also *Winch v Keeley* (1787) 1 Term Rep 619; *Tucker v Tucker* (1833) 4 B & Ad 745.

3 *Re Whitehouse & Co* (1878) 9 ChD 595; *Re Paraguassu Steam Tramroad Co* (1872) 8 Ch App 254; *Mercer v Graves* (1872) LR 7 QB 499. It is thought that the statements by Jessel MR in *Re Whitehouse & Co* (1878) 9 ChD 595, and Lord Selborne LC in *Re Paraguassu Steam Tramroad Co* (1872) 8 Ch App 254 that, where cross-claims are mutual at law but not in equity, set-off under the Statutes will not be allowed, are too absolute. The governing principle is that of unconscionability: *Rother Iron Works Ltd v Canterbury Precision Engineers Ltd* [1974] QB 1, [1973] 1 All ER 394.

4 *Moore v Jervis* (1845) 2 Coll 60; *Wilson v Gabriel* (1863) 4 B & S 243; but cf *Dixon v Winch* [1900] 1 Ch 736; *Turner v Smith* [1901] 1 Ch 213.

5 *Wilson v Gabriel* (1863) 4 B & S 243; *Christie v Taunton, Delmard, Lane & Co* [1893] 2 Ch 175.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(A) IN GENERAL/675. Claims which may or may not be pleaded by way of set-off.

675. Claims which may or may not be pleaded by way of set-off.

Modern authority favours the view that in an action for specific performance of a contract for the sale of land the defendant can plead by way of set-off a debt due from the claimant to the defendant¹. A mortgage debt may be set off against a claim for the purchase money².

In an action for a sum payable under a contract which contains a provision that in certain events the defendant may claim a deduction to be ascertained by arbitration, a set-off may be pleaded of a sum which the arbitrator has found to be the proper amount of deduction³.

1 *BICC plc v Burndy Corpn* [1985] Ch 232, [1985] 1 All ER 417, CA (where Dillon and Ackner LJ considered that both statutory and equitable set-off are a good defence re an action for specific performance; but cf Kerr LJ, who considered that neither is a defence though each is relevant to the exercise of the court's discretion to refuse relief). The view of Kerr LJ may be correct as to legal set-off, but it does not seem to be correct as to equitable set-off. See also *Phipps v Child* (1857) 3 Drew 709. If the vendor's agent without the vendor's knowledge agrees that the purchaser may deduct from the purchase price a debt due from the agent, this agreement does not bind the vendor and affords no ground of set-off, even though completion has taken place: *Young v White* (1844) 7 Beav 506; but see, to the contrary, *Gathercole v Smith* (1881) 7 QBD 626, CA, per Bramwell LJ. Cf PARA 657.

2 *Wallis v Bastard* (1853) 4 De GM & G 251 (where the set-off was based on an implied agreement).

3 *Parkes v Smith* (1850) 15 QB 297; *Murphy v Glass* (1869) LR 2 PC 408; *Alcoy and Gandia Rly and Harbour Co Ltd v Greenhill* (1897) 76 LT 542 (on appeal (1898) 79 LT 257, CA). See **EQUITY** vol 16(2) (Reissue) PARA 901. As to set-off at law and in equity see PARA 667 note 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(A) IN GENERAL/676. When the claim must arise.

676. When the claim must arise.

Under the law as it existed before 1873¹ no debt could be made the subject of a set-off at law unless it was in existence and was an actionable and enforceable debt both at the time when the action was commenced² and at the date when the plea was pleaded³, and had continued unsatisfied up to the trial⁴. It was no objection to a set-off that the debt relied upon accrued due after the plaintiff's cause of action accrued⁵. Nevertheless, a plea of set-off of a debt was bad unless it alleged that the plaintiff was liable to the defendant at the commencement of the action and still was so liable⁶. Equity would appear to have followed the law in refusing to permit such debts to be set off⁷.

Under the Civil Procedure Rules, a claim (including a counterclaim) must be made by a statement of case, and amendment to such statement may only be made as permitted by the rules of procedure⁸.

1 le before the passing of the Supreme Court of Judicature Act 1873 (repealed).

2 *Evans v Prosser* (1789) 3 Term Rep 186; *Richards v James* (1848) 2 Exch 471. So a defendant could not set off a sum due on a bill of exchange which was in the hands of a third person at the date the action was brought, and which was subsequently indorsed to the defendant: *Braithwaite v Coleman* (1835) 4 Nev & MKB 654.

3 *Eyton v Littledale* (1849) 7 Dow & L 55.

4 *Eyton v Littledale* (1849) 7 Dow & L 55; *Lee v Lester* (1849) 7 CB 1008 at 1015 per Maule J, *arguendo*. See also *Loughnan v O'Sullivan* [1922] 1 IR 103, Ir CA (affd [1922] 1 IR 160 (High Court of Appeal)).

5 *Lee v Lester* (1849) 7 CB 1008.

6 *Dendy v Powell* (1838) 3 M & W 442.

7 *Whyte v O'Brien* (1824) 1 Sim & St 551; *Green v Darling* 5 Mason's Reps 201 at 212 (US 1828) per Story J; *Maw v Ulyatt* (1861) 31 LJ Ch 33.

8 See CPR Pts 16-18; and PARAS 607 et seq, 712 et seq, 719.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(A) IN GENERAL/677. Company winding up and bankruptcy.

677. Company winding up and bankruptcy.

If a company goes into liquidation, debts which accrued due before the winding up may be set off against one another¹, but there is authority for the proposition that a defendant sued for a debt which has accrued since the winding up cannot set off a debt due from the company before the liquidator was appointed². Similar considerations govern set-off in bankruptcy³.

1 *Re Agra and Masterman's Bank, Anderson's Case* (1866) LR 3 Eq 337; *Christie v Taunton, Delmard, Lane & Co* [1893] 2 Ch 175. As to set-off at law and in equity see PARA 667 note 1.

2 *Ince Hall Rolling Mills Co v Douglas Forge Co* (1882) 8 QBD 179; *Re Newdigate Colliery Ltd, Newdegate v Newdigate Colliery Ltd* [1912] 1 Ch 468, CA. The decision in *Ince Hall Rolling Mills* (1882) 8 QBD 179 has been the subject of controversy. The decision is inconsistent with the principle as stated by Dixon J in *Hiley v Peoples Prudential Assurance Co Ltd* (1938) 60 CLR 468 at 497 ('it is enough that at the commencement of the winding-up mutual dealings exist which involve rights and obligations of such a nature that afterwards in the events that happen they mature or develop into pecuniary demands capable of set-off'). See *Re Charge Card Services Ltd* [1987] Ch 150, [1986] 3 All ER 289 (where Millett J accepted the statement by Dixon J as correct); affd [1989] Ch 497, [1988] 3 All ER 702, CA. See also *Naoroji v Chartered Bank of India* (1868) LR 3 CP 444 at 451-452; *Gye v McIntyre* (1991) 171 CLR 609. Compare *Ince Hall Rolling Mills Co v Douglas Forge Co* (1882) 8 QBD 179 with *Rother Iron Works Ltd v Canterbury Precision Engineers Ltd* [1974] QB 1, [1973] 1 All ER 394, CA (a receivership case in which a set-off was allowed and *Ince Hall Rolling Mills Co v Douglas Forge Co* (1882) 8 QBD 179 was distinguished). See also Wood *English and International Set-off* (1989) pp 326, 336; SR Derham *Set-off* (2nd Edn, 1996) pp 367-376. A debtor to a company of which a receiver has been appointed cannot set off an amount due to him as holder of second mortgage debentures in the company, as the effect would be to give him a preference over the first debenture holders: see *H Wilkins and Elkington Ltd v Milton* (1916) 32 TLR 618; and **COMPANIES** vol 15 (2009) PARA 1320.

3 But see *Drew v Josolyne* (1887) 18 QBD 590, CA; *Re Tout and Finch Ltd* [1954] 1 All ER 127, [1954] 1 WLR 178; *Re Davis & Co, ex p Rawlings* (1888) 22 QBD 193, CA. As to set-off in bankruptcy generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 547 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(A) IN GENERAL/678. Set-off of costs by solicitor.

678. Set-off of costs by solicitor.

A solicitor may set off an amount due to him for costs even though he has not complied with the statutory provision¹ which requires the delivery of a bill of costs a month before action².

¹ See the Solicitors Act 1974 s 69(1): see **LEGAL PROFESSIONS** vol 66 (2009) PARA 956.

² *Harrison v Turner* (1847) 10 QB 482; *Ex p Cooper* (1854) 14 CB 663; *Brown v Tibbits* (1862) 11 CBNS 855; *Currie & Co v Law Society* [1977] QB 990, [1976] 3 All ER 832 (where, however, set-off was refused in the exercise of the judge's discretion). See also *Rawley v Rawley* (1876) 1 QBD 460; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 956 et seq. As to set-off at law and in equity see PARA 667 note 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(A) Agents and Assignees/679. Claim by disclosed principal or by agent.

(B) SET-OFF IN PARTICULAR CASES

(

679. Claim by disclosed principal or by agent.

A defendant who is sued by the disclosed principal of an agent cannot set off a debt due from the agent¹, and if the defendant is sued by the agent he cannot set off a debt due from the principal², unless it can be shown that the agent has assented to such a set-off³. A set-off will not be allowed if it would prejudice an agent's lien for his expenses or any prior charge given him by his principal over the money in respect of which the action is brought⁴.

1 *Moore v Clementson* (1809) 2 Camp 22; *Richardson v Stormont, Todd & Co*[1900] 1 QB 701, CA. As to the relationship between principal and agent see **AGENCY** vol 1 (2008) PARA 71 et seq. As to set-off at law and in equity see PARA 667 note 1.

2 *Atkyns and Batten v Amber* (1796) 2 Esp 491; *Isberg v Bowden*(1853) 8 Exch 852; *Manley & Sons Ltd v Berkett*[1912] 2 KB 329 (set-off of debt due from owner to purchaser against claim by auctioneer for price). As to actions by auctioneers see **AUCTION** vol 2(3) (Reissue) PARA 258.

3 *Jarvis v Chapple* (1815) 2 Chit 387. In such a case the set-off may be considered as based on agreement: see PARA 661.

4 *Manley & Sons Ltd v Berkett*[1912] 2 KB 329. As to lien generally see **LIEN**. As to agents' liens see **AGENCY** vol 1 (2008) PARAS 114-118.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(A) Agents and Assignees/680. Claim by undisclosed principal.

680. Claim by undisclosed principal.

A defendant sued on a liquidated claim by an undisclosed principal¹ may set off a debt due to him from the agent of that undisclosed principal², provided (1) that the claim is in respect of a transaction entered into by the agent acting in his own name as principal; (2) that the claimant authorised the agent so to act or held him out as principal; (3) that the defendant dealt with the agent in the belief that he was the principal; and (4) that the debt which the defendant seeks to set off accrued due before he knew that the agent was merely an agent³.

1 As to the enforceability of contracts with undisclosed principals generally see **AGENCY** vol 1 (2008) PARA 125 et seq.

2 *Rabone v Williams* (1785) 7 Term Rep 360n; *George v Clagett* (1797) 7 Term Rep 359; *Carr v Hinchcliff* (1825) 4 B & C 547; *Purchell v Salter* (1841) 1 QB 197 (revsd sub nom *Salter v Purchell* (1841) 1 QB 209, Ex Ch); *Turner v Thomas* (1871) LR 6 CP 610; *Montgomerie v United Kingdom Mutual Steamship Association Ltd* [1891] 1 QB 370; *Re Henley, ex p Dixon* (1876) 4 ChD 133, CA; *Montagu v Forwood* [1893] 2 QB 350, CA; *Browning v Provincial Insurance Co of Canada* (1873) LR 5 PC 263. As to set-off at law and in equity see PARA 667 note 1.

3 *Borries v Imperial Ottoman Bank* (1873) LR 9 CP 38; *Isaac Cooke & Sons v Eshelby* (1887) 12 App Cas 271, HL. If the defendant has no belief one way or the other, the right of set-off does not arise: *Isaac Cooke & Sons v Eshelby* (1887) 12 App Cas 271, HL. See also *Carr v Hinchcliff* (1825) 4 B & C 547; *Fish v Kempton* (1849) 7 CB 687; *Kaltenbach, Fischer & Co v Lewis & Peat* (1885) 10 App Cas 617.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(A) Agents and Assignees/681. Mercantile agents.

681. Mercantile agents.

If the defendant knows only that the agent is an agent, for example that he is a broker, without knowing his principal, he is put on inquiry and in an action by the principal cannot set off a debt due from the agent¹, nor can he rely on any custom not known to the claimant as giving him the right of set-off². The existence of an authority from the principal to the agent to receive payment from the defendant on behalf of the principal does not enable the defendant to effect payment by a set-off against a debt owing by the agent³. However, if the defendant believes that the agent, having the right to do so, for example if he is a factor, has sold in his own name to repay advances made by him to his principal, the defendant is not bound to make further inquiry, and so may set off against a claim by the principal a debt due from the agent⁴.

1 *Baring v Corrie* (1818) 2 B & Ald 137 (where a set off was denied to a third party who bought goods from a broker selling in his own name, the broker's authority being confined to selling in the name of the principal); *Fish v Kempton* (1849) 7 CB 687; *Walshe v Provan* (1853) 8 Exch 843; *Dresser v Norwood* (1863) 14 CBNS 574; *Semenza v Brinsley* (1865) 18 CBNS 467; *Pearson v Scott* (1878) 9 ChD 198; *Mildred v Maspons* (1883) 8 App Cas 874, HL; *Knight v Matson & Co* (1902) 22 NZLR 293. In this respect the position of a broker differs from that of a factor. As to set-off at law and in equity see PARA 667 note 1.

2 *Blackburn v Mason* (1893) 68 LT 510, CA.

3 *Pearson v Scott* (1878) 9 ChD 198.

4 *Warner v McKay* (1836) 1 M & W 591. See also *Hudson v Granger* (1821) 5 B & Ald 27.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(A) Agents and Assignees/682. Defendant contracting by broker.

682. Defendant contracting by broker.

If the claim which the defendant seeks to set off arises out of a transaction with an agent entered into by a broker acting on the defendant's behalf, the knowledge of the broker is the knowledge of the defendant, and if the broker knew that the agent was an agent the defendant cannot set off a debt due from the agent¹.

1 *Dresser v Norwood* (1864) 17 CBNS 466, Ex Ch: see **AGENCY** vol 1 (2008) PARAS 133, 137.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(A) Agents and Assignees/683. Set-off between principal and agent.

683. Set-off between principal and agent.

A broker may set off as against his principal a debt due from the principal¹. Where, however, a broker, the defendant, had purchased and then resold goods on behalf of the claimant he could not set off the price paid by him to the original seller, for whom he sold the goods under a *del credere* commission, against the claim made by the claimant for the proceeds of the resale, even though the claimant knew that the defendant had acted throughout as broker².

1 *Dale v Sollet* (1767) 4 Burr 2133, which is an authority not on set-off but rather on the common law right of deduction enabling an agent who recovered money for his principal to deduct from the proceeds the amount of his recompense. As to set-off at law and in equity see PARA 667 note 1.

2 *Morris v Cleasby* (1816) 4 M & S 566 at 575 per Lord Ellenborough CJ. His Lordship thought that the case must be considered on the basis that the principal was disclosed at the sale and went on to say 'the principal must always be debtor, and that, whether he is known in the first instance or not, except where the broker has by the form of the instrument made himself so liable'. As to *del credere* agents see **AGENCY** vol 1 (2008) PARA 13; **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 120.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(A) Agents and Assignees/684. Claims between insurance brokers and underwriters.

684. Claims between insurance brokers and underwriters.

A claim under an insurance policy is a claim for unliquidated damages, and losses and premiums could not be set off against each other under the Statutes of Set-off¹. However, the nature of the claim and cross-claim might in appropriate cases permit an equitable defence or counterclaim².

1 See PARAS 652-653. As to the Statutes of Set-off see PARA 652 note 1. As to set-off at law and in equity see PARA 667 note 1. A broker who effects a policy of marine insurance on behalf of an insured is responsible as a principal to the underwriter for the premium: Marine Insurance Act 1906 s 53(1). The prima facie rule is that, unless the broker effects the policy on his own account, a set-off of the underwriter's liability to the insured is not available against the broker's liability for unpaid premiums: see *Koster v Eason* (1813) 2 M & S 112; *Wilson v Creighton* (1782) 3 Doug KB 132; *Bell v Auldjo* (1784) 4 Doug KB 48.

2 As to equitable defence see PARA 658 et seq. As to counterclaims see PARA 618 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(A) Agents and Assignees/685. Set-off against assignee of chose (or thing) in action.

685. Set-off against assignee of chose (or thing) in action.

In general, a debtor may set off against an assignee of a chose (or thing) in action any debt that he could have set off against the assignor, provided that it is a debt which accrued due before notice of assignment¹. The defendant to an action brought by the assignee of a marine insurance policy is entitled to raise any defence, and therefore any set-off, arising out of the contract which he would have been entitled to raise against the assignor².

1 For a detailed analysis of this right of set-off see **CHOSSES IN ACTION** vol 13 (2009) PARA 63. There is no right of set-off against the assignee of a debt which had neither accrued due before the date of the assignment nor was connected with the assigned debt, even though it had arisen under a contract which had been made between the debtor and the assignor before the date of the assignment: *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 2 All ER 741, [1977] 1 WLR 578. See also *Banco Central SA and Trevelan Navigation Inc v Lingoss and Falce Ltd and BFI Line Ltd, The Raven* [1980] 2 Lloyd's Rep 266.

2 See the Marine Insurance Act 1906 s 50(2); and **INSURANCE** vol 25 (2003 Reissue) PARA 389. Such a defendant has no greater right of set-off than the assignee of any other chose (or thing) in action and may not set off a claim for indemnity arising out of a policy other than that on which the claimant sues: *Baker v Adam* (1910) 102 LT 248.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(B) Banks and Customers/686. Set-off between bank and customer.

(

686. Set-off between bank and customer.

A bank is entitled to set off what is due to a customer on one account against what is due from him on another account¹, even if the money due to him may in fact belong to another person², unless there is some equity sufficient to bar the legal right of set-off³. But a bank has no right to set off a credit in a customer's account against a debit in a third party's account merely on suspicion that the customer holds as nominee of the third party⁴. Neither is a bank justified of its own motion in transferring a balance from what it knows to be a trust account of its customer to the customer's private account⁵, or in setting off against its customer's balance a debt from the customer before it has actually fallen due⁶; nor may it set off any debt from its customer against the holder of a letter of credit given to the customer⁷.

A customer has a right to set off a balance due to him from his bank against a debt due to the bank from him⁸, unless he has notice that the debt due from him has been assigned to a stranger⁹.

1 *Bailey v Finch*(1871) LR 7 QB 34 (which was distinguished in *Re Willis, Percival & Co, ex p Morier*(1879) 12 ChD 491, CA, and has been criticised: see SR Derham *Set-off* (2nd Edn, 1996) pp 423-424); *Re European Bank, Agra Bank Claim*(1872) 8 Ch App 41; *Union Bank of Australia Ltd v Murray-Aynsley*[1898] AC 693, PC. See also *Watts v Christie* (1849) 11 Beav 546; *Baker v Lloyds Bank Ltd*[1920] 2 KB 322; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 835, 860. As to set-off at law and in equity see PARA 667 note 1.

2 *Bank of New South Wales v Goulburn Valley Butter Co Pty*[1902] AC 543, PC; cf *North and South Wales Bank Ltd v Macbeth, North and South Wales Bank Ltd v Irvine*[1908] AC 137, HL.

3 *Bailey v Finch*(1871) LR 7 QB 34; *Newell v National Provincial Bank of England* (1876) 1 CPD 496; *Parsons v Sovereign Bank of Canada*[1913] AC 160, PC.

4 *Bhogal v Punjab National Bank*[1988] 2 All ER 296, 1 FTLR 161, CA. See also *Saudi Arabia Monetary Agency v Dresdner Bank AG* [2004] EWCA Civ 1074, [2005] 1 Lloyd's Rep 12 (bank blocked money transfer on suspicion money beneficially owned by debtor; customer awarded summary judgment).

5 *Re Gross, ex p Kingston*(1871) 6 Ch App 632, approved in *Bank of New South Wales v Goulburn Valley Butter Co Pty*[1902] AC 543, PC. See **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 842.

6 *Rogerson v Ladbroke* (1822) 1 Bing 93; *Jeffryes v Agra and Masterman's Bank*(1866) LR 2 Eq 674; cf *Thomas v Howell*(1874) LR 18 Eq 198 (distinguished in *Halse v Rumford* (1878) 47 LJ Ch 559).

7 *Re Agra and Masterman's Bank, ex p Asiatic Banking Corp*n(1867) 2 Ch App 391, explained in *Rainford v James Keith and Blackman Co Ltd*[1905] 1 Ch 296.

8 *Bailey v Finch*(1871) LR 7 QB 34.

9 *Cavendish v Geaves* (1857) 24 Beav 163.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(B) Banks and Customers/687. Customer's personal and joint accounts.

687. Customer's personal and joint accounts.

Where a customer of a bank having an account in his own name also has an account in the name of himself and another jointly¹, a right to set off items in the two accounts will only arise where the customer is so beneficially interested in the balance of the joint account that a court of equity would without terms or inquiry compel a transfer of the account into the customer's name alone².

1 As to joint accounts generally see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 823.

2 *Watts v Christie* (1849) 11 Beav 546; *Re Willis, Percival & Co, ex p Morier* (1879) 12 ChD 491, CA. As to set-off at law and in equity see PARA 667 note 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(C) Personal Representatives, Trustees and Beneficiaries/688. Claims by and against personal representatives.

(

688. Claims by and against personal representatives.

The defendant to a claim by an executor or administrator for a debt which has accrued due to the estate since the death may not set off a debt due to himself from the deceased during the lifetime of the deceased¹. Nor may a person sued for a debt which accrued due before the death set off a debt which has accrued due from the estate after the death². Similarly, an executor or administrator who is sued for a debt which accrued due from the deceased during his lifetime cannot set off a debt which has accrued due to the estate since the death³; but where an executor or administrator can show a debt due from the deceased he may set it off against a debt due to him⁴.

1 *Shipman v Thompson* (1738) Willes 103; *Schofield v Corbett* (1836) 11 QB 779; *Rees v Watts* (1855) 11 Exch 410; *Mardall v Thellusson* (1856) 6 E & B 976; *Hallett v Hallett* (1879) 13 ChD 232; *Re Gregson, Christison v Bolam* (1887) 36 ChD 223; *Re Gedney, Smith v Grummitt* [1908] 1 Ch 804. See further **EXECUTORS AND ADMINISTRATORS**. As to set-off at law and in equity see PARA 667 note 1.

2 *Newell v National Provincial Bank of England* (1876) 1 CPD 496. See also *Lambarde v Older* (1851) 17 Beav 542; *Allison v Smith* (1869) 10 B & S 747.

3 *Rees v Watts* (1855) 11 Exch 410; *Mardall v Thellusson* (1856) 6 E & B 976.

4 *Blakesley v Smallwood* (1846) 8 QB 538, explained in *Rees v Watts* (1855) 11 Exch 410.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(C) Personal Representatives, Trustees and Beneficiaries/689. Set-off against debts due from legatees.

689. Set-off against debts due from legatees.

An executor can set off against a legatee a debt owed to the testator¹ even though the debt has become statute-barred since the death of the testator². A debtor of a testator who is also the creditor of a legatee cannot, by some interposition of the executors, apply a legacy bequeathed by the testator to the legatee in discharge of the debt, unless there is some contract with the legatee for the purpose³.

1 *Smith v Smith* (1861) 3 Giff 263. See **EQUITY** vol 16(2) (Reissue) PARA 903; **EXECUTORS AND ADMINISTRATORS**. As to set-off at law and in equity see PARA 667 note 1.

2 *Coates v Coates* (1864) 33 Beav 249; *Gee v Liddell (No 2)* (1866) 35 Beav 629.

3 *Smee v Baines* (1861) 4 LT 573, where A bought part of the testator's business in his lifetime for £350 and sold it after his death to a legatee for £350.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(C) Personal Representatives, Trustees and Beneficiaries/690. Claims must exist in the same right.

690. Claims must exist in the same right.

The rule that the debts must accrue in the same right¹ is strictly applied. Therefore, if a claimant sues as executor, the defendant cannot set off a debt due from the claimant in his personal capacity². If an executor is sued as executor, he cannot set off a claim he has in his personal capacity against the claimant³, and if sued in his personal capacity he cannot set off a claim he has as executor, unless it is such a claim that he can also sue on it in his personal capacity⁴. If the claimant sues as assignee, the executor cannot set off a personal claim against the assignor⁵.

1 As to this rule see PARA 670.

2 *Hutchinson v Sturges* (1741) Willes 261; *Bishop v Church* (1748) 3 Atk 691; *Macdonald v Carington* (1878) 4 CPD 28; *Re Dickinson, Marquis of Bute v Walker, ex p Hoyle, Shipley and Hoyle* [1888] WN 94; *Phillips v Howell* [1901] 2 Ch 773. As to set-off at law and in equity see PARA 667 note 1.

3 *Gale v Luttrell* (1826) 1 Y & J 180.

4 *Bishop v Church* (1748) 3 Atk 691; *Harvey v Wood* (1821) 5 Madd 459; *Macdonald v Carington* (1878) 4 CPD 28; *Re Willis, Percival & Co, ex p Morier* (1879) 12 ChD 491, CA; *Nelson v Roberts* (1893) 69 LT 352, DC.

5 *Bishop v Church* (1748) 3 Atk 691; *Whitaker v Rush* (1761) Amb 407. But cf *Taylor v Taylor* (1875) LR 20 Eq 155; *Re Jones, Christmas v Jones* [1897] 2 Ch 190.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(C) Personal Representatives, Trustees and Beneficiaries/691. Personal representative who is both debtor and creditor.

691. Personal representative who is both debtor and creditor.

There is no principle which requires a different rule as to set-off to be applied in equity¹ from that to be applied at law. However, where the representative, having discharged all the liabilities of the estate, has, as sole next of kin or residuary legatee, become legally and equitably the absolute owner of a debt due to his testator, the debtor may set off a debt due from the representative personally against a claim for the debt, even though made by the representative in his representative capacity². This equitable exception is not, however, to be extended to a case in which administration accounts require to be taken in order to show that the representative is the beneficial owner of the debt³.

1 *Newell v National Provincial Bank of England* (1876) 1 CPD 496. As to equitable defences see PARA 658.

2 *Jones v Mossop* (1844) 3 Hare 568. See the discussion of this case in SR Derham *Set-off* (2nd Edn, 1996) pp 424-425.

3 *Re Willis, Percival & Co, ex p Morier* (1879) 12 ChD 491, CA, explaining *Bailey v Finch* (1871) LR 7 QB 34.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(C) Personal Representatives, Trustees and Beneficiaries/692. Set-off against claim of next of kin.

692. Set-off against claim of next of kin.

Where there is a claim in administration proceedings by a next of kin for a sum due in respect of a share of the intestate's estate, the administrator may set off a debt due to himself personally from the next of kin¹ notwithstanding that the share has been paid into court² or has been assigned by the next of kin³ or that the debt is statute-barred⁴.

1 *Taylor v Taylor* (1875) LR 20 Eq 155 (there was no fund in existence representing the proceeds of the intestate's estate). See also *Whitaker v Rush* (1761) Amb 407 (where it seems the legatee's claim was for payment out of a particular fund). As to set-off at law and in equity see PARA 667 note 1.

2 *Taylor v Taylor* (1875) LR 20 Eq 155.

3 *Re Jones, Christmas v Jones* [1897] 2 Ch 190. An executor may set off against a legacy costs which have been ordered to be paid to him by the legatee in probate proceedings: see *Re Knapman, Knapman v Wreford* (1881) 18 ChD 300, CA.

4 *Re Cordwell's Estate, White v Cordwell* (1875) LR 20 Eq 644. The decision in this case was based on the rule in *Cherry v Boulton* (1839) 4 My & Cr 442 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 559), rather than set-off.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(C) Personal Representatives, Trustees and Beneficiaries/693. Set-off between trustee and trust estate.

693. Set-off between trustee and trust estate.

A trustee is ordinarily entitled to set off an amount due to him from the trust estate against an amount due to it from him¹. He can also set off an amount due to the estate from a beneficiary against a sum payable out of the estate to that beneficiary².

In garnishee proceedings by a judgment creditor against solicitors for payment of money received by them on trusts which had failed, the solicitors could not set off against the fund the amount of legal costs owed to them by the judgment debtor³.

1 *McEwan v Crombie* (1883) 25 ChD 175, where, on a sum being found to be due to two trustees from the trust estate and a sum being due to the estate from one of them who was bankrupt, it was held that the portion, if any, of the sum due to the two trustees which, on inquiry, should be found to be due to the bankrupt trustee should be set off against the sum due from him. There is generally no right to set off a gain against a loss arising out of different breaches of trust: see *Adye v Feuilleteau* (1783) 3 Swan 84n; and **TRUSTS** vol 48 (2007 Reissue) PARA 1102.

2 *Re Harrald, Wilde v Walford* (1884) 53 LJ Ch 505, CA: see PARA 688 et seq. As to the right of trustees to retain trust property against beneficiaries indebted to the trustees as such see *Priddy v Rose* (1817) 3 Mer 86; and **TRUSTS** vol 48 (2007 Reissue) PARA 923.

3 *Stumore v Campbell & Co* [1892] 1 QB 314, CA. See also PARA 707.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(C) Personal Representatives, Trustees and Beneficiaries/694. Set-off between trustee and debtors to the trust estate.

694. Set-off between trustee and debtors to the trust estate.

Where a trustee sues a debtor to the trust estate, the debtor can set off against the trustee's claim an amount due to him from the beneficiary¹, and a person who is sued for a debt can set off a sum due from the claimant to a trustee for him².

1 *Thornton v Maynard* (1875) LR 10 CP 695. There can be a set-off even if the amount due from the beneficiary is in respect of unliquidated damages: *Bankes v Jarvis* [1903] 1 KB 549, which was approved in *Hanak v Green* [1958] 2 QB 9, [1958] 2 All ER 141, CA, per Morris LJ. Note, however, that the statement by Channell J in *Bankes v Jarvis* [1903] 1 KB 549 at 553 that 'the Judicature Act and more especially the rules, . . . put an unliquidated claim on the same footing as a liquidated claim for the purpose of set-off' is difficult to support: *McDonnell & East v McGregor* (1936) 56 CLR 50 at 61-62. But where trustees of a settlement are creditors of a testator under his covenant in the settlement, a legacy left by him to their beneficiary cannot be set off by way of satisfaction against their claim under the settlement: *Smith v Smith* (1861) 3 Giff 263.

2 *Cochrane v Green* (1860) 9 CBNS 448; but see *Middleton v Pollock, ex p Nugee* (1875) LR 20 Eq 29. Trustees of an estate in which they are also beneficiaries cannot set off a debt due to the estate from a person who is insolvent against a debt due from them personally to trustees for that person: *Middleton v Pollock, ex p Nugee* (1875) LR 20 Eq 29. As to set-off at law and in equity see PARA 667 note 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(D) Husband and Wife/695. Debts of or due to wife in proceedings between husband and third person.

(D) HUSBAND AND WIFE

695. Debts of or due to wife in proceedings between husband and third person.

Debts incurred by or due to a wife before marriage cannot be set off in proceedings between her husband and a third person¹. Debts due to a wife after marriage are her separate property and cannot be set off by her husband in an action against him², but debts incurred by a wife after marriage may apparently be set off by a defendant to an action by the husband if they were incurred in respect of necessities³.

¹ See *Wood v Akers* (1797) 2 Esp 594; *Ex p Blagden* (1815) 19 Ves 465; *Burrough v Moss* (1830) 10 B & C 558. As to set-off at law and in equity see PARA 667 note 1.

² See **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**. A debt due to a husband in right of his wife before the Married Women's Property Act 1882 could not be set off by him against a debt due from him personally: *Paynter v Walker* (1764) Bull NP 175.

³ *Jenner v Morris* (1860) 1 Dr & Sm 218; affd (1861) 3 De GF & J 45 (advances to deserted wife for purchase of necessities; held that the lender stood in the shoes of a supplier who had a remedy against the husband and that the lender could set off against the husband's judgment debt the husband's liability in equity arising from the advances). See *Jenner v Morris*, *Webster v Jenner* (1863) 11 WR 943; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(D) Husband and Wife/696. Debts between husband and wife.

696. Debts between husband and wife.

A husband may set off a debt paid by him as surety for his wife against an amount payable by him to trustees for his wife under an agreement¹. Where a wife was entitled to set off against a debt due from her to her husband the amount ordered to be paid by him by way of maintenance, the amount of set-off was limited to the amount actually paid to the wife under a 'less tax' order and did not include deductions for income tax².

1 *Ribblesdale v Forbes* (1916) 140 LT Jo 483, CA. As to set-off at law and in equity see PARA 667 note 1.

2 *Butler v Butler* [1961] P 33, [1961] 1 All ER 810, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(E) Landlord and Tenant/697. Set-off against claims for rent.

(E) LANDLORD AND TENANT

697. Set-off against claims for rent.

At common law a tenant's cross-demand for a liquidated sum may be set-off against the landlord's claim for rent under the Statutes of Set-off¹. Although it was thought that a tenant could not set off a cross-claim for unliquidated damages against the landlord's claim for rent², it is now recognised that there is nothing in the nature of the landlord's claim for rent that precludes a tenant from setting off a cross-claim so long as the cross-claim is sufficiently closely connected with the liability to pay rent³. Equitable set-off against rent is not confined to a cross-claim for breach of a covenant to repair⁴. However, a cross-claim that would otherwise give rise to an equitable set-off against a claim for the payment of rent by the landlord mortgagor will not do so when the rent is claimed by the mortgagee⁵.

The right of set-off is to be distinguished from the lessee's right to recoup from arrears of rent or future payments of rent money expended on repairs where the leased premises have fallen into disrepair and the landlord is in breach of a covenant to repair⁶. The right of set-off is also to be distinguished from rights of abatement⁷.

The traditional view is that no right of set-off under the Statutes can affect the landlord's remedy of distress⁸. But where an equitable set-off is available to the tenant he may be entitled to an injunction to restrain the landlord's remedy of distress⁹; and where a sub-tenant is forced by the superior landlord to pay unpaid rent or other charges owing by the immediate landlord, the immediate landlord cannot levy distress on the ground that the sub-tenant is regarded as authorised by the immediate landlord to apply the rent to which he is entitled in this way¹⁰.

A tenant's right of set-off is, of course, not limited to cases in which the landlord seeks to recover rent¹¹. Money due from the landlord may also, it seems, be set off against rent where there is an agreement to that effect between the parties¹².

1 *Gower v Hunt* (1734) Barnes 290; *Brown v Holyoak* (1734) cited in Willes 263; *Cleghorn v Durrant* (1858) 31 LTOS 235; *Hamp v Jones* (1840) 9 LJ Ch 258. As to the Statutes of Set-off see PARA 652 note 1.

2 *Weigall v Waters* (1795) 6 Term Rep 488; *Hart v Rogers* [1916] 1 KB 646. See also *Taylor v Webb* [1937] 2 KB 283, [1937] 1 All ER 590.

3 *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137, [1979] 2 All ER 1063. See also *Melville v Grapelodge Developments Ltd* (1978) 39 P & CR 179; and see *Edlington Properties Ltd v JH Fenner & Co Ltd* [2006] EWCA Civ 403, [2006] 3 All ER 1200, [2006] 1 WLR 1583 (no set-off against rent of damages for defective premises where reversion assigned to another party). As to equitable set-off see PARA 658 et seq.

4 *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137, [1979] 2 All ER 1063; *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 4 All ER 834, [1994] 1 WLR 501, CA (set-off based on breach of the covenant for quiet enjoyment). See *Fuller v Happy Shopper Markets Ltd* [2001] 1 WLR 1681 (overpayments of rent giving rise to equitable right of set-off against future arrears of rent).

5 *Reeves v Pope* [1914] 2 KB 284, CA. See Wood *English and International Set-off* (1989) pp 886-887; Waite 'Disrepair and Set-off of Damages Against Rent: The Implications of *British Anzani*' [1983] Conv 373 at 384-386 (as to absolute sale of the reversion); and the discussion in SR Derham *Set-off* (2nd Edn, 1996) pp 597-603.

6 *Taylor v Beal* (1591) Cro Eliz 222; *Watson v Weigall* (1795) 2 Anst 575, *Lee-Parker v Izzet*[1971] 3 All ER 1099, [1971] 1 WLR 1688; *Connaught Restaurants Ltd v Indoor Leisure Ltd*[1994] 4 All ER 834, [1994] 1 WLR 501, CA; *Asco Developments Ltd v Gordon*[1978] 2 EGLR 41, 248 Estates Gazette 683. See **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 463.

7 See PARA 640; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 266.

8 *Absolon v Knight* (1743) Barnes 450; *Townrow v Benson* (1818) 3 Madd 203. See also *Sapsford v Fletcher* (1792) 4 Term Rep 511; *Willson v Davenport* (1833) 5 C & P 531; *Pratt v Keith* (1864) 33 LJ Ch 528; *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd*[1980] QB 137, [1979] 2 All ER 1063. But see now *Eller v Grovecrest Investments Ltd*[1995] QB 272, [1994] 4 All ER 845, CA (where there are suggestions that the traditional view might be reconsidered). On the other hand, there is still support for a distinction between set-off under the Statutes of Set-off and equitable set-off in relation to distress: see *Aectra Refining & Manufacturing Inc v Exmar NV*[1994] 1 WLR 1634, [1995] 1 Lloyd's Rep 191, CA, per Hoffman LJ. As to distress generally see **DISTRESS**.

9 *Eller v Grovecrest Investments Ltd*[1995] QB 272, [1994] 4 All ER 845, CA.

10 *Sapsford v Fletcher* (1792) 4 Term Rep 511; *Carter v Carter* (1829) 5 Bing 406. See the discussion in SR Derham *Set-off* (2nd Edn, 1996) p 117.

11 *Filross Securities Ltd v Midgeley* [1998] EGLR 43, [1998] 43 EG 134, CA (where the landlord sued in respect of the tenant's failure to pay service charges); *Maunder Taylor v Blaquiére* [2002] EWCA Civ 1633, [2003] 1 WLR 379 (tenant not entitled to set off claims for unpaid service charge made by newly appointed manager of property against claims he might have for original landlord's breaches of lease).

12 *Willson v Davenport* (1833) 5 C & P 531; *Roper v Bumford* (1810) 3 Taunt 76.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(E) Landlord and Tenant/698. Tenant's claims against landlord.

698. Tenant's claims against landlord.

Where a tenant who had obtained judgment against his landlord became subsequently indebted to him in arrears of rent and for dilapidations, it was held that he could not be restrained from issuing execution against his landlord on the judgment¹.

¹ *Maw v Ulyatt* (1861) 31 LJ Ch 33.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(E) Landlord and Tenant/699. Assignment of reversion.

699. Assignment of reversion.

The rule of equity that to an action by an assignee of a chose (or thing) in action the defendant may set off a claim for damages against the assignor directly arising out of the same transaction as the subject matter of the assignment¹ does not apply where a mortgagee of a reversion on a lease, being in possession, is claiming rent against which the set-off is claimed in respect of a liability of the mortgagor². But where a mortgagee, having sold the mortgaged property pursuant to a possession order and the sale yielded insufficient funds to satisfy the debt, petitioned for the mortgagor's bankruptcy in respect of the balance, the mortgagor was allowed to counterclaim, on the ground that the mortgagee had negligently failed to obtain the market value of the property³.

1 As to set-off against assignees generally see PARAS 685, 705; and **CHOSSES IN ACTION** vol 13 (2009) PARA 63.

2 *Reeves v Pope* [1914] 2 KB 284, CA. See PARA 697.

3 *TSB Bank plc v Platts* [1998] 2 BCLC 1, CA (where it was held that it was for the court hearing the petition to ascertain the maximum possible value of the counterclaim and deduct it from the value of the debt on which bankruptcy was sought).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(F) Employer and Employee or Independent Contractor/700. Proceedings between employer and employee.

(F) EMPLOYER AND EMPLOYEE OR INDEPENDENT CONTRACTOR

700. Proceedings between employer and employee.

The right of an employer to make certain deductions from his employee's wages is governed by the contract between them and sometimes by usage, and is controlled by statute¹. An employee discharged without proper notice may set off a claim for wages in lieu of notice against a claim by the employer for money had and received². However, it has been held that an employer sued for wages cannot set off a sum claimed for the value of goods lost by the negligence of his employee³ unless there is an agreement between them authorising such sum to be deducted from the wages⁴.

1 See **EMPLOYMENT** vol 39 (2009) PARA 231 et seq. As to deductions in respect of bad work see *Sagar v H Ridehalgh & Son Ltd* [1931] 1 Ch 310, CA (deduction being permissible in appropriate cases under the principle of abatement). But in later cases the principle of abatement has not been applied and it has been said that the question is whether the employee can make out a case for equitable set-off: see *Miles v Wakefield Metropolitan District Council* [1987] AC 539, [1987] 1 All ER 1089, HL; *Sim v Rotherham Metropolitan Borough Council* [1987] Ch 216, [1986] 3 All ER 387 (where it was held that the employer can maintain a cross-claim for damages).

2 *East Anglian Rlys Co v Lythgoe* (1851) 10 CB 726.

3 *Le Loir v Bristow* (1815) 4 Camp 134.

4 *Le Loir v Bristow* (1815) 4 Camp 134. See also *Duckworth v Alison* (1836) 1 M & W 412; *Cleworth v Pickford* (1840) 7 M & W 314 (both cases concern independent contractors).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(F) Employer and Employee or Independent Contractor/701. Proceedings between employer and independent contractor.

701. Proceedings between employer and independent contractor.

Proceedings between an employer and an independent contractor¹, involving as they usually do a contract for services or work and labour, are subject to the rules governing abatement² and equitable defence³.

¹ As to rights of set-off arising under building contracts see **BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS** vol 4(3) (Reissue) PARAS 89, 91, 182. See *Sable Contractors Ltd v Bluett Shipping Ltd* [1979] 2 Lloyd's Rep 33, CA; *Rapid Building Group Ltd v Ealing Family Housing Association Ltd* (1984) 24 BLR 5, CA; *Tubeworkers Ltd v Tilbury Construction Ltd* (1985) 30 BLR 67, 1 Const LJ 385, CA; *Chatbrown Ltd v Alfred McAlpine Construction (Southern) Ltd* (1986) 35 BLR 44, 11 Con LR 1, CA; *Archital Luxfer Ltd v AJ Dunning & Sons (Weyhill) Ltd* (1987) 47 BLR 1, [1987] 1 FTLR 372, CA; *NEI Thompson Ltd v Wimpey Construction UK Ltd* (1987) 39 BLR 65, (1988) 4 Const LJ 46, CA; *BWP (Architectural) Ltd v Beaver Building Systems Ltd* (1988) 42 BLR 86; *Smallman Construction Ltd v Redpath Dorman Long Ltd* (1988) 47 BLR 15, CA; *Acsim (Southern) Ltd v Danish Contracting and Development Co Ltd* (1989) 47 BLR 55, CA; *Mellowes PPG Ltd v Snelling Construction Ltd* (1989) 49 BLR 109, QBD; *MJ Gleeson plc v Taylor Woodrow Construction Ltd* (1989) 49 BLR 95, 21 Con LR 71, QBD; *A Cameron Ltd v John Mowlem & Co plc* (1990) 52 BLR 24, CA; *RM Douglas Construction Ltd v Bass Leisure Ltd* (1990) 53 BLR 119, 25 Con LR 38, QBD; *Hermcrest plc v G Percy Trentham Ltd* (1991) 53 BLR 104, 25 Con LR 78, CA; *B Hargreaves Ltd v Action 2000* (1992) 62 BLR 72, [1993] BCLC 1111, CA; *CA Duquemin v Raymond Slater* (1993) 65 BLR 124.

² See PARA 643 et seq. The right of set-off may only be taken away by clear and unequivocal words, or at least by a clear implication: *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL; *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 4 All ER 834, [1994] 1 WLR 501, CA; *RM Douglas Construction Ltd v Bass Leisure Ltd* (1990) 53 BLR 119, 25 Con LR 38.

³ See PARA 658 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(G) Partners, Shareholders/702. Partner's joint and separate debts.

(G) PARTNERS, SHAREHOLDERS

702. Partner's joint and separate debts.

The law as to set-off between joint debts and several debts¹ applies when one or more of the parties is a firm. Therefore, where a defendant is sued by a firm he cannot set off a debt due from one of the partners individually² unless the partners have permitted one of their number to deal as a sole trader with the defendant and thereby led him to believe that he was dealing with an individual and not with a firm, and the defendant in this belief has made advances or given credit to that partner. In such a case the defendant may set off against the firm the debt due from the individual partner in respect of that advance or as to which the credit has been given³. Similarly, if in like circumstances an individual partner has agreed to allow a set-off, the agreement is binding on the firm⁴ provided the debt is due in respect of a matter within the scope of the apparent authority given by the firm to the individual partner⁵. However, if the other party knew that somebody besides the individual partner had an interest in the debt sued for, he will not be allowed to set off a debt due from the individual partner, and an agreement to allow him to do so, if made without the authority of the other partners, is not binding on the firm⁶.

1 See PARAS 673-674.

2 See **PARTNERSHIP** vol 79 (2008) PARA 83. Where the debt accrued due from the individual partner before the firm was constituted, there is no right of set-off even though the firm has since admitted the existence of the debt: *France v White* (1839) 6 Bing NC 33.

3 *Stracey and Ross v Deey* (1789) 7 Term Rep 361n; *Gordon v Ellis* (1846) 2 CB 821 (where set-off was disallowed because the plea did not allege that the partner appeared as sole owner with the consent or by default of his partners). As to set-off at law and in equity see PARA 667 note 1.

4 *Muggeridge's v Smith & Co* (1884) 1 TLR 166 (where the other party was justified in believing that the individual partner was the only partner in the business and was authorised to give the other party credit for the amount of his account).

5 *Baker v Gent* (1892) 9 TLR 159 (where the court disallowed a counterclaim for articles supplied by the defendant to 'L & Co', the defendant believing L to be the sole partner when the name 'L & Co' suggested otherwise).

6 *Piercy v Fynney* (1871) LR 12 Eq 69; but cf *Harper v Marten* (1895) 11 TLR 368. See also **PARTNERSHIP** vol 79 (2008) PARAS 47-57.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(G) Partners, Shareholders/703. Firm acting as agent.

703. Firm acting as agent.

Where a firm makes a contract as agent for an undisclosed principal, the other party to the contract in an action brought against him by the undisclosed principal may set off a debt due from the firm if the circumstances are such that he would have had a right of set-off if the agent had been a single individual¹. A similar rule applies where the agent is not really a firm but contracts in a firm name on behalf of one only of the persons acting as agents under that name².

1 *Rabone v Williams* (1785) 7 Term Rep 360n. As to claims by undisclosed principals see PARA 680.

2 *Spurr v Cass, Cass v Spurr* (1870) LR 5 QB 656.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(G) Partners, Shareholders/704. Debts owed by and to a firm.

704. Debts owed by and to a firm.

A defendant sued for a debt due from himself alone may not set off a debt owing to a firm of which he is a member¹. Similarly, a debt owed by a firm may not be set off against a claim by an individual partner². However, where all the other partners have died and the right to the firm debts is in the individual partner as survivor, the common law rule was that it could be made the subject of a set-off³. In equity, however, the claim is brought to account in ascertaining the entitlement of the deceased partners' estates⁴. A former partner of a dissolved partnership cannot set off money owed to him by the partnership against money owed by him to other partners⁵.

1 See the cases cited in PARA 673 note 2. A person may not be sued alone for a debt on a transaction concluded by him under a firm name unless he alone constituted the firm or so held himself out to the claimant: see *Bonfield v Smith* (1844) 12 M & W 405. As to set-off at law and in equity see PARA 667 note 1.

2 See the cases cited in PARA 672 note 3.

3 *Golding v Vaughan* (1782) 2 Chit 436; *Slipper v Stidstone* (1794) 5 Term Rep 493; *French v Andrade* (1796) 6 Term Rep 582; *Smith v Parkes* (1852) 16 Beav 115. See also **PARTNERSHIP** vol 79 (2008) PARA 87.

4 *McClellan v Kennard* (1874) 9 Ch App 336.

5 See *Re a Debtor (No 303 of 1997)* (2000) Times, 3 October.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(G) Partners, Shareholders/705. Set-off against assignee of debt.

705. Set-off against assignee of debt.

The law as to set-off as against an assignee obtains where any one or more of the parties concerned is a firm¹, and a firm may set off against the assignee of a retiring partner a debt due from the retiring partner at the date of assignment². Similarly, a debtor may set off against the assignee of a firm a debt due from the firm before assignment³.

1 This is, of course, subject to the limitation as to setting off joint and several debts, as to which see PARAS 672-673.

2 *Smith v Parkes* (1852) 16 Beav 115. See **PARTNERSHIP** vol 79 (2008) PARA 126. As to set-off at law and in equity see PARA 667 note 1.

3 *Puller v Roe* (1793) Peake 198. For a criticism of this decision see SR Derham *Set-off* (2nd Edn, 1996) pp 347-348. As to set-off against assignees generally see PARA 685.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(G) Partners, Shareholders/706. Set-off in relation to companies.

706. Set-off in relation to companies.

A shareholder may set off against a call a debt presently due and owing to him by the company while the company is a going concern¹. However, a set-off made within six months of a winding-up petition may constitute a fraudulent preference².

A debenture holder cannot set off a debt due from him to the company against sums due from the company to him on his debentures³, nor can a company's solicitor set off an unliquidated claim for his costs against calls made in respect of shares in the company held by him⁴.

In a winding-up, whether compulsory or voluntary, the ordinary rules of set-off apply in the case of a solvent company⁵, but if the company is insolvent the mutual credit provisions of bankruptcy apply⁶. Further in a winding-up a contributory cannot himself set off a debt owed to him by the company, although his trustee in bankruptcy may do so⁷. Where the liability of either the contributory or the company is unlimited the court may allow the contributory to set off money due to him in his personal capacity but not money due to him as a member of the company⁸.

¹ See **COMPANIES** vol 15 (2009) PARA 1140; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 738-740.

² See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 846, 850.

³ See **COMPANIES** vol 15 (2009) PARA 1327.

⁴ *Johnson v Lyttle's Iron Agency* (1877) 5 ChD 687, CA.

⁵ See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 792.

⁶ See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 792; **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 547 et seq. In a compulsory winding-up, the Insolvency Rules 1986, SI 1986/1925, apply. For the purposes of r 4.90, set-off is limited to mutual claims existing at the date of the bankruptcy and there can be no set-off of claims by third parties, even with their consent: *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214, [1997] 4 All ER 568, HL.

⁷ See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 738.

⁸ See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 740.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(H) Solicitors/707. Solicitor's costs.

(H) SOLICITORS

707. Solicitor's costs.

A solicitor is not prevented from setting off a sum due for costs by reason only of the fact that he has not complied with the statutory provision as to the delivery of a bill¹.

Where a claim for costs and disbursements in respect of work done by a solicitor fails because the solicitor has been negligent, and there is joined with that claim a claim to which this defence does not apply, the defendant cannot set off against the second claim money paid to the solicitor and expended by him in doing the work before the negligence occurred². In proceedings where one party is receiving Legal Services Commission funding³, the protection afforded by the limitation of costs awarded against the funded party⁴ does not apply in respect of orders for costs to be used as a shield or set off⁵.

1 See PARA 678.

2 *Lewis v Samuel*(1846) 8 QB 685. As to solicitor-trustees see PARAS 689-690.

3 See PARA 1814 et seq.

4 See the Access to Justice Act 1999 s 11; and **LEGAL AID** vol 65 (2008) PARA 109.

5 *Hill v Bailey*[2003] EWHC 2835 (Ch), [2004] 1 All ER 1210, (2004) Times, 5 January, following *Lockley v National Blood Transfusion Service*[1992] 2 All ER 589, [1992] 1 WLR 492, CA. See also *R (on the application of Burkett) v Hammersmith and Fulham London Borough Council*[2004] EWCA Civ 1342, [2004] All ER (D) 186 (Oct), [2005] JPL 525.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(I) Sureties/708. Claim against surety by third person.

(I) SURETIES

708. Claim against surety by third person.

A surety for payment of a sum due under a contract is entitled to be exonerated by his principal, and in an action against himself as surety may therefore set off a debt due from the claimant to the principal arising out of the same transaction¹. If under the contract the principal is entitled to the benefit of a deduction to be ascertained by arbitration, the surety may set off a sum awarded by an arbitrator acting under the contract².

¹ *Bechervaise v Lewis*(1872) LR 7 CP 372. *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502, CA; but cf *National Westminster Bank plc v Skelton*[1993] 1 All ER 242, [1993] 1 WLR 72n, CA (where doubt is expressed as to this proposition). See the discussion in SR Derham *Set-off* (2nd Edn, 1996) pp 642-644. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1135.

² *Parkes v Smith*(1850) 15 QB 297; *Murphy v Glass*(1869) LR 2 PC 408; *Alcoy and Gandia Rly and Harbour Co Ltd v Greenhill* (1897) 76 LT 542 (on appeal (1898) 79 LT 257, CA).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(I) Sureties/709. Proceedings between surety and principal.

709. Proceedings between surety and principal.

A surety sued by his principal may set off sums paid by him as surety¹, and if he is sued by the executor of the principal the right of set-off holds good².

1 This is so even if the surety has been sued to judgment and a writ of fieri facias has been issued, and the sum has been paid by the sheriff out of the proceeds of the goods taken in execution: *Rodgers v Maw* (1846) 15 M & W 444. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1126, 1135, 1164.

2 *Jones v Mossop* (1844) 3 Hare 568. See also *Ribblesdale v Forbes* (1916) 140 LT Jo 483, CA, where a husband who paid a debt as surety for his wife was allowed to set off the amount of the debt against a sum due to trustees for his wife under an agreement.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(I) Sureties/710. Claim against surety's securities.

710. Claim against surety's securities.

Where a loan is made by an insurance company to a person on the security of a policy on the life of another, and the latter dies, the company cannot set off a debt due from the deceased against a claim on the policy by a surety who has paid off the loan¹.

¹ *Re Jeffery's Policy* (1872) 20 WR 857.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(1) THE RIGHT OF SET-OFF/(v) The Modern Right of Set-off/(B) SET-OFF IN PARTICULAR CASES/(J) Bills of Exchange/711. Proceedings by holder of bill of exchange.

(

711. Proceedings by holder of bill of exchange.

Actions on bills of exchange constitute an exception to the rights of abatement and equitable defence¹.

¹ See PARA 646.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(2) PLEADING AND PRACTICE/(i) Pleading a Set-off/712. Procedure.

(2) PLEADING AND PRACTICE

(i) Pleading a Set-off

712. Procedure.

A set-off may be raised as follows. Where a defendant contends that he is entitled to money from the claimant¹, and relies on this as a defence to the whole or part of the claim, the contention may be included in the defence and set off against the claim².

Where the alternative procedure for claims is followed for the original claim³, a Part 20 claim may not be made without the permission of the court⁴.

1 As to the meaning of 'claimant' see PARA 18.

2 CPR 16.6. See PARA 715.

3 I.e. the procedure provided by CPR Pt 8. This procedure is available where a claimant seeks the court's decision which is unlikely to involve a substantial dispute of fact, or where it is provided by a practice direction that the procedure is to apply: CPR 8.1(1), (6).

4 CPR 8.7; see PARA 134.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(2) PLEADING AND PRACTICE/(i) Pleading a Set-off/713. Set-off as separate action.

713. Set-off as separate action.

A set-off is specifically included in the word 'action' for the purposes of the Bills of Exchange Act 1882¹ and the Sale of Goods Act 1979². However, a claim for set-off is not an 'action' within the provisions³ restricting the bringing of an action by a solicitor to recover costs⁴. For the purposes of the Crown Proceedings Act 1947, 'proceedings against the Crown' includes a claim by way of set-off⁵.

For limitation purposes a claim by way of set-off is deemed to be a separate action and to have been commenced on the same date as the action in which the set-off is pleaded⁶.

1 Bills of Exchange Act 1882 s 2.

2 Sale of Goods Act 1979 s 61.

3 Ie the Solicitors Act 1974 s 69: see **LEGAL PROFESSIONS** vol 66 (2009) PARA 956 et seq.

4 See PARA 678.

5 Crown Proceedings Act 1947 s 38(2). See PARA 668. As to proceedings against the Crown see **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARAS 110-114.

6 Limitation Act 1980 s 35(1), (2). As to whether this provision applies only to set-off at law and not to abatement or equitable defence see PARAS 644, 656, 666.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(2) PLEADING AND PRACTICE/(i) Pleading a Set-off/714. Counterclaim operating as set-off.

714. Counterclaim operating as set-off.

As a general rule, when the defendant's successful cross-claim exceeds the claimant's claim and is also effective as a set-off or defence, his cross-claim extinguishes the claimant's claim, and he also recovers the excess on his counterclaim¹. Where the claimant sues as an assignee of a debt² or the claimant is a sovereign prince or state unamenable to English jurisdiction³, the defendant may still raise his defence but he cannot recover the excess on his counterclaim. If, in either case, the nature of the cross-claim is not such as to make it a defence, the defendant cannot pursue his counterclaim at all in that action⁴.

1 See PARA 713.

2 *Young v Kitchin* (1878) 3 ExD 127; *Newfoundland Government v Newfoundland Rly Co* (1888) 13 App Cas 199, PC; *Banco Central SA and Trevelan Navigation Inc v Lingoss and Falce Ltd and BFI Line Ltd, The Raven* [1980] 2 Lloyd's Rep 266. See also **CHOSES IN ACTION** vol 13 (2009) PARA 63.

3 *Imperial Japanese Government v Peninsular and Oriental Steam Navigation Co* [1895] AC 644, PC; *South African Republic v Compagnie Franco-Belge du Chemin de Fer du Nord* [1898] 1 Ch 190. As to diplomatic immunity generally see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 265 et seq.

4 See PARA 630.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(2) PLEADING AND PRACTICE/(i) Pleading a Set-off/715. Pleading a set-off.

715. Pleading a set-off.

Where a defendant contends that he is entitled to money from the claimant¹, and relies on this as a defence to the whole or part of the claim, the contention may be included in the defence and set off against the claim².

¹ As to the meaning of 'claimant' see PARA 18.

² CPR 16.6. The defence of set-off may be included whether or not it is also a Part 20 claim: CPR 16.6. As to the meaning of 'Part 20 claim' see PARA 618. The statement of value required to be included in the particulars of claim of a claim for money must disregard the possibility that the defendant may make a counterclaim or that the defence may include a set-off: CPR 16.3(6)(c); see PARA 586.

As to the procedure for filing a defence see CPR Pt 15; and PARA 199.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(2) PLEADING AND PRACTICE/(i) Pleading a Set-off/716. Facts alleged by way of defence, or set-off.

716. Facts alleged by way of defence, or set-off.

A defendant relying, in support of a set-off, on facts already alleged by way of defence need not repeat them in full, but may incorporate them in the set-off by way of reference only¹. Similarly, where the same claim is relied on as a subject both of set-off and counterclaim, the facts, if not already alleged in the defence, may be alleged in the counterclaim and incorporated in the set-off by way of reference. An additional claim is for most purposes a claim in its own right, and, with certain exceptions, subject to the same procedural and evidential requirements as any other claim².

1 *Birmingham Estates Co v Smith* (1880) 13 ChD 506; *Benbow v Low* (1880) 13 ChD 553.

2 See CPR 20.3; and PARAS 619, 713. The CPR are silent on the question whether facts may be incorporated by reference as described in this paragraph. As to the citation of old cases in connection with the CPR see PARA 33 text and note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(2) PLEADING AND PRACTICE/(ii) Service, Striking Out etc/717. Striking out set-off.

(ii) Service, Striking Out etc

717. Striking out set-off.

Where the court is considering whether to permit an additional claim¹ to be made, dismiss an additional claim or require it to be dealt with separately from the claim by the claimant against the defendant², it may have regard to (1) the connection between the additional claim and the claim made by the claimant against the defendant; (2) whether the additional claimant is seeking substantially the same remedy which some other claimant is claiming from him; (3) whether the additional claimant wants the court to decide any question connected with the subject matter of the proceedings (a) not only between existing parties but also between existing parties and a person not already a party; or (b) against a party not only in a capacity in which he is already a party, but also in some further capacity³.

A set-off may be struck out as one which ought not to be allowed under the rules relating to pleadings generally, for instance because it is embarrassing⁴, or tends to delay the fair trial of the action⁵.

1 As to the meaning of 'additional claim' see PARA 618.

2 As to the court's power to order that part of proceedings be dealt with as separate proceedings see CPR 3.1(2)(e). As to the power to decide the order in which issues are to be tried see CPR 3.1(2)(j).

3 CPR 20.9. The court has a duty to ensure that, as far as possible, the claim and corresponding additional claim are dealt with together: see CPR 20.13(2); and PARA 629.

4 *Fendall v O'Connell* (1885) 52 LT 538; on appeal 29 ChD 899, CA. See CPR 3.4(2); and PARA 520.

5 *Gray v Webb* (1882) 21 ChD 802; *Normar (Owners) v British Transport Docks Board, The Normar* [1968] P 362, [1968] 1 All ER 753; *Zimmer Orthopaedic Ltd v Zimmer Manufacturing Co* [1968] 3 All ER 449, [1968] 1 WLR 1349, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(2) PLEADING AND PRACTICE/(iii) Responding to a Set-off/718. Point of law in reply.

(iii) Responding to a Set-off

718. Point of law in reply.

An additional claim¹ is for most purposes a claim in its own right², and replying or raising a point of law in defence to an additional claim is treated in the same way as in the case of defence to any other claim³.

1 As to the meaning of 'additional claim' see PARA 618.

2 See CPR 20.3; and PARA 619.

3 As to reply to defence see PARA 604. As to raising a point of law in defence see *Practice Direction--Statement of Case* PD16 para 13.3(1). As to disposal of cases after decisions on preliminary issues see CPR 3.1(2)(l); and PARA 247.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(2) PLEADING AND PRACTICE/(iv) Amendment/719. Amendment of set-off.

(iv) Amendment

719. Amendment of set-off.

An additional claim¹ is for most purposes a claim in its own right, and, with certain exceptions, subject to the same procedural rules as any other claim². A party may amend his statement of case³ at any time before it has been served on any other party⁴. After a statement of case has been served it may be amended only with the written consent of all other parties or with the permission of the court⁵. In a case where permission is not required⁶, a party may, within 14 days of service of a copy of the amended statement of case on him, apply to the court to disallow the amendment⁷.

An amendment to a statement of case must be verified by a statement of truth unless the court orders otherwise⁸.

1 As to the meaning of 'additional claim' see PARA 618.

2 See CPR 20.3; and PARA 619.

3 As to statements of case see CPR Pts 16, 17, which (except CPR 16.3(5)) apply to defences to Part 20 claims (CPR 20.3); and PARA 618 et seq.

4 CPR 17.1(1).

5 CPR 17.1(2). Where the court gives permission it may give directions as to the amendment of any other statement of case, and service of any amended statement of case: CPR 17.3(1).

6 See text and note 4.

7 See CPR 17.2.

8 CPR 22.1(2). As to statements of truth see PARA 613 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(2) PLEADING AND PRACTICE/(v) Judgment/720. Form of judgment.

(v) Judgment

720. Form of judgment.

Where the defendant establishes a set-off equal to or exceeding the claimant's claim, judgment is entered in his favour on the claim, because a set-off amounts to an absolute defence¹. Therefore, if he has also counterclaimed in respect of the matters pleaded by way of set-off, he obtains judgment both on the claim and the counterclaim². If both the claim and the counterclaim fail, judgment is entered for the defendant on the claim and the claimant on the counterclaim³.

Where the court gives judgment for specified amounts both for the claimant on his claim and against the claimant on a counterclaim⁴, if there is a balance in favour of one of the parties it may order the party whose judgment is for the lesser amount to pay the balance⁵. In such a case the court may make a separate order for costs against each party⁶.

¹ *Baines v Bromley*(1881) 6 QBD 691, CA; *Lowe v Holme*(1883) 10 QBD 286; *Hanak v Green*[1958] 2 QB 9, [1958] 2 All ER 141, CA; *Henriksens Rederi A/S v PHZ Rolimpex, The Brede*[1974] QB 233, [1973] 3 All ER 589, CA.

² See the cases cited in PARA 721 notes 8-9.

³ *Saner v Bilton*(1879) 11 ChD 416; *Mason v Brentini*(1880) 15 ChD 287, CA; *James v Jackson*[1910] 2 Ch 92.

⁴ As to the meaning of 'counterclaim' see PARA 618 note 3.

⁵ CPR 40.13(1), (2).

⁶ CPR 40.13(3). As to costs see further PARA 721 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(2) PLEADING AND PRACTICE/(vi) Costs/721. The court's discretion.

(vi) Costs

721. The court's discretion.

The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid¹. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order². In deciding what order (if any) to make, the court must have regard to all the circumstances, including (1) the conduct of all the parties³; (2) whether a party has succeeded on part of his case, even if he has not been wholly successful; and (3) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention and which is not an offer to which costs consequences⁴ apply⁵.

Where a party entitled to costs is also liable to pay costs the court may assess the costs which that party is liable to pay and either (a) set off the amount assessed against the amount the party is entitled to be paid and direct him to pay any balance; or (b) delay the issue of a certificate for the costs to which the party is entitled until he has paid the amount which he is liable to pay⁶.

Where a defendant succeeds in establishing a set-off equal to or exceeding the claimant's claim, then, in the absence of circumstances which the court may treat as a ground for depriving him of costs, he is entitled to judgment with costs⁷, and, if he has also counterclaimed in respect of the matters relied on by way of set-off, he is similarly entitled to the costs of the counterclaim⁸. If he proves a set-off for less than the claimant's claim he is held to have succeeded to that extent⁹.

1 Supreme Court Act 1981 s 51(1) (substituted by the Courts and Legal Services Act 1991 s 4(1)); CPR 44.3(1). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to costs generally see PARA 1729 et seq.

2 CPR 44.3(2). The orders which the court may make under this rule include an order that a party must pay (1) a proportion of another party's costs; (2) a stated amount in respect of another party's costs; (3) costs from or until a certain date only; (4) costs incurred before proceedings have begun; (5) costs relating to particular steps taken in the proceedings; (6) costs relating only to a distinct part of the proceedings; and (7) interest on costs from or until a certain date, including a date before judgment: CPR 44.3(6). Where the court would otherwise consider making an order under head (6), it must instead, if practicable, make an order under head (1) or (3): CPR 44.3(7).

3 The conduct of the parties includes (1) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol; (2) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (3) the manner in which a party has pursued or defended his case or a particular allegation or issue; and (4) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim: CPR 44.3(5). As to pre-action protocols see PARAS 13, 107 et seq.

4 I.e. the costs consequences of CPR Pt 36 (as to which see further PARA 736): CPR 44.3(4)(c).

5 CPR 44.3(4).

6 CPR 44.3(9).

7 *Baines v Bromley* (1881) 6 QBD 691, CA. See also CPR 44.3.

8 *Lowe v Holme*(1883) 10 QBD 286; *Lund v Campbell*(1885) 14 QBD 821, CA. Where a defendant recovered on his counterclaim a sum equal to that recovered by a plaintiff on his claim, Neville J ordered the plaintiff to pay the costs of the claim and counterclaim (*Sprange v Lee*[1908] 1 Ch 424 at 432, CA), but it is difficult to see how this order can be supported unless the subject of counterclaim was also a good ground of set-off.

9 *Lund v Campbell*(1885) 14 QBD 821, CA. The word formerly used in the County Courts Act 1984 ss 19, 20 (repealed), was 'recover', and it has been held that the word 'recover' means recover when set-off is allowed: *Ashcroft v Foulkes* (1856) 18 CB 261; *Beard v Perry* (1862) 2 B & S 493; *Staples v Young* (1877) 2 Ex D 324; *Stooke v Taylor*(1880) 5 QBD 569, DC. If the claimant succeeds on his claim to an extent entitling him to High Court costs, and the defendant succeeds on a counterclaim but not on a set-off, the claimant is entitled to costs on the High Court scale as he has 'recovered' the amount of the claim: *Stooke v Taylor*(1880) 5 QBD 569, DC.

UPDATE

721 The court's discretion

NOTE 5--See *Parkes v Martin*[2009] EWCA Civ 883, [2009] PIQR P1 (reduction of costs proportionate to reduction of damages for contributory negligence).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/16. SET-OFF/(2) PLEADING AND PRACTICE/(vi) Costs/722. Detailed assessment of costs.

722. Detailed assessment of costs.

In relation to proceedings begun on or after 26 April 1999¹, taxation of costs is replaced by assessment of costs, which may be either a summary assessment by the court, or a detailed assessment by a costs officer².

1 Ie the date on which the CPR came into operation: see PARA 30.

2 See CPR 44.7. As to provision for detailed assessment see CPR Pt 47; and PARA 1779 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/17. DISCONTINUANCE/723. In general.

17. DISCONTINUANCE

723. In general.

The rules in Part 38 of the Civil Procedure Rules¹ set out the procedure by which a claimant² may discontinue all or part of a claim³. A claimant who claims more than one remedy and subsequently abandons his claim to one or more of the remedies but continues with his claim for the other remedies, is not treated as discontinuing all or part of a claim for these purposes⁴.

1 Ie CPR Pt 38: see PARAS 724-728. As to the procedure where the parties are agreed as to the discontinuance or withdrawal of proceedings see *Practice Statement (Administrative Court: uncontested proceedings)*[2009] 1 All ER 651.

2 As to the meaning of 'claimant' see PARA 18.

3 CPR 38.1(1).

4 CPR 38.1(2). The procedure for amending a statement of case (see CPR Pt 17; and PARAS 607-610) applies where a claimant abandons a claim for a particular remedy but wishes to continue with his claim for other remedies: see CPR 38.1(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/17. DISCONTINUANCE/724. Right to discontinue claim.

724. Right to discontinue claim.

A claimant¹ may discontinue all or part of a claim at any time². He must, however, obtain the court's³ permission if he wishes to discontinue all or part of a claim in relation to which the court has granted an interim injunction⁴ or any party has given an undertaking to the court⁵. Furthermore, where the claimant has received an interim payment in relation to a claim⁶, he may discontinue that claim only if the defendant⁷ who made the interim payment consents in writing⁸ or the court gives permission⁹.

Where there is more than one claimant, a claimant may not discontinue unless every other claimant consents in writing¹⁰ or the court gives permission¹¹.

Where there is more than one defendant, the claimant may discontinue all or part of a claim against all or any of the defendants¹².

1 As to the meaning of 'claimant' see PARA 18.

2 CPR 38.2(1).

3 As to the meaning of 'court' see PARA 22.

4 CPR 38.2(2)(a)(i). No permission is required to discontinue claims against other parties, who were not subject to interim restraint: *Astaldi SpA v Generali-Kent Sigorta AS* (25 June 2002, unreported). As to the meaning of 'injunction' see PARA 315 note 2.

5 CPR 38.2(2)(a)(ii).

6 Ie whether voluntarily or pursuant to an order under CPR Pt 25 (see PARA 315 et seq): see CPR 38.2(2)(b).

7 As to the meaning of 'defendant' see PARA 18.

8 CPR 38.2(2)(b)(i).

9 CPR 38.2(2)(b)(ii).

10 CPR 38.2(2)(c)(i).

11 CPR 38.2(2)(c)(ii).

12 CPR 38.2(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/17. DISCONTINUANCE/725. Procedure for discontinuing.

725. Procedure for discontinuing.

In order to discontinue a claim or part of a claim, a claimant¹ must file a notice of discontinuance² and serve a copy on every other party to the proceedings³. The claimant must state in the notice of discontinuance which he files that he has served notice of discontinuance on every other party to the proceedings⁴. Where the claimant needs the consent of some other party, a copy of the necessary consent must be attached to the notice of discontinuance⁵ and where there is more than one defendant⁶, the notice of discontinuance must specify against which defendants the claim is discontinued⁷.

Discontinuance against any defendant takes effect on the date when notice of discontinuance is served on him⁸. The proceedings are brought to an end as against him on that date⁹ but this does not affect proceedings to deal with any question of costs¹⁰.

1 As to the meaning of 'claimant' see PARA 18.

2 CPR 38.3(1)(a). Such notice should be in Form N279 in *The Civil Court Practice*. As to the meaning of 'filing' see PARA 1832 note 8.

3 CPR 38.3(1)(b). As to the meaning of 'service' see PARA 138 note 2.

4 CPR 38.3(2).

5 CPR 38.3(3).

6 As to the meaning of 'defendant' see PARA 18.

7 CPR 38.3(4).

8 CPR 38.5(1). See eg *Jarvis plc v PriceWaterhouseCoopers (a firm)* [2000] All ER (D) 978, [2000] 2 BCLC 368.

9 CPR 38.5(2). This is subject to the defendant's right to apply to have the notice of discontinuance set aside under CPR 38.4: see PARA 726.

10 CPR 38.5(3). As to liability for costs see PARA 727.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/17. DISCONTINUANCE/726.
Application to have notice of discontinuance set aside.

726. Application to have notice of discontinuance set aside.

Where the claimant¹ discontinues² the defendant³ may apply to have the notice of discontinuance set aside⁴. He may not, however, make such an application more than 28 days after the date when the notice of discontinuance was served on him⁵.

1 As to the meaning of 'claimant' see PARA 18.

2 I.e. under CPR 38.2(1): see PARA 724.

3 As to the meaning of 'defendant' see PARA 18.

4 CPR 38.4(1). As to the meaning of 'set aside' see PARA 197 note 6. As to the notice of discontinuance see PARA 725. As to the circumstances in which the court will set aside a notice of discontinuance see *Sheltam Rail Co (Proprietary) Ltd v Mirambo Holdings Ltd* [2008] EWHC 829 (Comm), [2009] 1 All ER 84.

5 CPR 38.4(2). As to the meaning of 'service' see PARA 138 note 2; and as to time limits generally see PARA 88 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/17. DISCONTINUANCE/727. Liability for costs.

727. Liability for costs.

Unless the court¹ orders otherwise, a claimant² who discontinues is liable for the costs which a defendant³ against whom the claimant discontinues incurred on or before the date on which notice of discontinuance⁴ was served on the defendant⁵. If proceedings are only partly discontinued the claimant is so liable for costs relating only to the part of the proceedings which he is discontinuing⁶.

Unless the court orders otherwise, the costs which the claimant is liable to pay will not be assessed until the conclusion of the rest of the proceedings⁷.

These provisions do not apply to claims allocated to the small claims track⁸.

Where proceedings are partly discontinued and a claimant is liable to pay costs under these provisions, then if he fails to pay those costs within 21 days of the date on which the parties agreed the sum payable by him, or of the date on which the court ordered the costs to be paid, the court may stay⁹ the remainder of the proceedings until the claimant pays the whole of the costs which he is liable to pay¹⁰.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'claimant' see PARA 18.

3 As to the meaning of 'defendant' see PARA 18.

4 As to notice of discontinuance see PARA 725.

5 CPR 38.6(1). As to the meaning of 'service' see PARA 138 note 2. As to the basis of assessment where the right to costs arises on discontinuance see CPR 44.12; and see eg *R (on the application of Bowhay) v North and East Devon Health Authority* (2000) 60 BMLR 228, [2000] All ER (D) 1959 (defendants contributing to claimant's costs in discontinued judicial review proceedings); *Lloyds TSB Bank plc v Barlow* [2001] All ER (D) 172 (Jun) (costs of counterclaim set off against costs of proceedings to date). It is generally the case that the actual assessment of costs is a different procedure from deciding whether a party is to be awarded such costs: *R (on the application of Chorion plc) v Westminster City Council* [2002] EWCA Civ 1126, [2002] All ER (D) 468 (Jul). Where discontinuance of an action would equate to the claim being worthless from the beginning, the liquidator should not have commenced the proceedings and in deciding to discontinue the action, should be made to pay the respondent's costs: *Re Walker Wingsail Systems plc, Walker v Walker* [2005] EWCA Civ 247, [2006] 1 All ER 272, [2006] 1 WLR 2194. See also *Lay v Drexler* [2007] EWCA Civ 464, [2007] Bus LR 1357. As to costs generally see also PARA 1729 et seq.

6 CPR 38.6(2)(a).

7 CPR 38.6(2)(b).

8 CPR 38.6(3). As to the small claims track see CPR Pt 27; and PARA 274 et seq.

9 As to the meaning of 'stay' see PARA 233 note 11.

10 CPR 38.8(1), (2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/17. DISCONTINUANCE/728. Discontinuance and subsequent proceedings.

728. Discontinuance and subsequent proceedings.

A claimant¹ who discontinues a claim needs the permission of the court² to make another claim against the same defendant³ if he discontinued the claim after the defendant filed⁴ a defence⁵ and the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim⁶.

1 As to the meaning of 'claimant' see PARA 18.

2 As to the meaning of 'court' see PARA 22.

3 As to the meaning of 'defendant' see PARA 18.

4 As to the meaning of 'filing' see PARA 1832 note 8.

5 CPR 38.7(a).

6 CPR 38.7(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/18. OFFERS TO SETTLE AND PAYMENTS INTO COURT/729. Offers to settle; in general.

18. OFFERS TO SETTLE AND PAYMENTS INTO COURT

729. Offers to settle; in general.

Part 36 of the Civil Procedure Rules contains rules about offers to settle¹ and the consequences where an offer to settle is made in accordance with Part 36². Nothing in Part 36 prevents a party making an offer to settle in whatever way he chooses, but if the offer is not made in accordance with the specified rule³, it will not have the specified consequences⁴.

A Part 36 offer may be made at any time, including before the commencement of proceedings, and may be made in appeal proceedings⁵. A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until the date on which the period stated⁶ expires; or, in the specified circumstances⁷, a date 21 days after the offer was made⁸.

A Part 36 offer has the consequences set out in Part 36 only in relation to the costs of the proceedings in respect of which it is made, and not in relation to the costs of any appeal from the final decision in those proceedings⁹. Before expiry of the relevant period (which is normally 21 days)¹⁰, a Part 36 offer may be withdrawn or its terms changed to be less advantageous to the offeree¹¹, only if the court gives permission¹². After expiry of the relevant period and provided that the offeree has not previously served notice of acceptance, the offeror¹³ may withdraw the offer or change its terms to be less advantageous to the offeree without the permission of the court¹⁴. The offeror does so by serving written notice of the withdrawal or change of terms on the offeree¹⁵.

A Part 36 offer is made when it is served on the offeree¹⁶. A change in the terms of a Part 36 offer will be effective when notice of the change is served on the offeree¹⁷.

1 An offer to settle which is made in accordance with CPR 36.2 (see PARA 730) is called a Part 36 offer: CPR 36.2(1).

2 CPR 36.1(1).

3 Ie CPR 36.2: see PARA 730.

4 CPR 36.1(2). As to the specified consequences see CPR 36.10 (see PARA 736), CPR 36.11 (see PARA 737) and CPR 36.14 (see PARA 740). The court will take into account any offer however made when dealing with the issue of costs: see PARA 1739.

5 CPR 36.3(2).

6 Ie under CPR 36.2(2)(c): see PARA 730 head (3).

7 Ie if CPR 36.2(3) (see PARA 730 note 4) applies.

8 CPR 36.3(3).

9 CPR 36.3(4).

10 In CPR Pt 36, 'relevant period' means (1) in the case of an offer made not less than 21 days before trial, the period stated under CPR 36.2(2)(c) (see PARA 730 head (3)) or such longer period as the parties agree; (2) otherwise, the period up to end of the trial or such other period as the court has determined: CPR 36.3(1)(c).

11 In CPR Pt 36, the party to whom an offer is made is the 'offeree': CPR 36.3(1)(b).

12 CPR 36.3(5).

13 In CPR Pt 36, the party who makes an offer is the 'offeror': CPR 36.3(1)(a).

14 CPR 36.3(6).

15 CPR 36.3(7). As to the costs consequences following judgment of an offer that is withdrawn see CPR 36.14(6); and PARA 740.

16 CPR 36.7(1).

17 CPR 36.7(2). As to provision about when permission is required to change the terms of an offer to make it less advantageous to the offeree see the text and notes 12-14.

UPDATE

729 Offers to settle; in general

NOTES 5, 9--See *AF v BG* [2009] EWCA Civ 757, [2009] All ER (D) 249 (Jul) (proceedings to which Pt 36 offer related were entire proceedings, both original claim and proposed counterclaim).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/18. OFFERS TO SETTLE AND PAYMENTS INTO COURT/730. Form and content of a Part 36 offer.

730. Form and content of a Part 36 offer.

An offer to settle which is made in accordance with the provisions below¹ is called a Part 36 offer². A Part 36 offer must:

- 761 (1) be in writing;
- 762 (2) state on its face that it is intended to have the consequences of Part 36;
- 763 (3) specify a period of not less than 21 days within which the defendant³ will be liable for the claimant's costs⁴ if the offer is accepted⁵;
- 764 (4) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and
- 765 (5) state whether it takes into account any counterclaim⁶.

In appropriate cases, a Part 36 offer must contain certain further information⁷. An offeror⁸ may make a Part 36 offer solely in relation to liability⁹.

1 le CPR 36.2.

2 CPR 36.2(1).

3 As to the meaning of 'defendant' see PARA 18.

4 le in accordance with CPR 36.10: see PARA 736. As to the meaning of 'claimant' see PARA 18.

5 Head (3) in the text does not apply if the offer is made less than 21 days before the start of the trial: CPR 36.2(3).

6 CPR 36.2(2). As to provision for when a Part 36 offer is made see CPR 36.7; and PARA 729.

7 CPR 36.2(4), which refers to such information as is required by CPR 36.5 (see PARA 732), CPR 36.6 (see PARA 733) and CPR 36.15.

8 As to the meaning of 'offeror' see PARA 729 note 12.

9 CPR 36.2(5).

UPDATE

730 Form and content of a Part 36 offer

NOTE 6--See *AF v BG* [2009] EWCA Civ 757, [2009] All ER (D) 249 (Jul).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/18. OFFERS TO SETTLE AND PAYMENTS INTO COURT/731. Defendants' offers.

731. Defendants' offers.

A Part 36 offer¹ by a defendant² to pay a sum of money in settlement of a claim must be an offer to pay a single sum of money³ but an offer that includes an offer to pay all or part of the sum, if accepted, at a date later than 14 days following the date of acceptance will not be treated as a Part 36 offer unless the offeree⁴ accepts the offer⁵.

1 As to the meaning of 'Part 36 offer' see PARA 730.

2 As to the meaning of 'defendant' see PARA 18.

3 CPR 36.4(1). This is subject to CPR 36.5(3) (see PARA 732) and CPR 36.6(1) (see PARA 733).

4 As to the meaning of 'offeree' see PARA 729 note 10.

5 CPR 36.4(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/18. OFFERS TO SETTLE AND PAYMENTS INTO COURT/732. Personal injury claims for future pecuniary loss.

732. Personal injury claims for future pecuniary loss.

In the case of a claim for damages for personal injury which is or includes a claim for future pecuniary loss, an offer to settle such a claim will not have particular costs consequences¹ unless it is made by way of a Part 36 offer² under these provisions³. In such a case, a Part 36 offer may contain an offer to pay, or an offer to accept (1) the whole or part of the damages for future pecuniary loss in the form of (a) a lump sum; or (b) periodical payments; or (c) both a lump sum and periodical payments⁴; (2) the whole or part of any other damages in the form of a lump sum⁵.

To the extent that a Part 36 offer by a defendant⁶ under these provisions includes an offer to pay all or part of any damages in the form of a lump sum⁷, the offer:

766 (i) must state the amount of any offer to pay the whole or part of any damages in the form of a lump sum⁸;

767 (ii) may state:

76

27. (A) what part of the lump sum, if any, relates to damages for future pecuniary loss; and

28. (B) what part relates to other damages to be accepted in the form of a lump sum⁹;

77

768 (iii) must state what part of the offer relates to damages for future pecuniary loss to be paid or accepted in the form of periodical payments and must specify:

78

29. (A) the amount and duration of the periodical payments;

30. (B) the amount of any payments for substantial capital purchases and when they are to be made; and

31. (C) that each amount is to vary by reference to the retail prices index (or to some other named index, or that it is not to vary by reference to any index); and¹⁰;

79

769 (iv) must state either that any damages which take the form of periodical payments will be funded in a way which ensures that the continuity of payment is reasonably secure¹¹ or how such damages are to be paid and how the continuity of their payment is to be secured¹².

Where the offeror makes a Part 36 offer to which these provisions apply and which offers to pay or to accept damages in the form of both a lump sum and periodical payments, the offeree may only give notice of acceptance of the offer as a whole¹³. If the offeree accepts a Part 36 offer which includes payment of any part of the damages in the form of periodical payments, the claimant¹⁴ must, within seven days of the date of acceptance, apply to the court for an order for an award of damages in the form of periodical payments¹⁵.

1 le those set out in CPR 36.10 (see PARA 736), CPR 36.11 (see PARA 737) and CPR 36.14 (see PARA 740).

2 As to the meaning of 'Part 36 offer' see PARA 730.

3 CPR 36.5(1), (2).

4 CPR 36.5(3)(a).

5 CPR 36.5(3)(b).

6 As to the meaning of 'defendant' see PARA 18.

7 CPR 36.5(5).

8 CPR 36.5(4)(a).

9 CPR 36.5(4)(b).

10 CPR 36.5(4)(c).

11 Ie in accordance with the Damages Act 1996 s 2(4): see **DAMAGES** vol 12(1) (Reissue) PARA 931.

12 CPR 36.5(4)(d).

13 CPR 36.5(6).

14 As to the meaning of 'claimant' see PARA 18.

15 CPR 36.5(7), referring to CPR 41.8 (see PARA 1222). *Practice Direction--Periodical Payments under the Damages Act 1996* PD 41B contains information about periodical payments under the Damages Act 1996: see PARA 1222. Where the parties settle a claim to which CPR 36.5 applies, any consent order, whether made under CPR 40.6 or on an application under CPR Pt 23, must satisfy the requirements of CPR 41.8 and 41.9: *Practice Direction--Periodical Payments under the Damages Act 1996* PD 41B para 6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/18. OFFERS TO SETTLE AND PAYMENTS INTO COURT/733. Offer to settle a claim for provisional damages.

733. Offer to settle a claim for provisional damages.

An offeror¹ may make a Part 36 offer² in respect of a claim which includes a claim for provisional damages³. Where he does so, the Part 36 offer must specify whether or not the offeror is proposing that the settlement is to include an award of provisional damages⁴.

Where the offeror is offering to agree to the making of an award of provisional damages the Part 36 offer must also state:

- 770 (1) that the sum offered is in satisfaction of the claim for damages on the assumption that the injured person will not develop the disease or suffer the type of deterioration specified in the offer;
- 771 (2) that the offer is subject to the condition that the claimant⁵ must make any claim for further damages within a limited period; and
- 772 (3) what that period is⁶.

If the offeree⁷ accepts the Part 36 offer, the claimant must, within seven days of the date of acceptance, apply to the court for an order for an award of provisional damages⁸.

1 As to the meaning of 'offeror' see PARA 729 note 12.

2 As to the meaning of 'Part 36 offer' see PARA 730.

3 CPR 36.6(1).

4 CPR 36.6(2). CPR 36.4 (see PARA 731) applies to the extent that a Part 36 offer by a defendant includes an offer to agree to the making of an award of provisional damages: CPR 36.6(4). As to the meaning of 'defendant' see PARA 18.

5 As to the meaning of 'claimant' see PARA 18.

6 CPR 36.6(3).

7 As to the meaning of 'offeree' see PARA 729 note 10.

8 CPR 36.6(5), referring to CPR 41.2 (see PARA 1217).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/18. OFFERS TO SETTLE AND PAYMENTS INTO COURT/734. Clarification of a Part 36 offer.

734. Clarification of a Part 36 offer.

The offeree¹ may, within seven days of a Part 36 offer² being made, request the offeror³ to clarify the offer⁴. If the offeror does not give the clarification so requested within seven days of receiving the request, the offeree may, unless the trial has started, apply for an order that he does so⁵. If the court makes such an order, it must specify the date when the Part 36 offer is to be treated as having been made⁶.

1 As to the meaning of 'offeree' see PARA 729 note 10.

2 As to the meaning of 'Part 36 offer' see PARA 730.

3 As to the meaning of 'offeror' see PARA 729 note 12.

4 CPR 36.8(1).

5 CPR 36.8(2). As to provisions about making an application to the court see CPR Pt 23; and PARA 852 et seq.

6 CPR 36.8(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/18. OFFERS TO SETTLE AND PAYMENTS INTO COURT/735. Acceptance of a Part 36 offer.

735. Acceptance of a Part 36 offer.

A Part 36 offer¹ is accepted by serving written notice of the acceptance on the offeror². Subject to the provision below³, a Part 36 offer may be accepted at any time (whether or not the offeree⁴ has subsequently made a different offer) unless the offeror serves notice of withdrawal on the offeree⁵.

The court's permission is required to accept a Part 36 offer in certain circumstances⁶. Where the court gives such permission, unless all the parties have agreed costs, the court will make an order dealing with costs, and may order that certain costs consequences⁷ will apply⁸.

Unless the parties agree, a Part 36 offer may not be accepted after the end of the trial but before judgment is handed down⁹.

1 As to the meaning of 'Part 36 offer' see PARA 730.

2 CPR 36.9(1). As to the meaning of 'offeror' see PARA 729 note 12.

3 Ie CPR 36.9(3).

4 As to the meaning of 'offeree' see PARA 729 note 10.

5 CPR 36.9(2). As to compromise etc by or on behalf of a child or protected party see CPR 21.10; and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1422.

6 See CPR 36.9(3). The court's permission is so required where (1) CPR 36.12(4) (see PARA 738) applies; (2) CPR 36.15(3)(b) (see PARA 741 head (2)) applies, the relevant period has expired and further deductible amounts have been paid to the claimant since the date of the offer; (3) an apportionment is required under CPR 41.3A; or (4) the trial has started: CPR 36.9(3)(a)-(d). As to offers by some but not all of multiple defendants see CPR 36.12; and PARA 738. As to deductible amounts see CPR 36.15; and PARA 741. As to the meanings of 'claimant' and 'defendant' see PARA 18. CPR 41.3A requires an apportionment in proceedings under the Fatal Accidents Act 1976 and Law Reform (Miscellaneous Provisions) Act 1934.

7 Ie set out in CPR 36.10: see PARA 736.

8 CPR 36.9(4).

9 CPR 36.9(5).

UPDATE

735 Acceptance of a Part 36 offer

NOTE 5--See *Sampla v Rushmoor BC* [2008] EWHC 2616 (TCC), [2008] All ER (D) 335 (Oct).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/18. OFFERS TO SETTLE AND PAYMENTS INTO COURT/736. Costs consequences of acceptance of a Part 36 offer.

736. Costs consequences of acceptance of a Part 36 offer.

Subject to certain provisions¹ set out below, where a Part 36 offer² is accepted within the relevant period³, the claimant⁴ will be entitled to the costs of the proceedings up to the date on which notice of acceptance was served on the offeror⁵.

Where:

- 773 (1) a defendant's⁶ Part 36 offer relates to part only of the claim; and
- 774 (2) at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim,

the claimant will be entitled to the costs of the proceedings up to the date of serving notice of acceptance unless the court orders otherwise⁷.

Costs under the provisions above will be assessed on the standard basis if the amount of costs is not agreed⁸.

Where:

- 775 (a) a Part 36 offer that was made less than 21 days before the start of trial is accepted; or
- 776 (b) a Part 36 offer is accepted after expiry of the relevant period,

if the parties do not agree the liability for costs, the court will make an order as to costs⁹.

Where head (b) above applies, unless the court orders otherwise, the claimant will be entitled to the costs of the proceedings up to the date on which the relevant period expired; and the offeree¹⁰ will be liable for the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance¹¹. The claimant's costs include any costs incurred in dealing with the defendant's counterclaim if the Part 36 offer states that it takes into account the counterclaim¹².

- 1 le subject to CPR 36.10(2) (see text to note 5) and CPR 36.10(4)(a) (see head (a) in the text).
- 2 As to the meaning of 'Part 36 offer' see PARA 730.
- 3 As to the meaning of 'relevant period' see PARA 729 note 9.
- 4 As to the meaning of 'claimant' see PARA 18.
- 5 CPR 36.10(1). As to the meaning of 'offeror' see PARA 729 note 12.
- 6 As to the meaning of 'defendant' see PARA 18.
- 7 CPR 36.10(2).
- 8 CPR 36.10(3). Where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue; and resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party: CPR 44.4(2).

- 9 CPR 36.10(4).
- 10 As to the meaning of 'offeree' see PARA 729 note 10.
- 11 CPR 36.10(5).
- 12 CPR 36.10(6).

UPDATE

736 Costs consequences of acceptance of a Part 36 offer

TEXT AND NOTES--On the determination of costs, the issue of contributory negligence is part of liability and is not a separate issue: *Onay v Brown* [2009] EWCA Civ 775, [2010] All ER (D) 64 (Mar) (nothing to justify claimant paying costs).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/18. OFFERS TO SETTLE AND PAYMENTS INTO COURT/737. Effect of acceptance of a Part 36 offer.

737. Effect of acceptance of a Part 36 offer.

If a Part 36 offer¹ is accepted, the claim will be stayed². In the case of acceptance of a Part 36 offer which relates to the whole claim the stay will be on the terms of the offer³.

If a Part 36 offer which relates to part only of the claim is accepted:

- 777 (1) the claim will be stayed as to that part on the terms of the offer; and
- 778 (2) unless the parties have agreed costs, the liability for costs is to be decided by the court⁴.

If the approval of the court is required before a settlement can be binding, any stay which would otherwise arise on the acceptance of a Part 36 offer will take effect only when that approval has been given⁵. Any stay arising under these provisions will not affect the power of the court to enforce the terms of a Part 36 offer or to deal with any question of costs (including interest on costs) relating to the proceedings⁶.

Unless the parties agree otherwise in writing, where a Part 36 offer by a defendant⁷ that is or that includes an offer to pay a single sum of money is accepted, that sum must be paid to the offeree within 14 days of the date of acceptance or of the order, when the court makes an order⁸, unless the court orders otherwise⁹.

If the accepted sum is not paid within 14 days or such other period as has been agreed the offeree may enter judgment for the unpaid sum¹⁰. In certain circumstances¹¹, where a Part 36 offer (or part of a Part 36 offer) is accepted and a party alleges that the other party has not honoured the terms of the offer, that party may apply to enforce the terms of the offer without the need for a new claim¹².

1 As to the meaning of 'Part 36 offer' see PARA 730.

2 CPR 36.11(1). As to the effect of a stay of proceedings see PARA 278 note 11.

3 CPR 36.11(2).

4 CPR 36.11(3).

5 CPR 36.11(4).

6 CPR 36.11(5).

7 As to the meaning of 'defendant' see PARA 18.

8 Ie under CPR 41.2 (order for an award of provisional damages) or CPR 41.8 (order for an award of periodical payments).

9 CPR 36.11(6).

10 CPR 36.11(7).

11 Ie where a Part 36 offer (or part of a Part 36 offer) is not an offer to which CPR 36.11(6) applies.

12 CPR 36.11(8).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/18. OFFERS TO SETTLE AND PAYMENTS INTO COURT/738. Acceptance of a Part 36 offer made by one or more, but not all, defendants.

738. Acceptance of a Part 36 offer made by one or more, but not all, defendants.

Where the claimant¹ wishes to accept a Part 36 offer² made by one or more, but not all, of a number of defendants³:

779 (1) if the defendants are sued jointly or in the alternative, the claimant may accept the offer if:

80

32. (a) he discontinues his claim against those defendants who have not made the offer; and

33. (b) those defendants give written consent to the acceptance of the offer⁴;

81

780 (2) if the claimant alleges that the defendants have a several liability⁵ to him, the claimant may:

82

34. (a) accept the offer; and

35. (b) continue with his claims against the other defendants if he is entitled to do so⁶.

83

In all other cases the claimant must apply to the court for an order permitting him to accept the Part 36 offer⁷.

1 As to the meaning of 'claimant' see PARA 18.

2 As to the meaning of 'Part 36 offer' see PARA 730.

3 As to the meaning of 'defendant' see PARA 18.

4 CPR 36.12(1), (2).

5 As to the meaning of 'several liability' see PARA 822 note 8.

6 CPR 36.12(1), (3).

7 CPR 36.12(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/18. OFFERS TO SETTLE AND PAYMENTS INTO COURT/739. Restriction on disclosure of a Part 36 offer.

739. Restriction on disclosure of a Part 36 offer.

A Part 36 offer¹ will be treated as 'without prejudice'² except as to costs³.

The fact that a Part 36 offer has been made must not be communicated to the trial judge or to the judge (if any) allocated in advance to conduct the trial until the case has been decided⁴ but this does not apply:

- 781 (1) where the defence of tender before claim⁵ has been raised;
- 782 (2) where the proceedings have been stayed⁶ following acceptance of a Part 36 offer; or
- 783 (3) where the offeror and the offeree agree in writing that it should not apply⁷.

1 As to the meaning of 'Part 36 offer' see PARA 730.

2 As to the meaning of 'without prejudice' see PARA 804 note 4.

3 CPR 36.13(1).

4 CPR 36.13(2). See *HSS Hire Services Group plc v BMB Builders Merchants Ltd* [2005] EWCA Civ 626, [2005] 3 All ER 486; *Johnson v Gore Wood & Co* [2004] EWCA Civ 14, [2004] All ER (D) 248 (Jan). Where the judge becomes aware of such offer, he is obliged to determine whether justice required him to recuse himself; in reaching a decision, the judge should ask himself whether he can put the CPR Pt 36 offer out of his mind; if he can, he may consider the additional time, cost and difficulty for all concerned if the hearing were to be aborted: *Millensted v Grosvenor House (Park Lane) Ltd* [1937] 1 KB 717, [1937] 1 All ER 736; *Garratt v Saxby* [2004] EWCA Civ 341, [2004] 1 WLR 2152.

5 As to the meaning of 'defence of tender before claim' see PARA 600 note 1.

6 Ie under CPR 36.11: see PARA 737. As to the effect of a stay of proceedings see PARA 233 note 11.

7 CPR 36.13(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/18. OFFERS TO SETTLE AND PAYMENTS INTO COURT/740. Costs consequences following judgment.

740. Costs consequences following judgment.

The following provisions apply where on judgment being entered:

- 784 (1) a claimant¹ fails to obtain a judgment more advantageous than a defendant's Part 36 offer²; or
- 785 (2) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer³.

Subject to heads (A) to (C) below, where head (1) above applies, the court will, unless it considers it unjust to do so, order that the defendant is entitled to his costs from the date on which the relevant period⁴ expired; and interest on those costs⁵.

Also subject to heads (A) to (C) where head (2) above applies, the court will, unless it considers it unjust to do so, order that the claimant is entitled to:

- 786 (a) interest on the whole or part of any sum of money (excluding interest) awarded at a rate not exceeding 10 per cent above base rate⁶ for some or all of the period starting with the date on which the relevant period expired;
- 787 (b) his costs on the indemnity basis from the date on which the relevant period expired; and
- 788 (c) interest on those costs at a rate not exceeding 10 per cent above base rate⁷.

In considering whether it would be unjust to make the orders referred to above⁸, the court will take into account all the circumstances of the case including:

- 789 (i) the terms of any Part 36 offer;
- 790 (ii) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
- 791 (iii) the information available to the parties at the time when the Part 36 offer was made; and
- 792 (iv) the conduct of the parties with regard to the giving of or refusing to give information for the purposes of enabling the offer to be made or evaluated⁹.

Where the court awards interest under these provisions and also awards interest on the same sum and for the same period under any other power, the total rate of interest may not exceed 10 per cent above base rate¹⁰.

The provisions above¹¹ do not apply to a Part 36 offer:

- 793 (A) that has been withdrawn;
- 794 (B) that has been changed so that its terms are less advantageous to the offeree, and the offeree has beaten the less advantageous offer;
- 795 (C) made less than 21 days before trial, unless the court has abridged the relevant period¹².

1 As to the meaning of 'claimant' see PARA 18.

2 As to the meaning of 'Part 36 offer' see PARA 730. As to the meaning of 'defendant' see PARA 18.

3 CPR 36.14(1). As to the power under CPR 36.14(1) to adopt a broad approach and to award costs in favour of the losing party or to make no order for costs see *Carver v BAA plc* [2008] EWCA Civ 412, [2008] 3 All ER 911, [2009] 1 WLR 113.

4 As to the meaning of 'relevant period' see PARA 729 note 9.

5 CPR 36.14(2).

6 'Base rate' means the interest rate set by the Bank of England which is used as the basis for other banks' rates: CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31.

7 CPR 36.14(3).

8 Ie in CPR 36.14(2) and CPR 36.14(3).

9 CPR 36.14(4).

10 CPR 36.14(5).

11 Ie CPR 36.14(2) and CPR 36.14(3).

12 CPR 36.14(6). As to the requirement that the court consider an offer to settle that does not have the costs consequences set out in CPR Pt 36 in deciding what order to make about costs see CPR 44.3; and PARAS 1738-1741.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/18. OFFERS TO SETTLE AND PAYMENTS INTO COURT/741. Deduction of benefits and lump sum payments.

741. Deduction of benefits and lump sum payments.

The following provisions apply where a payment to a claimant¹ following acceptance of a Part 36 offer² would be a compensation payment³.

A defendant⁴ who makes a Part 36 offer should state either:

- 796 (1) that the offer is made without regard to any liability for recoverable amounts⁵; or
- 797 (2) that it is intended to include any deductible amounts⁶.

Where head (2) above applies, the following provisions will apply to the Part 36 offer⁷.

Before making the Part 36 offer, the offeror⁸ must apply for a certificate⁹. The Part 36 offer must state:

- 798 (a) the amount of gross compensation;
- 799 (b) the name and amount of any deductible amount by which the gross amount is reduced; and
- 800 (c) the net amount of compensation¹⁰.

If at the time he makes the Part 36 offer, the offeror has applied for, but not received a certificate, he must clarify the offer by stating the matters referred to in heads (b) and (c) above not more than seven days after receipt of the certificate¹¹.

Where:

- 801 (i) further deductible amounts have accrued since the Part 36 offer was made; and
- 802 (ii) the court gives permission to accept the Part 36 offer,

the court may direct that the amount of the offer payable to the offeree¹² be reduced by a sum equivalent to the deductible amounts paid to the claimant since the date of the offer¹³.

1 As to the meaning of 'claimant' see PARA 18.

2 As to the meaning of 'Part 36 offer' see PARA 730.

3 CPR 36.15(2), referring to a compensation payment as defined in the Social Security (Recovery of Benefits) Act 1997 s 1(4)(b) or 1A(5)(b) (see **DAMAGES** vol 12(1) (Reissue) PARA 904).

4 As to the meaning of 'defendant' see PARA 18.

5 CPR 36.15(3)(a). 'Recoverable amount' means 'recoverable benefits' as defined in the Social Security (Recovery of Benefits) Act 1997 s 1(4)(c); and 'recoverable lump sum payments' as defined in the Social Security (Recovery of Benefits) (Lump Sum Payments) Regulations 2008, SI 2008/1596, reg 4: CPR 36.15(1)(a)-(c).

6 CPR 36.15(3)(b). 'Deductible amount' means (1) any benefits by the amount of which damages are to be reduced in accordance with the Social Security (Recovery of Benefits) Act 1997 s 8, Sch 2 ('deductible benefits': see **DAMAGES** vol 12(1) (Reissue) PARA 904); and (2) any lump sum payment by the amount of which damages

are to be reduced in accordance with the Social Security (Recovery of Benefits) (Lump Sum Payments) Regulations 2008, SI 2008/1596, reg 12 ('deductible lump sum payments': see **DAMAGES**): CPR 36.15(1)(d).

7 CPR 36.15(4).

8 As to the meaning of 'offeror' see PARA 729 note 12.

9 CPR 36.15(5). 'Certificate' (1) in relation to recoverable benefits is construed in accordance with the provisions of the Social Security (Recovery of Benefits) Act 1997; and (2) in relation to recoverable lump sum payments has the meaning given in s 29 as applied by the Social Security (Recovery of Benefits) (Lump Sum Payments) Regulations 2008, SI 2008/1596, reg 2 and modified by Sch 1: CPR 36.15(1)(e).

10 CPR 36.15(6). For the purposes of CPR 36.14(1)(a) (see PARA 740 head (2)), a claimant fails to recover more than any sum offered (including a lump sum offered under CPR 36.5) (see PARA 732) if the claimant fails on judgment being entered to recover a sum, once deductible amounts identified in the judgment have been deducted, greater than the net amount stated under head (c) in the text: CPR 36.15(8). As to requirement that the court specify the compensation payment attributable to each head of damage see the Social Security (Recovery of Benefits) Act 1997 s 15; and **DAMAGES** vol 12(1) (Reissue) PARA 921.

11 CPR 36.15(7).

12 As to the meaning of 'offeree' see PARA 729 note 10.

13 CPR 36.15(9). As to the requirement for permission to accept an offer where the relevant period has expired and further deductible amounts have been paid to the claimant see CPR 36.9(3)(b); and PARA 735 note 6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/18. OFFERS TO SETTLE AND PAYMENTS INTO COURT/742. Money paid into court under a court order.

742. Money paid into court under a court order.

A party who makes a payment into court under a court order must (1) serve notice of the payment on every other party; and (2) in relation to each such notice, file a certificate of service¹.

¹ CPR 37.1. As to the modes of payment in see *Practice Direction--Miscellaneous Provisions About Payments into Court* PD 37 paras 1.1, 1.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/18. OFFERS TO SETTLE AND PAYMENTS INTO COURT/743. Payment out of money paid into court.

743. Payment out of money paid into court.

Money paid into court under a court order or in support of a defence of tender before claim¹ may not be paid out without the court's permission except where (1) a Part 36 offer² is accepted without needing the permission of the court³; and (2) the defendant⁴ agrees that a sum paid into court by him should be used to satisfy the offer (in whole or in part)⁵.

Where the court's permission is required, permission may be obtained by making an application in accordance with Part 23 of the Civil Procedure Rules⁶. The application notice must state the grounds on which the order for payment out is sought, and evidence of any facts on which the applicant relies may also be necessary⁷. Where the court gives permission⁸, it will include a direction for the payment out of any money in court, including any interest accrued⁹.

1 As to the meaning of 'defence of tender before claim' see PARA 600 note 1. As to the requirement of payment into court where a defendant wishes to rely on a defence of tender before claim see PARA 600.

2 As to the meaning of 'Part 36 offer' see PARA 730.

3 As to when the court's permission is required to accept a Part 36 offer see CPR 36.9; and PARA 735.

4 As to the meaning of 'defendant' see PARA 18.

5 CPR 37.3; *Practice Direction--Miscellaneous Provisions About Payments into Court* PD 37 para 3.1. Where permission is not required to take money out of court, the requesting party should file a request for payment in Court Funds Office form 201 with the Court Funds Office, accompanied by a statement that the defendant agrees that the money should be used to satisfy the Part 36 offer in Court Funds Office form 202: *Practice Direction--Miscellaneous Provisions About Payments into Court* PD 37 para 3.4. As to the details required to be given in the request for payment see para 3.5. Where para 3.4 applies, interest accruing up to the date of acceptance will be paid to the defendant: para 3.6.

6 *Practice Direction--Miscellaneous Provisions About Payments into Court* PD 37 para 3.2. As to CPR Pt 23 see PARA 303 et seq.

7 *Practice Direction--Miscellaneous Provisions About Payments into Court* PD 37 para 3.2.

8 I.e. under CPR 37.3.

9 *Practice Direction--Miscellaneous Provisions About Payments into Court* PD 37 para 3.3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/18. OFFERS TO SETTLE AND PAYMENTS INTO COURT/744. Payment into court under enactments.

744. Payment into court under enactments.

A practice direction may set out special provisions with regard to payments into court under various enactments¹.

¹ CPR 37.4. See *Practice Direction--Miscellaneous Provisions About Payments into Court* PD 37 paras 4, 5 (payment into court, and payment out, under the Life Assurance Companies (Payment into Court) Act 1896); *Practice Direction--Miscellaneous Provisions About Payments into Court* PD 37 paras 6, 7 (payment into court, and payment out, under the Trustee Act 1925); and *Practice Direction--Miscellaneous Provisions About Payments into Court* PD 37 para 8 (payment into court under Vehicular Access across Common and other Land (England) Regulations 2002, SI 2002/1711 (lapsed)).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/19. SECURITY FOR COSTS/745. Security for costs; in general.

19. SECURITY FOR COSTS

745. Security for costs; in general.

A defendant¹ to any claim² may apply³ for security for his costs of the proceedings⁴ and such an application must be supported by written evidence⁵. Where the court makes an order for security for costs, it will determine the amount of security⁶ and direct the manner⁷ in which and the time within which the security must be given⁸.

Note that when the court makes any order, it may make it subject to conditions, including the payment of a sum into court⁹; and that the court also has power to order the payment of a sum into court as a condition for continued participation in litigation when a party has been guilty of non-compliance with a rule, practice direction or relevant pre-action protocol¹⁰. Money paid into court by a party in such circumstances will stand as security for any sum payable by that party to any other party in the proceedings¹¹.

1 As to the meaning of 'defendant' see PARA 18.

2 Ie including Part 20 claims and counterclaims: see CPR 20.1; CPR 20.3; and PARAS 618-619. As to the meaning of 'Part 20 claim' see PARA 618. As to the application of CPR 25.12 to New York Convention awards see *Gater Assets Ltd v Nak Naftogaz Ukrainiy*[2007] EWCA Civ 988, [2008] 1 All ER (Comm) 209.

3 Ie under CPR 25.12-CPR 25.15: see the text and notes 4-8; and PARAS 746-748.

4 CPR 25.12(1). As to costs generally see also PARA 1729 et seq.

5 CPR 25.12(2). An order is not intended to be a weapon by which a defendant can obtain speedy summary judgment without trial: *Radu v Houston*[2006] EWCA Civ 1575, [2006] All ER (D) 295 (Nov). The court should be reluctant to award security in respect of pre-action costs: *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd*[2008] EWHC 413 (TCC), [2008] 2 All ER 1173.

6 CPR 25.12(3)(a). Where the court is not satisfied that it has a full account of the claimant's resources, it has a discretion to set an amount according to its best estimate of what the claimant can afford: *Al-Koronky v Time-Life Entertainment Group Ltd*[2006] EWCA Civ 1123, [2006] All ER (D) 447 (Jul).

7 The manner in which security is ordered to be given is usually that the amount of security be paid into court. As to the payment of money into court see CPR Pt 37; and PARA 1553 et seq.

As to the provision of security in the form of a charge over property without a bank guarantee see *AP (UK) Ltd v West Midlands Fire & Civil Defence Authority*[2001] EWCA Civ 1917, [2002] 1 CPLR 57. See also *Cie Noga D'Importation et D'Exportation SA v Abacha (as personal representatives of Sani Abacha (deceased)) (No 3)* [2003] EWCA Civ 1101, [2003] 2 All ER (Comm) 935.

8 CPR 25.12(3)(b). As to making further orders increasing the security see *Cripps v Heritage Distribution Corpn, New England International Surety Inc v Cripps* [1999] CPLR 858, (1999) Times, 10 November, CA. As to security for costs under the Companies Act 1986 s 726 see **COMPANIES** vol 14 (2009) PARA 308; and see eg *Fernhill Mining Ltd v Keir Construction Ltd* [2000] CPLR 23, CA.

9 See CPR 3.1(3); and PARA 247.

10 See CPR 3.1(5); and PARA 247.

11 See CPR 3.1(6A); and PARA 247.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/19. SECURITY FOR COSTS/746. Conditions to be satisfied.

746. Conditions to be satisfied.

The court¹ may make an order for security for costs² if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order³ and either an enactment permits the court to require security for costs⁴ or one or more of the following conditions applies⁵. Such conditions are:

- 803 (1) the claimant⁶ is resident out of the jurisdiction⁷ but not resident in a Brussels Contracting State, a Lugano Contracting State or a Regulation State⁸;
- 804 (2) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's⁹ costs if ordered to do so¹⁰;
- 805 (3) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation¹¹;
- 806 (4) the claimant failed to give his address in the claim form, or gave an incorrect address in that form¹²;
- 807 (5) the claimant is acting as a nominal claimant, other than as a representative claimant¹³, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so¹⁴;
- 808 (6) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him¹⁵.

1 As to the meaning of 'court' see PARA 22.

2 See under CPR 25.12: see PARA 745. A court may order a non-compliant party to pay money into court akin to an order for security for costs, taking into account costs incurred or to be incurred: *Olatawura v Abiloye* [2002] EWCA Civ 998, [2002] 4 All ER 903, [2003] 1 WLR 275.

3 CPR 25.13(1)(a). In deciding whether it is just to order the provision of security for costs, the court will have regard to all the relevant circumstances of the case and, in particular, whether: (1) it appears that the application is made in order to stifle a genuine claim; (2) the order will have the effect of stifling a genuine claim, even if that is not the motive for the defendant's application; (3) the application is made at a late stage, by which time the claimant will have already incurred substantial costs which might be thrown away if security were ordered and the claimant were unable to provide it; (4) any impecuniosity on the part of the claimant has been caused by the defendant as a result of the matters in issue in the claim or otherwise: see *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609, [1973] 2 All ER 273, CA. If the relative strengths of the parties' cases can be discerned without prolonged examination of voluminous evidence, the court will also have regard to the likely outcome of the case: see *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074, [1987] 1 WLR 420, CA. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2. Relevant consideration should be given to the effect of requiring payment: *CIBC Mellon Trust Co v Mora Hotel Corp NV* [2002] EWCA Civ 1688, [2003] 1 All ER 564. Where the parties have explicitly agreed that the court should not exercise its discretion to vary the amount of security for costs, the court nevertheless retains a residual discretion, which it should exercise only in wholly exceptional circumstances, to vary that agreed security: *Republic of Kazakhstan v Istil Group Inc* [2005] EWCA Civ 1468, [2006] 2 All ER (Comm) 26, [2006] 1 WLR 596. See also *Calltell Telecom Ltd v Revenue and Customs Comrs* [2008] EWHC 2107 (Ch), [2008] All ER (D) 89 (Jun) (argument that order would stifle appeal rejected). As to costs generally see also PARA 1729 et seq.

4 CPR 25.13(1)(b)(ii). As to such enactments see eg the Companies Act 1985 s 726(1), which provides that the court may order security for costs to be given by a claimant company registered under the Act if it appears, by credible testimony, that the company will be unable to pay the costs of a successful defendant; and **COMPANIES** vol 14 (2009) PARA 308; and see CPR 25.13(2)(c); and the text and note 12. See also the Arbitration Act 1996 s 38(3); and **ARBITRATION** vol 2 (2008) PARA 1248.

5 CPR 25.13(1)(b)(i).

6 As to the meaning of 'claimant' see PARA 18.

7 CPR 25.13(2)(a)(i). As to the meaning of 'jurisdiction' see PARA 117 note 6. The court must not order security for costs against an individual who is ordinarily resident outside the jurisdiction except on grounds relating to the difficulties of enforcement: *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556, [2002] 1 All ER 401, [2002] 1 WLR 1868. There is no general principle that, where a claimant residing outside the jurisdiction in a country where the Brussels Conventions and the Lugano Convention do not apply does not disclose where his assets are located, security for costs will be ordered: *Somerset-Leeke v Kay Trustees* [2003] EWHC 1243 (Ch), [2004] 3 All ER 406.

8 As defined in the Civil Jurisdiction and Judgments Act 1982 s 1(3): CPR 25.13(2)(a)(ii); see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65. See eg *De Beer v Kanaar & Co (a firm)* [2001] EWCA Civ 1318, [2002] 3 All ER 1020, [2003] 1 WLR 38 (CPR 25.13(2)(a) does not preclude the court from making an order for security for costs against an individual claimant who is not ordinarily resident in the jurisdiction or in that of a convention state, but has assets in such a state).

9 As to the meaning of 'defendant' see PARA 18.

10 CPR 25.13(2)(c). See eg *Classic Catering Ltd v Donnington Park Leisure Ltd* [2001] 1 BCLC 537. There is a critical difference between a conclusion that there is 'reason to believe' that a company will not be able to pay costs and a conclusion that this has been proved to be the case: *Jirehouse Capital v Beller* [2008] EWCA Civ 908, [2008] All ER (D) 397 (Jul).

11 CPR 25.13(2)(d). The sale of a house is a step taken in relation to assets making it difficult to enforce an order for costs: *Aoun v Bahri* [2002] EWHC 29 (Comm), [2002] 3 All ER 182.

12 CPR 25.13(2)(e). As the requirement to give an address in the claim form see PARA 585 note 6.

13 As under CPR Pt 19: see PARA 210 et seq.

14 CPR 25.13(2)(f). See eg *Farmer v Moseley (Holdings) Ltd* [2001] 2 BCLC 572, [2001] All ER (D) 16 (Jul) (no order made as claimant entitled to fruits of action).

15 CPR 25.13(2)(g). The court must be cautious in making an order for security for costs if such an order might effectively shut out a claimant from his claim being properly considered: *Chandler v Brown* [2001] All ER (D) 302 (Jul) per Park J. The claimant's intention is irrelevant for the purposes of CPR 25.13(2)(g): *Harris v Wallis* [2006] All ER (D) 158 (Mar).

UPDATE

746 Conditions to be satisfied

NOTE 10--*Jirehouse*, cited, reported at [2009] 1 WLR 751.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/19. SECURITY FOR COSTS/747. Security for costs other than from the claimant.

747. Security for costs other than from the claimant.

The defendant¹ may seek an order against someone other than the claimant², and the court³ may make an order for security for costs against that person, if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order⁴ and one or more of the following conditions applies⁵. The conditions are that the person:

- 809 (1) has assigned the right to the claim to the claimant with a view to avoiding the possibility of a costs order being made against him; or
- 810 (2) has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings,

and is a person against whom a costs order may be made⁶.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'claimant' see PARA 18.

3 As to the meaning of 'court' see PARA 22.

4 CPR 25.14(1)(a).

5 CPR 25.14(1)(b).

6 CPR 25.14(2). Under the Supreme Court Act 1981 s 51(3), persons who are not parties to the action may be liable to an order for costs against them in certain circumstances, which are wider than those prescribed by this rule: see *Aiden Shipping Co Ltd v Interbulk Ltd*, *The Vimeira* [1986] AC 965, [1986] 2 All ER 409, HL; *Symphony Group plc v Hodgson* [1994] QB 179, [1993] 4 All ER 143, CA. See also CPR 48.2, which makes provision for costs orders against non-parties and provides that a person against whom such an order is sought should be made a party to the action for such purposes; and PARA 217. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. A judge should give relevant consideration to the effect of a costs order, especially where it may in practice require that a third party make payment: *CIBC Mellon Trust Co v Mora Hotel Corpn NV* [2002] EWCA Civ 1688, [2003] 1 All ER 564. As to costs generally see also PARA 1729 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/19. SECURITY FOR COSTS/748. Security for costs of an appeal.

748. Security for costs of an appeal.

The court¹ may order security for costs of an appeal against an appellant or a respondent who also appeals, on the same grounds as it may order security for costs² against a claimant³. The court may also make an order under this provision where the appellant, or the respondent who also appeals, is a limited company and there is reason to believe it will be unable to pay the costs of the other parties to the appeal should its appeal be unsuccessful⁴.

1 As to the meaning of 'court' see PARA 22.

2 Ie under CPR Pt 25: see PARAS 745-747.

3 CPR 25.15(1). For guidance as to the exercise of this discretion see *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556, [2002] 1 All ER 401. See also *Dar International FEF Co v Aon Ltd* [2004] EWCA Civ 1833, [2004] 3 All ER 986, [2004] 1 WLR 1395.

4 CPR 25.15(2). As to security for the costs of a company see also PARA 746 note 4. As to appeals see PARA 1657 et seq. As to costs generally see also PARA 1729 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(i) In general/749. Scope of this section of the title.

20. EVIDENCE

(1) INTRODUCTION

(i) In general

749. Scope of this section of the title.

This part of the title is concerned with the general law of evidence applying in civil cases¹. There are some civil proceedings to which the strict rules of evidence do not apply² and also some proceedings which cannot be categorised as either civil or criminal and to which those rules do not apply³.

Although there are principles common to both civil and criminal evidence, there are many important distinctions between them⁴. The law of criminal evidence is dealt with elsewhere in this work⁵ but the authorities cited in this title to illustrate general principles of the law of evidence are sometimes drawn from the criminal law.

1 As to the distinction between civil and criminal proceedings see generally PARA 2.

2 Eg proceedings allocated to the small claims track (see PARAS 267, 274 et seq) and proceedings under the Children Act 1989 (see the Children Act 1989 s 96; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 228).

3 Eg proceedings in coroners' courts: see **CORONERS** vol 9(2) (2006 Reissue) PARAS 1020-1026.

4 For a discussion of the different ways in which rules of evidence may be applied in civil and criminal proceedings see *R v Christie*[1914] AC 545, HL.

5 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1359 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(i) In general/750. Evidence of witnesses; in general.

750. Evidence of witnesses; in general.

The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved, at trial, by their oral evidence given in public¹ and at any other hearing, by their evidence in writing². This is subject to any provision to the contrary contained in the Civil Procedure Rules or elsewhere³ or to any order of the court⁴.

As a specific example of the court's case management power to make use of technology⁵, a witness may be allowed to give evidence through a video link or by other means⁶.

1 CPR 32.2(1)(a).

2 CPR 32.2(1)(b) As to the ways in which evidence may be given in writing see PARA 751 et seq.

3 CPR 32.2(2)(a).

4 CPR 32.2(2)(b). As to the meaning of 'court' see PARA 22.

5 See CPR 1.4(2)(k); and PARA 246.

6 CPR 32.3. See *Rowland v Bock* [2002] EWHC 692 (QB), [2002] 4 All ER 370; *Polanski v Condé Nast Publications Ltd* [2005] UKHL 10, [2005] 1 All ER 945, [2005] 1 WLR 637; and PARA 1032. As to the use of video conferencing in relation to evidence given at trial or other hearings see *Practice Direction--Evidence* PD 32 para 29.1, Annex 3; and PARAS 1033-1035.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(i) In general/751. Evidence in proceedings other than at trial.

751. Evidence in proceedings other than at trial.

Subject as follows, the general rule is that evidence at hearings other than the trial is to be by witness statement¹ unless the court², a practice direction or any other enactment requires otherwise³. At hearings other than the trial, a party may, however, in support of his application, rely on the matters set out in his statement of case⁴ or his application notice⁵, if the statement of case or application notice is verified by a statement of truth⁶, which is a statement that the party putting the document forward believes that the facts stated in it are true⁷.

The court may give directions requiring the parties to use their best endeavours to agree a bundle or bundles of documents for use at any hearing⁸. All documents contained in bundles which have been agreed for use at a hearing are admissible at that hearing as evidence of their contents, unless (1) the court orders otherwise; or (2) a party gives written notice of objection to the admissibility of particular documents⁹.

1 A witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally: see CPR 32.4(1); and PARA 981 et seq. For a document to be a witness statement it must be verified by a statement of truth (see CPR 22.1(1)(c); and PARA 613) which is signed by the witness who makes the statement (see CPR 22.1(6)(b); and PARA 613). The statement of truth to be signed is: 'I believe that the facts stated in this witness statement are true': see CPR 22.1(4)(b); *Practice Direction--Evidence* PD 32 para 20.2; and PARA 613. As to the additional statement of truth required to be made on a report by an expert witness see CPR 35.10; and PARA 839. As to the meaning of 'expert' see PARA 791 note 10.

2 As to the meaning of 'court' see PARA 22.

3 CPR 32.6(1).

4 As to the meaning of 'statement of case' see PARA 584.

5 See Forms N244, PF244 (the latter for use in the Royal Courts of Justice) in *The Civil Court Practice* and, in particular, Pt C of those forms providing for evidence to be set out or reference to be made to other material (such as affidavits, witness statements, or statements of case) which it is intended to rely upon at the hearing of the application to which the notice relates. As to the meaning of 'affidavit' see PARA 540 note 5.

6 CPR 32.6(2). As to the requirement that statements of case must be verified by a statement of truth see CPR 22.1(1)(a); and PARA 613. To verify a statement of case the statement of truth should be set out as follows: '[I believe][the (party on whose behalf the statement of case is being signed) believes] that the facts stated in the statement of case are true': *Practice Direction--Evidence* PD 32 para 26.2. As to parties who may sign a statement of truth see PARA 613. A statement of case which is not verified by a statement of truth may not be relied on as evidence of the matters set out in it: see CPR 22.2(1)(b); and PARA 614. See also CPR 22.1(3) (if an applicant wishes to rely upon the matters set out in an application notice as evidence, it must be verified by a statement of truth); *Practice Direction--Evidence* PD 32 para 1.3; and PARA 613. See also see Forms N244, PF244 in *The Civil Court Practice* for the form of a statement of truth verifying an application notice.

7 See CPR 22.1(4); and PARA 613. If a party is conducting proceedings with a litigation friend (ie the party is a child or a protected party: see CPR Pt 21; PARA 222; and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1411 et seq) then the statement of truth is a statement that the litigation friend believes the facts stated in the document are true: see CPR 22.1(5); and PARA 613. As to who may sign the statement of truth verifying a statement of case or an application notice see CPR 22.1(6); *Practice Direction--Statements of Truth* PD 22 para 3; and PARA 613.

8 *Practice Direction--Evidence* PD 32 para 27.1.

9 *Practice Direction--Evidence* PD 32 para 27.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(ii) Purpose and Application of the Law of Evidence/752. Proof of facts.

(ii) Purpose and Application of the Law of Evidence

752. Proof of facts.

Evidence is the usual means of proving or disproving a fact or matter in issue. The law of evidence indicates what may properly be introduced by a party (that is, what is admissible), and also what standard of proof is necessary (that is, the degree of conviction or persuasion that the evidence needs to produce). In short, the law of evidence governs the means and manner in which a party may substantiate his own case, or refute that of his opponent.

To some extent, modern evidential principles still reflect the now obsolete assumption that all cases are tried by judge and jury, the former deciding on matters of admissibility, the latter deciding questions of fact by drawing the appropriate inferences from the evidence that has been admitted. While this is largely untrue in civil cases, with which this title is solely concerned¹, the distinction between admissibility of evidence and the conclusions to be drawn from it (or weight) is still fundamental to a proper understanding of the English law of evidence².

Two further principles are important. First, cases are tried solely on the evidence adduced by the parties, which may be limited as a matter of agreement or tactics³; the judge does not pursue⁴ any independent inquiry⁵. Secondly, in a minority of cases evidence may not be necessary to enable a party to establish a particular fact; there may be formal or deemed admissions⁶, what is contended for may be a matter of which judicial notice⁷ may be taken, or a presumption of sufficient strength may operate⁸.

1 See PARA 749. As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

2 As to the functions of the judge and of the tribunal of fact see PARA 795 et seq. The law of civil evidence has been the subject of significant statutory revision by the Civil Evidence Acts 1968, 1972 and 1995 (see PARAS 1088, 1208-1209, 808 et seq, 970, 974 et seq); nevertheless, many of its principles are those of nineteenth and twentieth century case law.

3 See *Henderson v Henry E Jenkins & Sons and Evans*[1970] AC 282, [1969] 3 All ER 756, HL.

4 In most civil proceedings the court has no power to call witnesses without the consent of the parties: see *Re Enoch and Zaretsky, Bock & Co's Arbitration*[1910] 1 KB 327, CA. In certain matrimonial causes the court may, if it thinks fit, make arrangements for any question to be fully argued. As to evidence in matrimonial causes see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 825 et seq.

See *Air Canada v Secretary of State for Trade (No 2)*[1983] 2 AC 394 at 438, [1983] 1 All ER 910 at 919, HL, per Lord Wilberforce ('In a contest purely between one litigant and another . . . the task of the court is to do, and be seen to be doing, justice between the parties . . . There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter; yet, if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done').

5 The judge has no discretion to include any item of legally inadmissible evidence: *Myers v DPP*[1965] AC 1001, [1964] 2 All ER 881, HL. See also PARA 755 note 2. The court has, however, a general discretion under the Civil Procedure Rules to exclude legally admissible evidence: see CPR 32.1(2); and PARA 791. Note that there are now virtually no inadmissibility rules remaining for civil proceedings.

6 As to formal admissions see PARAS 776-778. As to informal admissions which may be admitted as hearsay evidence see PARA 819.

7 As to judicial notice see PARA 779 et seq.

8 Eg of legitimacy, or death, innocence or sanity. However, in these cases it will be necessary to adduce sufficient evidence for the presumption to operate. See PARA 1096 et seq.

UPDATE

752 Proof of facts

TEXT AND NOTES--See *Markel International Insurance Co Ltd v Higgins; QBE Insurance (Europe) Ltd v Higgins*[2009] EWCA Civ 790, [2009] All ER (D) 240 (Jul).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(ii) Purpose and Application of the Law of Evidence/753. Application of the law of evidence.

753. Application of the law of evidence.

Subject to a number of exceptions and modifications, the rules of evidence¹ are binding upon all courts², and upon some tribunals of other kinds. Among the exceptions are prize courts³, coroners' courts⁴, election courts⁵, and, to some extent, ecclesiastical courts⁶. Additionally, a court may be bound by rules of evidence when sitting in one capacity, but not in another⁷; for example the strict rules of evidence do not apply to proceedings allocated to the small claims track⁸. Arbitrators are not necessarily bound by the strict rules of evidence⁹.

Justices are bound when sitting in a judicial capacity, but not when in an administrative capacity¹⁰.

1 'The rules of evidence' comprise the statutory and common law principles of the law of evidence and should be distinguished from the procedural rules relating to evidence contained in CPR Pts 32-35. As to the application of CPR Pts 32-35 see **PARA 32**. As to the rules of evidence in magistrates' courts see **MAGISTRATES**. As to modifications to the rules in the case of specialist proceedings see **PARA 757**.

2 As to what constitutes a court see **COURTS** vol 10 (Reissue) **PARA 301** et seq.

3 *The Kim, The Alfred Nobel, The Björnsternje Björnson, The Fridland* [1915] P 215; affd (1917) 116 LT 577, PC; *The Dirigo* (1919) 35 TLR 533; and see **PRIZE** vol 36(2) (Reissue) **PARA 806**.

4 See **CORONERS** vol 9(2) (2006 Reissue) para 1020.

5 See **ELECTIONS AND REFERENDUMS**.

6 *Chesney v Newsholme* [1908] P 301; *Conway v Breazley* (1831) 3 Hag Ecc 639; and see *Re St Luke's, Chelsea* [1976] Fam 295, [1976] 1 All ER 609. As to the procedure in ecclesiastical courts see **ECCLESIASTICAL LAW**.

7 The Crown Court hearing an appeal from a refusal to grant a firearms dealer's certificate is not bound by strict rules of evidence because it is then exercising its administrative function: see *Kavanagh v Chief Constable of Devon and Cornwall* [1974] QB 624, [1973] 3 All ER 657, DC; affd [1974] QB 624 at 631, [1974] 2 All ER 697, CA. See also *R v Crown Court at Aylesbury, ex p Farrer* (1988) Times, 9 March, CA.

8 See CPR 27.8(3); and **PARA 279**. As to cases allocated to the small claims track see **PARAS 267, 274** et seq.

9 As to the rules governing arbitration see **ARBITRATION**. The Bankers' Books Evidence Act 1879 applies to arbitrations: see s 10; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) **PARAS 908, 911**. See also **PARA 939**.

10 *Boulter v Kent Justices* [1897] AC 556, HL; and see **MAGISTRATES**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(ii) Purpose and Application of the Law of Evidence/754. Other tribunals.

754. Other tribunals.

There are a wide variety of tribunals. Whether a particular tribunal is bound by the rules of evidence¹ depends upon the interpretation of the provisions which constitute or regulate it². Tribunals which are to a great extent bound by the rules include the Commissioners of Income Tax³, the Solicitors Disciplinary Tribunal⁴, electoral registration officers hearing claims and objections to registrations in lists of electors⁵, an investigation committee, a fitness to practise panel or an interim orders panel of the General Medical Council⁶ (to some extent) and, normally, the Lands Tribunal⁷. A tribunal may have only some of these powers, such as the right to summon witnesses or to take evidence on oath, and the exercise of a power may be discretionary⁸. Some tribunals, such as appeal tribunals under the social security legislation⁹, are not bound by the rules of evidence, and any tribunal acting under statutory authority is entitled to act on any material which is logically probative unless the statute indicates to the contrary¹⁰. There are cases where there is express provision to allow evidence otherwise inadmissible, such as in relation to Pensions Appeal Tribunals¹¹ and Agricultural Land Tribunals¹². Many statutory tribunals have their own rules of evidence as part of the statutory rules or regulations governing their practice and procedure¹³.

1 See PARA 753 note 1.

2 Consideration of the legislation may show that proceedings were intended to be informal and that the tribunal can proceed without evidence according to law (and may lack the power to summon witnesses or administer an oath, as is the case with rent tribunals): see *R v Brighton and Area Rent Tribunal, ex p Marine Parade Estates (1936) Ltd* [1950] 2 KB 410, [1950] 1 All ER 946, DC; *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Zerek* [1951] 2 KB 1, [1951] 1 All ER 482, DC; *R v Paddington North and St Marylebone Rent Tribunal, ex p Perry* [1956] 1 QB 229, [1955] 3 All ER 391, DC.

3 As to evidence on appeals before the general and special commissioners see the Taxes Management Act 1970 s 50; and **INCOME TAXATION** vol 23(2) (2002 Reissue) PARA 1763. Special commissioners hearing appeals have the same powers as general commissioners: see Pt I (ss 1-6) and Pt V (ss 44-58); and **INCOME TAXATION**.

4 Proceedings before this body are legal proceedings within the meaning of the Bankers' Books Evidence Act 1879 s 10: see PARA 939; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 908, 911. The Civil Evidence Act 1968 and the Civil Evidence Act 1995 apply in relation to proceedings before the tribunal as they apply in relation to civil proceedings: Solicitors (Disciplinary Proceedings) Rules 2007, SI 2007/3588, r 13. Whether the proceedings can properly be described as quasi-criminal or not, there is nothing in the statutes or rules which binds the tribunal to the rules of criminal law: see *Re A Solicitor* [1945] KB 368, [1945] 1 All ER 445, CA. See further **LEGAL PROFESSIONS** vol 66 (2009) PARA 913.

5 As to the application of the rules of evidence in election courts see **ELECTIONS AND REFERENDUMS**.

6 See eg the General Medical Council (Fitness to Practise) Rules 2004 r 34 (set out in the General Medical Council (Fitness to Practise) Rules Order of Council 2004, SI 2004/2608, Schedule). See further **MEDICAL PROFESSIONS**.

7 The transfer of jurisdiction to the tribunal does not affect any provision relating to evidence: Lands Tribunal Act 1949 s 7(1) (amended by the Land Compensation Act 1961 s 40(3), Sch 5). As to evidence before the Lands Tribunal see generally the Lands Tribunal Rules 1996, SI 1996/1022, r 33. Nothing in the Civil Evidence Act 1972, or in rules of court made under it, prevents expert evidence from being given before the tribunal by any party even if no application has been made to the tribunal for a direction as to the disclosure of that evidence to any other party to the proceedings: Lands Tribunal Rules 1996, SI 1996/1022, r 33(4). See further **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq. As to expert evidence see PARA 835 et seq.

8 Eg the giving of evidence on oath before disciplinary committees of agricultural marketing boards: see **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1099. Similar powers and discretions exist in

respect of tribunals holding inquiries to which the Local Government Act 1972 s 250 is applied: see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 600, 777; **LOCAL GOVERNMENT** vol 69 (2009) PARA 105. Tribunals having no statutory powers are unable to summon witnesses or administer oaths, and their proceedings are not bound by rules of evidence, unless their rules or usage indicate to the contrary. As to the observance of the rules of natural justice in their proceedings see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 13; **JUDICIAL REVIEW** vol 61 (2010) PARA 629 et seq.

9 For the procedural rules regarding these tribunals which are not explicit with regard to evidence see **SOCIAL SECURITY AND PENSIONS**.

10 *TA Miller Ltd v Ministry of Housing and Local Government* [1968] 2 All ER 633, [1968] 1 WLR 992, CA.

11 See the Pensions Appeals Tribunals (England and Wales) Rules 1980, SI 1980/1120, r 12(5).

12 See the Agricultural Land Tribunals (Rules) Order 2007, SI 2007/3105, art 2, Schedule r 23(6). Questions of law may be referred to the High Court under r 37. See further **AGRICULTURAL LAND** vol 1 (2008) PARA 670 et seq.

13 See eg the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, SI 2004/1861, reg 16, Sch 1 r 14(2); and **EMPLOYMENT**. The practice and procedure of specialist tribunals, and the rules of evidence therein, are discussed elsewhere in this work in the titles dealing with the substantive law relevant to such tribunals.

UPDATE

754 Other tribunals

TEXT AND NOTE 7--Reference to the Lands Tribunal is now to the Upper Tribunal: Lands Tribunal Act 1949 s 7(1); SI 1996/1022 r 33 (amended by SI 2009/1307).

NOTE 11--SI 1980/1120 revoked: SI 2008/2683.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(ii) Purpose and Application of the Law of Evidence/755. Law of the forum.

755. Law of the forum.

In courts in England and Wales, domestic rules of evidence are applied¹ and the courts have no power to depart from this principle² except to the extent that statute so provides³.

¹ See *Bain v Whitehaven and Furness Junction Rly Co and Forbes* (1850) 3 HL Cas 1; *Hamlyn & Co v Talisker Distillery* [1894] AC 202, HL.

² *Baerlein v Chartered Mercantile Bank* [1895] 2 Ch 488, CA. Thus, if it is wished to prove a foreign document in an English court, even if by the law of its country of origin the document could be proved by the production of a copy, it cannot be so proved in England unless the circumstances are such that it is admissible under English law: *Brown v Thornton* (1837) 6 Ad & El 185; *Clark v Mullick* (1840) 3 Moo PCC 252. As to documents and their admissibility under English law see PARA 864 et seq. See also the Private International Law (Miscellaneous Provisions) Act 1995 s 14(3)(b); and **CONFLICT OF LAWS**.

³ See eg the Evidence (Proceedings in Other Jurisdictions) Act 1975 ss 2, 3(1)(b); PARAS 1058, 1061; and *Desilla v Fells & Co* (1879) 40 LT 423; the Insolvency Act 1986 s 426(5); *England v Smith* [2001] Ch 419, [2000] 2 BCLC 21, CA; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(ii) Purpose and Application of the Law of Evidence/756. Content and application of Parts 32 to 35 of the Civil Procedure Rules.

756. Content and application of Parts 32 to 35 of the Civil Procedure Rules.

Parts 32 to 35 of the Civil Procedure Rules ('CPR') contain rules about evidence. Part 32 contains rules about the court's general power to control evidence¹ and general rules about witness evidence² and is supplemented by a practice direction about written evidence³. Part 33 contains miscellaneous rules about evidence, including rules about the introduction of hearsay evidence under the Civil Evidence Act 1995⁴ and is supplemented by a brief practice direction⁵. Part 34 and its supplementary practice directions contain rules about witnesses, depositions and evidence for foreign courts⁶; and Part 35 and its supplementary practice direction contain rules about expert witnesses and assessors⁷.

The general application of the CPR is discussed elsewhere in this title⁸. Although they do not apply to most proceedings in the Family Division of the High Court or in family courts⁹, Part 35 applies to proceedings for ancillary relief¹⁰ and the CPR apply generally to committal applications¹¹, to proceedings in the Family Division which invoke the jurisdiction of the High Court to grant declarations as to the best interests of incapacitated adults¹² and to appeals to the Court of Appeal in family cases¹³. Evidence in family proceedings is discussed in detail elsewhere in this work¹⁴.

Except for the court's general power to control evidence¹⁵, Part 32 of the CPR does not apply to cases allocated to the small claims track¹⁶. Part 33 does not apply to such cases¹⁷ and the application to them of Part 35 is limited¹⁸. Part 34 does, however, apply to such cases, except to the extent that a rule limits such application¹⁹.

1 See CPR 32.1; and PARA 791.

2 See CPR 32.2-32.19; and PARAS 777-778, 981 et seq.

3 See *Practice Direction--Evidence* PD 32; and PARA 981 et seq.

4 See CPR 33.1-33.9; and PARA 808 et seq.

5 See *Practice Direction--Civil Evidence Act 1995* PD 33; and PARA 806.

6 See CPR 34.1-34.24; *Practice Direction--Depositions and Court Attendances by Witnesses* PD 34A; *Practice Direction--Fees for Examiners of the Court* PD 34B; and PARA 992 et seq.

7 See CPR 35.1-35.15; *Practice Direction--Experts and Assessors* PD 35; and PARA 838 et seq.

8 See PARA 32.

9 See PARA 32 heads (5)-(6) in the text.

10 See CPR 35.1-CPR 35.14 (with appropriate modifications), except CPR 35.5(2) and CPR 35.8(4)(b): see the Family Proceedings Rules 1991, SI 1991/1247, r 2.61C (added by SI 1999/3491); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 932.

11 See *Practice Direction* [2001] 2 All ER 704, sub nom *Practice Direction (Family Proceedings: Committal)* [2001] 1 WLR 1253.

12 See *Practice Direction (declaratory proceedings: incapacitated adults)* [2002] 1 All ER 794, [2002] 1 WLR 325, Fam D.

13 See **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 737. For the purpose only of appeals to the Court of Appeal from cases in family proceedings, *Practice Direction--Appeals* PD 52 will apply with such modifications as may be required: para 2.2. As to civil appeals to the Court of Appeal generally see PARA 1701 et seq.

14 See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 228-229; **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

15 Ie CPR 32.1: see PARA 791.

16 CPR 27.2(1)(c). As to cases allocated to the small claims track see PARAS 267, 274 et seq.

17 CPR 27.2(1)(d).

18 See CPR 27.2(1)(e). Only the following rules contained in CPR Pt 35 apply: CPR 35.1 (duty to restrict expert evidence: see PARA 791); CPR 35.3 (experts--overriding duty to the court: see PARA 848); CPR 35.7 (court's power to direct that evidence is to be given by single joint expert: see PARA 840); and CPR 35.8 (instructions to a single joint expert: see PARA 847): CPR 27.2(1)(e).

19 CPR 27.2(2). The court of its own initiative may order a party to provide further information if it considers it appropriate to do so: CPR 27.2(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(ii) Purpose and Application of the Law of Evidence/757. Evidence in specialist proceedings.

757. Evidence in specialist proceedings.

Where the Civil Procedure Rules ('CPR') do not apply in particular categories of proceedings, for example in most family proceedings¹, rules of court will make provision for the manner in which evidence may be adduced and for the extent to which the strict rules of evidence will apply². In other categories of proceedings, for example Admiralty, commercial and mercantile proceedings, the provisions in the CPR may be supplemented by additional rules of court and practice directions³ and by the guides to proceedings in particular civil courts⁴.

These particular provisions are discussed elsewhere in this work in the titles dealing with the relevant substantive law⁵.

¹ See PARA 32 text and note 13.

² See eg the Family Proceedings Rules 1991, SI 1991/1247; and **CHILDREN AND YOUNG PERSONS; MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

³ See eg CPR 58.14 (disclosure of ship's papers in commercial proceedings relating to a marine insurance policy); *Practice Direction--Commercial Court* PD 58 paras 13.1-13.4 (evidence for applications in the commercial court); *Practice Direction--Mercantile Courts* PD 59 paras 9.1-9.4 (evidence for applications in mercantile courts); CPR 61.13 (assessors in certain Admiralty claims); CPR 62.15(7) (filing of evidence in certain arbitration claims); *Practice Direction--Arbitration* PD 62 paras 7.1-7.3 (securing attendance of witnesses in arbitral proceedings).

⁴ See eg *The Admiralty and Commercial Courts Guide* (7th Edn, 2006) para H1.1 (witness statements in Admiralty and commercial proceedings). Court guides are published giving guidance for proceedings in the Admiralty and Commercial Courts, the Chancery Division, the Queen's Bench Division, mercantile courts, the Patents Court and the Supreme Court Costs Office. At the date at which this title states the law, these guides were available at www.hmcourts-service.gov.uk. As to the status of such court guides see PARA 16. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

⁵ See eg **SHIPPING AND MARITIME LAW; ARBITRATION; BANKRUPTCY AND INDIVIDUAL INSOLVENCY; CHILDREN AND YOUNG PERSONS; COMPANIES; CONTRACT; INSURANCE; MATRIMONIAL AND CIVIL PARTNERSHIP LAW; PATENTS AND REGISTERED DESIGNS**.

UPDATE

757 Evidence in specialist proceedings

NOTE 4--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para H1.1-H1.3. Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(iii) Relevance and Admissibility/758. In general.

(iii) Relevance and Admissibility

758. In general.

The prime requirement of anything sought to be admitted in evidence is that it is of sufficient relevance¹. What is relevant (namely what goes to the proof or disproof of a matter in issue) will be decided by logic and human experience, and facts may be proved directly or circumstantially². Exclusionary rules³ may, however, provide that certain kinds of evidence are inadmissible notwithstanding that they may be logically relevant⁴. Admissible evidence is thus that which is (1) relevant; and (2) not excluded by any rule of law or practice. It may be that an item of evidence is admissible on one ground and inadmissible on others; if so, it will be admitted⁵. Evidence may also be admissible for one purpose and not for another⁶.

The court has a general discretionary power to control evidence⁷ and this includes the power to exclude evidence even if it is admissible⁸. Disputes about the admissibility of evidence in civil proceedings should be dealt at the substantive hearing rather than at a preliminary hearing⁹.

1 See *Hollington v F Hewthorn & Co Ltd*[1943] KB 587, [1943] 2 All ER 35, CA; and *R v Turner*[1975] QB 834, [1975] 1 All ER 70, CA; *Computer Machinery Co Ltd v Drescher*[1983] 3 All ER 153, [1983] 1 WLR 1379; and see *Stephen's Digest of the Law of Evidence* (12th Edn) art 1. A fact may be relevant to an issue, or to the weight to be afforded to evidence, or to the admissibility of other evidence. Evidence of a settled personal injury claim following one accident is admissible in a subsequent personal injury claim following another accident as it is relevant to the inquiry as to what injury was suffered in the accident concerned: *Murrell v Healy*[2001] EWCA Civ 486, [2001] 4 All ER 345. See *Raja v Hoogstraten*[2005] EWHC 2890 (Ch), [2005] All ER (D) 264 (Dec) (significance of criminal proceedings).

The test of relevance applies to hearsay evidence admitted under the Civil Evidence Act 1995: see PARA 808 et seq.

2 See *Caswell v Powell Duffryn Associated Collieries Ltd*[1940] AC 152, [1939] 3 All ER 722, HL. There is also an important distinction between admissibility and weight; evidence may be admissible but of little cogency and value, and therefore of little use.

3 Exclusionary rules render types or classes of evidence (eg hearsay) inadmissible: see further PARA 760. In addition, the court may hold, in a particular case, that a specific piece of evidence is inadmissible on grounds of eg lack of sufficient relevance, or unfairness.

4 See *R v Bond*[1906] 2 KB 389, CCR.

5 *R v Bond*[1906] 2 KB 389, CCR; *R v Gebree*(1974) Times, 8 June, CA. Items of evidence otherwise inadmissible may sometimes be admitted as part of the *res gestae*: see PARAS 759, 1066.

6 *Berry v St Marylebone Borough Council*[1958] Ch 406, [1957] 3 All ER 677, CA (evidence of an organisation's activities admissible to show which object in its constitution was the main one, but not to construe constitution itself); see also *North of England Zoological Society v Chester RDC*[1959] 3 All ER 116, [1959] 1 WLR 773, CA; and *BOC Ltd v Instrument Technology Ltd*[2001] EWCA Civ 854, [2002] QB 537, [2001] All ER (D) 53 (Jun) (evidence obtained by letter of request from prosecuting authority restricted to criminal proceedings).

7 See CPR 32.1; and PARA 791. Relevant evidence obtained by unlawful means can be included, although the court's disapproval of such means can be reflected in any order for costs it makes: *Jones v University of Warwick*[2003] EWCA Civ 151, [2003] 3 All ER 760, [2003] 1 WLR 954 (secret video recordings admissible).

8 See eg *Grobelaar v Sun Newspapers Ltd*(1999) Times, 12 August, CA.

9 *Stroude v Beazer Homes Ltd*[2005] EWCA Civ 265, [2005] All ER (D) 298 (Mar)

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(iii) Relevance and Admissibility/759. The *res gestae*.

759. The *res gestae*.

Items of evidence are sometimes said to be part of the *res gestae*¹, owing to the nature and strength of their connection with the matters in issue, and as such are admissible. 'Res gestae' is an expression mainly of utility in the criminal law concerning the contemporaneity of statements to incidents² but, in so far as contemporaneous statements are relevant and accompany and explain matters in issue, they will be admissible³. Such statements are now admissible as hearsay evidence under the Civil Evidence Act 1995⁴.

1 The expression '*res gestae*' was used by Lord Denman in *Rouch v Great Western Rly Co* (1841) 1 QB 51 at 60; see PARA 1066. See further *Ratten v R* [1972] AC 378, [1971] 3 All ER 801, PC.

2 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1530.

3 See PARA 1066. Facts which are not sufficiently connected to matters in issue are sometimes described as *res inter alios acta*: see *Hyde v Palmer* (1863) 32 LJB 126; *Wright v Tatham* (1838) 5 Cl & Fin 670, HL; *Agassiz v London Tramway Co Ltd* (1872) 21 WR 199. Any fact forming part of a transaction being inquired into is sufficiently connected with it to be provable, even though it is not itself in issue: *R v Ellis* (1826) 6 B & C 145; *Carmarthen and Cardigan Rly Co v Manchester and Milford Rly Co* (1873) LR 8 CP 685.

4 See PARA 808 et seq. See also PARA 825.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(iii) Relevance and Admissibility/760. Exclusionary rules.

760. Exclusionary rules.

There are a number of exclusionary rules of evidence which may be said to be based substantially on two grounds. First, there are situations in which public policy requires that evidence be inadmissible¹. Secondly, there are situations in which the admission of evidence is subject to specified conditions or safeguards², or where the leave of the judge is required and is not forthcoming³.

1 See PARA 574 et seq. Illegally obtained evidence is not necessarily inadmissible: see PARA 765.

2 As to the statutory safeguards with regard to hearsay evidence see PARAS 811-815.

3 Eg the permission of the court is required where a party who has failed to disclose an expert's report wishes to rely on it: see CPR 35.13; and PARA 856.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(iii) Relevance and Admissibility/761. The residue of the best evidence rule.

761. The residue of the best evidence rule.

That evidence should be the best that the nature of the case will allow¹ is, besides being a matter of obvious prudence, a principle with a considerable pedigree². However, any strict interpretation of this principle has long been obsolete, and the rule is now only of importance in regard to the primary evidence of private documents³. The logic of requiring the production of an original document where it is available rather than relying on possibly unsatisfactory copies, or the recollections of witnesses, is clear⁴, although modern techniques make objections to the first alternative less strong. When a deed has superseded a written agreement it must be produced⁵. The best evidence rule does not apply to cases in which the issue concerns the state of a chattel, such as the correspondence of the bulk of goods to a sample, and the chattel need not be produced⁶.

Where a party has served⁷ a witness statement and wishes to rely at trial on the evidence of the witness who made the statement, he must generally call the witness to give oral evidence⁸.

1 See *Omychund v Barker* (1745) 1 Atk 21 at 49 per Lord Hardwicke.

2 *MacDonnell v Evans* (1852) 11 CB 930; *Twyman v Knowles* (1853) 22 LJCP 143; *R v Francis* (1874) LR 2 CCR 128; *Lucas v Williams & Sons* [1892] 2 QB 113, CA; *Brewster v Sewell* (1820) 3 B & Ald 296; *Strother v Barr* (1828) 5 Bing 136; *Jones v Tarleton* (1842) 9 M & W 675.

3 *Garton v Hunter* [1969] 2 QB 37, [1969] 1 All ER 451, CA; but see *R v Osbourne*, *R v Virtue* [1973] QB 678, [1973] 1 All ER 649, CA; *R v Quinn*, *R v Bloom* [1962] 2 QB 245, [1961] 3 All ER 88, CCA; and see PARA 878. As to proof of statements contained in a document see the Civil Evidence Act 1995 s 8; and PARA 816.

4 *Permanent Trustee Co of New South Wales v Fels* [1918] AC 879, PC.

5 *Williams v Morgan* (1850) 15 QB 782.

6 *R v Francis* (1874) LR 2 CCR 128 (non-production of the article may afford ground for observation more or less weighty, according to circumstances, but this only goes to weight, not to admissibility, of the evidence); *Hocking v Ahlquist Bros Ltd* [1944] KB 120, [1943] 2 All ER 722, DC; applied in *Miller v Howe* [1969] 3 All ER 451, [1969] 1 WLR 1510, DC. See also *R v Orrell* [1972] RTR 14, CA.

7 As to the meaning of 'service' see PARA 138 note 2. As to the application of the CPR see PARA 32. As to service see generally PARA 138 et seq.

8 See CPR 32.5(1); and PARA 983.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(iii) Relevance and Admissibility/762. Secondary evidence.

762. Secondary evidence.

In the unavoidable absence of the best or primary evidence of documents, the court will accept secondary evidence. This is evidence which suggests, on the face of it, that other and better evidence exists¹. Public and judicial documents² are usually proved by copies, without accounting for the absence of the originals³; and a statement contained in any document may now be proved by the production of an authenticated copy of the document⁴.

1 It has been said that a party tendering secondary evidence ought to show that he is unable to obtain the best evidence: *Lucas v Williams & Sons* [1892] 2 QB 113 at 116, CA, per Lord Esher MR. However, this doctrine is now of limited application: see PARA 761 the text and note 3. Secondary evidence may well have less weight than primary evidence.

2 See PARAS 884-885. As to private documents see PARA 878 et seq.

3 The admission of documentary copies is subject to the Civil Evidence Act 1995: see PARA 808 et seq.

4 See the Civil Evidence Act 1995 s 8; and PARA 816.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(iii) Relevance and Admissibility/763. How secondary evidence may be given.

763. How secondary evidence may be given.

There are no degrees¹ of secondary evidence, and once it has been shown that, for example, a private document cannot be produced for reasons which admit the giving of secondary evidence², the contents may be proved by any type of secondary evidence, for example by the production of a copy which can be proved to have been correctly made from the original³, a counterpart⁴ or a draft⁵, by sworn oral testimony as to the contents of the document⁶, or as authorised by statute⁷. Statements of a deceased person as to the contents of documents may also be admissible⁸.

1 *Brown v Woodman* (1834) 6 C & P 206; *Doe d Gilbert v Ross* (1840) 7 M & W 102; *Hall v Ball* (1841) 3 Man & G 242; *Waldy v Gray* (1875) LR 20 Eq 238.

2 As to secondary evidence of private documents see PARA 878 et seq.

3 *Waldy v Gray* (1875) LR 20 Eq 238; *Permanent Trustee Co of New South Wales v Fels* [1918] AC 879, PC; *Clark v Capp* (1824) 1 C & P 199 (copy of card); *Johnson v Hudson and Morgan* (1836) 7 Ad & El 233n (copy of song); *Sturge v Buchanan* (1839) 10 Ad & El 598 (copy of letter in letter book); *R v Robinson* [1917] 2 KB 108, CCA (copy made by prison authorities of letter written by prisoner admissible, where original had been destroyed by recipient, on proof of that destruction); *R v Haines* (1695) Skin 584; *Everingham v Roundell* (1838) 2 Mood & R 138; *Waldy v Gray* (1875) LR 20 Eq 238 (copy of a copy inadmissible). But *Lafone v Griffin* (1909) 25 TLR 308 is authority for the proposition that a copy of a copy can be admissible; and see *R v Collins* (1960) 44 Cr App Rep 170, CCA, where the court found it unnecessary to come to any final conclusion on the matter but could see no objection to a copy of a copy being produced, provided a witness could verify not only that the copy produced was a true copy of the original, but also that it was in the same terms as the original. A copy examined with a draft, but with the draft itself not having been examined with the original, is inadmissible: *Re Halifax Commercial Banking Co Ltd and Wood* (1898) 79 LT 183; affd 79 LT 536, CA. A written statement containing extracts from original notes was admitted in *R v Cheng* (1976) 63 Cr App Rep 20, CA.

4 *Ludlam d Hunt* (1774) Lofft 362; *Doe d Earl of Egremont v Pulman* (1842) 3 QB 622; *Houghton v Koenig* (1856) 18 CB 235; *R v Hinckley Overseers* (1863) 3 B & S 885; *Barber v Rowe* [1948] 2 All ER 1050, CA.

5 *Waldy v Gray* (1875) LR 20 Eq 238.

6 *Leyfield's Case* (1611) 10 Co Rep 88a; *Ludlam d Hunt* (1774) Lofft 362; *Read v Price* [1909] 2 KB 724, CA.

7 See the Civil Evidence Act 1995 s 8; and PARA 816.

8 I.e. the statements may be within the terms of the Civil Evidence Act 1995: see PARA 808 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(iii) Relevance and Admissibility/764. Hearsay.

764. Hearsay.

Hearsay evidence is evidence given by a witness in court of a statement made by some other person out of court, when such evidence is tendered to prove the truth of the statement¹. Under the common law hearsay evidence was generally inadmissible²; but in civil proceedings this rule has been abolished by the Civil Evidence Act 1995³, which provides for the admissibility of hearsay evidence subject to statutory safeguards⁴, and preserves a number of common law exceptions to the rule against hearsay⁵.

1 See PARA 806. Evidence is not hearsay when only tendered for other reasons, eg to show that a statement was made.

2 See eg *R v Sharp* [1988] 1 All ER 65, [1988] 1 WLR 7, HL; *R v Kearley* [1992] 2 AC 228, [1992] 2 All ER 345, HL.

3 See the Civil Evidence Act 1995 ss 1-7; and PARA 808 et seq.

4 See the Civil Evidence Act 1995 ss 2-4; CPR Pt 33; and PARAS 811-815.

5 See the Civil Evidence Act 1995 s 7; and PARA 819 et seq. As to hearsay in criminal cases see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1519 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(iii) Relevance and Admissibility/765. Evidence wrongfully obtained.

765. Evidence wrongfully obtained.

The court has a duty to reject evidence which is not relevant and admissible¹. In civil proceedings, the fact that relevant evidence has been improperly or illegally obtained does not necessarily render it inadmissible² but the authorities must now be read in the light of the Convention rights given greater weight in domestic law by the Human Rights Act 1998³ and in the light of the court's general discretionary power to exclude evidence⁴. The person who has wrongfully obtained such evidence may be restrained from using it by proceedings promoted by the owner of the evidence so obtained⁵.

1 *Shaw v Roberts* (1818) 2 Stark 455.

2 *Kuruma Son of Kaniu v R* [1955] AC 197, [1955] 1 All ER 236, PC (unlawful search); applied in *R v Fox* [1986] AC 281, sub nom *Fox v Chief Constable of Gwent* [1985] 3 All ER 392, HL. See also *Jeffrey v Black* [1978] QB 490, [1978] 1 All ER 555, DC (evidence obtained by police without proper authority admissible); *King v R* [1969] 1 AC 304, [1968] 2 All ER 610, PC (warrant not authorising search of appellant); *Ghani v Jones* [1970] 1 QB 693, [1969] 3 All ER 1700, CA; *Stockfleth v De Tastet* (1814) 4 Camp 10 (improper examination in bankruptcy proceedings); see also *Robson v Alexander* (1828) 1 Moo & P 448. As to the examination of debtors in bankruptcy proceedings see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 291 et seq. In criminal cases the court has a discretion to exclude such evidence under the Police and Criminal Evidence Act 1984 s 78: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1365. As to the irrelevance of how a plaintiff (now known as a 'claimant': see PARA 18) came into possession of an indictment in cases of malicious prosecution (see **TORT**) see *Jordan v Lewis* (1740) 2 Stra 1122; *Legatt v Tollervey* (1811) 14 East 302; *Caddy v Barlow* (1827) 1 Man & Ry KB 275; *Doe d Earl of Egremont v Date* (1842) 3 QB 609; and see *R v Leatham* (1861) 3 E & E 658. See also *Jones v Owens* (1870) 34 JP 759; *Elias v Pasmore* [1934] 2 KB 164 (unauthorised search); *King v R* [1969] 1 AC 304, [1968] 2 All ER 610, PC (unauthorised search); *International Electronics Ltd v Weigh Data Ltd* [1980] FSR 423; *ITC Film Distributors v Video Exchange Ltd* [1982] Ch 431, [1982] 2 All ER 241 (party to litigation improperly obtaining documents brought into court by other party; copies of documents not admissible except where exhibited to affidavit seen by judge).

3 See generally PARA 792. See also *Jones v University of Warwick* [2003] EWCA Civ 151, [2003] 3 All ER 760.

4 See PARA 791.

5 *Lord Ashburton v Pape* [1913] 2 Ch 469, CA. This case is also authority for the proposition that a copy of a document may be given in evidence as secondary evidence of an original document which cannot be tendered by reason of private privilege, even though the copy was improperly obtained; see *Lloyd v Mostyn* (1842) 10 M & W 478; *Calcraft v Guest* [1898] 1 QB 759, CA. However, the intention to use copies is no answer to a claim for delivery up of copies or restraint from disclosure: *Goddard v Nationwide Building Society* [1987] QB 670, [1986] 3 All ER 264, CA; see also *English and American Insurance Co Ltd v Herbert Smith & Co* [1988] FSR 232; *Derby & Co Ltd v Weldon (No 8)* [1990] 3 All ER 762, [1991] 1 WLR 73, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(iv) Weight of Evidence/766. Weight of evidence; in general.

(iv) Weight of Evidence

766. Weight of evidence; in general.

The weight to be given to a particular item of evidence is a matter of fact which will be decided, largely on the basis of common sense¹, in the light of the circumstances of the case² and of the views formed by the jury (or judge where there is no jury) on the reliability and credibility of the witnesses and exhibits. Frequently, a conclusion on the facts will decide a case one way or another, and the burden of proof has no part to play in the resolution of evidential conflict³, although it may be the determining factor if evidence is non-existent or evenly balanced⁴.

¹ *Lord Advocate v Lord Blantyre*(1879) 4 App Cas 770, HL. Unchallenged evidence need not necessarily be accepted: *O'Connell v Adams* [1973] RTR 150, DC.

² A variety of considerations pertinent to the weight of evidence are set out in the Civil Evidence Act 1995 s 4(2), in relation to admissible hearsay evidence: see PARA 815.

³ *Robins v National Trust Co Ltd*[1927] AC 515, PC; *North of Scotland Hydro-Electric Board v David MacBrayne Ltd* [1954] 1 Lloyd's Rep 171; *Huyton-with-Roby UDC v Hunter*[1955] 2 All ER 398, [1955] 1 WLR 603, CA. As to whether conclusions or inferences of fact are themselves facts see *Lord Luke of Pavenham v Minister of Housing and Local Government*[1968] 1 QB 172, [1967] 2 All ER 1066, CA (a case on the inspector's conclusions in town and country planning appeals), and *Re Barrell Enterprises*[1972] 3 All ER 631, [1973] 1 WLR 19, CA (no room for a distinction between what is found by inference and what is found as a positive fact).

⁴ See PARA 769. It would be rarely that a road traffic accident case will fall into the exceptional category where a judge is unable to make a decision on the evidence as to the liability of the parties: *Cooper v Floor Cleaning Machines Ltd*[2003] EWCA Civ 1649, [2004] RTR 254, (2003) Times, 24 October. There is no principle of law that expert evidence in an unusual field has to be dispositive of liability in a case and that a judge is compelled to accept it over the evidence of honest witnesses of fact: *Armstrong v First York Ltd* [2005] EWCA Civ 277, [2005] 1 WLR 2751. See also *Stephens v Cannon*[2005] EWCA Civ 222, [2006] RVR 126 (judge ought to have been able arrive at probable value of hypothetical property).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(iv) Weight of Evidence/767. Prima facie, sufficient and conclusive evidence.

767. Prima facie, sufficient and conclusive evidence.

Some statutes provide that a fact or document or procedure is to be prima facie, sufficient or conclusive evidence of some other fact or matter¹; and it is open to parties to a contract to insert similar terms².

'Prima facie evidence' means evidence which, if not balanced or outweighed by other evidence, would suffice to establish a particular contention³. 'Sufficient evidence' usually means no more than prima facie evidence⁴, but the matter is always one of interpretation of the particular statute or document. 'Conclusive evidence'⁵ means that no contrary evidence will be effective to displace it⁶, unless the so-called conclusive evidence is inaccurate on its face, or fraud can be shown⁷. Conclusive evidence does not mean exclusive evidence⁸.

1 See eg the Social Security Contributions and Benefits Act 1992 s 103(5), Sch 6 para 2 in respect of disablement; and **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 142. See also *R v National Insurance Comr, ex p Viscusi* [1974] 2 All ER 724, [1974] 1 WLR 646, CA. Where a subsisting conviction is admissible as evidence in civil proceedings to prove, where relevant, that a person has committed an offence, he is taken to have committed the offence unless the contrary is proved: see the Civil Evidence Act 1968 s 11(1), (2)(a); and PARA 1208. This has the effect of shifting the legal burden of proof (see PARA 769) onto the person seeking to upset the effect of that evidence; and the civil burden, ie the balance of probabilities, must be discharged: *Wauchope v Mordecai* [1970] 1 All ER 417, [1970] 1 WLR 317, CA; *Stupple v Royal Insurance Co Ltd* [1971] 1 QB 50, [1970] 3 All ER 230, CA; *Taylor v Taylor (Taylor intervening, Holmes cited)* [1970] 2 All ER 609, [1970] 1 WLR 1148, CA.

2 In the absence of fraud or inaccuracy this is not contrary to public policy as tending to oust the court's jurisdiction: *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA* [1973] 2 Lloyd's Rep 437, CA.

3 An example is an authorised analyst's certificate under the Road Traffic Offenders Act 1988 s 16; and see *Smithwick v National Coal Board* [1950] 2 KB 335, CA; *Ajum Goolam Hossen & Co v Union Marine Insurance Co* [1901] AC 362, PC.

4 See *Barracrough v Greenhough* (1867) LR 2 QB 612, Ex Ch.

5 See eg the Civil Evidence Act 1968 s 13(1) (conclusiveness of convictions for purposes of defamation); and PARA 1209. As to certificates admissible by statute see PARA 897.

6 *Re Barned's Banking Co, Peel's Case* (1867) 2 Ch App 674; *Oakes v Turquand and Harding, Peek v Turquand and Harding, Re Overend, Gurney & Co* (1867) LR 2 HL 325 (distinguished in *Re National Debenture and Assets Corpn* [1891] 2 Ch 505, CA); *Re Foulds, ex p Learoyd* (1878) 10 ChD 3, CA; *Ladies' Dress Association Ltd v Polbrook* [1900] 2 QB 376, CA; *Hammond v Prentice Bros Ltd* [1920] 1 Ch 201; *Kerr v John Mottram Ltd* [1940] Ch 657, [1940] 2 All ER 629.

7 See *Re Caratal (New) Mines Ltd* [1902] 2 Ch 498; *Wall v London and Northern Assets Corpn* [1899] 1 Ch 550; *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, [1956] 1 All ER 341, CA.

8 It may, eg, be necessary or desirable to call other evidence to the same effect as whatever evidence would be conclusive: *R v Thomas* (1870) 22 LT 138; *A-G v Bournemouth Corpn* [1902] 2 Ch 714, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(iv) Weight of Evidence/768. Evidence of witnesses.

768. Evidence of witnesses.

Proper evaluation of the weight of evidence given by different witnesses is a matter for the common sense and impression of judge or jury¹; and although it has been said that the testimony of a witness who swears positively to a fact should be preferred to that of one who testifies to a negative², and that an independent witness will normally be preferred to an interested one in cases of conflict³, matters of motive, prejudice, partiality, accuracy, incentive and reliability all have to be weighed in each case⁴. Questions of fact are not to be determined by counting the number of witnesses on each side⁵.

Oral evidence given in open court by witnesses whose demeanour and deportment have been observed is preferable to evidence given by witnesses out of court⁶, especially in matrimonial cases⁷, and consequently appellate tribunals are slow to interfere with the decisions of inferior courts on questions of fact or oral testimony⁸.

The authorities suggest that expert witnesses present certain difficulties⁹, their evidence possibly being of a partisan character¹⁰, usually evidence of opinion¹¹, and sometimes presented as fact although based on hearsay¹². However, the court now has power to direct that a single joint expert is to be instructed¹³ and expert evidence is usually given in a written report¹⁴. More weight should be given to facts which are proved than to conclusions drawn from scientific investigations¹⁵. An appellate court should not generally interfere with a trial judge's finding of fact based on conflicting expert evidence¹⁶; and where the expert medical evidence is all one way, the trial judge is entitled not to accept it if he has contrary evidence he can rely upon but he is obliged to give reasons why he should set that medical evidence aside¹⁷. However, expert evidence should be disregarded only in very rare cases¹⁸.

1 See PARA 766. As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

2 *The Glenalbyn* (1849) 6 LT 581; *The Batavier* (1854) 1 Ecc & Ad 378; affd 9 Moo PCC 286; *Lane v Jackson* (1855) 20 Beav 535; *The Vivid* (1856) 10 Moo PCC 472 (evidence as to what had not been seen of less weight than evidence as to what had been seen); *Lefeunteum v Beaudoin* (1897) 28 SCR 89; *Charlton v R* (1912) 11 ELR 284; *Hallett v Bank of Montreal* (1918) 46 NBR 62.

3 *Ridgway v Wharton* (1857) 6 HL Cas 238; *Re Direct Exeter, Plymouth and Devonport Rly Co, Hall's Case* (1850) 3 De G & Sm 214.

4 The Civil Evidence Act 1995 s 4(1) permits the court to draw any reasonable inference from surrounding circumstances in estimating the weight, if any, to be given to hearsay evidence in civil proceedings: see PARA 815. See *Coopers Payen Ltd v Southampton Container Terminal Ltd* [2003] EWCA Civ 1223, [2004] 1 Lloyd's Rep 331 (finding of fact based on credibility of witness not to be reversed unless plainly wrong).

5 *Bates v Graves* (1793) 2 Ves 287; *The Wega* [1895] P 156; *Collector of Revenue for Quebec v Lepinay* (1916) QR 50 SC 433; *Tucker v Ayre* (1821) 3 Phillim 539.

6 *The Apollo* (1824) 1 Hag Adm 306; *Johnston v Todd* (1843) 5 Beav 597; *Ridgway v Wharton* (1857) 6 HL Cas 238; *Hay v Gordon* (1872) 9 Moo PCCNS 102; cf *R v Bertrand* (1867) LR 1 PC 520. The obvious construction of documents may be preferred to contrary oral evidence: *Cooper v Cooper* (1888) 13 App Cas 88, HL.

7 *Ammar v Ammar* [1954] P 468, [1954] 2 All ER 365.

8 See eg *Metropolitan Rly Co v Wright* (1886) 11 App Cas 152, HL; *Bigsby v Dickinson* (1876) 4 ChD 24, CA; *Khoo Sit Hoh v Lim Thean Tong* [1912] AC 323, PC; *Strathlorne Steamship Co v Baird & Sons* 1916 SC 134, HL; *Clarke v Edinburgh and District Tramways Co* 1919 SC 35, HL; *SS Hontestroom v SS Sagaporak, SS Hontestroom*

v SS Durham Castle [1927] AC 37, HL; *Powell v Streatham Manor Nursing Home* [1935] AC 243, HL; *Watt v Thomas* [1947] AC 484, [1947] 1 All ER 582, HL. This principle applies to appeals to the Judicial Committee of the Privy Council in Commonwealth cases (see eg *Archambault v Archambault* [1902] AC 575, PC; *Whitney v Joyce* (1906) 75 LJPC 89, PC; *Tshingumuzi v A-G of Natal* [1908] AC 248, PC; *Baldwin v Baldwin* (1922) 91 LJPC 208; *Official Liquidator of ME Moolla Sons Ltd v Burjorjee* (1932) 48 TLR 279, PC) and in prize cases (see eg *The Ophelia* [1916] 2 AC 206, PC). In the case of inferences from facts the appellate court will more readily form an independent opinion, subject only to the weight which should be given to the opinion of the trial judge: *Benmax v Austin Motor Co Ltd* [1955] AC 370, [1955] 1 All ER 326, HL. See also *Jewo Ferrous BV v Lewis Moore (a firm)* [2001] Lloyd's Rep PN 6, [2000] All ER (D) 1464, CA. As to an appeal court's power to receive fresh evidence see PARA 1676; and PARA 1672; and as to the circumstances in which the House of Lords and the Judicial Committee of the Privy Council will receive fresh evidence see PARAS 1677-1678; and **COURTS** vol 10 (Reissue) PARAS 363, 384, 459. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

9 As to expert evidence generally see PARA 835 et seq.

10 *Tracy Peerage Case* (1843) 10 Cl & Fin 154, HL; *Cresswell v Jackson* (1864) 4 F & F 1; *Thorn v Worthing Skating Rink Co* (1876) 6 ChD 415n; *Aitken v McMeckan* [1895] AC 310, PC; *Perera v Perera* [1901] AC 354, PC; *Fleet v Metropolitan Asylum's Board, Darenth Smallpox Camp Case* (1886) 2 TLR 361, CA; *British Celanese Ltd v Courtaulds Ltd* [1935] WN 31, HL.

11 See the Civil Evidence Act 1972 s 3; and PARA 835.

12 *English Exporters (London) Ltd v Eldonwall Ltd* [1973] Ch 415, [1973] 1 All ER 726.

13 See CPR 35.7; and PARA 840.

14 See CPR 35.5; and PARA 839.

15 *Goldsmid v Tunbridge Wells Improvement Comrs* (1866) 1 Ch App 349; *Liverpool Corpn v H Coghill & Son* [1918] 1 Ch 307.

16 *Joyce v Yeomans* [1981] 2 All ER 21, [1981] 1 WLR 549, CA; *Maynard v West Midlands Regional Health Authority* [1985] 1 All ER 635, [1984] 1 WLR 634, HL; cf *The Saudi Prince (No 2)* [1988] 1 Lloyd's Rep 1, CA (experts on foreign law).

17 *Re B (children: non-accidental injury)* [2002] EWCA Civ 902, [2002] 2 FCR 654. See also *Re N-B (children) (residence: expert evidence)* [2002] EWCA Civ 1052, [2002] 3 FCR 259. Even the most experienced and insightful family judge does not have the specialised training and skills of consultant psychiatrists and paediatricians who spend their lives working with damaged adults and children: *Re N-B (children) (residence: expert evidence)* [2002] EWCA Civ 1052 at [65], [2002] 3 FCR 259 at [65] per Robert Walker LJ (not sufficient for the judge in that case to say or imply that he took account of the views of the guardian and the experts but that he took a different view).

18 *Coopers Payen Ltd v Southampton Container Terminal Ltd* [2003] EWCA Civ 1223, [2004] 1 Lloyd's Rep 331.

UPDATE

768 Evidence of witnesses

NOTE 8--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 17--See also *Re G (children) (fact-finding hearing)* [2009] EWCA Civ 10, [2010] 1 FCR 73.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(v) Burden and Standard of Proof/769. Meaning and general incidence of the burden of proof.

(v) Burden and Standard of Proof

769. Meaning and general incidence of the burden of proof.

There are at least two distinct senses in which burden of proof is used¹, and clarity over which sense is relevant at any given time is essential².

The legal burden³ (or the burden of persuasion) is a burden of proof which remains constant throughout a trial⁴; it is the burden of establishing the facts and contentions which will support a party's case, or persuading the tribunal of the correctness of a party's allegations. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose⁵. The incidence of this burden is usually clear from the statements of case⁶, it usually being incumbent upon the claimant to prove what he contends⁷.

The evidential burden⁸ (or the burden of adducing evidence) requires the party bearing the burden to produce evidence capable of supporting but not necessarily proving a fact in issue; the burden rests upon the party who would fail if no evidence at all, or no further evidence, as the case may be, was adduced by either side⁹. It has been said that the evidential burden shifts from one party to another as the trial progresses according to the balance of evidence given at any particular stage, but it may be more accurate to say that it is the need to respond to the other party's case that changes¹⁰.

1 See *Wakelin v London and South Western Rly Co*(1886) 12 App Cas 41, HL; *Hill v Baxter*[1958] 1 QB 277, [1958] 1 All ER 193, DC; *Brown v Rolls Royce Ltd*[1960] 1 All ER 577, [1960] 1 WLR 210, HL; *Bratty v A-G for Northern Ireland*[1963] AC 386, [1961] 3 All ER 523, HL.

2 An example of a case in which the position was not at all clear is *Redpath v Redpath and Milligan*[1950] 1 All ER 600, CA.

3 See the cases cited in note 1. As to the legal burden see further PARA 770.

4 This is the preferable view. The incidence of the burden on different issues may lie in different places (see PARA 770), and issues may rise or fall according to the facts proved (cf *Emanuel v Emanuel*[1946] P 115, [1945] 2 All ER 494; and *Southport Corp v Esso Petroleum Co Ltd*[1954] 2 QB 182, [1954] 2 All ER 561, CA), but on the analysis of issues the legal burden will not change (see *The Merchant Prince*[1892] P 179, CA).

5 *Pickup v Thames and Mersey Marine Insurance Co Ltd*(1878) 3 QBD 594, CA; *Wakelin v London and South Western Rly Co*(1886) 12 App Cas 41, HL. As to submissions of no case to answer see *Alexander v Rayson*[1936] 1 KB 169, CA; *Young v Rank*[1950] 2 KB 510, [1950] 2 All ER 166; and PARA 798.

6 As to statements of case see PARA 1065 note 1; and PARA 584 et seq.

7 The golden rule is that the onus of proof is on the claimant: *Chapman v Oakleigh Animal Products Ltd* (1970) 8 KIR 1063 at 1072, CA, per Davies LJ.

8 As to the evidential burden see further PARA 771.

9 See *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd*[1942] AC 154, [1941] 2 All ER 165, HL; *Huyton-with-Roby UDC v Hunter*[1955] 2 All ER 398, [1955] 1 WLR 603, CA; *Brown v Rolls Royce Ltd*[1960] 1 All ER 577, [1960] 1 WLR 210, HL.

10 See eg the cases cited in note 9.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(v) Burden and Standard of Proof/770. Incidence of the legal burden.

770. Incidence of the legal burden.

The legal burden (or the burden of persuasion) of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied¹. In respect of a particular allegation, the burden lies upon the party for whom the substantiation of that particular allegation is an essential of his case². There may therefore be cases where different parties bear the burden on different issues.

Thus, in a negligence claim the legal burden of proof in respect of duty, breach of duty and damage is upon the claimant, and in respect of contributory negligence is upon the defendant³. In a claim against an innkeeper for loss of a customer's luggage, where the loss is admitted but the defence raises contributory negligence and exemption beyond the statutory value limit⁴, the burden is upon the defendant as to the first point, and upon the claimant, in reply, to show wilful act, default or neglect to the defendant so as to disentitle him to the statutory exemption⁵. In a claim on a charterparty where the defence is frustration and the reply asserts that frustration was due to the defendant's default the claimant, in the absence of admissions, must prove the contract and the breach, the defendant must prove facts amounting to frustration, and the claimant must prove that frustration was caused by the defendant's default⁶. When damage to goods shipped under a charterparty containing the usual exemptions is alleged, the burden (in the absence of admissions) is upon the claimant to prove the contract and damage or non-delivery, upon the defendant to prove that the damage arose by the perils excepted, and upon the claimant in reply to prove negligence by the defendant disentitling him to the benefit of the exemption⁷. In a claim against a common carrier for loss of goods in transit the onus of proving protection by statutory exemption is on the carrier⁸; and in a claim on an insurance contract the burden of proving a breach of condition which would relieve the insurer of liability is on the insurer⁹. In a claim on a contract in restraint of trade the onus of establishing that a covenant is reasonable is on the party seeking to rely on it; but if that is established, the onus of proving that the covenant is contrary to public policy lies on the party attacking it¹⁰; and in a claim for false imprisonment proof of the existence of a reasonable cause is upon the defendant¹¹. The onus of proving that a sale is not a consumer sale is upon the party making the contention¹². If in a claim for trespass to land the claimant's title is proved or admitted, the burden is on the defendant to prove a right to possession consistent with that title¹³. Where a defendant is seeking to strike out a claimant's personal injury claim on the ground that the medical certificate and the claim specify different conditions, the burden of proof is on the defendant to show that the certificate relates to different matters and conditions¹⁴.

1 See *Dickinson v Minister of Pensions* [1953] 1 QB 228, [1952] 2 All ER 1031. As to the importance of a correct determination of the incidence of the legal burden see *The Glendarroch* [1894] P 226, CA.

2 *Mills v Barber* (1836) 1 M & W 425; *Abrath v North Eastern Rly Co* (1883) 11 QBD 440, CA; affd (1886) 11 App Cas 247, HL (malicious prosecution: see **TORT**); *Talbot v Von Beris* [1911] 1 KB 854, CA. Formulations of the incidence of the legal burden of proof are sometimes made on the basis that it rests upon the party asserting the affirmative of an issue: see eg *Robins v National Trust Co Ltd* [1927] AC 515, PC; *Huyton-with-Roby UDC v Hunter* [1955] 2 All ER 398, [1955] 1 WLR 603, CA.

It has been said that the terms 'negative' and 'affirmative' are relative and not absolute: see *Abrath v North Eastern Rly Co* (1883) 11 QBD 440 at 457, CA, per Bowen LJ. Most statements can be made positive or negative by suitable choice of language, and allegations in the negative usually mean that something positive ought to have been done, eg in a claim against a tenant for non-repair (*Soward v Leggatt* (1835) 7 C & P 613; see

LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 438); or in a claim to charge frontagers with the cost of making up a road (*Rishton v Haslingden Corpn* [1898] 1 QB 294, DC; *Vyner v Wirral RDC* (1909) 73 JP 242, DC; *Huyton-with-Roby UDC v Hunter* [1955] 2 All ER 398, [1955] 1 WLR 603, CA: see **HIGHWAYS, STREETS AND BRIDGES**); or where it is contended that goods were not supplied in time (*Calder v Rutherford* (1822) 3 Brod & Bing 302), that houses were not up to specification (*Smith v Davies* (1836) 7 C & P 307), that a transaction is not what it appears on its face to be (*Nicol v Vaughan* (1832) 6 Bli NS 104), that a will should not be admitted to proof (*Bremer v Freeman* (1857) 10 Moo PCC 306), that a contract, unlimited on its face, is not perpetual (*Llanelly Rly and Dock Co v London and North Western Rly Co* (1875) LR 7 HL 550), that premises are not insured (*Doe d Bridger v Whitehead* (1838) 8 Ad & El 571; *Price v Worwood* (1859) 4 H & N 512), that premises have been assigned without consent (*Wedgwood v Hart* (1856) 2 Jur NS 288), or that there has been a sale on premises without the lessor's written consent (*Toleman v Portbury* (1870) LR 5 QB 288).

3 *Dublin, Wicklow and Wexford Rly Co v Slattery* (1878) 3 App Cas 1155, HL; *Wakelin v London and South Western Rly Co* (1886) 12 App Cas 41, HL; *Heranger (Owners) v Diamond (Owners)* [1939] AC 94, HL. The Law Reform (Contributory Negligence) Act 1945 does not affect the burden of proof: see further **NEGLIGENCE** vol 78 (2010) PARA 75 et seq.

4 The limit is £50 for one article, or £100 in the aggregate: Hotel Proprietors Act 1956 s 2(3); and see **LICENSING AND GAMBLING** vol 67 (2008) PARA 203.

5 *Medawar v Grand Hotel Co* [1891] 2 QB 11, CA: see **LICENSING AND GAMBLING; NEGLIGENCE** vol 78 (2010) PARAS 62 et seq, 75 et seq.

6 *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corpn Ltd* [1942] AC 154, [1941] 2 All ER 165, HL. As to the doctrine of frustration see **CONTRACT** vol 9(1) (Reissue) PARA 888 et seq; and as to charterparties see **CARRIAGE AND CARRIERS; SHIPPING AND MARITIME LAW**.

7 *The Glendarroch* [1894] P 226, CA: see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 267. In such a claim when the loss of goods is the act of negligence alleged, and the loss is in consequence of a criminal act, it is not necessary to give such evidence as would convict the person charged with the criminal act: *Vaughton v London and North Western Rly Co* (1874) LR 9 Exch 93. Where a conviction is admissible under the Civil Evidence Act 1968 s 11 (see PARA 1208), the burden is on the defendant to prove that he has not done the act for which he has been convicted: *Wauchope v Mordecai* [1970] 1 All ER 417, [1970] 1 WLR 317, CA.

8 *Hunt and Winterbotham (West of England) Ltd v BRS (Parcels) Ltd* [1962] 1 QB 617, [1962] 1 All ER 111, CA; *Ashton & Co v London and North Western Rly Co* [1918] 2 KB 488, CA; affd sub nom *London and North Western Rly Co v JP Ashton & Co* [1920] AC 84, HL; and see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 28. See also *Asiatic Petroleum Co Ltd v Lennard's Carrying Co Ltd* [1914] 1 KB 419, CA; affd sub nom *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, HL. In bailment the bailee has to prove that goods were lost without his fault: *Coldman v Hill* [1919] 1 KB 443, CA; *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694, [1962] 2 All ER 159, CA. See further **BAILMENT**.

9 *Bond Air Services Ltd v Hill* [1955] 2 QB 417, [1955] 2 All ER 476; following *Stebbing v Liverpool and London and Globe Insurance Co Ltd* [1917] 2 KB 433. Very clear words are necessary for an insurer to prove an exception to the rule: see *Bond Air Services Ltd v Hill* [1955] 2 QB 417, [1955] 2 All ER 476; and **INSURANCE**.

10 *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, HL.

11 *Hicks v Faulkner* (1881) 8 QBD 167; affd (1882) 46 LT 127, CA.

12 See the Unfair Contract Terms Act 1977 s 12(3); and **CONTRACT** vol 9(1) (Reissue) PARA 832.

13 *Portland Managements Ltd v Harte* [1977] QB 306, [1976] 1 All ER 225, CA. See also **TORT**.

14 *Edwards v Peter Black Healthcare (Southern) Ltd* [2000] ICR 120, CA (decided with reference to the county court procedure prior to the introduction of the CPR). As to striking out a statement of case under the CPR see PARAS 520-523.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(v) Burden and Standard of Proof/771. Incidence of the evidential burden.

771. Incidence of the evidential burden.

The evidential burden (or the burden of adducing evidence) will rest initially upon the party bearing the legal burden¹ but, as the weight of evidence given by either side during the trial varies, the evidential burden may be said to shift to the party who would fail without further evidence². However, rather than referring to a shifting burden, it may be more accurate to say that it is the need to respond to the other party's case that changes as the trial progresses according to the balance of evidence given by each party at any particular stage³. If the party bearing the legal burden fails to adduce evidence, he has failed to discharge his burden and there will be no need for the other party to respond; however, if the party bearing the legal burden brings evidence tending to prove his claim, the other party may in response wish to raise an issue such as causation and must then adduce evidence capable of supporting though not necessarily proving his point, and once he has done so then the party bearing the legal burden will have to bring evidence to disprove that point. If a party fails to adduce evidence when he bears the evidential burden, he risks losing his case.

1 As to the legal burden see PARA 770.

2 *Abrath v North Eastern Rly Co* (1883) 11 QBD 440, CA (affd (1886) 11 App Cas 247, HL); *Pickup v Thames and Mersey Marine Insurance Co Ltd* (1878) 3 QBD 594, 600, CA; *Wakelin v London and South Western Rly Co* (1884) as reported in [1896] 1 QB 189n at 196n, CA (affd (1886) 12 App Cas 41, HL); *R v Stoddart* (1909) 73 JP 348, CCA; *Talbot v Von Boris* [1911] 1 KB 854, CA; *Jayasena v R* [1970] AC 618, [1970] 1 All ER 219, PC; and see *Beard v London General Omnibus Co* [1900] 2 QB 530, CA, where it was held that where a claimant in a claim for negligent driving of a bus proved that the person driving was the conductor, the burden was upon the claimant to show that the conductor was acting within the scope of his employment. See generally **NEGLIGENCE** vol 78 (2010) PARA 62 et seq.

There are situations in which conditions necessary for the reception of a given piece of evidence have to be established which illustrate the principle described in the text; for example, where a party is tendering an ambiguous document he has to show that his interpretation of it is correct: *Falck v Williams* [1900] AC 176, PC; and see **MISREPRESENTATION AND FRAUD; MISTAKE**.

3 See also PARA 769.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(v) Burden and Standard of Proof/772. Exceptions to the normal rules regarding incidence of a burden of proof.

772. Exceptions to the normal rules regarding incidence of a burden of proof.

Where there is a rebuttable presumption¹ of law in favour of one party, the burden of rebutting it lies upon the other. Therefore a party suing on a bill of exchange need not initially give any evidence of consideration, or that he is a holder in due course, since there are presumptions to this effect in his favour². Similarly a presumption of death may assist a party³. Where a question of gifts to public officers arises, consideration is deemed to be given corruptly unless the contrary is proved⁴. In negligence claims a claimant may be able to rely upon the doctrine of *res ipsa loquitur*⁵, or in claims where it is relevant to any issue that a person did or did not commit a criminal offence previous convictions may be pleaded⁶.

Where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it often lies upon the latter⁷, but there is no general rule of law to this effect⁸. There is authority contrary to this exception⁹, but it certainly exists and has frequently been applied by the courts¹⁰. This is particularly the case in magistrates' courts and in criminal proceedings based on statute¹¹, and in some employers' liability situations¹². In civil cases the incidence of the burden of proof may be determined by agreement between the parties¹³, so far as not prohibited by statute¹⁴.

1 As to presumptions see PARA 1096 et seq. Note that presumptions that allocate the burden of persuasion should be distinguished from those that allocate the burden of adducing evidence. As to the legal burden (or the burden of persuasion) see PARAS 769-770; and as to the evidential burden (or the burden of adducing evidence) see PARAS 769, 771.

2 See the Bills of Exchange Act 1882 s 30(2); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1478. See also *Talbot v Von Boris* [1911] 1 KB 854, CA.

3 See PARA 1100.

4 Prevention of Corruption Act 1916 s 2. As to the standard of proof see *R v Carr-Briant* [1943] KB 607, [1943] 2 All ER 156, CCA; followed in *Public Prosecutor v Yuvaraj* [1970] AC 913, PC. The Prevention of Corruption Act 1916 s 2 does not, however, apply to the offence of conspiring to corrupt because that is a statutory offence solely provided for by the Criminal Law Act 1977 s 1(1): *R v A-G, ex p Rockall* [1999] 4 All ER 312, [2000] 1 WLR 882. See further **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 530.

5 See **NEGLIGENCE** vol 78 (2010) PARA 64 et seq.

6 See PARAS 1208-1209; but see also PARA 1210.

7 *R v Edwards* [1975] QB 27, [1974] 2 All ER 1085, CA (what rests on the defendant is the legal or, as it is sometimes called, the persuasive burden of proof; it is not the evidential burden: see *R v Edwards* [1975] QB 27, [1974] 2 All ER 1085, CA; and see further **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1370); *R v Turner* (1816) 5 M & S 206; *McGowan v Carville* [1960] IR 330.

8 *R v Edwards* [1975] QB 27, [1974] 2 All ER 1085, CA.

9 *Doe d Bridger v Whitehead* (1838) 8 Ad & El 571; *Elkin v Janson* (1845) 13 M & W 655; *Abrath v North Eastern Rly Co* (1883) 11 QBD 440, CA; affd (1886) 11 App Cas 247, HL; *John v Humphreys* [1955] 1 All ER 793, [1955] 1 WLR 325, DC; *R v Spurge* [1961] 2 QB 205, [1961] 2 All ER 688, CCA (defendant does not bear onus of proof on a charge of driving a mechanically defective vehicle); *R v Mandry*, *R v Wooster* [1973] 3 All ER 996, [1973] 1 WLR 1232, CA.

10 *Apothecaries' Co v Bentley* (1824) 1 C & P 538; *Hibbs v Ross* (1866) LR 1 QB 534; *Governors of Magdalen Hospital v Knotts* (1878) 8 ChD 709, CA; *Mahoney v Waterford, Limerick and Western Rly Co* [1900] 2 IR 273;

Powell v M'Glynn and Bradlaw [1902] 2 IR 154; *General Accident Fire and Life Assurance Corp'n v Robertson* [1909] AC 404, HL; *R v Scott* (1921) 86 JP 69; *R v Kakeo* [1923] 2 KB 793, CCA; *Williams v Russell* (1933) 149 LT 190, DC; and see *Designers and Decorators (Scotland) Ltd v Ellis* 1957 SC (HL) 69; *R v Edwards* [1975] QB 27, [1974] 2 All ER 1085, CA.

11 See *R v Edwards* [1975] QB 27, [1974] All ER 1085, CA; *R v Ewens* [1967] 1 QB 322, [1966] 2 All ER 470, CCA; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1370. The Magistrates' Courts Act 1980 s 101 places the burden of proof of any exception, exemption, proviso, excuse or qualification upon the defendant who relies on it; and see *R v Edwards* [1975] QB 27, [1974] All ER 1085, CA (decided under earlier legislation); and **MAGISTRATES** vol 29(2) (Reissue) PARA 731.

12 *Callaghan v Fred Kidd & Son (Engineers) Ltd* [1944] 1 KB 560, [1944] 1 All ER 525, CA; *Taylor v R and H Green and Silley Weir Ltd* [1951] 1 Lloyd's Rep 345, CA; *McCarthy v Coldair Ltd* [1951] 2 TLR 1226, CA; *McDonald v British Transport Commission* [1955] 3 All ER 789, [1955] 1 WLR 1323, *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107, [1967] 3 All ER 187, HL.

13 *Levy v Assicurazioni Generali* [1940] AC 791, [1940] 3 All ER 427, PC; *Bond Air Services Ltd v Hill* [1955] 2 QB 417, [1955] 2 All ER 476; *Re Hooley Hill Rubber and Chemical Co Ltd and Royal Insurance Co Ltd* [1920] 1 KB 257, CA. Cf *Thomas v HS Alper & Sons* (1953) Times, 26 June, CA.

14 See eg the Unfair Contract Terms Act 1977 s 13(1)(c); and **CONTRACT** vol 9(1) (Reissue) PARA 833.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(v) Burden and Standard of Proof/773. The right to begin.

773. The right to begin.

Associated with the onus of proof is the right to begin calling evidence¹. The claimant normally has this right² if he bears, as he usually will, the legal burden of proof on any issue³, including the quantum of damages⁴. It has been said that the right to begin depends more upon what justice to the parties requires than upon any strict rule⁵. If damages are not in dispute or are nominal and if the affirmative of the issues is on the defendant then there is authority to the effect that he is entitled to begin⁶. The claimant cannot usually be deprived of his right to begin by an admission of his claim at the hearing⁷, but the court will consider what is the substantial matter requiring determination⁸. As the onus of proof can generally be varied by agreement, so the right to begin may be affected by any appropriate contractual term⁹. Where both parties allege affirmative issues, or where the onus of proof on some issue or issues is on one party and on another issue on the other party, then if the claimant undertakes to adduce evidence upon any issue, the onus of proving which is upon him, he is entitled to begin¹⁰.

However, the court has wide powers of case management and the above principles are subject to the court's general discretionary power to control the evidence¹¹.

1 This should be distinguished from opening the case, ie explaining the issues.

2 In *Grunther Industrial Developments and Gid Ltd v Federated Employers Insurance Association Ltd* (1972) 117 Sol Jo 13, CA, it was held that the plaintiffs (now known as the 'claimants': see PARA 18) must begin, for, even though an allegation of fraud might prove to be the main issue in the case, it did not in the least determine the question on whom lay the obligation to open the case.

3 *Tyrell v Holt and Hopley* (1727) 1 Barn KB 12; *Fowler v Coster* (1826) Mood & M 241; *Wootton v Barton* (1835) 1 Mood & R 518; *Scott v Lewis* (1836) 7 C & P 347; *R v London and Birmingham Rly Co* (1839) 1 Ry & Can Cas 317; *Ashby v Bates* (1846) 15 M & W 589; *Midland Rly Co v Great Western Rly Co (No 2)* (1876) 2 Ry & Can Tr Cas 298; *Saqui v Lazarus* (1895) 73 LT 194; *L v L (otherwise M)* (1908) 25 TLR 43.

4 *Carter v Jones* (1833) 1 Mood & R 281; *Wood v Pringle* (1933) 1 Mood & R 277; *Doe d Worcester Trustees v Rowlands* (1841) 9 C & P 734; *Mercer v Whall* (1845) 5 QB 447; *Chapman v Rawson* (1846) 8 QB 673. Cf *Bastard v Smith* (1837) 2 Mood & R 129.

5 *Scott v Lewis* (1836) 7 C & P 347. When dealing with the question of onus and the right to begin, it is not so much the form of the issue that has to be considered as its substance and effect: *Soward v Leggatt* (1835) 7 C & P 613.

6 *Fowler v Coster* (1826) Mood & M 241; *Silk v Humphrey* (1835) 7 C & P 14.

7 *Pontifex v Jolly* (1839) 9 C & P 202; *Price v Seaward* (1841) Car & M 23. As to partial admissions see *Doe d Corbett v Corbett* (1813) 3 Camp 368; *Doe d Lewis v Lewis* (1843) 1 Car & Kir 122; *Doe d Bather v Brayne* (1848) 5 CB 655.

8 *Thomson v South Eastern Rly Co* (1882) 9 QBD 320, CA; *Lewis Falk Ltd v Jacobwitz* [1944] Ch 64; *W Lusty & Sons Ltd v Morris Wilkinson & Co (Nottingham) Ltd* [1954] 2 All ER 347, [1954] 1 WLR 911.

9 See the cases cited in PARA 772 note 13.

10 *Curtis v Wheeler* (1830) Mood & M 493; *Williams v Thomas* (1830) 4 C & P 234; *James v Salter* (1835) 1 Mood & R 501; *Rawlins v Desborough* (1837) 2 Mood & R 70; *Craig v Fenn* (1841) Car & M 43; *Cripps v Wells* (1843) Car & M 489; *Mercer v Whall* (1845) 5 QB 447; *Booth v Millns* (1846) 15 M & W 669.

11 See CPR 32.1; and PARA 791.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(v) Burden and Standard of Proof/774. Evidence in rebuttal.

774. Evidence in rebuttal.

When the onus of proof on all issues is on one party, that party must ordinarily, when presenting his case, adduce all his evidence, and may not, after the close of his opponent's case, seek to adduce additional evidence to strengthen his own case¹. In theory, when the onus is partly upon the claimant and partly upon the defendant, the claimant may in the first instance limit his evidence to proving those issues in respect of which the onus is upon him, and then, after the close of the defendant's case, adduce evidence in rebuttal upon those issues where the burden was upon the defendant². Such evidence in rebuttal must be confined solely to rebuttal and not merely be evidence in confirmation of evidence-in-chief³.

There is a judicial discretion to allow further evidence to be called, even when it should have been adduced in the first place, where the judge considers it necessary in the interests of justice⁴. Such evidence in rebuttal will generally be allowed when the party wishing to adduce it has been taken by surprise and for that reason did not call the evidence earlier⁵.

The above principles are subject to the court's general discretionary power to control the evidence⁶.

¹ *Jacobs v Tarleton* (1848) 11 QB 421. The passage in the text was cited with approval in *Ernest Scragg & Sons Ltd's Application* [1972] RPC 679 per Graham J. This is said to be a principle of practice although not a rule of law in criminal cases: *R v Rice* [1963] 1 QB 857, [1963] 1 All ER 832, CCA. The subject is one of greater importance in criminal law: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1316.

² *Penn v Jack* (1866) LR 2 Eq 314; *Shaw v Beck* (1853) 8 Exch 392; cf *Vernon v St James, Westminster, Vestry* (1880) 49 LJ Ch 130, CA.

³ *R v Hilditch* (1832) 5 C & P 299; *Rowlandson v Fenton and Rogers* (1853) 1 CLR 344; *R v Sullivan* [1923] 1 KB 47, CCA. Where a claim and counterclaim raise identical issues, a claimant cannot rebut the defendant's evidence after the latter's case, as such evidence would necessarily confirm the evidence previously adduced by him: *Green v Sevin* (1879) 13 ChD 589.

⁴ *Doe d Nicoll v Bower* (1851) 16 QB 805; *Rogers v Manley* (1880) 42 LT 584; *Budd v Davison* (1880) 29 WR 192; *Wright v Willcox* (1850) 9 CB 650; and see *Noble v Noble and Ellis* [1963] 3 All ER 887n, [1963] 1 WLR 1395.

⁵ *Crewe v Crewe* (1800) 3 Hag Ecc 123; *Bigsby v Dickinson* (1876) 4 ChD 24, CA. There is a statutory right to call evidence in rebuttal in a magistrates' court: see the Magistrates' Courts Rules 1981, SI 1981/552, rr 13, 14; the Criminal Procedure Rules 2005, SI 2005/384, rr 37.1, 37.7; and **MAGISTRATES** vol 29(2) (Reissue) PARA 728.

⁶ See CPR 32.1; and PARA 791.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(v) Burden and Standard of Proof/775. Standard of proof.

775. Standard of proof.

To succeed on any issue the party bearing the legal burden of proof must (1) satisfy a judge or jury of the likelihood of the truth of his case by adducing a greater weight of evidence than his opponent; and (2) adduce evidence sufficient to satisfy them to the required standard or degree of proof. The standard differs in criminal and civil cases.

In civil cases the standard of proof is satisfied on a balance of probabilities¹. It has been said that, even within this formula variations in subject matter or in allegations may affect the standard required²; it has commonly been said that the more serious the allegation, for example fraud, crime or professional misconduct or the sexual abuse of children, the higher will be the required degree of proof³. A high standard of proof has also been stated to be required in child abduction cases where the parent who has wrongfully removed the child from the relevant jurisdiction is seeking to establish the defence that the child would be exposed to a grave risk of harm if subsequently returned⁴. However, it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but that the gravity of the issue becomes part of the circumstances which the court has to take into consideration in deciding whether or not the burden of proof has been discharged: the more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it⁵.

In criminal cases the standard required of the prosecution is proof beyond reasonable doubt⁶. This standard is also requisite in cases of committal for contempt⁷ or committal under the Debtors Act 1869⁸, and in certain pension claims cases⁹.

In matrimonial causes it seems that proof on the balance of probabilities is normally sufficient¹⁰, although proof beyond reasonable doubt is required to rebut the presumption of the formal validity of a marriage¹¹.

Once a matter is established beyond reasonable doubt it must be taken for all purposes of law to be a fact, as there is no room¹² for a distinction between what is found by inference from the evidence and what is found as a positive fact¹³.

1 See the formulation of Denning J in *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373-374; and see *Newis v Lark* (1571) 2 Plowd 408; *Cooper v Slade* (1858) 6 HL Cas 746; *Lancaster v Blackwell Colliery Co Ltd* (1919) 89 LJBK 609, HL; *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, [1956] 1 All ER 615, HL. See also *Dingwall v J Wharton (Shipping) Ltd* [1961] 2 Lloyd's Rep 213, HL. Where the civil standard of proof applies it is not necessary for every piece of the 'evidential jigsaw' to fit: *Whalley v Montracon Ltd* [2005] EWCA Civ 1383, [2005] All ER (D) 269 (Nov).

2 See the observation of Denning LJ in *Bater v Bater* [1951] P 35 at 36-37, [1950] 2 All ER 458 at 459, CA; *Blyth v Blyth* [1966] AC 643, [1966] 1 All ER 524, HL. See also *R (McCann) v Crown Court at Manchester*, *Clingham v Kensington and Chelsea Royal London Borough Council* [2002] UKHL 39, [2003] 1 AC 787, [2002] 4 All ER 593 (although proceedings to obtain an anti-social behaviour order are civil proceedings under domestic law, and in principle the standard of proof ordinarily applicable in civil proceedings, namely the balance of probabilities, should apply, pragmatism dictates that in all cases under the Crime and Disorder Act 1998 s 1 magistrates should apply the criminal standard since, given the seriousness of the matters involved in proceedings for an anti-social behaviour order, at least some reference to the heightened civil standard (which is virtually indistinguishable from the criminal standard) will usually be necessary).

3 See *Re H and R (minors) (sexual abuse: standard of proof)* [1996] AC 563, [1996] 1 All ER 1, HL. See also eg *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, [1956] 3 All ER 970, CA (fraud alleged in civil proceedings); followed in *Nishina Trading Co Ltd v Chiyoda Fire and Marine Insurance Co Ltd* [1969] 2 QB 449,

[1969] 2 All ER 776, CA; *Re Dellow's Will Trusts, Lloyds Bank Ltd v Institute of Cancer Research* [1964] 1 All ER 771, [1964] 1 WLR 451 (unlawful killing); *Chalmers v Shackell* (1834) 6 C & P 475 (forgery); *Willmet v Harmer* (1839) 8 C & P 695 (bigamy); *Statham v Statham* [1929] P 131, CA (sodomy in a divorce case); *Herbert v Poland* (1932) 44 Ll L Rep 139 (arson and conspiracy); *Miles v Cain* (1989) Times, 15 December, CA (civil proceedings for rape).

Professional tribunals should not condemn on a balance of probabilities: see *Bhandari v Advocates Committee* [1956] 3 All ER 742, [1956] 1 WLR 1442, PC; *Moore v General Dental Council* (1964) 108 Sol Jo 1011, PC. For the situation in which an injunction is sought on facts constituting an offence see *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, [1967] 3 All ER 663, CA.

4 See eg *Re S (a child) (abduction: grave risk of harm)* [2002] EWCA Civ 908, [2002] 3 FCR 43.

5 *Re H and R (minors) (sexual abuse: standard of proof)* [1996] AC 563, [1996] 1 All ER 1, HL (considered in *A Local Authority v H* [2005] EWHC 2885 (Fam), [2005] All ER (D) 185 (Dec)); and see *Re Dellow's Will Trusts, Lloyds Bank Ltd v Institute of Cancer Research* [1964] 1 All ER 771, [1964] 1 WLR 451; *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, [1956] 3 All ER 970, CA; *R (on the application of D) v Life Sentence Review Comrs (Northern Ireland)* [2008] UKHL 33, [2008] 4 All ER 992, [2008] 1 WLR 1499.

6 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1372.

7 See *Practice Direction--Committal Applications* PD RSC O 52 para 1.4; PARAS 1235, 1514; and **CONTEMPT OF COURT**.

8 See *Quinn v Cuff* [2001] EWCA Civ 36, [2001] All ER (D) 49 (Jan); and PARAS 1235, 1514.

9 *Judd v Minister of Pensions and National Insurance* [1966] 2 QB 580, [1965] 3 All ER 642; and see **ARMED FORCES**.

10 *Blyth v Blyth* [1966] AC 643, [1966] 1 All ER 524, HL; *Bastable v Bastable and Sanders* [1968] 3 All ER 701, [1968] 1 WLR 1684, CA. As to the standard of proof required in certain matrimonial causes see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARAS 352, 369.

11 *Mahadervan v Mahadervan* [1964] P 233, [1962] 3 All ER 1108, DC; and see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARAS 6, 7.

12 There had been introduced into the matrimonial law such a differentiation: see *Chatwynd-Talbot v Chatwynd-Talbot* [1963] P 436, [1963] 2 All ER 561; approved in *Howarth v Howarth* [1964] P 6, [1963] 3 All ER 164, CA; and see *Bull v Bull* [1968] P 618, [1965] 1 All ER 1057. See also the Civil Evidence Act 1968 s 12; and PARA 1211.

13 *Re Barrell Enterprises* [1972] 3 All ER 631, [1973] 1 WLR 19, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(vi) Formal Admissions/776. Formal admissions; in general.

(vi) Formal Admissions

776. Formal admissions; in general.

Admissions for the purposes of civil proceedings¹ may be made by actual or implied admissions in the statements of case², or in answer to a request or court order to give further information³, or in writing⁴, or at the trial⁵. A fact may also be admitted by default⁶ or in response to a notice to admit facts⁷.

A party may admit the truth of the whole or any part of another party's case⁸ and may do so by giving notice in writing (such as in a statement of case or by letter)⁹. Where the only remedy which the claimant¹⁰ is seeking is the payment of money, the defendant¹¹ may also make an admission in accordance with the relevant rules¹². When particulars of claim are served¹³ on a defendant the forms for responding to the claim that will accompany them will include a form for making an admission¹⁴.

The court¹⁵ may allow a party to amend or withdraw an admission¹⁶.

In his defence, the defendant must state which allegations he admits¹⁷. Subject to certain exceptions¹⁸, a defendant who fails to deal with an allegation is to be taken to admit that allegation¹⁹.

1 As to formal admissions in criminal cases see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1538.

2 As to statements of case see PARA 1065 note 1.

3 As to requests for further information see CPR Pt 18; and PARAS 611-612. As to the court's power to order a party to provide further information about his case before allocating it to a track for trial see CPR 26.5(3); and PARA 266.

4 Eg formal admissions may be made before trial in a letter written by a legal adviser acting on behalf of a party: see *Ellis v Allen*[1914] 1 Ch 904.

5 An admission made by counsel in interim proceedings may be withdrawn if the other party has not acted on it so as to give rise to an estoppel: *H Clark (Doncaster) Ltd v Wilkinson*[1965] Ch 694, [1965] 1 All ER 934, CA. At the trial an admission of facts by a party or his legal adviser will render any evidence on the matter inadmissible: *Urquhart v Butterfield*(1887) 37 ChD 357, CA; and see also *The Hardwick* (1884) 9 PD 32; *The Rothbury* (1893) 10 TLR 60; *The Buteshire*[1909] P 170; *The Woodarra* (1921) 38 TLR 160; *The Cornish Rose*[1936] P 174, [1936] 2 All ER 805; *The Sandefjord* [1953] 2 Lloyd's Rep 789; *Pioneer Plastic Containers Ltd v Customs and Excise Comrs*[1967] Ch 597, [1967] 1 All ER 1053. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

6 See the text and notes 18-19; and PARA 778.

7 See PARA 777.

8 CPR 14.1(1).

9 CPR 14.1(2).Where a party makes an admission by notice in writing any other party may apply for judgment based on that admission: see CPR 14.3; and PARA 190.

10 As to the meaning of 'claimant' see PARA 18.

11 As to the meaning of 'defendant' see PARA 18.

12 See CPR 14.1(3). The rules referred to in the text are: (1) CPR 14.4 (admission of whole claim for specified amount of money); (2) CPR 14.5 (admission of part of claim for specified amount of money); (3) CPR 14.6 (admission of liability to pay whole of claim for unspecified amount of money); (4) CPR 14.7 (admission of liability to pay claim for unspecified amount of money where defendant offers a sum in satisfaction of the claim): CPR 14.1(3); and see PARAS 191-194.

13 As to the meaning of 'service' see PARA 138 note 2.

14 See *Practice Direction--Admissions* PD 14 para 2.1; and PARA 187.

15 As to the meaning of 'court' see PARA 22.

16 CPR14.1(5). This rule does not apply to pre-action admission: *Sowerby v Charlton*[2005] EWCA Civ 1610, [2005] All ER (D) 343 (Dec), [2006] 1 WLR 568. See also *Walley v Stoke on Trent City Council*[2006] EWCA Civ 1137, [2006] 4 All ER 1230; *White v Greensand Homes Ltd*[2007] EWCA Civ 643, [2007] All ER (D) 371 (Jun).

17 CPR 16.5(1)(c).

18 A defendant who fails to deal with an allegation but has set out in his defence the nature of his case in relation to the issue to which that allegation is relevant is to be taken to require that allegation to be proved: CPR 16.5(3). Further, where the claim includes a money claim, a defendant is to be taken to require that any allegation relating to the amount of money claimed be proved unless he expressly admits the allegation: CPR 16.5(4).

19 CPR 16.5(5). See further PARA 599.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(vi) Formal Admissions/777. Notice to admit facts.

777. Notice to admit facts.

A party may serve¹ notice on another party requiring him to admit the facts, or the part of the case of the serving party, specified in the notice². A notice to admit facts must be served no later than 21 days before the trial³.

Where the other party makes any admission in response to the notice, the admission may be used against him only in the proceedings in which the notice to admit is served⁴ and by the party who served the notice⁵.

The court⁶ may allow a party to amend or withdraw any admission made by him on such terms as it thinks just⁷.

1 As to the meaning of 'service' see PARA 138 note 2.

2 CPR 32.18(1). See Form N266 in *The Civil Court Practice*, which includes provision for the party receiving it to admit the facts or part of the case under this rule.

3 CPR 32.18(2). As to time limits generally see PARA 88 et seq. Subject to the 21-day time limit, it is for any party to decide when to serve a notice to admit facts and there is no reason why the service of notices to admit facts and the responses to them have to be simultaneous: *MMR and MR Vaccine Litigation (No 5)*, *Sayers v Smithkline Beecham Ltd* [2002] EWHC 1280 (QB), [2002] All ER (D) 230 (Jun).

4 CPR 32.18(3)(a).

5 CPR 32.18(3)(b).

6 As to the meaning of 'court' see PARA 22.

7 CPR 32.18(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(vi) Formal Admissions/778. Notice to admit or produce documents.

778. Notice to admit or produce documents.

A party will be deemed to admit the authenticity of a document disclosed¹ to him² unless he serves³ notice that he wishes the document to be proved at trial⁴. A notice to prove a document must be served by the latest date for serving witness statements⁵ or within seven days of disclosure of the document, whichever is later⁶.

A notarial act or instrument may be received in evidence without further proof as duly authenticated in accordance with the requirements of law unless the contrary is proved⁷.

1 As to the meaning of 'disclosure' see PARA 538.

2 Ie under CPR Pt 31 (disclosure and inspection of documents): see PARAS 112, 963, 538 et seq.

3 As to the meaning of 'service' see PARA 138 note 2.

4 CPR 32.19(1). See Form N268 in *The Civil Court Practice*.

5 As to the meaning of 'witness statement' see PARA 751 note 1.

6 CPR 32.19(2). As to the calculation of time and the court's general discretion to extend time limits see PARA 88 et seq.

7 CPR 32.20.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(vii) Judicial Notice/779. Meaning of 'judicial notice'.

(vii) Judicial Notice

779. Meaning of 'judicial notice'.

Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer¹.

¹ *Commonwealth Shipping Representative v P & O Branch Service*[1923] AC 191 at 212, HL, per Lord Summer. Judicial notice is thus a means of establishing, rather than proving, a fact.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(vii) Judicial Notice/780. English law.

780. English law.

The judges are bound to recognise and give effect to all equitable estates, titles, rights, reliefs, defences and counterclaims, and to all equitable duties and liabilities; and subject thereto, to all legal claims and demands, and all estates, titles, rights, duties, obligations and liabilities existing by the common law or by any custom, or created by any statute¹. They are also bound to take notice of all public Acts of Parliament, and of all Acts of Parliament whatever passed since the year 1850, unless the contrary is expressly provided in the Act in question². Government orders and statutory instruments are not judicially noticed³ unless provision is made for them to be so noticed⁴.

The courts also take notice of every branch of English law. Thus they take judicial notice of the principles of international law and must have regard to European human rights law⁵. Specific statutory provision is made with regard to judicial notice of:

- 1 (1) the Madrid Protocol on the international registration of trade marks⁶ and the Common Regulations⁷, copies issued by the International Bureau of the World Intellectual Property Organisation ('WIPO') of entries in the International Register of trade marks maintained by the International Bureau for the purposes of the Madrid Protocol and copies of the periodical gazette published by the International Bureau⁸;
- 2 (2) certain provisions of the Convention concerning International Carriage by Rail⁹; and
- 3 (3) the Statute and Rules of each of the International Tribunals relating to Rwanda¹⁰ and the former Yugoslavia¹¹.

The courts take judicial notice of European Community law. The general statutory provisions in this regard are discussed elsewhere in this title¹². Specific statutory provision is made with regard to judicial notice of:

- 4 (a) the Brussels Conventions¹³ and any decision of, or expression of opinion by, the Court of Justice of the European Communities ('ECJ') on any question as to their meaning¹⁴;
- 5 (b) the Lugano Convention¹⁵;
- 6 (c) the European Patent Convention, the Community Patent Convention and the Patent Co-operation Treaty, any bulletin, journal or gazette published under the relevant convention and the register of European patents kept under the European Patent Convention¹⁶ and any decision of, or expression of opinion by, the relevant Convention court¹⁷ on any question arising under or in connection with the relevant Convention¹⁸; and
- 7 (d) any decision of, or expression of opinion by, the ECJ on any question as to the meaning or effect of certain other¹⁹ Conventions²⁰.

The courts will also take judicial notice of ecclesiastical and maritime law²¹, the law and customs of Parliament, the existence and extent of the privileges of each House of Parliament²², and the clearly established privileges of the Crown, for example the privileges in relation to the royal palaces²³.

1 Supreme Court Act 1981 s 49(2). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to the equity jurisdiction of county courts see **COURTS** vol 10 (Reissue) PARA 719. As to judicial notice of custom see PARA 781.

2 See PARA 889. Judicial notice may be taken of reports of parliamentary commissions or official committees to see the mischief at which an Act was directed, and the background against which the legislation was enacted: see *Letang v Cooper* [1965] 1 QB 232, [1964] 2 All ER 929, CA; *Pillai v Mudanayake* [1953] AC 514, [1955] 2 All ER 833, PC. The courts may also refer to the legislative history of a statute as an aid to its construction: see *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, [1993] 1 All ER 42, HL. See further **STATUTES**.

The Irish Supreme Court has held that judicial notice should be taken of the fact that an Act is in force after it has been in force for some time, even though the order required to bring it into force has not been proved: *State (Taylor) v Wicklow Circuit Court Judge* [1951] IR 311.

Every Act of the Scottish Parliament must be judicially noticed: Scotland Act 1998 s 28(6).

3 *R v Governor of Brixton Prison, ex p Servini* [1914] 1 KB 77, DC; *Duffin v Markham* (1918) 88 LJB 581, DC; *Tyrrell v Cole* (1918) 120 LT 156, DC; *R v Clarke* [1969] 2 QB 91, [1969] 1 All ER 924, CA; *Todd v Anderson* 1912 SC (J) 105. The Interpretation Act 1978 s 23(1), which applies most provisions of that Act to subordinate legislation, expressly excepts s 3 (judicial notice): see **STATUTES** vol 44(1) (Reissue) PARA 1352. But see *Palastanga v Solman* [1962] Crim LR 334, 106 Sol Jo 176, DC (defendant in criminal case should not insist upon formal proof of a widely-known order); *R v Jones (Reginald)* [1969] 3 All ER 1559, [1970] 1 WLR 16, CA (court entitled to take judicial notice of order by Secretary of State approving breath-test device, where the order had previously been proved in a large number of cases). See also PARA 892 note 9. At one time emanations from the Crown pursuant to statute were judicially noticed: see *Bradley v Arthur* (1825) 4 B & C 292.

As to the proof, where necessary, of statutory instruments and government orders see PARA 892. As to the making of statutory instruments and their publication see the Statutory Instruments Act 1946; *R v Sheer Metalcraft Ltd* [1954] 1 QB 586, [1954] 1 All ER 542; and **STATUTES** vol 44(1) (Reissue) PARA 1506 et seq.

4 Provision in respect of judicial notice may be made in the enabling statute itself: see eg the Bankruptcy Act 1914 s 132(2) (repealed). Alternatively, the statutory instrument may itself provide that the Interpretation Act 1978 should apply to it as if it were an Act of Parliament: see eg the Trading with the Enemy (Custodian No 5) Order 1951, SI 1951/1526, art 9 (applying the Interpretation Act 1889 (repealed)). Formal proof of a well-known instrument should not be insisted upon: see *Palastanga v Solman* [1962] Crim LR 334, 106 Sol Jo 176, DC, cited in note 3.

5 As to the extent to which the rules of public international law are part of the municipal law of England see **CONFLICT OF LAWS; INTERNATIONAL RELATIONS LAW**. As to decisions of the European Court of Human Rights see PARA 1086.

6 See the Protocol relating to the Madrid Agreement Concerning the International Registration of Marks (Cm 1601) adopted at Madrid on 27 June 1989: see **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 8.

7 'Common Regulations' means the regulations adopted under the Madrid Protocol art 10 with effect from 1 April 1996 as amended with effect from 1 April 2002: Trade Marks (International Registration) Order 2008, SI 2006/2206, art 2.

8 See the Trade Marks (International Registration) Order 2008, SI 2008/2206, art 6, Sch 5 para 3(1). Any document mentioned in the text to this note is admissible as evidence of any instrument or other act of the International Bureau thereby communicated: Sch 5 para 3(2).

9 See the Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092, reg 3; and **CARRIAGE AND CARRIERS** vol 7 (2008) PARAS 683; **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 27. The text of the convention is published as *Convention Concerning International Carriage by Rail (COTIF)* (Cm 41) (1987).

10 See the United Nations (International Tribunal) (Rwanda) Order 1996, SI 1996/1296, art 27(3).

11 See the United Nations (International Tribunal) (Former Yugoslavia) Order 1996, SI 1996/716, art 27(3). Similar provision is made with regard to both tribunals in the orders enabling Jersey, Guernsey and the Isle of Man to co-operate with those tribunals: see the United Nations (International Tribunals) (Former Yugoslavia and Rwanda) (Jersey) Order 1997, SI 1997/283, art 25(3); the United Nations (International Tribunals) (Former Yugoslavia and Rwanda) (Isle of Man) Order 1997, SI 1997/282, art 24(3); and the United Nations (International Tribunals) (Former Yugoslavia and Rwanda) (Guernsey) Order 1997, SI 1997/281, art 25(3).

- 12 See the European Communities Act 1972 s 3(1), (2); and PARA 1087.
- 13 See the Civil Jurisdiction and Judgments Act 1982 s 2(1); and **CONFLICT OF LAWS**.
- 14 See the Civil Jurisdiction and Judgments Act 1982 s 3(2); and **CONFLICT OF LAWS**.
- 15 See the Civil Jurisdiction and Judgments Act 1982 s 3A(1); and **CONFLICT OF LAWS**.
- 16 Any such document is admissible as evidence of any instrument or other act thereby communicated of any Convention institution: Patents Act 1977 s 91(2).
- 17 'Relevant Convention court' does not include a court of the United Kingdom or of any other country which is a party to the relevant Convention: Patents Act 1977 s 91(6).
- 18 Patents Act 1977 s 91(1) (amended by the Patents Act 2004 s 16(1), Sch 2 paras 1(1), 20); and see **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 541. Decisions of the European Patent Office may now be considered by the English courts: see eg *Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc* [2000] All ER (D) 713, [2000] IP & T 908, CA; and PARA 105.
- 19 Ie (1) the Rome Convention (the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 and signed by the United Kingdom on 7 December 1981); (2) the Luxembourg Convention (the Convention on the accession of the Hellenic Republic to the Rome Convention signed by the United Kingdom in Luxembourg on 10 April 1984); (3) the Brussels Protocol (the first Protocol on the interpretation of the Rome Convention by the European Court signed by the United Kingdom in Brussels on 19 December 1988); (4) the Funchal Convention (the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Rome Convention and the Brussels Protocol, with adjustments made to the Rome Convention by the Luxembourg Convention, signed by the United Kingdom in Funchal on 18 May 1992); (5) the 1996 Accession Convention (the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Rome Convention and the Brussels Protocol, with the adjustments made to the Rome Convention by the Luxembourg Convention and the Funchal Convention, signed by the United Kingdom in Brussels on 29 November 1996): see the Contracts (Applicable Law) Act 1990 s 1 (amended by SI 1994/1900 and SI 2000/1825); and **CONFLICT OF LAWS; CONTRACT**.
- 20 See the Contracts (Applicable Law) Act 1990 s 3(2).
- 21 *Chandler v Grieves* (1792) 2 Hy Bl 606n; *Sims v Marryat* (1851) 17 QB 281.
- 22 See *Stockdale v Hansard* (1839) 9 Ad & El 1; *Burdett v Abbot* (1811) 14 East 1; affd (1817) 5 Dow 165, HL; *Wason v Walter* (1868) LR 4 QB 73; *Bradlaugh v Gossett* (1884) 12 QBD 271, DC; *Earl of Shaftesbury's Case* (1677) 1 Mod Rep 144; and **PARLIAMENT** vol 78 (2010) PARAS 801 et seq, 1076 et seq.
- 23 As to privileges in relation to the royal palaces see **CROWN AND ROYAL FAMILY** vol 12(1) (Reissue) PARA 53.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(vii) Judicial Notice/781. Custom and usage.

781. Custom and usage.

The court will take judicial notice of the customs which formerly governed the descent of land in certain parts of England¹, as opposed to manorial customs in contravention of the common law, which must be proved². Judicial notice will be taken of the customs of the City of London which have been certified by the Recorder of London³.

The court will also take judicial notice of usages which are embodied in the law merchant⁴, and of commercial or other usages which have been proved sufficiently often in the courts of law⁵.

1 All these were abolished, subject to rare exceptions, in relation to the estates of persons dying after 1925: see the Administration of Estates Act 1925 s 45; and **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 643; **REAL PROPERTY** vol 39(2) (Reissue) PARA 31 et seq.

2 See **CUSTOM AND USAGE** vol 12(1) (Reissue) PARAS 641-643, 695 et seq.

3 See **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 628.

4 See **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 685.

5 See **CUSTOM AND USAGE** vol 12(1) PARA 686. See also PARA 788.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(vii) Judicial Notice/782. Practice.

782. Practice.

The Supreme Court of England and Wales takes judicial notice of the several branches into which it is divided by the statute under which it is constituted¹ and of the statutory rules which govern its practice and procedure². The rules governing the practice and procedure of inferior courts, if made under statutory authority, are judicially noticed by all courts³; further, the Civil Procedure Rules and their supplementary practice directions now apply to most civil proceedings in the county courts, the High Court and the Court of Appeal⁴.

The court is entitled to look at its own records and proceedings in any matter and take notice of their contents even though they may not have been formally brought before the court by the parties⁵. It will also take notice of the privileges and obligations of solicitors as officers of the court⁶ and of the practice of costs judges (formerly known as 'taxing masters')⁷.

Judicial notice is also taken of any illegality⁸ appearing in proceedings, on the part of any party, by reason of which the court considers that its assistance should be refused to that party, even though the illegality is not pleaded or relied upon by the opposite party⁹.

1 As to the constitution of the Supreme Court of England and Wales see **COURTS** vol 10 (Reissue) PARA 601 et seq. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

2 *Longman v East* (1877) 3 CPD 142, CA; and see *Schneider v Batt & Co* (1881) 8 QBD 701, CA; *Re Mills Estate, ex p Works and Public Buildings Comrs* (1886) 34 ChD 24, CA; *Re Fisher* [1894] 1 Ch 450, CA.

Before the Judicature Acts (see **COURTS** vol 10 (Reissue) PARA 601) the superior courts took notice of the 'customs and courses of every of the King's Courts': *Lane's Case* (1586) 2 Co Rep 16b; cf *Dobson v Bell* (1676) 2 Lev 176; *Pugh v Robinson* (1786) 1 Term Rep 116. In *Dance v Robson* (1829) Mood & M 294 printed copies of the rules circulated among the court's officers for their guidance were accepted as evidence of the rules.

3 *Dance v Robson* (1829) Mood & M 294; *Van Sandau v Turner* (1845) 6 QB 773; and see PARA 780.

4 See PARA 32.

5 *Craven v Smith* (1869) LR 4 Exch 146; cf *Robinson v Robinson* (1877) 2 PD 75 (judicial notice not taken of the fact that an issue in the case is res judicata).

6 *Stokes v Mason* (1808) 9 East 424; *Ex p Hore* (1835) 3 Dowl 600; *Day v Ward* (1886) 17 QBD 703; *Re A Solicitor, ex p Hales* [1907] 2 KB 539. The court will not take judicial notice of the names of the officers of the court: *Frost v Hayward* (1842) 10 M & W 673. See also the Solicitors Act 1974 s 50; and **LEGAL PROFESSIONS** vol 65 (2008) PARA 745.

7 *Cobbett v Wood* [1908] 2 KB 420, CA; *Harbin v Gordon* [1914] 2 KB 577, CA. This practice is now governed by the CPR: see generally PARA 1729 et seq.

8 As to the court's duty to reject unstamped documents tendered in evidence see PARA 959.

9 The illegality must be directly connected with the proceedings: *North Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461, HL; *Feret v Hill* (1854) 15 CB 207; *Gordon v Metropolitan Police Chief Comr* [1910] 2 KB 1080, CA; cf *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724, CA; and see *Snell v Unity Finance Co Ltd* [1964] 2 QB 203, [1963] 3 All ER 50, CA. See further **CONTRACT** vol 9(1) (Reissue) PARA 838. As to the court's power to exclude the production of documents where the public interest would be injured by their production see PARAS 555 et seq, 574 et seq.

UPDATE

782 Practice

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(vii) Judicial Notice/783. Scots, Irish and foreign law.

783. Scots, Irish and foreign law.

The House of Lords takes judicial notice of the law of Scotland and Northern Ireland so far as it is material to the issues raised by the record in all cases that come before it¹; and, similarly, the Judicial Committee of the Privy Council takes judicial notice of the law of the country from which appeal is made to it². The courts in England and Wales take notice of the prevalence in Ireland³ of the common law of England⁴. With these exceptions the courts in this jurisdiction⁵ cannot take judicial notice of foreign law⁶, which in this connection includes the law of Scotland, Commonwealth countries, British colonies and possessions; for foreign laws require proof as questions of fact⁷. However, the citation of decisions of foreign courts, even though such decisions are not binding authority in courts in England and Wales, may be useful for the purposes of interpretation of English law⁸. Further, it is desirable that the great common law jurisdictions should not differ lightly⁹.

Every Act of the Scottish Parliament must be judicially noticed¹⁰.

1 *Cooper v Cooper* (1888) 13 App Cas 88, HL; *Lyell v Kennedy, Kennedy v Lyell* (1889) 14 App Cas 437, HL; *Elliot v Lord Joicey* [1935] AC 209, HL. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

2 *Sumboochunder Chowdry v Naraini Dibeh and Ramkishor* (1835) 3 Knapp 55, PC; *Cameron v Kyte* (1835) 3 Knapp 332.

3 The Republic of Ireland, although no longer a part of Her Majesty's dominions, is not a foreign country for the purposes of any law in force in any part of the United Kingdom or in any colony, protectorate or United Kingdom trust territory: Ireland Act 1949 s 2(1).

4 *Re Nesbitt* (1844) 14 LJM 30; cf *R v Sunderland* (1837) 2 Lew CC 109.

5 A consular court acting in a foreign country where the Crown has jurisdiction is bound to take judicial notice of the law of that country: see *Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co* [1901] AC 373, PC.

6 The canon law of the Roman Catholic Church has been held to be foreign law by the Irish courts: see *O'Callaghan v O'Sullivan* [1925] 1 IR 90. As to European Union law see PARA 1087; and as to decisions of the European Court of Human Rights see PARA 1086.

7 See *Guaranty Trust Co of New York v Hannay & Co* [1918] 2 KB 623, CA; *Beatty v Beatty* [1924] 1 KB 807, CA; *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, HL. As to the modes of proving foreign law see PARAS 1085-1093.

8 See *Liddle v North Riding of Yorkshire County Council* [1934] 2 KB 101, CA; *Re Hartland, Banks v Hartland* [1911] 1 Ch 459; *Palmer v R* [1971] AC 814, [1971] 1 All ER 1077, PC; *R v McInnes* [1971] 3 All ER 295, [1971] 1 WLR 1600, CA. See further PARA 105.

9 See PARA 105 and the authorities there cited.

10 Scotland Act 1998 s 28(6). As to Welsh Assembly and Northern Ireland Assembly legislation see PARA 889.

UPDATE

783 Scots, Irish and foreign law

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(vii) Judicial Notice/784. The calendar; time.

784. The calendar; time.

The almanac is established by statute¹, and was previously recognised by the common law². The court will take judicial notice of the succession of years, months and days³, of the years of each sovereign's reign and the years in the calendar to which they correspond⁴, and of the days of the week upon which the days in the calendar fall⁵.

An expression of time of day in any Act of Parliament, statutory instrument, deed or other legal instrument or document means Greenwich mean time, unless otherwise specifically stated⁶; but judicial notice is taken, if necessary, of the fact that a place lies east or west of Greenwich, and therefore has a time different from Greenwich time⁷, although not of the times at which the sun rises and sets⁸.

1 See the Calendar (New Style) Act 1750 (repealed in part); the Calendar Act 1751; and **TIME** vol 97 (2010) PARA 301.

2 *R v Dyer* (1703) 6 Mod Rep 41; *Brough v Parkings* (1703) 2 Ld Raym 992.

3 *R v Brown* (1828) Mood & M 163; *Harvy v Broad* (1704) 2 Salk 626.

4 *Holman v Burrow* (1702) 2 Ld Raym 791; *Henry v Cole* (1702) 2 Ld Raym 811. As to reference by the court to appropriate sources in order to take judicial notice of historical facts see PARA 788 note 6.

5 *Hoyle v Lord Cornwallis* (1720) 1 Stra 387; *Hanson v Shackelton* (1835) 4 Dowl 48; *Pearson v Shaw* (1844) 7 ILR 1.

6 Interpretation Act 1978 ss 9, 23(1), (3), Sch 2 paras 1, 6. There is a limited contrary provision in relation to summer time in the Summer Time Act 1972 ss 1, 3 (amended by SI 2002/262): see **TIME** vol 97 (2010) PARAS 317-318.

7 *Curtis v March* (1858) 3 H & N 866.

8 *Collier v Nokes* (1849) 2 Car & Kir 1012; *Tutton v Darke*, *Nixon v Freeman* (1860) 5 H & N 647. An almanac may, however, be prima facie evidence of the time of the moon's rising: see *R v Hillier and Harnham* (1840) 4 JP 155.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(vii) Judicial Notice/785. Governments and Parliament.

785. Governments and Parliament.

The courts take judicial notice of the government of the United Kingdom and of the great officers of state by whom it is carried on¹, of the order and course of proceedings in Parliament², of the reports of parliamentary commissions³, and of the commencement, prorogation and sessions of Parliament⁴.

Judicial notice will be taken of the existence and titles of foreign states which are recognised by the British government⁵, and also the territorial limits of their dominions⁶, but not of their internal constitutions⁷. The status of a foreign ruler will be noticed by the court in accordance with the recognition afforded to him by the British government⁸, as also will the status of persons claiming certain privileges and immunities⁹.

The court will, in any case of uncertainty, seek information from a Secretary of State as to the status of a foreign government or sovereign¹⁰. A statement by the Secretary of State, or by the Attorney General on behalf of the Secretary of State¹¹, as to the status of a foreign power is accepted by the court as conclusive¹², but is not always conclusive for the purpose of construing a commercial document¹³.

¹ In *Whaley v Carlisle* (1866) 17 ICLR 792 the court took notice that Lord Hawkesbury was Foreign Minister in 1803; and see *R v Jones* (1809) 2 Camp 131.

² *Lake v King* (1668-70) 1 Wms Saund 131b. As to the admissibility in evidence of the Journals of either House of Parliament, and other official parliamentary documents see PARA 890.

³ See PARA 780 note 2.

⁴ *R v Wilde* (1670) 1 Lev 296; *Birt v Rothwell* (1697) 1 Ld Raym 210.

⁵ *Taylor v Barclay* (1828) 2 Sim 213; *United States of America v Wagner* (1867) 2 Ch App 582; *Duff Development Co Ltd v Kelantan Government* [1924] AC 797, HL; *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532, CA. When a question arises as to the validity of the laws of a foreign country, it is the duty of the court itself to take notice of it: *Carl Zeiss Stiftung v Rayner and Keeler Ltd* [1965] Ch 525, [1964] 3 All ER 326, CA.

⁶ *Foster v Globe Venture Syndicate Ltd* [1900] 1 Ch 811; and see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 33.

⁷ *Rendal AS v Arcos Ltd* [1936] 1 All ER 623, CA; revsd on other grounds [1937] 3 All ER 577, HL.

⁸ *Mighell v Sultan of Johore* [1894] 1 QB 149, CA; *Statham v Statham and Gaekwar of Baroda* [1912] P 92; *Sultan of Johore v Abubakar Tunku Aris Bendahar* [1952] AC 318, [1952] 1 All ER 1261, PC; *Sayce v Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State* [1952] 2 QB 390, [1952] 2 All ER 64, CA; *Rahimtoola v Nizam of Hyderabad* [1958] AC 379, [1957] 3 All ER 441, HL. See also *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853, [1966] 2 All ER 536, HL. The immunity of a foreign sovereign from proceedings in this country is discussed elsewhere in this work: see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 242 et seq; and see especially *The Parlement Belge* (1880) 5 PD 197, CA; *Cia Naviera Vascongado v SS Cristina* [1938] AC 485, [1938] 1 All ER 719, HL.

⁹ See the Diplomatic Privileges Act 1964 s 4; the International Organisations Act 1968 s 8; the Consular Relations Act 1968 s 11 (certificate issued by or under the authority of the Secretary of State to be conclusive evidence of any fact stated in it relating to the question whether or not a person is entitled to any privilege or immunity under the respective Acts). See also *Engelke v Musmann* [1928] AC 433, HL. Cf *Zoernsch v Waldock* [1964] 2 All ER 256, [1964] 1 WLR 675, CA. See further **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARAS 282, 297, 323.

10 *Duff Development Co Ltd v Kelantan Government* [1924] AC 797, HL; *Cremidi v Powell, The Gerasimo* (1857) 11 Moo PCC 88; *The Annette, The Dora* [1919] P 105; *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 1 KB 456; on appeal [1921] 3 KB 532, CA; *White, Child and Beney Ltd v Simmons, White, Child and Beney Ltd v Eagle Star and British Dominions Insurance Co* (1922) 127 LT 571, CA; *The Jupiter* [1924] P 236, CA; *The Arantzazu Mendi* [1939] AC 256, [1939] 1 All ER 719, HL; *Carl Zeiss Stiftung v Rayner and Keeler Ltd* [1965] Ch 525, [1964] 3 All ER 326, CA. See also the statutory provisions cited in note 9.

11 *The Gagara* [1919] P 95, CA (statement by Attorney General on behalf of Foreign Office); and see *Engelke v Musmann* [1928] AC 433, HL.

12 See note 9; and see *Mighell v Sultan of Johore* [1894] 1 QB 149, CA (disapproving *The Charkieh* (1873) LR 4 A & E 59); *Statham v Statham and Gaekwar of Baroda* [1912] P 92; *The Gagara* [1919] P 95, CA; *The Jupiter* [1924] P 236, CA; *Duff Development Co Ltd v Kelantan Government* [1924] AC 797, HL; *The Arantzazu Mendi* [1939] AC 256, [1939] 1 All ER 719, HL; *Haile Selassie v Cable and Wireless Ltd (No 2)* [1939] Ch 182, CA; *Kahan v Pakistan Federation* [1951] 2 KB 1003, CA; *Boguslawski v Gdynia-Ameryka Linie* [1951] 1 KB 162, [1950] 2 All ER 355, CA; *Sayce v Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State* [1952] 2 QB 390, [1952] 2 All ER 64, CA; *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853, [1966] 2 All ER 536, HL. See also *City of Berne v Bank of England* (1804) 9 Ves 347 (a court may not take notice of a foreign government which has not been recognised by the British government); *The Annette, The Dora* [1919] P 105 (courts should not recognise a foreign government as independent until the British government has so recognised it). See also *Yrisarri v Clement* (1825) 2 C & P 223, in which Best CJ held that when recognition had not been given, independence was a matter of proof, and which may no longer be regarded as a statement of the law. Where a foreign power is recognised by the British government, the recognition has a retroactive effect: see *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289 at 297, HL, per Lord Wright; and see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 52.

13 *Luigi Monta of Genoa v Cechofracht Co Ltd* [1956] 2 QB 552, [1956] 2 All ER 769 (Foreign Office statement not conclusive for the purposes of interpreting the word 'government' in the war risks clause). The word 'war' in a charterparty must be construed, having regard to the general tenor and purpose of the document, in a common sense way: *Kawasaki Kisen Kaisha of Kobe v Bantham Steamship Co Ltd (No 2)* [1939] 2 KB 544, [1939] 1 All ER 819, CA. As to the question whether a state of war exists see PARA 786.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(vii) Judicial Notice/786. State of war.

786. State of war.

Judicial notice will be taken of a state of war that exists¹ or has existed² between the United Kingdom and any other country³; and, possibly, of a state of war existing between two foreign countries, where the fact is recognised by the British government⁴.

Judicial notice may also be taken of the circumstances in which a war involving the United Kingdom is or was carried on⁵, but not of the date of any particular operation or engagement⁶.

1 *R v De Berenger* (1814) 3 M & S 67; *Alcinous v Nigreu* (1854) 4 E & B 217; *Re a Petition of Right* [1915] 3 KB 649, CA; *R v Trainor* [1917] 1 WWR 415.

2 *R v Bottrill, ex p Kuechenmeister* [1947] KB 41, [1946] 2 All ER 434, CA; *Re Grotrian, Cox v Grotrian* [1955] Ch 501, [1955] 1 All ER 788.

3 A certificate of the Secretary of State to the effect that the United Kingdom is at war is conclusive: *R v Bottrill, ex p Kuechenmeister* [1947] KB 41, [1946] 2 All ER 434, CA; see also *Blackburne v Thompson* (1812) 15 East 81; *Esposito v Bowden* (1857) 7 E & B 763, ExCh; *Driefontein Consolidated Gold Mines Ltd v Janson, West Rand Central Gold Mines Co Ltd v De Rougemont* [1900] 2 QB 339; affd sub nom *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484, HL; and see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 15.

4 See *Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Co Ltd (No 2)* [1938] 3 All ER 80; on appeal [1939] 2 KB 544, [1939] 1 All ER 819, CA; cf *Dolder v Lord Huntingfield* (1805) 11 Ves 283; *Thelluson v Cosling* (1803) 4 Esp 266.

5 *Re a Petition of Right* [1915] 3 KB 649, CA (certain parts of England had been attacked by aircraft); *R v Vine Street Police Station Superintendent, ex p Liebmann* [1916] 1 KB 268 (foreign civilians in this country communicating information to the enemy); *The Pacific and The San Francisco* (1917) 33 TLR 529 (Swedish firms engaged in shipping contraband goods to the enemy); *Atlantic Mutual Insurance Co v King* [1919] 1 KB 307 (unrestricted submarine warfare carried on); *J Wharton (Shipping) Ltd v Mortleman* [1941] 1 KB 340, [1941] 1 All ER 175, DC (Brest a war base).

6 *Commonwealth Shipping Representative v P & O Branch Service* [1923] AC 191, HL; *Jabbour v Custodian of Israeli Absentee Property* [1954] 1 All ER 145, [1954] 1 WLR 139; cf *Ward v Murray* (1900) Times, 5 March (notice taken of dates relating to siege of Kimberley); *Cornelius v Banque Franco-Serbe* [1942] 1 KB 29, [1941] 2 All ER 728 (notice taken that German invasion of Holland was taking place on 10 May 1940).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(vii) Judicial Notice/787. State and county divisions.

787. State and county divisions.

The court takes judicial notice of the existence, extent and geographical position of British areas of jurisdiction¹, including those abroad². The territory of foreign states is also noticed³.

Judicial notice is taken of the counties into which England and Wales are divided⁴, but not of the distance of one county from another, nor of the particular places situated within each county⁵, unless such situation is recognised by statute⁶.

The court does not take judicial notice of the particular diocese in which any town is situated⁷.

1 See *The Fagernes* [1927] P 311, CA, in which it was held that a statement by or on behalf of the Secretary of State as to the extent of British territorial sovereignty was conclusive; and see *R v Kent Justices, ex p Lye* [1967] 2 QB 153, [1967] 1 All ER 560, DC.

2 If in any proceeding, civil or criminal, any question arises as to the existence or extent of any jurisdiction of Her Majesty in a foreign country, a Secretary of State must, on the application of the court, send to the court within a reasonable time his decision on the question, and his decision is final for the purposes of the proceeding: Foreign Jurisdiction Act 1890 s 4(1). The court must send to the Secretary of State, in a document under the seal of the court, or signed by a judge of the court, questions framed so as properly to raise the question, and sufficient answers to those questions must be returned by the Secretary of State to the court, and those answers are, on production thereof, conclusive evidence of the matters therein contained: s 4(2). The effect of this provision is that no evidence may be led to contradict such a statement: see *Kerr v John Mottram Ltd* [1940] Ch 657, [1940] 2 All ER 629. Apart from this limitation, other evidence is admissible, for 'conclusive' does not mean 'exclusive': see *A-G v Bournemouth Corpn* [1902] 2 Ch 714, CA; *Ibrahim v R* [1914] AC 599, PC. See also *Cooke v Wilson* (1856) 1 CBNS 153 (notice taken of existence of colony of Victoria, and that it was out of England).

3 In *Foster v Globe Venture Syndicate Ltd* [1900] 1 Ch 811, Farwell J felt himself bound to take judicial notice of whether a tract of land in North Africa was the territory of the tribes of Suss or of the Sultan of Morocco, and applied to the Foreign Office whose reply was accepted as conclusive for information upon the question. But see *Duff Development Co Ltd v Kelantan Government* [1924] AC 797, HL, per Lord Summer. It may be that judicial notice of the territory of foreign states will only be taken where a particular tract of land is recognised by the British government as being under the sovereignty of a particular foreign state. As to judicial notice of foreign governments see PARA 785. In *Birrell v Dryer* (1884) 9 App Cas 345 at 352, HL, Lord Blackburn said that the court should take judicial notice of the geographical position and the general names applied to districts of the sea, 'in short, of all that we see on the Admiralty chart'. However, the better view may be that a map is no more than evidence of what it depicts. As to the admissibility of maps and plans see PARA 943.

4 *R v Sharpe and Vaul* (1838) 8 C & P 436 (county of Stafford in England); *R v St Maurice Inhabitants* (1851) 16 QB 908 (city of York was also a county, the county and the city having, by statute, the same limits); *R v Isle of Ely Inhabitants* (1850) 15 QB 827 (by statute, the Isle of Ely was a division of a county). In *R v Whittles* (1849) 13 QB 248 at 253, Lord Denman CJ said that a court of quarter sessions for a county could take notice of the petty sessional divisions of the county. The jurisdiction of the former courts of quarter sessions is now exercised by the Crown Court: see **COURTS** vol 10 (Reissue) PARA 601.

For lists and descriptions of English metropolitan counties and districts and non-metropolitan counties and counties in Wales see the Local Government Act 1972 Schs 1, 4 (Sch 4 substituted by the Local Government (Wales) Act 1994 s 1(2), Sch 1 para 1); and see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

5 *Deybel's Case* (1821) 4 B & Ald 243. The court refused to take notice that Ivelchester was in the county of Somerset (*R v Burrige* (1735) 3 P Wms 439); that the whole of the Tower of London was in the City of London (*Brune v Thompson* (1842) 2 QB 789); that Bedford Row was in the county of Middlesex (*Thorne v Jackson* (1846) 3 CB 661); that the board room of the Holborn Union Workhouse was in Middlesex (*R v St George's, Bloomsbury, Inhabitants* (1855) 4 E & B 520); that Holborn might not be in Surrey (*Humphreys v Budd* (1841) 9 Dowl 1000); or that Park Street, Grosvenor Square, was within 20 miles of Russell Square (*Kirby v Hickson* (1850) 1 LM & P 364); cf *Kearney v King* (1819) 2 B & Ald 301, where the court declined to take judicial notice that a bill drawn in Dublin meant Dublin in Ireland.

6 *R v Holborn Union Guardians* (1856) 6 E & B 715. Thus the court will take judicial notice of the descriptions of the counties listed in the Local Government Act 1972 Schs 1, 4.

7 *R v Simpson* (1724) 2 Ld Raym 1379.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(vii) Judicial Notice/788. Notorious facts.

788. Notorious facts.

The court takes judicial notice of matters with which persons of ordinary intelligence are acquainted¹, whether in human affairs², including the way in which business is carried on³, or human nature⁴, or in relation to natural phenomena⁵.

In order to equip himself to take judicial notice of a fact, the judge may consult appropriate sources⁶, or he may hear evidence⁷. He may also act upon his general knowledge of local affairs⁸, but it has generally been held that he may not import into a case his own private knowledge of particular facts⁹, even if those facts have been proved in previous proceedings¹⁰. There is, however, authority to the effect that a judge hearing proceedings in a county court against a local housing authority for compensation for breach of a repairing covenant and for a mandatory order to carry out remedial work is entitled to take judicial notice of how the authority has conducted itself in relation to undertakings given in similar cases, since that conduct, even if not notorious or clearly established, is clearly susceptible of demonstration by reference to the court records of those occasions where the authority gave undertakings and was brought back to court at the behest of an aggrieved claimant¹¹.

1 *Byrne v Londonderry Tramway Co* [1902] 2 IR 457; see also *Hoare v Silverlock* (1848) 12 QB 624; *Lumley v Gye* (1853) 2 E & B 216; *R v Aspinall* (1876) 2 QBD 48, CA; *Morgan v London General Omnibus Co* (1884) 13 QBD 832, CA; *Loughney v Caledonian Rly Co* 1902 39 Sc LR 289.

2 See eg *Peters v Fleming* (1840) 6 M & W 42 (not unreasonable that an undergraduate should require a watch); *Re Oxford Poor Rate* (1857) 8 E & B 184 (University of Oxford created for advancement of education and learning); *Tynte v Hodge*, *Tynte v Beavan* (1864) 2 Hem & M 287 (dearness of money in 1847); *Bryant v Foot* (1868) LR 3 QB 497, Ex Ch (great difference in the value of money in the years 1189 and 1868); *Penny v Hanson* (1887) 18 QBD 478, DC (impossibility of predicting fortunes by reference to the aspect of the stars); *Dennis v AJ White & Co* [1916] 2 KB 1, CA (streets of London crowded and dangerous); *Preston-Jones v Preston-Jones* [1951] AC 391, [1951] 1 All ER 124, HL (normal period of human gestation); *Williamson v Freer* (1874) LR 9 CP 393 (practice of the office); *Robinson v Jones* (1879) 4 LR Ir 391 (postcard an unenclosed document); *Chapman v Kirke* [1948] 2 KB 450, [1948] 2 All ER 556, DC (ordinary meaning of English words); *Davey v Harrow Corp* [1958] 1 QB 60, [1957] 2 All ER 305, CA (practice of the compilers of ordnance survey maps); *Burns v Edman* [1970] 2 QB 541, [1970] 1 All ER 886 (criminals do not live happy lives); *R v Yap Chuan Ching* (1976) 63 Cr App Rep 7, CA (reconstructed trials are a popular form of television entertainment). In Northern Ireland, the court has taken judicial notice of the fact that petrol bomb attacks on houses, while always containing an element of potential danger to the occupants, only rarely cause serious injury, the majority appearing to cause only minor fires: see *R v Gilmour* [2000] NI 367, NI CA.

3 Notice will be taken of the normal hours of banking (*Parker v Gordon* (1806) 7 East 385; *Elford v Teed* (1813) 1 M & S 28; *Wilkins v Jadis* (1831) 2 B & Ad 188); of the nature and incidents of the employment of a stockbroker (*Johnson v Kearley* [1908] 2 KB 514, CA); of the practice of conveyancers (*Re Rosher*, *Rosher v Rosher* (1884) 26 ChD 801); of the peculiar risks inherent in the nature of particular trades (*Dennis v AJ White & Co* [1917] AC 479, HL); of the way in which the market in second-hand cars is carried on (*Poole v Smith's Car Sales (Balham) Ltd* [1962] 2 All ER 482, [1962] 1 WLR 744, CA); and that a costermonger's barrow moves (*Kahn v Newberry* [1959] 2 QB 1, [1959] 2 All ER 202, DC).

4 The mischievous nature of children, making them vulnerable to danger, has often formed the subject of judicial notice: see eg *Lynch v Nurdin* (1841) 1 QB 29; *Williams v Eady* (1893) 10 TLR 41, CA; *Sullivan v Creed* [1904] 2 IR 317, CA; *Cooke v Midland Great Western Rly Co of Ireland* [1909] AC 229, HL; *Clayton v Hardwick Colliery Co Ltd* (1915) 85 LJB 292, HL; *Glasgow Corp v Taylor* [1922] 1 AC 44, HL, per Lord Atkinson; *Yachuk v Oliver Blais Co Ltd* [1949] AC 386, [1949] 2 All ER 150, PC; *Williams v Cardiff Corp* [1950] 1 KB 514, [1950] 1 All ER 250, CA; *Jones v Lawrence* [1969] 3 All ER 267; *British Railways Board v Herrington* [1972] AC 877, [1972] 1 All ER 749, HL; cf the Occupiers' Liability Act 1957 s 2(3)(a); and see **NEGLIGENCE** vol 78 (2010) PARAS 32, 40.

5 *R v Woodward* (1831) 1 Mood CC 323 (beans are a species of pulse); *Fay v Prentice* (1845) 1 CB 828 (rainfalls); *Clinton v Lyons & Co Ltd* [1912] 3 KB 198 (hostility between cat and dog); *Nye v Niblett* [1918] 1 KB 23, DC (cats are domestic animals); *R v Nelson* [1922] 2 WWR 381 (whisky is intoxicating); *McQuaker v Goddard* [1940] 1 KB 687, [1940] 1 All ER 471, CA (the camel is a domestic and not a wild animal in England).

6 See *Commonwealth Shipping Representative v P & O Branch Service* [1923] AC 191, HL; *McQuaker v Goddard* [1940] 1 KB 687, [1940] 1 All ER 471, CA. Historical works, for example, may be referred to: *Read v Bishop of Lincoln* [1892] AC 644, PC. As to evidence to explain the meaning of words see *Marquis Camden v IRC* [1914] 1 KB 641, CA; on appeal sub nom *IRC v Marquess Camden* [1915] AC 241, HL; *Chapman v Kirke* [1948] 2 KB 450, [1948] 2 All ER 556, DC (court taken to know the meaning of any ordinary expression in the English language); and see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 198-205; **STATUTES**. In some cases the court may, and perhaps should, consult the Secretary of State: see PARAS 785-786.

7 There is a distinction between the use of evidence for the purpose of proving a fact, and its use for the purpose of assisting a judge in forming a clear view of a fact of which he is entitled to take judicial notice: see *McQuaker v Goddard* [1940] 1 KB 687, [1940] 1 All ER 471, CA. The court may require the appropriate works of reference to be produced to it: see *Van Omeron v Dowick* (1809) 2 Camp 42. As to the admissibility of books and works of reference in evidence generally see PARAS 941-944.

8 *Roberts and Ruthven Ltd v Hall* (1912) 5 BWCC 331, CA; *Peart v Bolckow, Vaughan & Co* [1925] 1 KB 399, CA; *Keane v Mount Vernon Colliery Co* [1933] AC 309, HL; *Youngmin v Heath* [1974] 1 All ER 461, [1974] 1 WLR 135, CA. As to justices see *Ingram v Percival* [1969] 1 QB 548, [1968] 3 All ER 657, DC (justices may make use of their knowledge of local conditions); *Borthwick v Vickers* [1973] RTR 390, DC (justices entitled to supplement evidence by their knowledge of local geography to infer that a certain journey involved travelling on public roads).

9 *R v Sutton* (1816) 4 M & S 532; *Van Breda v Silberbauer* (1869) LR 3 PC 84; *Hurpurshad v Sheo Dyal* (1876) LR 3 Ind App 259, PC; *R (Giant's Causeway etc Tramway Co) v Antrim County Justices* [1895] 2 IR 603; *Palmer v Crone* [1927] 1 KB 804; *Reynolds v Llanelly Associated Tinplate Co Ltd* [1948] 1 All ER 140, CA.

It is not improper, however, for a justice with specialised knowledge of the circumstances forming the background of a particular case to draw on that knowledge for the purpose of interpreting the evidence which he has heard: *Wetherall v Harrison* [1976] QB 773, [1976] 1 All ER 241, DC. See further **MAGISTRATES**.

10 *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, HL; *Roper v Taylor's Central Garages (Exeter) Ltd* [1951] 2 TLR 284, DC. Justices in a matrimonial case are not entitled to take into consideration their previous experience of dealing with the parties without having referred in open court to the previous proceedings and giving the parties an opportunity to deal with those previous proceedings and any inference to be drawn from them: *Thomas v Thomas* [1961] 1 All ER 19, [1961] 1 WLR 1, DC. As to judges and jurors giving evidence see PARAS 968, 971.

11 *Mullen v Hackney London Borough Council* [1997] 2 All ER 906, [1997] 1 WLR 1103, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(vii) Judicial Notice/789. Official seals.

789. Official seals.

The courts in England and Wales will take judicial notice of the following seals: the Great Seals of the United Kingdom and of England, Ireland and Scotland¹; the privy seal²; the wafer seals (Great and privy)³; the seals of the duchies of Cornwall⁴ and Lancaster⁵; the seal of the Corporation of the City of London⁶; the seals of the old superior courts of justice⁷, the old Admiralty court⁸, the prerogative court of Canterbury⁹, and any other court authorised by statute to use a seal¹⁰. However, every document purporting to be sealed or stamped with the seal or stamp of the Supreme Court or of any office of the Supreme Court is now to be received in evidence in the United Kingdom without further proof¹¹. Every county court is a court of record and has a seal¹² and a document purporting to bear the court's seal is likewise admissible in evidence without further proof¹³.

Judicial notice must be taken of the seal of an implementation body established by the 1999 Dublin agreement on north/south co-operation between the United Kingdom Government and the Irish Government¹⁴; and of the seals of each of the International Tribunals relating to Rwanda¹⁵ and the former Yugoslavia¹⁶.

Many public offices and bodies are authorised by statute to use distinctive seals, which are directed either to be noticed judicially, or to be received in evidence without proof of authenticity, for example the seals of the Patent¹⁷ and Record¹⁸ Offices, of various Secretaries of State¹⁹ and of the Forestry Commissioners²⁰.

There are particular provisions requiring judicial notice to be taken in connection with documents or affidavits made or used under the companies winding-up provisions of the Insolvency Act 1986²¹, of seals on affidavits sworn abroad²², and of seals on certain official and public documents²³.

However, courts will not generally take judicial notice of the seals of corporations²⁴, other than that of the City of London²⁵.

1 *Viscount Melville's Case* (1806) 29 State Tr 549. As to such seals see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 909-911.

2 *Lane's Case* (1586) 2 Co Rep 16b.

3 Crown Office Act 1877 ss 4, 5(3) proviso (a): see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 914.

4 As to the seal of the Duchy of Cornwall see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 327.

5 As to the seals of the Duchy of Lancaster see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 303. Any document purporting to be sealed with the official seal of the Duchy solicitor is receivable in evidence of the particulars stated in that document: Duchy of Lancaster Act 1920 s 3(2).

6 *Doe d Woodmass v Mason* (1793) 1 Esp 52.

7 *Tooker v Duke of Beaufort* (1757) Say 297.

8 *Green v Waller* (1703) 2 Ld Raym 891.

9 *Kempton d Boyfield v Cross* (1735) Lee temp Hard 108.

10 *Doe d Duncan v Edwards* (1839) 9 Ad & El 554. The seal of the Aircraft and Shipbuilding Industries Arbitration Tribunal must be judicially noticed (Aircraft and Shipbuilding Industries Act 1977 s 42(2)); as must that of the Employment Appeal Tribunal (Employment Tribunals Act 1996 s 20(3)).

11 Supreme Court Act 1981 s 132. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

12 County Courts Act 1984 s 1(2).

13 See CPR 2.6(3) (which also applies in relation to the High Court and the Civil Division of the Court of Appeal); and PARA 81. As to the meaning of 'seal' see PARA 81 note 2.

14 See the North/South Co-operation (Implementation Bodies) (Northern Ireland) Order 1999, SI 1999/859, Sch 2 para 4(1). A document purporting to be duly executed under the seal of an implementation body must, unless the contrary is shown, be received in evidence and be deemed to be such a document without further proof: para 4(2).

15 See the United Nations (International Tribunal) (Rwanda) Order 1996, SI 1996/1296, art 27(3).

16 See the United Nations (International Tribunal) (Former Yugoslavia) Order 1996, SI 1996/716, art 27(3). Similar provision is made with regard to both tribunals in the orders enabling Jersey, Guernsey and the Isle of Man to co-operate with those tribunals: see the United Nations (International Tribunals) (Former Yugoslavia and Rwanda) (Jersey) Order 1997, SI 1997/283, art 25(3); the United Nations (International Tribunals) (Former Yugoslavia and Rwanda) (Isle of Man) Order 1997, SI 1997/282, art 24(3); and the United Nations (International Tribunals) (Former Yugoslavia and Rwanda) (Guernsey) Order 1997, SI 1997/281, art 25(3).

17 Patents and Designs Act 1907 s 64: see **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 579.

18 Public Records Act 1958 s 9(2).

19 See eg the Secretaries of State for Education and Skills and for Work and Pensions Order 2002, SI 2002/1397, art 3(2)(b) (corporate seal of Secretary of State for Education and Skills must be judicially noticed). As to the use of seals by Secretaries of State see generally **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 357.

20 See the Forestry Act 1967 s 2, Sch 1 para 4; and **FORESTRY** vol 52 (2009) PARA 34. Other examples are the seals of (1) the Official Custodian for Charities (see the Charities Act 1993 s 2(1)); (2) the Social Security, Child Support and Pensions Joint Authority for the purposes of the legislation to which the Northern Ireland Act 1998 s 87 applies (see s 88(4)(b)).

21 In such proceedings all courts, judges and persons judicially acting, and all officers, judicial or ministerial, of any court, or employed in enforcing the process of any court must take judicial notice of the official seal or stamp of the several offices of the High Court in England and Wales or Northern Ireland, or of the Court of Session, appended to or impressed on any document made, issued or signed under the provisions of the Insolvency Act 1986 or the Companies Act 1985, or any official copy of such a document: see the Insolvency Act 1986 s 196(b). Further, all courts, judges, justices, commissioners and persons acting judicially must take judicial notice of the seal or stamp or signature (as the case may be) of any court, judge, person, consul or vice-consul lawfully authorised to take and receive affidavits attached, appended or subscribed to any affidavit sworn for the purposes of those provisions whether in the United Kingdom or overseas, or to any other document to be used for those purposes: see s 200; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1079. As to affidavits generally see PARA 989 et seq.

22 See PARA 1027.

23 Evidence Act 1845 s 1.

24 *Doe d Bank of England v Chambers* (1836) 4 Ad & El 410. As to proof of a corporation's seal see PARA 865.

25 See the text to note 6.

UPDATE

789 Official seals

NOTE 11--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 21--Insolvency Act 1986 s 196(b) amended: SI 2009/1941.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(vii) Judicial Notice/790. Official signatures and appointments.

790. Official signatures and appointments.

Courts will take judicial notice of the following signatures: the royal sign manual, and the signatures of the principal Secretaries of State¹; those of the judges of the superior courts to any judicial or official document² and of persons before whom depositions are taken³. However, the normal way of authenticating a court document, whether in the High Court and Civil Division of the Court of Appeal or in a county court, is by sealing it, and certain documents are required to be sealed⁴.

Notice will also be taken of the signatures of certain persons in respect of the winding up of companies⁵, of the signatures of persons empowered to administer oaths or do notarial acts abroad⁶, and of signatures on various public and official documents⁷. In addition, many particular documents are admissible in evidence without proof of the authenticity of the signatures they bear⁸. For example, for the purposes of the Extradition Act 2003, foreign documents may be authenticated by the oath or affirmation of a witness, but are deemed in any case to be duly authenticated if they purport to be signed by a judge, magistrate or officer of the territory where they were issued or if they purport to be certified, whether by seal or otherwise, by the ministry or department of the territory responsible for justice or for foreign affairs, and duly authenticated documents may be received in evidence without further proof⁹.

Judicial notice must be taken of the appointment¹⁰ of official receivers and deputy official receivers¹¹.

1 *Mighell v Sultan of Johore* [1894] 1 QB 149, CA.

2 Evidence Act 1845 s 2 (amended by the Statute Law Revision Act 1891); and see *Blades v Lawrence* (1874) LR 9 QB 374.

3 As to depositions see PARA 992 et seq.

4 See PARA 81.

5 In all proceedings under the Insolvency Act 1986 Pt IV (ss 73-219), all courts, judges and persons judicially acting, and all officers, judicial or ministerial, of any court, or employed in enforcing the process of any court must take judicial notice of the signature of any officer of the High Court or of a county court in England and Wales, or of the Court of Session or a sheriff court in Scotland, or of the High Court in Northern Ireland: s 196(a).

6 See PARA 1027. The signature of a foreign notary to a protest abroad of a foreign bill has been judicially noticed: *Chesmer v Noyes* (1815) 4 Camp 129.

7 Evidence Act 1845 s 1; Evidence Act 1851 s 14.

8 See eg PARA 887 (certified copies of public documents).

9 See the Extradition Act 2003 s 202 (amended by the Police and Justice Act 2006 s 42, Sch 13 Pt 1 para 26); and **EXTRADITION**.

10 *Ie* under the Insolvency Act 1986 ss 399-401: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 31 et seq.

11 Insolvency Rules 1986, SI 1986/1925, r 10.1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(viii) The Court's Power to Control Evidence/A. CONTROL OF EVIDENCE AT HEARINGS AND TRIAL/791. Court's general power to control evidence.

(viii) The Court's Power to Control Evidence

A. CONTROL OF EVIDENCE AT HEARINGS AND TRIAL

791. Court's general power to control evidence.

In proceedings to which the Civil Procedure Rules ('CPR') apply¹, the court² may control the evidence by giving directions as to (1) the issues on which it requires evidence³; (2) the nature of the evidence which it requires to decide those issues⁴; and (3) the way in which the evidence is to be placed before the court⁵. The court may use this power to exclude evidence that would otherwise be admissible⁶.

Except for the above provisions relating to the control of evidence, neither the general rules relating to evidence in the CPR⁷ nor the strict rules of evidence apply to cases which have been allocated to the small claims track⁸.

The court may limit cross-examination⁹.

Expert¹⁰ evidence must be restricted to that which is reasonably required to resolve the proceedings¹¹ and no party may call an expert or put in evidence an expert's report without the court's permission¹².

In exercising these powers the court must seek to give effect to the overriding objective of enabling the court to deal with cases justly¹³. Dealing with a case justly includes, so far as is practicable, ensuring that the parties are on an equal footing¹⁴ in accordance with the principle of 'equality of arms' which forms part of the right to a fair trial under the Convention for the Protection of Human Rights and Fundamental Freedoms, now given greater effect in domestic law by the Human Rights Act 1998¹⁵.

The court must actively manage cases in order to further the overriding objective¹⁶. Active case management includes identifying the issues at an early stage¹⁷ and deciding the order in which they are to be resolved¹⁸.

In family proceedings¹⁹, nothing in the rules relating to evidence therein²⁰ affects the power of the judge at the trial to refuse to admit any evidence if in the interest of justice he thinks fit to do so²¹.

1 As to the application of the CPR see PARA 32.

2 As to the meaning of 'court' see PARA 22.

3 CPR 32.1(1)(a). As to identifying the issues see the text and notes 19-20.

4 CPR 32.1(1)(b).

5 CPR 32.1(1)(c). As to the principles governing the use of video evidence for the purposes of cross-examination in personal injury cases see *Rall v Hume*[2001] EWCA Civ 146, [2001] 3 All ER 248, [2001] CPLR 239. As to the meaning of 'cross-examination' see PARA 50 note 4. In proceedings for judicial review, the court may rely on its general and unfettered powers under CPR 32.1 to hear oral evidence and order the cross-examination of witnesses on their witness statements: see CPR 54.16(1), which was amended with effect from 2 December 2002 to confirm this position in the light of *R (on the application of PG) v Ealing London Borough Council*[2002] EWHC 250 (Admin), [2002] All ER (D) 61 (Mar). As to the exercise of the discretion under CPR

32.1 see eg *GKR Karate (UK) Ltd v Yorkshire Newspapers Ltd* [2000] 2 All ER 931, [2000] 1 WLR 2571, CA. A court should afford anonymity to a professional social worker witness in care proceedings only in exceptional cases: *Re W (Care Proceedings: Witness Anonymity)* [2002] EWCA Civ 1626, [2003] 1 FLR 329.

6 CPR 32.1(2). See *Silversafe Ltd (in liquidation) v Hood* [2006] EWHC 1849 (Ch), [2007] STC 871. As to admissibility generally see PARA 758 et seq; and as to the admissibility of specific types of evidence see PARA 806 et seq.

7 le CPR Pts 32, 33: see PARA 750 et seq.

8 See CPR 27.2(1)(c), (d); CPR 27.8(3), (4); and PARAS 275, 279. As to allocation to track see CPR 26.5; and PARA 266; as to claims normally allocated to the small claims track see PARA 267; and as to case management of such cases see CPR Pt 27; and PARA 274 et seq.

9 CPR 32.1(3). As to the meaning of 'cross-examination' see PARA 50 note 4. As to witness evidence see PARA 966 et seq.

10 A reference to an 'expert' in CPR Pt 35 (see PARA 838 et seq) is a reference to an expert who has been instructed to give or prepare evidence for the purpose of court proceedings: CPR 35.2.

11 CPR 35.1. This rule applies to claims allocated to the small claims track (see PARA 756 note 18), as do CPR 35.3 (experts; overriding duty to the court: see PARA 848); CPR 35.7 (court's power to direct that evidence is to be given by a single joint expert: see PARA 840); and CPR 35.8 (instructions to a single joint expert: see PARA 847); but the remainder of CPR Pt 35 (see PARA 838 et seq) does not apply to small claims: see CPR 27.2(e); and PARA 275.

12 See CPR 35.4(1); and PARA 838.

13 CPR 1.1(1), 1.2. As to the overriding objective see PARA 33.

14 CPR 1.1(2)(a).

15 As to the right to a fair trial see the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) art 6, now given direct effect in domestic law by the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 6; and PARAS 5, 792; and see further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 135 et seq.

16 See CPR 1.4(1); and PARA 246.

17 CPR 1.4(2)(b). The court must also decide promptly which issues need full investigation and trial and accordingly dispose summarily of the others: see CPR 1.4(2)(c); and PARA 246. In a jury trial it is for the judge to identify the issues: see PARA 796. As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

18 CPR 1.4(2)(d). As to the order in which evidence is usually presented see PARA 773.

19 The CPR do not generally apply to family proceedings: see PARA 32.

20 le nothing in the Family Proceedings Rules 1991, SI 1991/1247, r 10.14 (evidence of marriage outside England and Wales: see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 835), r 2.28 (evidence at trial of cause: see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 837) and r 2.29 (evidence by deposition: see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 838): r 2.28(2).

21 Family Proceedings Rules 1991, SI 1991/1247, r 2.28(2).

UPDATE

791 Court's general power to control evidence

NOTE 10--CPR 35.2 substituted: SI 2009/2092.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(viii) The Court's Power to Control Evidence/A. CONTROL OF EVIDENCE AT HEARINGS AND TRIAL/792. Court's powers are to be exercised in accordance with Convention rights.

792. Court's powers are to be exercised in accordance with Convention rights.

Under the Human Rights Act 1998, it is unlawful for a court or tribunal to act in a way which is incompatible with a Convention right¹. The following Convention rights are particularly relevant in the context of the law of civil evidence:

- 8 (1) in the determination² of his civil rights and obligations³ or of any criminal charge against him, everyone is entitled to a fair⁴ and public hearing⁵ within a reasonable time by an independent and impartial tribunal established by law⁶;
- 9 (2) everyone charged with a criminal offence⁷ must be presumed innocent until proved guilty according to law⁸ and has certain minimum rights including the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him⁹ and the right to the free assistance of an interpreter if he cannot understand or speak the language used in court¹⁰;
- 10 (3) everyone has the right to freedom of expression¹¹ but this right may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for preventing the disclosure of information received in confidence¹².

1 See the Human Rights Act 1998 s 6(1), (3)(a); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to Convention rights see s 1(3), Sch 1. See also PARA 1235; and **COURTS** vol 10 (Reissue) PARA 316.

2 If there is no adjudication, the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) art 6(1) is not engaged: see eg *R v Hertfordshire County Council, ex p Green Environmental Industries Ltd* [2000] 2 AC 412, [2000] 1 All ER 773, HL.

3 For this purpose, 'civil rights and obligations' does not include matters of public law, eg tax: Application 44759/98 *Ferrazzini v Italy* [2001] STC 1314, 34 EHRR 1068, ECtHR.

4 In addition to the rights that are expressly mentioned in the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)), it has been held that certain other rights are implicit in the concept of a fair trial; these are the right of access to court, the right to an adversarial hearing, the right to equality of arms between the parties, the right to fair presentation of the evidence, the right to cross-examine and the right to a reasoned judgment: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 135 et seq.

The right to a fair trial is not confined to the purely judicial part of the proceedings; thus in family proceedings, where a jointly instructed or sole expert's report is likely to have a preponderant influence on the court's assessment of the facts, there may be a breach of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) now given direct effect in domestic law by the Human Rights Act 1998 Sch 1 Pt I art 6 if a litigant is denied the opportunity, before that report is produced, to examine and comment on the documents being considered by the expert and cross-examine witnesses interviewed by the expert and on whose evidence the report is based: *Re C (care proceedings: disclosure of local authority's decision-making process)* [2002] EWHC 1379 (Fam), [2002] 2 FCR 673. As to experts' reports see PARA 852 et seq.

5 As to public hearings and the circumstances in which the press and public may be excluded see generally **COURTS** vol 10 (Reissue) PARAS 312-313.

6 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(1), given direct effect in domestic law by the Human Rights Act 1998 Sch 1 Pt I art 6(1). For a discussion of the interaction between the rights under the Human Rights Act 1998 Sch 1 Pt I art 6 and art 8 (right to respect for private and family life) see *Re C (care proceedings: disclosure of local authority's decision-making process)* [2002] EWHC 1379 (Fam), [2002] 2 FCR 673.

7 It is now settled law that both imprisonment for contempt of court and imprisonment under the Debtors Act 1869 fall under head (2) in the text so that the standard of proof required is proof beyond reasonable doubt: see PARA 775.

8 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(2), now given direct effect in domestic law by the Human Rights Act 1998 Sch 1 Pt I art 6(2).

9 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(3)(d), now given direct effect in domestic law by the Human Rights Act 1998 Sch 1 Pt I art 6(3)(d).

10 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(3)(e), now given direct effect in domestic law by the Human Rights Act 1998 Sch 1 Pt I art 6(3)(e). As to the use of interpreters in Welsh courts see PARA 1031.

11 Protection of Human Rights and Fundamental Freedoms (1950) art 10(1), now given direct effect in domestic law by the Human Rights Act 1998 Sch 1 Pt I art 10(1). As to the confidentiality of journalists' sources see the Contempt of Court Act 1981 s 10; and PARA 576.

12 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 10(2), now given direct effect in domestic law by the Human Rights Act 1998 Sch 1 Pt I art 10(2). As to the exclusion of evidence on grounds of public policy see PARA 574 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(viii) The Court's Power to Control Evidence/A. CONTROL OF EVIDENCE AT HEARINGS AND TRIAL/793. Orders for the inspection or preservation etc of property.

793. Orders for the inspection or preservation etc of property.

On the application of any person in accordance with rules of court¹, the High Court or a county court may make an order, on the application of any party, for the inspection, photographing, preservation, custody and detention of any property² which appears to the court to be property which may become the subject matter of subsequent proceedings in that court, or as to which any question may arise in any such proceedings, and for the taking of any samples of, and the carrying on of any experiment on or with, any such property³.

The court also has power to order the inspection, photographing, preservation, custody and detention of any property, and the taking of any samples of, and the carrying on of any experiment on or with, any property, which is not the property of, or in the possession of, any party to the proceedings but which is the subject matter of the proceedings or as to which any question arises in the proceedings⁴.

The procedure on such applications is discussed elsewhere in this title⁵. The court may not make such an order if it considers that compliance with the order, if made, would be likely to be injurious to the public interest⁶.

1 As to the procedure on such applications see CPR 25.5; and PARA 323.

2 As to the meaning of 'property' for these purposes see PARA 114 note 2.

3 See the Supreme Court Act 1981 s 33(1); the County Courts Act 1984 s 52(1); and PARA 114. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

4 See the Supreme Court Act 1981 s 34(3); the County Courts Act 1984 s 53(3); and PARA 317.

5 See PARAS 114, 317, 323.

6 Supreme Court Act 1981 s 35(1); County Courts Act 1984 s 54(1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(viii) The Court's Power to Control Evidence/A. CONTROL OF EVIDENCE AT HEARINGS AND TRIAL/794. Orders for a person to submit to inspection out of court.

794. Orders for a person to submit to inspection out of court.

In a few cases there is statutory power to order a person to submit to inspection out of court; for example in any civil proceedings in which the parentage of any person falls to be determined, the court may give a direction for the use of scientific tests to ascertain whether such tests show that a party to the proceedings is or is not the father or mother of that person, and for the taking, within a period specified in the direction, of bodily samples from all or any of the following: (1) that person; (2) any party who is alleged to be the father or mother of that person; and (3) any other party to the proceedings¹. The procedure for taking such samples and the consents required are discussed elsewhere in this work². Where a court gives such a direction and any person fails to take any step required of him for the purpose of giving effect to the direction, the court may draw such inferences, if any, from that fact as appear proper in the circumstances³.

A court has the power in an appropriate case to stay proceedings if the claimant refuses to co-operate in a medical examination which the judge reasonably requires⁴.

1 See the Family Law Reform Act 1969 s 20(1) (substituted by the Family Law Reform Act 1987 s 23(1)); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 113.

2 See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 113 et seq.

3 See the Family Law Reform Act 1969 s 23(1); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 116.

As to orders for inspection etc in other circumstances see eg *Agnew v Jobson* (1877) 47 LJMC 67 (medical examination of female charged with concealment of birth illegal, unless by consent); *Re Betts and Block, ex p Board of Trade* (1887) 19 QBD 39, CA; affd sub nom *Board of Trade v Block* (1888) 13 App Cas 570, HL (bankrupt not compellable to submit to medical examination for the purpose of having an insurance on his life effected); *Mitchell v Stephens* (1894) 29 LJo 389 (refusal by county court to order inspection of patient's mouth, in action (now known as a 'claim': see PARA 18) by dentist for professional charges). As to medical inspection in nullity suits see eg *S v B (falsely called S)* (1905) 21 TLR 219 (where a wife refused to submit herself for medical examination in a nullity suit, the court drew an inference of incapacity); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 338. As to failure to undergo a breath test or to provide a specimen of blood or urine in a road traffic case see **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARAS 985, 988. As to the taking of bodily samples from accused persons generally see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARAS 1027-1030.

4 See *James v Baily Gibson & Co (a firm)* [2002] EWCA Civ 1690, [2002] All ER (D) 454 (Oct), where, however, it was held that the judge's order staying proceedings when the claimant refused to attend for a psychiatric examination was disproportionate because the claimant could establish a viable lost chance and her case could proceed on the issues not affected by the psychiatric evidence.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(viii) The Court's Power to Control Evidence/B. FUNCTIONS OF JUDGE AND JURY/795. Functions of judge and jury; in general.

B. FUNCTIONS OF JUDGE AND JURY

795. Functions of judge and jury; in general.

Although almost all civil proceedings are now tried by judge alone¹, the judge thus deciding both questions of law and of fact, the distinction between the functions of judge and jury is important². In a jury trial, once the judge has decided that there is sufficient evidence to go to the jury, all matters of fact are for the jury to decide, while all matters of law are for the judge³.

It is the judge's duty to give the jury a proper and complete direction on the law applicable⁴ and on the incidence of the burden of proof, and it is for the jury to accept this direction. The judge should sum up the evidence to the jury and may properly comment on the relative values of classes of testimony, and of the evidence given⁵. The credibility of testimony is a matter for the jury⁶, as may be general damages⁷.

Both the High Court and a judge in the county court have statutory power to appoint expert assessors to assist the court in hearing and disposing of a claim or other matter⁸.

1 As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132. In trials before a judge alone, the judge acts also as the tribunal of fact; but the term 'jury' is used in this and the following paragraphs for convenience. As to the allocation of proceedings to different levels of the judiciary, including masters, registrars and district judges, see PARAS 50, 62.

2 A judge may sit with assessors: see the text and note 8.

3 In cases of malicious prosecution it is for the judge to decide whether the defendant had reasonable and probable cause for instituting proceedings: *Herniman v Smith*[1938] AC 305, [1938] 1 All ER 1, HL; see further **TORT** vol 45(2) (Reissue) PARA 471.

4 *Prudential Assurance Co v Edmonds*(1877) 2 App Cas 487, HL. As to the judge's direction to the jury in criminal trials see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1319 et seq.

5 *Bishop of Meath v Marquess of Winchester* (1836) 3 Bing NC 183, HL; *Heslop v Chapman* (1853) 23 LJQB 49, Ex Ch; *A-G v Good* (1825) M'Cle & Yo 286; *R v Bliss Hill*(1918) 82 JP 194, CCA; *R v Feigenbaum*[1919] 1 KB 431, CCA; *Stamps Minister v Townend*[1909] AC 633, PC.

6 See eg *Dublin, Wicklow and Wexford Rly Co v Slattery*(1878) 3 App Cas 1155, HL; *Watt v Watt* (1909) 10 WLR 699.

7 *Mechanical and General Inventions Co Ltd and Lehwess v Austin and Austin Motor Co Ltd*[1935] AC 346, HL. As to the assessment of damages see **DAMAGES** vol 12(1) (Reissue) PARA 826 et seq.

8 As to the appointment of assessors and trial by a judge with assessors to assist him see PARA 863; and PARA 1133.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(viii) The Court's Power to Control Evidence/B. FUNCTIONS OF JUDGE AND JURY/796. Ascertainment of the issues.

796. Ascertainment of the issues.

It is the judge's duty to ascertain the issues and so to determine what evidence is or is not relevant¹. The issues will generally be ascertained from the statements of case², since only the issues raised by the statements of case are decided at the trial³. The normal rules with regard to statements of case do not, however, apply to some trials⁴. In such cases the issues may be established by the claim form⁵ or by some other means⁶.

In proceedings under the Children Act 1989, the judge has a quasi-inquisitorial role⁷. Such proceedings are discussed elsewhere in this work⁸.

1 *R v Gebreel* (1974) Times, 8 June, CA. As to the court's general power to control evidence and the duty to identify the issues at an early stage see CPR 32.1, CPR 1.4(2)(b) respectively; and PARA 791. As to whether the viewing of prejudicial irrelevant information by the judge compels him to recuse himself see *Berg v IML London* [2002] 4 All ER 87, [2002] All ER (D) 46 (Aug), cited in PARA 792 note 4.

2 As to statements of case see PARA 1065 note 1; and PARA 584 et seq.

3 It has been held that evidence at variance with the particulars of claim should be excluded: *Roberts v Dorman Long & Co Ltd* [1953] 2 All ER 428, [1953] 1 WLR 942, CA. However, amendment of the statement of case is permitted at any time before service and after service with the court's permission: see PARA 607 et seq. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2. As to the court's general discretion to exclude evidence see PARA 791.

4 See PARA 584.

5 In where the procedure under CPR Pt 8 is used: see CPR 8.2(b); and PARA 128.

6 Eg by affidavits of property and income in respect of applications for financial provision orders (see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 941); by the application notice or the evidence contained or referred to in it where an application is made for ruling on meaning in a defamation case (see *Practice Direction--Defamation Claims* PD 53 para 4.2; and **LIBEL AND SLANDER**).

7 See *Re H (a child: residence)* [2002] 3 FCR 277, CA.

8 See **CHILDREN AND YOUNG PERSONS**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(viii) The Court's Power to Control Evidence/B. FUNCTIONS OF JUDGE AND JURY/797. Admissibility a question of law.

797. Admissibility a question of law.

Questions relating to the admissibility of evidence are questions of law and must be determined by the judge¹. If such questions depend upon the determination of some preliminary question of fact, the judge may decide that question by himself after hearing any necessary evidence upon it². This is so even though the decision of the preliminary question involves the determination by the judge of the same fact which the jury has ultimately to decide³, but he may ask the jury to determine the fact⁴.

Upon this principle it is for the judge to decide whether deeds or documents more than 20 years old are produced from proper custody⁵, whether a witness can claim privilege⁶, whether documents required to be stamped are stamped sufficiently in accordance with their true character⁷, and whether a witness sufficiently understands the nature of an oath⁸. So also, where it is sought, in the absence of an original document, to adduce secondary evidence of its contents, the judge decides whether reasonable exertion or search has been made to procure the original⁹, whether the original is in the possession of the party to whom notice has been given to produce it¹⁰, whether a witness required to produce documents has a reasonable excuse for withholding them from production¹¹, and any questions that may be raised as to the existence¹² or identity¹³ of the document alleged to be the original.

In cases of disputed ownership of land, where evidence is tendered of acts of ownership done in places not in dispute, it is for the judge to decide whether there is such a unity of character in the land in dispute and the places where the acts of ownership were done as to render the evidence admissible¹⁴.

1 *Lewis v Marshall* (1844) 7 Man & G 729.

2 *Boyle v Wiseman* (1855) 11 Exch 360; *Welstead v Levy* (1831) 1 Mood & R 138; *Lewis v Marshall* (1844) 7 Man & G 729; *Duke of Beaufort v Crawshay* (1866) LR 1 CP 699; *Minter v Priest* [1930] AC 558, HL. In *Froude v Hobbs* (1859) 1 F & F 612 the preliminary question was, by consent, decided by the jury. Even when the objection is to evidence prima facie admissible, the judge should, before admitting it, allow evidence to be interposed to show its inadmissibility: *Boyle v Wiseman* (1855) 11 Exch 360, overruling *Jones v Fort* (1828) Mood & M 196; *Bartlett v Smith* (1843) 11 M & W 483; *State v Treanor* [1924] 2 IR 193; *A-G v O'Leary* [1926] IR 445. A party in contempt of court, who is permitted by a judge to call evidence, should call that evidence himself if he is acting in person or by an advocate instructed on his behalf: *Grupo Torras SA v Sheikh Fahad Mohammed Al Sabah* (1999) Times, 30 March, Independent, 25 February, CA.

3 *Doe d Jenkins v Davies* (1847) 10 QB 314; see contra *Stowe v Querner* (1870) LR 5 Exch 155. In *Hitchins v Eardley* (1871) LR 2 P & D 248, as a practical means of meeting the difficulty, Lord Penzance decided, when a strong prima facie case had been made out, to admit the evidence the admissibility of which was disputed, and to leave the whole case to the jury.

4 *Stowe v Querner* (1870) LR 5 Exch 155.

5 *Rees v Walters* (1838) 3 M & W 527; *Doe d Earl of Shrewsbury v Keeling* (1848) 11 QB 884; *Doe d Jacobs v Phillips* (1845) 8 QB 158; and see PARA 871.

6 *Cleave v Jones* (1852) 7 Exch 421; *Stace v Griffith* (1869) LR 2 PC 420.

7 *Bartlett v Smith* (1843) 11 M & W 483; *Bennison v Jewison* (1848) 12 Jur 485; *Dunsford v Curlew* (1859) 1 F & F 702; and see PARAS 959-960.

8 *R v Williams* (1835) 7 C & P 320 (child); *R v Whitehead* (1866) LR 1 CCR 33 (deaf mute); *R v Hill* (1851) 2 Den 254 (person of unsound mind). As to the competence of a person to give evidence in criminal proceedings see the Youth Justice and Criminal Evidence Act 1999 s 53; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1401. Any proceedings held for the determination of the question must take place in the absence of the jury (if there is one): s 54(4). Expert evidence may be received on the question: s 54(5). Any questioning of the witness (where the court considers that necessary) must be conducted by the court in the presence of the parties: s 54(6). As to the competence of witnesses in civil proceedings see PARA 966 et seq.

9 *Quilter v Jorss* (1863) 14 CBNS 747.

10 *Harvey v Mitchell* (1841) 2 Mood & R 366.

11 *Amey v Long* (1808) 9 East 473; *Eccles & Co v Louisville and Nashville Railroad Co* [1912] 1 KB 135, CA; and see PARA 1011.

12 *Froude v Hobbs* (1859) 1 F & F 612; *Cox v Couveless* (1860) 2 F & F 139.

13 *Boyle v Wiseman* (1855) 11 Exch 360.

14 *Doe d Barrett v Kemp* (1831) 7 Bing 332. As to such evidence see PARA 1082; and **BOUNDARIES**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(viii) The Court's Power to Control Evidence/B. FUNCTIONS OF JUDGE AND JURY/798. Prima facie case to answer.

798. Prima facie case to answer.

Before the evidence is left to the jury, the judge has to decide whether there is sufficient evidence to establish a prima facie case¹. He must consider whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof rests². If there is no evidence either the case will be withdrawn or the jury will be directed to find in favour of the other party³. Similarly it is for the judge to determine whether it is open to the jury to draw an inference from facts proved, leaving it to the jury to say whether or not it does⁴. If there is a conflict of evidence, it is the jury's province to decide which evidence it prefers to accept⁵.

This rule, in a civil case tried before a judge alone, has the effect of enabling a party at the conclusion of his opponent's case to submit that there is no case to answer. In such a situation the judge will not normally rule upon the submission unless the party making it elects to call no evidence⁶. There is a discretion, even where a civil case is tried without a jury, to rule without requiring an election⁷ but this must be exercised with caution⁸ since the trial is now in progress, and although the test (no real prospect) differs from that applicable after hearing all possible evidence (balance of probability), the submission interrupts the ordinary trial process, and it is not desirable that, during that process, the judge of fact should be put in a position where he may find himself having to express first an initial view on the basis of the claimant's evidence alone and then (if he allows the claim to proceed) a further final view after taking into account further evidence, even though he does so by reference to different tests. There may be cases where this consideration is of less force, because nothing in the defendant's evidence could affect the view taken of the claimant's evidence or case. But there is also the second and very important consideration that, if the judge rules that the claimant's evidence does not show a real prospect of success (whether this is for reasons of fact or law), he may prove wrong on appeal. In that event, the procedure adopted will prove to have caused much unnecessary cost, involving a re-trial which will probably be before a different judge⁹.

The judge may refuse so to rule at the end of the claimant's case, but may review his opinion at the close of the evidence or after the verdict of the jury¹⁰. It is not, however, open to a judge, at the close of a claimant's case and without requiring any election by the defendant to call no evidence, to determine whether or not the claimant has on his own evidence made out his case on the balance of probability¹¹.

Submissions of no case to answer may also be made before magistrates¹².

1 *Ryder v Wombwell* (1868) LR 4 Exch 32; *Giblin v McMullen* (1868) LR 2 PC 317; *Hiddle v National Fire and Marine Insurance Co of New Zealand* [1896] AC 372, PC.

2 See *Giblin v McMullen* (1869) LR 2 PC 317.

3 *Daniel v Metropolitan Rly Co* (1871) LR 5 HL 45. If a judge is prepared to decide in favour of the other party without hearing his evidence, that party is entitled to insist that his evidence is heard before the decision is given: see *Re Pincoffs, ex p Jacobson* (1882) 22 ChD 312, CA.

4 *Parfitt v Lawless* (1862) LR 2 P & D 462; *Metropolitan Rly Co v Jackson* (1877) 3 App Cas 193, HL; *Toal v North British Rly Co* [1908] AC 352, HL.

5 *Dublin, Wicklow and Wexford Rly Co v Slattery* (1878) 3 App Cas 1155, HL.

6 *Alexander v Rayson* [1936] 1 KB 169, CA; *Laurie v Raglan Building Co Ltd* [1942] 1 KB 152, [1941] 3 All ER 332, CA. As to the submission of no case in criminal trials see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1313; and as to the submission of no case in matrimonial causes see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 851.

7 *Bentley v Jones Harris & Co* [2001] EWCA Civ 1724, [2001] All ER (D) 37 (Nov); *Boyce v Wyatt Engineering* [2001] EWCA Civ 692, [2001] All ER (D) 16 (May); and see *Young v Rank* [1950] 2 KB 510, [1950] 2 All ER 166. Some flaw of fact or law may, eg, have emerged for the first time, of such a nature as to make it entirely obvious that the claimant's case must fail, and it may save significant costs if a determination is made at that stage: *Miller (t/a Waterloo Plant) v Cawley* [2002] EWCA Civ 1100, [2002] All ER (D) 452 (Jul).

8 *Boyce v Wyatt Engineering* [2001] EWCA Civ 692, [2001] All ER (D) 16 (May); *Miller (t/a Waterloo Plant) v Cawley* [2002] EWCA Civ 1100, [2002] All ER (D) 452 (Jul); *Benham Ltd v Kythira Investments Ltd* [2003] EWCA Civ 1794, [2003] All ER (D) 252 (Dec). See also *Graham v Chorley Borough Council* [2005] EWCA Civ 92, [2006] All ER (D) 288 (Feb).

9 *Miller (t/a Waterloo Plant) v Cawley* [2002] EWCA Civ 1100, [2002] All ER (D) 452 (Jul); *Benham Ltd v Kythira Investments Ltd* [2003] EWCA Civ 1794, [2003] All ER (D) 252 (Dec). See also *Graham v Chorley Borough Council* [2005] EWCA Civ 92, [2006] All ER (D) 288 (Feb).

10 *Peters v Perry & Co* (1894) 10 TLR 366; *Skeate v Slaters Ltd* [1914] 2 KB 429, CA; *Shears v Mendeloff* (1914) 30 TLR 342; *Grinsted v Hadrill* [1953] 1 All ER 1188, [1953] 1 WLR 696, CA.

11 *Miller (t/a Waterloo Plant) v Cawley* [2002] EWCA Civ 1100, [2002] All ER (D) 452 (Jul); *Benham Ltd v Kythira Investments Ltd* [2003] EWCA Civ 1794, [2003] All ER (D) 252 (Dec). See also *Graham v Chorley Borough Council* [2005] EWCA Civ 92, [2006] All ER (D) 288 (Feb).

12 See eg *Disher v Disher* [1965] P 31, [1963] 3 All ER 933, DC; *De Filippo v De Filippo* (1963) 108 Sol Jo 56, DC.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(viii) The Court's Power to Control Evidence/B. FUNCTIONS OF JUDGE AND JURY/799. Admitted facts.

799. Admitted facts.

Facts are sometimes admitted¹, and different views may be possible as to their significance. The jury must be allowed to decide which it prefers².

¹ As to formal admissions see PARAS 776-778; and as to informal admissions see PARA 819.

² See *Davey v London and South Western Rly Co* (1883) 12 QBD 70, CA. As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(viii) The Court's Power to Control Evidence/B. FUNCTIONS OF JUDGE AND JURY/800. Construction of documents a question of law.

800. Construction of documents a question of law.

Except in libel cases¹ the construction, meaning and effect of all written and printed documents are matters of law for the judge². Where there is a jury, it may determine as facts any surrounding circumstances which affect the construction of words which have peculiar meanings in particular localities or trades³, and then it is for the judge to say what is the meaning and effect of the document in question⁴. It must also find as a fact the meaning of technical or commercial terms used in a written contract⁵. It is a question of law for the judge to decide, from the existence of facts found by any jury, whether a written contract is subject to any implied term or condition⁶. When the legal effect of any transaction is to be ascertained from a number of documents which do not involve the consideration of any technical expressions, the construction, meaning and effect of the documents are matters entirely for the judge to decide; but where it also is necessary to take into consideration the conduct, course of business or oral communications of the parties, it is for any jury to weigh the oral evidence and to decide what was the real intention and meaning of the parties⁷.

In the case of a document in a foreign language, the meaning of the words must first be determined as a question of fact, upon the evidence of persons competent to translate them, and to explain any technical, legal or scientific expressions which the document may contain; the construction of the document so translated then becomes a question of law for the judge to decide⁸.

The inspection of a record is peculiarly within the province of the court⁹, and if there is any dispute as to what are the actual words written in a document, it is for the judge on inspection of the document to decide and not for a jury¹⁰.

When the contents of a lost document are proved by secondary evidence it is for the judge to say what is its proper meaning and effect¹¹.

1 'Libel or no libel' is for the jury: see **LIBEL AND SLANDER**. However, at any time after the service of particulars of claim, either party may apply to the court for a ruling on meaning (ie whether a statement complained of is capable of having any meaning attributed to it in a statement of case, whether the statement is capable of being defamatory of the claimant and whether the statement is capable of bearing any other meaning defamatory of the claimant): see *Practice Direction--Defamation Claims* PD 53 paras 4.1-4.4; and **LIBEL AND SLANDER** vol 28 (Reissue) PARA 224. As to the meaning of 'court' for these purposes see PARA 22.

2 *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, HL; *Macbeath v Haldimand* (1786) 1 Term Rep 172; *Lovell and Christmas Ltd v Wall* (1911) 104 LT 85, CA; *Neilson v Harford* (1841) 8 M & W 806; *Hill v Evans* (1862) 4 De GF & J 288; *Bowes v Shand* (1877) 2 App Cas 455, HL. See also *R v Spens* [1991] 4 All ER 421, [1991] 1 WLR 624, CA (construction of City Code on Take-overs and Mergers a matter of law). Accordingly, the construction of statutes is a matter of law for the judge: *A-G v Cast-Plate Glass Co* (1792) 1 Anst 39; *Planché v Braham* (1837) 8 C & P 68 (subsequent proceedings, 4 Bing NC 17); *Elliott v South Devon Rly Co* (1848) 2 Exch 725. As to construction generally see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 164 et seq; **STATUTES** vol 44(1) (Reissue) PARA 1369 et seq.

3 *Neilson v Harford* (1841) 8 M & W 806; *Bowes v Shand* (1877) 2 App Cas 455, HL; *Ashforth v Redford* (1873) LR 9 CP 20; *Alexander v Vanderzee* (1872) LR 7 CP 530, Ex Ch. See **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 669; **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 167. Where the document is plain and unambiguous there is no question for the jury: *Hitchin v Groom* (1848) 5 CB 515.

4 *Hutchison v Bowker* (1839) 5 M & W 535; *Neilson v Harford* (1841) 8 M & W 806.

5 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 167.

6 *Re Comptoir Commercial Anversois and Power, Son & Co* [1920] 1 KB 868, CA; and see **CONTRACT** vol 9(1) (Reissue) PARA 778 et seq.

7 *Smith v Thompson* (1849) 8 CB 44; *Hordern v Commercial Union Insurance Co* (1887) 56 LT 240, PC; and see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 209. As to the admissibility of such evidence see PARA 1070.

8 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 201.

9 *R v Hucks* (1816) 1 Stark 521. A shorthand report of a judgment, although not appearing in any recognised series of law reports, may be referred to as a record of what a judge had said on a former occasion as to the meaning of an Act of Parliament: *Renshaw v Dixon* [1911] WN 40. As to reference to *Hansard* as an aid to statutory construction see *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, [1993] 1 All ER 42, HL; and **STATUTES** vol 44(1) (Reissue) PARA 1421.

10 *Remon v Hayward* (1835) 2 Ad & El 666.

11 *Berwick v Horsfall* (1858) 4 CBNS 450; and see *Read v Price* [1909] 2 KB 724, CA. Where the evidence is oral and the veracity of the witness is not impeached, it is solely a question of law for the judge (*Berwick v Horsfall* (1858) 4 CBNS 450), but where there is a conflict of evidence it becomes a question of fact for the jury.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(viii) The Court's Power to Control Evidence/B. FUNCTIONS OF JUDGE AND JURY/801. Particular proceedings.

801. Particular proceedings.

The respective functions of judge and jury¹ are more particularly defined in relation to certain questions arising in particular classes of proceedings. These proceedings, which are dealt with elsewhere in this work, include claims for libel and slander², for malicious prosecution and false imprisonment³, and for the price of necessities⁴. So, too, the functions of judge and jury have been particularly defined in relation to questions of boundaries⁵, liquidated damages⁶, acknowledgments extending a period of limitation⁷, restraint of trade⁸, the reasonableness of custom and usage⁹, and foreign law¹⁰.

1 As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

2 This applies, in particular, with regard to the questions whether words are capable of bearing a defamatory meaning, whether a document or occasion was privileged, or whether, if the defence of fair comment is raised, the matter was of public interest: see **LIBEL AND SLANDER**. See also PARA 800 note 1.

3 Eg with regard to the question whether there was reasonable and probable cause: see **TORT**.

4 Eg with regard to the questions whether the goods in question can be necessities and whether they are necessities in a particular case: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 18-19.

5 Whether a particular parcel of land is contained or not in the description of land conveyed by deed is a question of fact: see **BOUNDARIES**.

6 The question whether a sum specified in a written contract is a penalty or liquidated damages is a question of law for the judge: see **DAMAGES** vol 12(1) (Reissue) PARA 1066.

7 As to the determination of what constitutes an acknowledgment for the purposes of preventing the barring of a claim by lapse of time see **LIMITATION PERIODS** vol 68 (2008) PARA 946.

8 Eg with regard to the determination of the questions whether or not a contract is in restraint of trade and whether or not the restraint is reasonable: see **COMPETITION** vol 18 (2009) PARA 377 et seq.

9 See **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 609 et seq.

10 See PARA 1088.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(viii) The Court's Power to Control Evidence/C. EXCLUSION OF EVIDENCE ON GROUNDS OF PUBLIC POLICY/802. Public interest immunity.

C. EXCLUSION OF EVIDENCE ON GROUNDS OF PUBLIC POLICY

802. Public interest immunity.

The general rule of law that any documentary evidence may be withheld or an answer to any question may be refused on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest is discussed elsewhere in this title¹.

¹ See PARAS 574-579.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(1) INTRODUCTION/(viii) The Court's Power to Control Evidence/D. ADMISSION OF FRESH EVIDENCE ON APPEAL/803. Admission of fresh evidence in civil appeals.

D. ADMISSION OF FRESH EVIDENCE ON APPEAL

803. Admission of fresh evidence in civil appeals.

Oral evidence, or evidence which was not before the lower court will not generally be received by an appellate court. If the appellate court does allow evidence to be given, the evidence must meet defined criteria, applied subject to the overriding objective¹ of dealing with cases justly².

1 As to the overriding objective see PARA 33.

2 See PARAS 1676-1678.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(2) 'WITHOUT PREJUDICE' COMMUNICATIONS/804. Communications 'without prejudice'.

(2) 'WITHOUT PREJUDICE' COMMUNICATIONS

804. Communications 'without prejudice'.

Letters written and oral communications made¹ during a dispute² between the parties, which are written or made for the purpose of settling the dispute³, and which are expressed or otherwise proved to have been made 'without prejudice'⁴, cannot generally⁵ be admitted in evidence⁶. The rule does not apply to communications which have a purpose other than settlement of the dispute⁷; thus it does not apply in respect of a document which, from its character, may prejudice the person to whom it is addressed⁸.

The privilege, where it exists, covers not only the particular letter itself but also all subsequent parts of the same correspondence on both sides, even if they are not expressed to be 'without prejudice'⁹, unless there is a clear break in the chain of correspondence to show that the ensuing letters are open¹⁰. Moreover, it has been held to cover an open letter, followed by another from the same party to the effect that their communications were intended to be 'without prejudice'¹¹.

It has been said that the privilege attaches only for the purposes of the proceedings in which the letter was written¹², but this now seems doubtful¹³.

The privilege applies for the protection of the solicitor who writes the letter, as well as for his client¹⁴.

Offers under Part 36 of the Civil Procedure Rules are treated as without prejudice except as to costs¹⁵. An offer to settle the costs of proceedings which gave rise to detailed assessment proceedings in respect of costs may be made without prejudice save as to the costs of the detailed assessment proceedings¹⁶.

1 Privilege attaches to the contents of a 'without prejudice' conversation between the parties which takes place in the presence of the judge or arbitrator: *Stotesbury v Turner* [1943] KB 370. For general guidance on the nature of the privilege see *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, [1988] 3 All ER 737, HL. As to the extent of the privilege see also *Dixons Stores Group Ltd v Thames Television plc* [1993] 1 All ER 349; *Gnitrow Ltd v Cape plc* [2000] 3 All ER 763, [2000] 1 WLR 2327, CA.

2 If there is no dispute as yet, there can be no 'without prejudice' privilege: *Standrin v Yenton Minster Homes Ltd* (1991) Times, 22 July, CA.

3 *Grace v Baynton* (1877) 21 Sol Jo 631; *Kitcat v Sharp* (1882) 48 LT 64; *Re Daintrey, ex p Holt* [1893] 2 QB 116. See also *E Hulton & Co Ltd v Chadwick, Taylor & Co* (1919) 122 LT 66, HL; *South Shropshire District Council v Amos* [1987] 1 All ER 340, [1986] 1 WLR 1271, CA; *Norwich Union Life Insurance Society v Tony Waller Ltd* [1984] 1 EGLR 126, 270 Estates Gazette 42. See also *Schering Corp'n v Cipla Ltd* [2004] EWHC 2587 (Ch), [2005] FSR 575; and *Brown v Rice* [2007] EWHC 625 (Ch), [2008] FSR 61.

4 Negotiations with a view to a settlement are usually conducted 'without prejudice', which means that the circumstances in which the content of those negotiations may be revealed to the court are very restricted: CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31. As to the meaning of 'without prejudice' see also *Woodard v Eastern Counties and London and Blackwall Rly Co* (1855) 1 Jur NS 899; *Kurtz & Co v Spence & Sons* (1887) 57 LJ Ch 238; *Walker v Wilsher* (1889) 23 QBD 335, CA; *Re River Steamer Co, Mitchell's Claim* (1871) 6 Ch App 822. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

5 For exceptions to the 'without prejudice' rule see PARA 805.

6 *Waldridge v Kennison* (1794) 1 Esp 143; *Paddock v Forrester* (1842) 3 Scott NR 715; *Whiffen v Hartwright* (1848) 11 Beav 111; *Hoghton v Hoghton* (1852) 15 Beav 278; *Re Daintrey, ex p Holt* [1893] 2 QB 116. See also *Cory v Bretton* (1830) 4 C & P 462; *Re River Steamer Co, Mitchell's Claim* (1871) 6 Ch App 822. The 'without prejudice' rule ought to be applied with restraint and only in cases to which public interests underlying the rule are plainly applicable: *Prudential Assurance Co Ltd v Prudential Insurance Co of America* [2002] EWHC 2809 (Ch), [2002] All ER (D) 337 (Dec). The test to be applied is whether unambiguous impropriety will arise where the 'without prejudice' communications are not admitted in evidence: *Berry Trade Ltd v Moussavi* [2003] EWCA Civ 715, [2003] All ER (D) 315 (May); *BNP Paribas v Mezzotero* [2004] IRLR 508, EAT. The public interest in favour of the protection of 'without prejudice' negotiations will usually outweigh the public interest in discouraging perjury: *Savings and Investment Bank Ltd (in liquidation) v Fincken* [2003] EWCA Civ 1630, [2004] 1 All ER 1125, [2004] 1 WLR 667. See also *Stax Claimants v Bank of Nova Scotia Channel Islands* [2007] EWHC 1153 (Ch), [2007] All ER (D) 215 (May), where the court refused to extend the protection for 'without prejudice' communications to discussions not falling strictly within the scope of genuine negotiations to settle.

In *Vaseghi v Brunel University* [2007] EWCA Civ 482, [2007] IRLR 592, there was said to be a bilateral waiver of privilege in respect of the 'without prejudice' negotiations.

As to the relationship between the 'without prejudice' rule and pre-action protocol communications see *Zuckerman Civil Procedure: Principles of Practice* (2nd Edn, 2006) para 16.15-16.17; but see *Belt v Basildon and Thurrock NHS Trust* [2004] EWHC 783 (QB) at [18], [2004] All ER (D) 445 (Feb).

7 There is danger in using the words 'without prejudice' in communications intended to have a binding effect: see *Re Weston and Thomas' Contract* [1907] 1 Ch 244 (notice of rescission, marked 'without prejudice', void).

8 *Re Daintrey, ex p Holt* [1893] 2 QB 116 ('without prejudice' letter admitted to prove act of bankruptcy contained in it); *Kurtz & Co v Spence & Sons* (1887) 57 LJ Ch 238 (letter containing threat which infringed patent legislation); and see *Grace v Baynton* (1877) 21 Sol Jo 631; *Kitcat v Sharp* (1882) 48 LT 64.

9 *Paddock v Forrester* (1842) 3 Scott NR 715; *Re Harris, ex p Harris* (1875) 44 LJ Bcy 33; *Peacock v Harper* (1877) 26 WR 109; cf *Walker v Wilsher* (1889) 23 QBD 335, CA; *Oliver v Nautilus Steam Shipping Co* [1903] 2 KB 639, CA; *India Rubber, Gutta Percha, and Telegraph Works Co Ltd v Chapman* (1926) 20 BWCC 184, CA.

10 *India Rubber, Gutta Percha, and Telegraph Works Co Ltd v Chapman* (1926) 20 BWCC 184, CA. If one party to negotiations on a without prejudice basis wishes to change the basis to an open one, the burden is on him to bring the change to the attention of the other party: *Cheddar Valley Engineering Ltd v Chaddlewood Homes Ltd* [1992] 4 All ER 942, [1992] 1 WLR 820.

11 *Peacock v Harper* (1877), as reported at 26 WR 109, where Hall V-C is reported as saying that the second letter must be taken as a postscript to the former. The proper view may be that if a communication is intended to be 'without prejudice', and is accepted by the other party as such, then the privilege attaches. See also *Oliver v Nautilus Steam Shipping Co* [1903] 2 KB 639, CA.

12 *Stretton v Stubbs* (1905) Times, 28 February. Cf *Instance v Denny Bros Printing Ltd* [2000] FSR 869 (privilege attached for purpose of subsequent litigation connected with same subject matter).

13 See eg *Unilever plc v Procter and Gamble Co* [2001] 1 All ER 783, [2000] 1 WLR 2436, CA ('without prejudice' statements made by the parties could not be used as admissions either in those proceedings or in other proceedings).

14 *La Roche v Armstrong* [1922] 1 KB 485. The rule does not otherwise apply in relation to third persons (*Teign Valley Co v Woodcock* (1899) Times, 22 July), although discovery (now known as 'disclosure': see PARA 963) of a surveyor's report and correspondence following discussions 'without prejudice' was refused in *Rabin v Mendoza & Co* [1954] 1 All ER 247, [1954] 1 WLR 271, CA. As to the privilege which arises between spouses and a third party when discussions have taken place for the purpose of reconciliation see PARA 972 note 5; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 833.

15 See CPR 36.13(1); and PARA 739. As to Part 36 offers see PARA 729 et seq.

16 See CPR 47.19(1), (2); and PARA 1799.

UPDATE

804 Communications 'without prejudice'

NOTE 6--Policy of protecting without prejudice communications is stronger than policy of providing judge with every conceivable help to arrive at just solution: *Oceanbulk*

Shipping and Trading SA v TMT Asia Ltd [2010] EWCA Civ 79, [2010] All ER (D) 163 (Feb) (reversing: [2009] EWHC 1946 (Comm), [2009] 2 All ER (Comm) 1021).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(2) 'WITHOUT PREJUDICE' COMMUNICATIONS/805. Limits of the rule.

805. Limits of the rule.

The contents of a communication made 'without prejudice' are admissible when there has been a binding agreement between the parties arising out of it¹, or for the purpose of deciding whether such an agreement has been reached², and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place³, or that an act of bankruptcy⁴, or a severance of a joint tenancy⁵, or a trigger for a rent review clause⁶, has occurred, but generally speaking they are not otherwise admissible. Thus they cannot be used as admissions, or as acknowledgments to prevent a debt from becoming statute-barred⁷, or, normally, for the purpose of deciding the question of costs⁸, or to show malice⁹, although it has been held that they may be admitted to prove matters not connected with the merits of the dispute¹⁰.

The consent of both parties to the dispute is required for the privilege to be waived¹¹, even if there has been only one communication¹²; but a party deploying the substance of 'without prejudice' communications in support of its case may no longer object to the use by its opponents of any admissions in those communications¹³. The critical question for the court as to admissibility is where to draw the line between the public policy of encouraging parties to resolve disputes without litigation, and wrongly preventing one or other party from putting their case at its best in litigation¹⁴.

1 See *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, [1988] 3 All ER 737, HL. The agreement which has been reached may thus be construed: *Holdsworth v Dimsdale* (1871) 19 WR 798; *Re River Steamer Co, Mitchell's Claim* (1871) 6 Ch App 822; *Re Leite, Leite v Ferreira* (1881) 72 LT Jo 97; cf *Walker v Wilsher* (1889) 23 QBD 335, CA.

2 *Tomlin v Standard Telephones and Cables Ltd* [1969] 3 All ER 201, [1969] 1 WLR 1378, CA. Such a communication may also be looked at by the judge (though not by the jury) to decide the question of its admissibility: *Re Daintrey, ex p Holt* [1893] 2 QB 116; applied in *South Shropshire District Council v Amos* [1987] 1 All ER 340, [1986] 1 WLR 1271, CA. The question of admissibility is decided at the hearing: *Re Jessopp (a Solicitor)* (1910) 54 Sol Jo 543, CA. As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

3 Eg when there is an allegation of laches: see *Walker v Wilsher* (1889) 23 QBD 335. See also *Jones v Foxall* (1852) 15 Beav 388.

4 *Re Daintrey, ex p Holt* [1893] 2 QB 116.

5 *McDowall v Hirschfield Lipson & Rumney* [1992] 2 FLR 126, (1992) Times, 13 February.

6 *Norwich Union Life Insurance Society v Tony Waller Ltd* [1984] 1 EGLR 126, 270 Estates Gazette 42.

7 *Cory v Bretton* (1830) 4 C & P 462; and see *Re River Steamer Co, Mitchell's Claim* (1871) 6 Ch App 822. Cf *Froyssell v Lewelyn* (1821) 9 Price 122. See also **LIMITATION PERIODS**.

8 *Walker v Wilsher* (1889) 23 QBD 335, CA; *Stotesbury v Turner* [1943] KB 370. Dicta to the contrary in *Woodard v Eastern Counties and London and Blackwall Rly Co* (1855) 1 Jur NS 899, must be regarded as wrong. However, in matrimonial proceedings relating to finance a party may make a compromise offer in respect of financial provision or property without prejudice to that issue at the hearing, but reserving the right of the party making the offer to refer to it on the issue of costs: see *Calderbank v Calderbank* [1976] Fam 93, [1975] 3 All ER 333, CA.

9 *Watt v Watt* [1905] AC 115, HL. An offer to settle the costs of proceedings which gave rise to the detailed assessment of costs without prejudice to the costs of the detailed assessment proceedings will be taken into account by the court in deciding who should pay the costs of those proceedings: see CPR 47.19; and PARA 1799.

10 *Waldrige v Kennison* (1794) 1 Esp 143 (admission by defendant during 'without prejudice' discussion that a document was in his handwriting). The contents of 'without prejudice' correspondence may be disclosed in an application to strike out for want of prosecution: *Family Housing Association (Manchester) Ltd v Michael Hyde & Partners (a firm)* [1993] 2 All ER 567, [1993] 1 WLR 354, CA. Caution should be exercised when allowing one party to argue that without prejudice negotiations reveal that a fact relied upon at trial is not true: *UYB Ltd v British Railways Board* [2000] All ER (D) 1477, CA.

11 See *McTaggart v McTaggart* [1949] P 94, [1948] 2 All ER 754, CA; and *Blow v Norfolk County Council* [1966] 3 All ER 579, [1967] 1 WLR 1280, CA. As to waiver of privilege generally see PARA 970.

12 *Walker v Wilsher* (1889) 23 QBD 335, CA, disapproving the contrary opinion expressed in *Williams v Thomas* (1862) 2 Drew & Sm 29.

13 *Somatra Ltd v Sinclair Roche & Temperley (a firm)* [2000] 1 WLR 2453, [2000] All ER (D) 1055, CA.

14 *Barnetson v Framlington Group Ltd* [2007] EWCA Civ 502, [2007] 3 All ER 1054, [2007] 1 WLR 2443.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(i) Introduction/806. The former common law rule against hearsay; admissibility under the legislation.

(3) HEARSAY EVIDENCE

(i) Introduction

806. The former common law rule against hearsay; admissibility under the legislation.

Hearsay evidence in its legal sense is evidence given by a testifying witness of a statement made on some other occasion, when it is intended as evidence of the truth of what was asserted¹. It is essential to appreciate that evidence is only hearsay when tendered to prove the truth of the facts asserted, not when tendered simply to show that the statement was made². Hearsay may be first hand, when a witness says what he heard someone else say, or second hand (or even more distant) when he relates what he was told that someone else said. It may be oral or documentary³, of fact or of opinion.

With certain very significant exceptions, hearsay evidence was not admissible at common law⁴. By virtue of Part I of the Civil Evidence Act 1968, first hand hearsay became admissible in civil proceedings to the extent provided by that Part or by any other statutory provision, or by agreement of the parties⁵, while the Civil Evidence Act 1972 made hearsay statements of opinion evidence admissible in civil proceedings to substantially the same extent as hearsay statements of fact were admissible under Part I of the 1968 Act⁶. The Civil Evidence Act 1995 finally abolished the rule against the admission of hearsay in civil proceedings⁷ subject to statutory safeguards where such evidence is admitted⁸. Certain common law exceptions to the former exclusionary rule continue to have effect⁹.

In civil proceedings before the High Court or a county court and family proceedings and civil proceedings under the Child Support Act 1991 in a magistrates' court, evidence given in connection with the upbringing, maintenance or welfare of a child is admissible notwithstanding any rule of law relating to hearsay¹⁰.

1 It is not hearsay when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made: see *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, PC. For an example of a case where the distinction was not made by the trial judge see *R v Willis* [1960] 1 All ER 331, [1960] 1 WLR 55, CCA. See also *Perkins v Vaughan* (1842) 4 Man & G 988; *Wright and Webb v Annandale* (1930) 46 TLR 239; on appeal [1930] 2 KB 8, CA; *Myers v DPP* [1965] AC 1001, [1964] 2 All ER 881, HL; *R v Chapman* [1969] 2 QB 436, [1969] 2 All ER 321, CA. All the pre-1995 authorities cited in this paragraph must now be read in the light of the Civil Evidence Act 1995.

2 This kind of evidence is sometimes called 'original': see *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, PC; *R v Chapman* [1969] 2 QB 436, [1969] 2 All ER 321, CA; and see *The Statue of Liberty* [1968] 2 All ER 195, [1968] 1 WLR 739, in which a record on film of radar observations was held to be real, not hearsay, evidence. See further PARA 958.

3 Thus, if a party had taken counsel's opinion, the contents of that opinion would be hearsay if related to prove the truth of what was contained in it: *Ravenga v Mackintosh* (1824) 2 B & C 693.

4 *Berkeley Peerage* (1811) 4 Camp 401, HL; *Healy v Jacobs* (1827) 5 LJOSKB 180.

5 See the Civil Evidence Act 1968 Pt I (ss 1-10) (repealed).

6 See the Civil Evidence Act 1972 s 1 (repealed), s 2 (as originally enacted).

7 As to the meaning of 'civil proceedings' for the statutory purposes see PARA 808 note 1. As to hearsay in criminal cases see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1519 et seq.

8 See PARA 808 et seq. The Civil Evidence Act 1995 implements the principal recommendations of the Law Commission contained in its Report *The Hearsay Rule in Civil Proceedings* (1993; Law Com No 216). The Commission had observed in its earlier consultation paper *The Hearsay Rule in Civil Proceedings* (1991; Law Com No 117) para 5.1 that 'there can be little doubt that the rule excluding hearsay is the most confusing of the rules of evidence, posing difficulties for courts, practitioners and witnesses alike . . . any reform of the hearsay rule which succeeds in improving the clarity of understanding of its purpose and the manner in which it is to be applied would do much to improve evidence law as a whole'. In formulating its recommendations, the Law Commission had regard to two guiding principles: (1) that the law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence; and (2) that as a general rule all evidence should be admissible unless there is a good reason for it to be treated as inadmissible: see *The Hearsay Rule in Civil Proceedings* (1993; Law Com No 216) para 4.2.

With the exception of the Civil Evidence Act 1995 s 10 (Ogden Tables: see PARA 818), the Civil Evidence Act 1995 came into force on 31 January 1997: s 16(2); Civil Evidence Act 1995 (Commencement) Order 1996, SI 1996/3217. Transitional provisions for its application to proceedings begun before that date may be made by rules of court or practice directions, but subject thereto the Act was not to apply to such proceedings: see the Civil Evidence Act 1995 s 16(3), (3A) (respectively substituted and added by SI 1999/1217). The provisions of the 1995 Act apply to claims commenced before 31 January 1997 unless, before 26 April 1999, either directions were given, or orders were made, as to the evidence to be given at the trial or hearing, or the trial or hearing had begun: *Practice Direction--Civil Evidence Act 1995* PD 33 paras 2, 3.

9 See PARAS 819-823.

10 See the Children (Admissibility of Hearsay Evidence) Order 1993, SI 1993/621, art 2; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 228, 317.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(i) Introduction/807. The quality of hearsay.

807. The quality of hearsay.

Hearsay evidence may very well not be of the same value as direct testimony¹; lack of opportunity for cross-examination², or of an oath, depreciation of the truth by repetition or embellishment, incentive to conceal or misrepresent and absence of contemporaneity may all diminish its probative effect. Regard must be had to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence in estimating the weight, if any, to be given to hearsay evidence³.

1 A transparently honest and careful witness cannot make information reliable if, instead of speaking of what he has seen and heard for himself, he is merely retailing what others have told him: *English Exports (London) Ltd v Eldonwall Ltd* [1973] Ch 415 at 421, [1973] 1 All ER 726 at 731; and see also at 420-423 and at 730-733 for a discussion on the relationship of expert evidence and hearsay.

2 As to cross-examination on a hearsay statement see PARA 814.

3 See the Civil Evidence Act 1995 s 4(1); and PARA 815. For a comment on a statement taken as proof nine months after the event to which it related see *Morris v Stratford-on-Avon RDC* [1973] 3 All ER 263 at 266-267, [1973] 1 WLR 1059 at 1064-1065, CA, per Megaw LJ.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(ii) Admissibility under the Civil Evidence Act 1995/A. CONDITIONS OF ADMISSIBILITY/808. Admissibility of hearsay evidence.

(ii) Admissibility under the Civil Evidence Act 1995

A. CONDITIONS OF ADMISSIBILITY

808. Admissibility of hearsay evidence.

In civil proceedings¹ evidence must not be excluded on the ground that it is hearsay². For these purposes, 'hearsay' means a statement³ made otherwise than by a person while giving oral evidence⁴ in the proceedings which is tendered as evidence of the matters stated⁵ and references to hearsay include hearsay of whatever degree⁶.

Nothing in the Civil Evidence Act 1995 affects the admissibility of evidence admissible apart from the provisions set out above⁷. Further, nothing in that Act affects the exclusion of evidence on grounds other than that it is hearsay⁸, and this applies whether the evidence falls to be excluded in pursuance of any enactment⁹ or rule of law¹⁰, for failure to comply with rules of court¹¹ or an order of the court¹² or otherwise¹³.

1 For these purposes, 'civil proceedings' means civil proceedings, before any tribunal, in relation to which the strict rules of evidence apply, whether as a matter of law or by agreement of the parties; and references to the 'court' and 'rules of court' are to be construed accordingly: Civil Evidence Act 1995 ss 11, 13. As to the application of the strict rules of evidence see PARA 753 et seq. Under the equivalent provision in the Civil Evidence Act 1968 (ie s 18(1): see PARA 1208 note 1) it has been held that an application to commit for contempt founded on the breach of an order made in civil proceedings is itself a civil proceeding, notwithstanding the criminal standard of proof appropriate to such an application (see PARA 775) and its possible penal consequences: *Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV (No 2)* [1988] Ch 422, [1988] 1 All ER 975, CA. See also *R (McCann) v Crown Court at Manchester, Clingham v Kensington and Chelsea Royal London Borough Council* [2002] UKHL 39, [2003] 1 AC 787, [2002] 4 All ER 593 (proceedings for an anti-social behaviour order under the Crime and Disorder Act 1998 s 1 are civil proceedings in which hearsay evidence is admissible pursuant to the Civil Evidence Act 1995 and the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999, SI 1999/681, notwithstanding the higher standard of proof required). For guidance on serving and adducing hearsay evidence in proceedings for an anti-social behaviour order under the Crime and Disorder Act 1998 s 1C see *R v W* [2006] EWCA Crim 686, [2006] 3 All ER 562, [2007] 1 WLR 339.

Any power to make rules of court regulating the practice or procedure of the court in relation to civil proceedings includes power to make such provision as may be necessary or expedient for carrying into effect the provisions of the Civil Evidence Act 1995: s 12(1). Any rules of court made for the purposes of that Act as it applies in relation to proceedings in the High Court apply, except in so far as their operation is excluded by agreement, to arbitration proceedings to which that Act applies, subject to such modifications as may be appropriate; and any question arising as to what modifications are appropriate must be determined, in default of agreement, by the arbitrator or umpire, as the case may be: s 12(2).

2 Civil Evidence Act 1995 s 1(1).

3 'Statement' means any representation of fact or opinion, however made: Civil Evidence Act 1995 s 13. Quaere whether a written statement in an affidavit is included in this definition: cf *Rover International Ltd v Cannon Film Sales Ltd (No 2)* [1987] 3 All ER 986, [1987] 1 WLR 1597 (revsd on other grounds (1988) Financial Times, 10 June, CA).

4 'Oral evidence' includes evidence which, by reason of a defect of speech or hearing, a person called as a witness gives in writing or by signs: Civil Evidence Act 1995 s 13. As to witness evidence generally see PARA 966 et seq.

5 Civil Evidence Act 1995 ss 1(2)(a), 13. See also CPR 33.1(a), which contains an identical definition.

6 Civil Evidence Act 1995 ss 1(2)(b), 13. See also CPR 33.1(b), which contains an identical definition. As to first-hand hearsay and second-hand hearsay see PARA 806.

7 Civil Evidence Act 1995 s 1(3). The provisions of ss 2-6 (safeguards and supplementary provisions relating to hearsay evidence: see PARA 809 et seq) do not apply in relation to hearsay evidence admissible apart from s 1, notwithstanding that it may also be admissible by virtue of s 1: s 1(4). As to hearsay evidence otherwise admissible see eg the Children (Admissibility of Hearsay Evidence) Order 1993, SI 1993/621, art 2; PARA 806 text and note 10; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 228. See also PARAS 824-825.

8 Civil Evidence Act 1995 s 14(1).

9 Eg expert opinion evidence on an irrelevant matter is not admissible under the Civil Evidence Act 1972 s 3: see PARA 835.

10 Eg evidence may be excluded on grounds of public policy: see PARA 574 et seq.

11 See eg CPR 35.13; and PARA 856.

12 As to the court's general discretionary power to control evidence see PARA 791.

13 Civil Evidence Act 1995 s 14(1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(ii) Admissibility under the Civil Evidence Act 1995/A. CONDITIONS OF ADMISSIBILITY/809. Competence and credibility.

809. Competence and credibility.

Hearsay evidence¹ must not be admitted in civil proceedings² if or to the extent that it is shown to consist of, or to be proved by means of, a statement³ made by a person who at the time he made the statement was not competent as a witness⁴.

Where in civil proceedings hearsay evidence is adduced and the maker of the original statement⁵, or of any statement relied upon to prove another statement, is not called as a witness, evidence which if he had been so called would be admissible for the purpose of attacking or supporting his credibility as a witness is admissible for that purpose in the proceedings⁶; and evidence tending to prove that, whether before or after he made the statement, he made any other statement inconsistent with it is admissible for the purpose of showing that he had contradicted himself⁷. Evidence may not, however, be given of any matter of which, if he had been called as a witness and had denied that matter in cross-examination⁸, evidence could not have been adduced by the cross-examining party⁹.

Where a party proposes to rely on hearsay evidence but does not propose to call the person who made the original statement to give oral evidence and another party wishes to call evidence to attack the credibility of the person who made the statement, the party who so wishes must give notice of his intention to the party who proposes to give the hearsay statement in evidence¹⁰. A party must give such notice not more than 14 days¹¹ after the day on which a hearsay notice¹² relating to the hearsay evidence was served¹³ on him¹⁴.

1 As to the meaning of 'hearsay' see PARA 808.

2 As to the meaning of 'civil proceedings' see PARA 808 note 1.

3 As to the meaning of 'statement' see PARA 808 note 3.

4 Civil Evidence Act 1995 s 5(1). For this purpose 'not competent as a witness' means suffering from such mental or physical infirmity, or lack of understanding, as would render a person incompetent as a witness in civil proceedings; but a child must be treated as competent as a witness if he satisfies the requirements of the Children Act 1989 s 96(2)(a), (b) (conditions for reception of unsworn evidence of child: see PARA 1029; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 228); Civil Evidence Act 1995 s 5(1).

5 'Original statement', in relation to hearsay evidence, means the underlying statement (if any) by (1) in the case of evidence of fact, a person having personal knowledge of that fact; or (2) in the case of evidence of opinion, the person whose opinion it is: Civil Evidence Act 1995 s 13.

6 Civil Evidence Act 1995 s 5(2)(a).

7 Civil Evidence Act 1995 s 5(2)(b).

8 As to cross-examination see PARA 1042 et seq.

9 Civil Evidence Act 1995 s 5(2) proviso. The provisions of s 5 do not apply in relation to hearsay evidence admissible apart from s 1, notwithstanding that it may also be admissible by virtue of s 1: s 1(4).

10 CPR 33.5(1).

11 As to the calculation of time and the court's general discretion to extend time limits see PARA 88 et seq.

12 As to hearsay notices see PARAS 811-813.

13 As to the meaning of 'service' see PARA 138 note 2.

14 CPR 33.5(2). CPR Pt 33 does not apply to small claims hearings: see PARA 756. See also the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999, SI 1999/681, r 5; and **MAGISTRATES** vol 29(2) (Reissue) PARA 729.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(ii) Admissibility under the Civil Evidence Act 1995/A. CONDITIONS OF ADMISSIBILITY/810. Previous statements of witnesses.

810. Previous statements of witnesses.

Subject as follows, the provisions of the Civil Evidence Act 1995 as to hearsay¹ evidence in civil proceedings² apply equally (but with any necessary modifications) in relation to a previous statement³ made by a person called as a witness in the proceedings⁴.

A party who has called or intends to call a person as a witness in civil proceedings may not in those proceedings adduce evidence of a previous statement made by that person, except with the leave of the court⁵ or for the purpose of rebutting a suggestion that his evidence has been fabricated⁶. This is not, however, to be construed as preventing a witness statement⁷ from being adopted by a witness in giving evidence or treated as his evidence⁸.

Where, in the case of civil proceedings, the provisions made by the Criminal Procedure Act 1865 with regard to how far a witness may be discredited by the party producing him, the proof of contradictory statements made by a witness and cross-examination as to previous statements in writing⁹ apply¹⁰, the Civil Evidence Act 1995 does not authorise the adducing of evidence of a previous inconsistent or contradictory statement otherwise than in accordance with those provisions¹¹; but this is without prejudice to any provision made by rules of court¹² under the power¹³ to call a witness for cross-examination on a hearsay statement¹⁴.

Nothing in the Civil Evidence Act 1995 affects any of the rules of law as to the circumstances in which, where a person called as a witness in civil proceedings is cross-examined on a document¹⁵ used by him to refresh his memory, that document may be made evidence in the proceedings¹⁶; and nothing in the provisions set out above is to be construed as preventing a statement of any description referred to above from being admissible¹⁷ as evidence of the matters stated¹⁸.

1 As to the meaning of 'hearsay' see PARA 808.

2 As to the meaning of 'civil proceedings' see PARA 808 note 1. As to the provisions of the Civil Evidence Act 1995 as to hearsay evidence see PARAS 808-809; the text and notes 3-18; and PARA 811 et seq.

3 As to the meaning of 'statement' see PARA 808 note 3.

4 Civil Evidence Act 1995 s 6(1). As to witnesses see generally PARA 966 et seq.

5 Civil Evidence Act 1995 s 6(2)(a).

6 Civil Evidence Act 1995 s 6(2)(b).

7 I.e a written statement of oral evidence which a party to the proceedings intends to lead: Civil Evidence Act 1995 s 6(2). As to the meaning of 'witness statement' see PARA 751 note 1. As to the meaning of 'oral evidence' see PARA 808 note 4.

8 Civil Evidence Act 1995 s 6(2) proviso.

9 I.e the Criminal Procedure Act 1865 s 3, 4 or 5: see PARAS 1047-1048, 1050.

10 As to the application of the Criminal Procedure Act 1865 ss 3-5 to civil proceedings see s 1. See further PARAS 1047-1048, 1050.

11 Civil Evidence Act 1995 s 6(3).

12 As to the meaning of 'rules of court' see PARA 808 note 1.

13 le under the Civil Evidence Act 1995 s 3: see PARA 814.

14 Civil Evidence Act 1995 s 6(3) proviso.

15 'Document' means anything in which information of any description is recorded: Civil Evidence Act 1995 s 13.

16 Civil Evidence Act 1995 s 6(4). As to refreshing a witness's memory see PARA 1039.

17 le by virtue of the Civil Evidence Act 1995 s 1: see PARA 808.

18 Civil Evidence Act 1995 s 6(5). The provisions of s 6 do not apply in relation to hearsay evidence admissible apart from s 1, notwithstanding that it may also be admissible by virtue of s 1: s 1(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(ii) Admissibility under the Civil Evidence Act 1995/B. SAFEGUARDS/811. Notice of proposal to adduce hearsay evidence.

B. SAFEGUARDS

811. Notice of proposal to adduce hearsay evidence.

A party proposing to adduce hearsay¹ evidence in civil proceedings² must, subject to the following provisions, give to the other party or parties to the proceedings (1) such notice (if any) of that fact; and (2) on request, such particulars of or relating to the evidence, as is reasonable and practicable in the circumstances for the purpose of enabling him or them to deal with any matters arising from its being hearsay³. Provision may be made by rules of court⁴ specifying classes of proceedings or evidence in relation to which these requirements do not apply⁵ and as to the manner in which, including the time within which, the duties imposed by heads (1) and (2) above are to be complied with in the cases where they do apply⁶. The notice requirements do not apply:

- 11 (a) to evidence at hearings other than trials⁷;
- 12 (b) to an affidavit⁸ or witness statement⁹ which is to be used at trial but which does not contain hearsay evidence¹⁰;
- 13 (c) to a statement which a party to probate proceedings wishes to put in evidence and which is alleged to have been made by the person whose estate is the subject of the proceedings¹¹; or
- 14 (d) where the requirement is excluded by a practice direction¹².

Where a party intends to rely on hearsay evidence at trial and either that evidence is to be given by a witness giving oral evidence or that evidence is contained in a witness statement of a person who is not being called to give oral evidence, that party complies with head (1) above by serving¹³ a witness statement on the other parties in accordance with the court's¹⁴ order¹⁵. Where the evidence is contained in a witness statement of a person who is not being called to give oral evidence, the party intending to rely on the hearsay evidence must, when he serves the witness statement, inform the other parties that the witness is not being called to give oral evidence and give the reason why the witness will not be called¹⁶. In all other cases where a party intends to rely on hearsay evidence at trial, that party complies with head (1) above by serving a notice on the other parties which identifies the hearsay evidence, states that the party serving the notice proposes to rely on the hearsay evidence at trial and gives the reason why the witness will not be called¹⁷.

The party proposing to rely on the hearsay evidence must serve the notice no later than the latest date for serving witness statements¹⁸ and, if the hearsay evidence is to be in a document, supply a copy to any party who requests him to do so¹⁹.

1 As to the meaning of 'hearsay' see PARA 808.

2 As to the meaning of 'civil proceedings' see PARA 808 note 1.

3 Civil Evidence Act 1995 s 2(1).

4 As to the meaning of 'rules of court' see PARA 808 note 1.

5 Civil Evidence Act 1995 s 2(2)(a). See the text and notes 7-12.

6 Civil Evidence Act 1995 s 2(2)(b). See the text and notes 13-19. See also the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999, SI 1999/681, r 3; and **MAGISTRATES** vol 29(2) (Reissue) PARA 729. The provisions of the Civil Evidence Act 1995 s 2 do not apply in relation to hearsay evidence admissible apart from s 1, notwithstanding that it may also be admissible by virtue of s 1: s 1(4).

7 CPR 33.3(a).

8 As to the meaning of 'affidavit' see PARA 540 note 5.

9 As to the meaning of 'witness statement' see PARA 751 note 1.

10 CPR 33.3(aa).

11 CPR 33.3(b).

12 CPR 33.3(c).

13 As to the meaning of 'service' see PARA 138 note 2.

14 As to the meaning of 'court' see PARA 22.

15 CPR 33.2(1).

16 CPR 33.2(2). As to the power to call such a witness for cross-examination see PARA 814.

17 CPR 33.2(3); and see note 16.

18 CPR 33.2(4)(a). As to the date for serving witness statements see PARA 982. As to the calculation of time and the court's general discretion to extend time limits see PARA 88 et seq.

19 CPR 33.2(4)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(ii) Admissibility under the Civil Evidence Act 1995/B. SAFEGUARDS/812. Exclusion of notice requirements by agreement.

812. Exclusion of notice requirements by agreement.

The statutory requirements to give notice of a proposal to adduce hearsay¹ evidence and, on request, particulars of or relating to it², may be excluded by agreement of the parties³. Compliance with the duty to give notice may in any case be waived by the person to whom notice is required to be given⁴.

1 As to the meaning of 'hearsay' see PARA 808.

2 Ie the requirements contained in the Civil Evidence Act 1995 s 2(1): see PARA 811.

3 Civil Evidence Act 1995 s 2(3).

4 Civil Evidence Act 1995 s 2(3). As to the persons to whom notice is required to be given see PARA 811. As to the application of s 2 see PARA 811 note 6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(ii) Admissibility under the Civil Evidence Act 1995/B. SAFEGUARDS/813. Effect of failure to comply with notice requirements.

813. Effect of failure to comply with notice requirements.

A failure to comply with the statutory requirements to give notice of a proposal to adduce hearsay¹ evidence and, on request, particulars of or relating to it², or with rules as to the manner and time in which the duties imposed by those requirements are to be complied with³, does not affect the admissibility of the evidence⁴. Such a failure may, however, be taken into account by the court⁵ (1) in considering the exercise of its powers with respect to the course of proceedings⁶ and costs⁷; and (2) as a matter adversely affecting the weight to be given⁸ to the evidence⁹.

1 As to the meaning of 'hearsay' see PARA 808.

2 Ie the requirements contained in the Civil Evidence Act 1995 s 2(1): see PARA 811.

3 Ie rules under the Civil Evidence Act 1995 s 2(2)(b): see PARA 811 text and notes 1-6. See also the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999, SI 1999/681, r 3; and **MAGISTRATES** vol 29(2) (Reissue) PARA 729.

4 Civil Evidence Act 1995 s 2(4).

5 As to the meaning of 'court' for these purposes see PARA 808 note 1.

6 As to the court's general case management powers see PARA 246 et seq.

7 Costs are in the discretion of the court: see generally PARA 1729 et seq.

8 Ie in accordance with the Civil Evidence Act 1995 s 4: see PARA 815.

9 Civil Evidence Act 1995 s 2(4). As to the application of s 2 see PARA 811 note 6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(ii) Admissibility under the Civil Evidence Act 1995/B. SAFEGUARDS/814. Power to call witness for cross-examination on hearsay statement.

814. Power to call witness for cross-examination on hearsay statement.

Rules of court¹ may provide that where a party to civil proceedings² adduces hearsay³ evidence of a statement⁴ made by a person and does not call that person as a witness, any other party to the proceedings may, with the leave of the court⁵, call that person as a witness and cross-examine⁶ him on the statement as if he had been called by the first-mentioned party and as if the hearsay statement were his evidence in chief⁷.

Such leave may be given on the application of the party wishing to call the maker of the statement⁸. An application for permission to cross-examine must be made not more than 14 days⁹ after the day on which a notice of intention to rely on the hearsay evidence was served¹⁰ on the applicant¹¹.

1 As to the meaning of 'rules of court' see PARA 808 note 1.

2 As to the meaning of 'civil proceedings' see PARA 808 note 1.

3 As to the meaning of 'hearsay' see PARA 808.

4 As to the meaning of 'statement' see PARA 808 note 3.

5 As to the meaning of 'court' for these purposes see PARA 808 note 1.

6 As to cross-examination see PARA 1042 et seq.

7 Civil Evidence Act 1995 s 3. The provisions of s 3 do not apply in relation to hearsay evidence admissible apart from s 1, notwithstanding that it may also be admissible by virtue of s 1: s 1(4). As to evidence in chief see PARA 1037 et seq.

8 See CPR 33.4(1).

9 As to the calculation of time and the court's general discretion to extend time limits see PARA 88 et seq.

10 As to the meaning of 'service' see PARA 138 note 2.

11 CPR 33.4(2). See also the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999, SI 1999/681, r 4; and **MAGISTRATES** vol 29(2) (Reissue) PARA 729.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(ii) Admissibility under the Civil Evidence Act 1995/B. SAFEGUARDS/815. Considerations relevant to weighing of hearsay evidence.

815. Considerations relevant to weighing of hearsay evidence.

In estimating the weight, if any, to be given to hearsay¹ evidence in civil proceedings² the court³ must have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence⁴. Regard may be had, in particular, to the following:

- 15 (1) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement⁵ as a witness⁶;
- 16 (2) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated⁷;
- 17 (3) whether the evidence involves multiple hearsay⁸;
- 18 (4) whether any person involved had any motive to conceal or misrepresent matters⁹;
- 19 (5) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose¹⁰;
- 20 (6) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight¹¹.

Failure to comply with the notice requirements¹² may be taken into account by the court as a matter adversely affecting the weight to be given to hearsay evidence¹³.

1 As to the meaning of 'hearsay' see PARA 808.

2 As to the meaning of 'civil proceedings' see PARA 808 note 1.

3 As to the meaning of 'court' for these purposes see PARA 808 note 1.

4 Civil Evidence Act 1995 s 4(1).

5 As to the meaning of 'original statement' see PARA 809 note 5.

6 Civil Evidence Act 1995 s 4(2)(a).

7 Civil Evidence Act 1995 s 4(2)(b).

8 Civil Evidence Act 1995 s 4(2)(c). As to degrees of hearsay see PARA 806.

9 Civil Evidence Act 1995 s 4(2)(d).

10 Civil Evidence Act 1995 s 4(2)(e).

11 Civil Evidence Act 1995 s 4(2)(f). The provisions of s 4 do not apply in relation to hearsay evidence admissible apart from s 1, notwithstanding that it may also be admissible by virtue of s 1: s 1(4). The guidelines set out in s 4(2) 'do little more than set out matters which courts already consider when assessing evidence' but are particularly useful for magistrates' courts: see 564 HL Official Report (5th series), 25 May 1995, col 1051 per Lord Mackay of Clashfern LC. As to hearsay evidence in civil proceedings in magistrates' courts see **MAGISTRATES** vol 29(2) (Reissue) PARA 729.

12 See PARA 811.

13 See the Civil Evidence Act 1995 s 2(4); and PARA 813.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(ii) Admissibility under the Civil Evidence Act 1995/C. PROOF OF STATEMENTS CONTAINED IN DOCUMENTS/816. Proof of statements contained in documents; in general.

C. PROOF OF STATEMENTS CONTAINED IN DOCUMENTS

816. Proof of statements contained in documents; in general.

Where a statement¹ contained in a document² is admissible as evidence in civil proceedings³, it may be proved (1) by the production of that document⁴; or (2) whether or not that document is still in existence, by the production of a copy⁵ of that document or of the material part of it⁶, authenticated in such manner as the court⁷ may approve⁸. It is immaterial for this purpose how many removes there are between a copy and the original⁹.

1 As to the meaning of 'statement' see PARA 808 note 3.

2 As to the meaning of 'document' see PARA 810 note 15.

3 As to the meaning of 'civil proceedings' see PARA 808 note 1.

4 Civil Evidence Act 1995 s 8(1)(a). In this context, 'production' refers not to counsel handing the document to the court, but to a witness who is qualified to do so in accordance with the rules of evidence producing the document and saying what it is: *Ventouris v Mountain (No 2)*, *The Italia Express*[1992] 3 All ER 414 at 427, [1992] 1 WLR 887 at 901, CA, per Staughton LJ (decided under the Civil Evidence Act 1968 s 6(1) (repealed)).

5 'Copy', in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly: Civil Evidence Act 1995 s 13.

6 Civil Evidence Act 1995 s 8(1)(b).

7 As to the meaning of 'court' for these purposes see PARA 808 note 1.

8 Civil Evidence Act 1995 s 8(1). The 'authentication' required relates to the authentication of copies as true copies of the document and not to proof of the original: *Ventouris v Mountain (No 2)*, *The Italia Express*[1992] 3 All ER 414, [1992] 1 WLR 887, CA (decided under the Civil Evidence Act 1968 s 6(1) (repealed)).

9 Civil Evidence Act 1995 s 8(2). For similar provisions with regard to criminal proceedings see the Criminal Justice Act 2003 s 133; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1464.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(ii) Admissibility under the Civil Evidence Act 1995/C. PROOF OF STATEMENTS CONTAINED IN DOCUMENTS/817. Proof of records of business or public authority.

817. Proof of records of business or public authority.

A document¹ which is shown to form part of the records² of a business³ or public authority⁴ may be received in evidence in civil proceedings⁵ without further proof⁶.

A document is to be taken to form part of the records of a business or public authority if there is produced to the court⁷ a certificate to that effect signed by an officer⁸ of the business or authority to which the records belong⁹; and for this purpose a document purporting to be a certificate signed by an officer of a business or public authority is to be deemed to have been duly given by such an officer and signed by him¹⁰ and a certificate is to be treated as signed by a person if it purports to bear a facsimile of his signature¹¹.

The absence of an entry in the records of a business or public authority may be proved in civil proceedings by affidavit¹² of an officer of the business or authority to which the records belong¹³.

The court may, having regard to the circumstances of the case, direct that all or any of the above provisions do not apply in relation to a particular document or record, or description of documents or records¹⁴.

Unless the court¹⁵ orders otherwise, evidence such as a plan, photograph or model which is admissible without further proof under the above provisions¹⁶ but which is not either (1) contained in a witness statement¹⁷, affidavit or expert's report¹⁸; (2) to be given orally at trial; or (3) evidence of which prior notice must be given under the general rule relating to notice of hearsay evidence¹⁹, is not receivable at a trial unless the party intending to put it in evidence has given notice to the other parties²⁰. Where the party intends to use the evidence as evidence of any fact then, except where it forms part of expert evidence²¹, he must give notice not later than the latest date for serving²² witness statements²³. If there are not to be witness statements, or he intends to put in the evidence solely in order to disprove an allegation made in a witness statement, he must give notice at least 21 days before the hearing at which he proposes to put in the evidence²⁴. Where the evidence forms part of expert evidence, he must give notice when the expert's report is served on the other party²⁵. Where the evidence is being produced to the court for any reason other than as part of factual or expert evidence, he must give notice at least 21 days before the hearing at which he proposes to put in the evidence²⁶. Where a party has given notice that he intends to put in the evidence, he must give every other party an opportunity to inspect it and to agree to its admission without further proof²⁷.

1 As to the meaning of 'document' see PARA 810 note 15.

2 For these purposes, 'records' means records in whatever form: Civil Evidence Act 1995 s 9(4).

3 For these purposes, 'business' includes any activity regularly carried on over a period of time, whether for profit or not, by any body (whether corporate or not) or by an individual: Civil Evidence Act 1995 s 9(4).

4 For these purposes, 'public authority' includes any public or statutory undertaking, any government department and any person holding office under Her Majesty: Civil Evidence Act 1995 s 9(4).

5 As to the meaning of 'civil proceedings' see PARA 808 note 1.

6 Civil Evidence Act 1995 s 9(1).

7 As to the meaning of 'court' for these purposes see PARA 808 note 1.

8 For these purposes, 'officer' includes any person occupying a responsible position in relation to the relevant activities of the business or public authority or in relation to its records: Civil Evidence Act 1995 s 9(4).

9 Civil Evidence Act 1995 s 9(2).

10 Civil Evidence Act 1995 s 9(2)(a).

11 Civil Evidence Act 1995 s 9(2)(b).

12 As to affidavits see PARA 989 et seq.

13 Civil Evidence Act 1995 s 9(3).

14 Civil Evidence Act 1995 s 9(5).

15 As to the meaning of 'court' for these purposes see PARA 22.

16 See CPR 33.6(2).

17 As to the meaning of 'witness statement' see PARA 981.

18 As to experts' reports see PARA 852 et seq.

19 Ie under CPR 33.2: see PARA 811.

20 CPR 33.6(1), (3).

21 Ie except where CPR 33.6(6) applies: see the text and note 25. As to expert evidence see PARA 835 et seq.

22 As to the meaning of 'service' see PARA 138 note 2.

23 CPR 33.6(4). As to the time for serving witness statements see PARA 982. As to the calculation of time and the court's general discretion to extend time limits see PARA 88 et seq.

24 CPR 33.6(5).

25 CPR 33.6(6).

26 CPR 33.6(7).

27 CPR 33.6(8). He may do so by serving a notice to admit facts: see CPR 32.18; and PARA 777.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(ii) Admissibility under the Civil Evidence Act 1995/C. PROOF OF STATEMENTS CONTAINED IN DOCUMENTS/818. Admissibility and proof of Ogden Tables.

818. Admissibility and proof of Ogden Tables.

Provision is prospectively made under the Civil Evidence Act 1995 whereby the actuarial tables, together with explanatory notes, for use in personal injury¹ and fatal accident cases issued from time to time by the Government Actuary's Department² are admissible in evidence for the purpose of assessing, in a claim for personal injury³, the sum to be awarded as general damages for future pecuniary loss⁴. At the date at which this title states the law, this provision had not been brought into force⁵; but reference is frequently made to the tables (known as the 'Ogden Tables') when the court is assessing damages⁶.

1 For these purposes, 'personal injury' includes any disease and any impairment of a person's physical or mental condition: Civil Evidence Act 1995 s 10(3)(a) (s 10 in force as from a day to be appointed: see note 5).

2 As to the Government Actuary see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

3 'Claim for personal injury' includes a claim brought by virtue of the Law Reform (Miscellaneous Provisions) Act 1934 or the Fatal Accidents Act 1976: Civil Evidence Act 1995 s 10(3)(b). The statutory wording is 'action' but in civil proceedings in England and Wales actions are now known as 'claims': see PARA 18.

4 Civil Evidence Act 1995 s 10(1). They are to be proved by the production of a copy published by Her Majesty's Stationery Office: s 10(2).

5 The Civil Evidence Act 1995 (Commencement) Order 1996, SI 1996/3217, which brought the provisions of the Civil Evidence Act 1995 into force as from 31 January 1997, excluded s 10; and at the date at which this title states the law no further commencement order had been made under s 16(2). Further, s 10 is repealed in relation to Northern Ireland, as from a day to be appointed, by the Civil Evidence (Northern Ireland) Order 1997, SI 1997/2983, art 13(2), Sch 2; for savings see art 12.

6 See eg *Worrall v Powergen plc* [1999] Lloyd's Rep Med 177, (1999) Times, 10 February (the starting point for determining a multiplier based on life expectancy should be tables 11 to 20 of the Actuarial Tables with Explanatory notes for use in Personal Injury and Fatal Accident cases, published by the Government Actuary's Department); and see generally **DAMAGES**. For a general discussion of the Ogden Tables see *Wells v Wells*, *Thomas v Brighton Health Authority*, *Page v Sheerness Steel Co plc* [1999] 1 AC 345 at 369-370, [1998] 3 All ER 481 at 489-490, HL, per Lord Lloyd of Berwick.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(ii) Admissibility under the Civil Evidence Act 1995/D. EVIDENCE FORMERLY ADMISSIBLE AT COMMON LAW/819. Adverse admissions.

D. EVIDENCE FORMERLY ADMISSIBLE AT COMMON LAW

819. Adverse admissions.

Under the common law, an informal admission¹ adverse to a party to the proceedings, whether made by that party or by another person², might be given in evidence against that party for the purpose of proving any fact stated in the admission; and that rule was effectively preserved by the Civil Evidence Act 1968³. The justification for the rule was that there was clearly a likelihood of truth⁴ in a statement adverse to the interests of its maker, which was not the case with statements made in his own favour⁵.

The common law rule preserved by the 1968 Act is, however, superseded by the provisions of the Civil Evidence Act 1995⁶. Adverse admissions are thus admissible as hearsay⁷ evidence subject to the safeguards contained in the 1995 Act⁸.

Such admissions are to be distinguished from formal admissions which are discussed elsewhere in this title⁹.

Informal admissions may be by conduct as well as by statement¹⁰. Thus payment of money by one party to another would be an admission by the former that the money was due to the latter¹¹; and an admission of a debt due under a written agreement may be inferred from conduct in order to support a claim upon an account stated¹².

As the value of an admission depends on the circumstances in which it was made, evidence of such circumstances will affect the weight of the admission¹³. Thus, the party against whom it is tendered may show that it was made under an erroneous view of the law¹⁴, or in ignorance of the facts¹⁵, or when his mind was in an abnormal condition¹⁶, or he may be otherwise able to explain it away.

Admissions or representations made by a partner concerning partnership affairs, and in the ordinary course of its business, are evidence against the firm¹⁷.

Where a statement contains both informal admissions adverse to the party making it and exculpatory qualifications, explanations and excuses, and any part of it is admitted in evidence, the whole statement is admissible¹⁸. Such statements, which are known as 'mixed statements', are normally considered in the context of criminal proceedings¹⁹.

1 'Admission' included any representation of fact, whether made in words or otherwise: see the Civil Evidence Act 1968 s 9(2) (repealed).

2 Admissions made by a minor before proceedings were begun might be admitted in evidence in matrimonial causes and might be given whatever weight the court considered it proper to attribute to them: *Alderman v Alderman and Dunn*[1958] 1 All ER 391, [1958] 1 WLR 177.

3 See the Civil Evidence Act 1968 s 9(1), (2)(a) (repealed).

4 *Slattey v Pooley* (1840) 6 M & W 664. The authorities cited in this paragraph must now be read in the light of the Civil Evidence Act 1995 s 7(1): see the text and note 6.

5 *Smyth v Anderson* (1849) 7 CB 21; and see *R v Hardy* (1794) 24 State Tr 199; *Heane v Rogers* (1829) 9 B & C 577; *R v Petcherini* (1855) 7 Cox CC 79; *Darby v Ouseley* (1856) 1 H & N 1; *R v Haines* (1858) 1 F & F 86; *R v Erdheim*[1896] 2 QB 260, CCR; *Corke v Corke and Cook*[1958] P 93, [1958] 1 All ER 224, CA.

6 Civil Evidence Act 1995 s 7(1).

7 As to the meaning of 'hearsay' see PARA 808.

8 See PARA 811 et seq.

9 See PARAS 776-778.

10 See eg *Moriarty v London, Chatham and Dover Rly Co*(1870) LR 5 QB 314 (evidence of party's conduct in suborning witnesses admitted against him as evidence of the weakness and falsity of his claim). See also PARA 1074.

11 *James v Biou, Owen v Flack* (1826) 2 Sim & St 600; but it would not be an admission against the payee that the payer was the person bound to pay it: see *James v Biou, Owen v Flack* (1826) 2 Sim & St 600.

12 Although the account stated may only take the form of a mere acknowledgment of a debt, which amounts to a promise and the inference that a debt exists, such evidence may be rebutted: see *Camillo Tank Steamship Co Ltd v Alexandria Engineering Works* (1921) 38 TLR 134, HL; *Siqueira v Noronha*[1934] AC 332, PC; and **CONTRACT** vol 9(1) (Reissue) PARA 1049.

13 *Rouse v Redwood* (1794) 1 Esp 155; *Newton v Belcher*(1848) 12 QB 921. As to general considerations relevant to the weighing of informal admissions see now the Civil Evidence Act 1995 s 4; and PARA 815.

14 *Newton v Liddiard*(1848) 12 QB 925; *Barker v Whitworth* (1850) 14 LTOS 550.

15 Thus, if a person admits something of which he knows nothing, it is of no real evidential value: *Customs Comptroller v Western Electric Co Ltd*[1966] AC 367 at 371, [1965] 3 All ER 599, PC; and see *Bird v Adams* [1972] Crim LR 174, DC.

16 *Heane v Rogers* (1829) 9 B & C 577; cf *Robson v Alexander* (1828) 1 Moo & P 448; *Tucker v Barrow* (1828) 7 B & C 623; *Skinners' Co v Irish Society* (1838) 7 Beav 593 (cases of admissions made under compulsion). An admission made by a person when drunk is not so weighty as one made when he is sober: *R v Hedges*(1909) 3 Cr App Rep 262, CCA. As to admissions or confessions of guilt see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1540 et seq.

17 Partnership Act 1890 s 15. As to the effect of an acknowledgment by one of several partners see **LIMITATION PERIODS; PARTNERSHIP**.

18 See eg *R v Duncan*(1981) 73 Cr App Rep 359, CA; *R v Sharp* [1988] 1 All ER 65, [1988] 1 WLR 7, HL; *R v Aziz*[1996] AC 41, [1995] 3 All ER 149, HL.

19 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1540 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(ii) Admissibility under the Civil Evidence Act 1995/D. EVIDENCE FORMERLY ADMISSIBLE AT COMMON LAW/820. Published works.

820. Published works.

In civil proceedings¹ published works dealing with matters of a public nature, for example histories, scientific works, dictionaries and maps, are admissible as evidence of facts of a public nature stated in them². This was a rule of the common law³ which continues to have effect⁴. Such evidence is admissible without the statutory safeguards applying to hearsay⁵ evidence admitted under the Civil Evidence Act 1995⁶.

1 As to the meaning of 'civil proceedings' see PARA 808 note 1.

2 See the Civil Evidence Act 1995 s 7(2)(a). As to such works see PARAS 941-944.

3 Ie a rule effectively preserved by the Civil Evidence Act 1968 s 9(1), (2)(b) (repealed).

4 See the Civil Evidence Act 1995 s 7(2). The words in which a rule of law mentioned in s 7 is described are intended only to identify the rule and must not be construed as altering it in any way: s 7(4).

5 As to the meaning of 'hearsay' see PARA 808.

6 See the Civil Evidence Act 1995 s 1(4); and PARA 811.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(ii) Admissibility under the Civil Evidence Act 1995/D. EVIDENCE FORMERLY ADMISSIBLE AT COMMON LAW/821. Public documents.

821. Public documents.

In civil proceedings¹ public documents², for example public registers, and returns made under public authority with respect to matters of public interest, are admissible as evidence of facts stated in them³. This was a rule of the common law⁴ which continues to have effect⁵. Such evidence is admissible without the statutory safeguards applying to hearsay⁶ evidence admitted under the Civil Evidence Act 1995⁷.

The following categories of documents are, subject to public availability, treated as public documents: public statutes, parliamentary journals and government gazettes⁸; public registers⁹; public surveys, assessments and reports¹⁰; official certificates¹¹; books of corporations¹²; histories¹³, scientific works¹⁴ and works of reference¹⁵.

1 As to the meaning of 'civil proceedings' see PARA 808 note 1.

2 As to the meaning of 'document' see PARA 810 note 15.

3 See the Civil Evidence Act 1995 s 7(2)(b).

4 The rule effectively preserved by the Civil Evidence Act 1968 s 9(1), (2)(c) (repealed). The original basis for the admissibility of public documents was that they were made in the course of official duty by persons with a duty to inquire into the truth (see *Doe d France v Andrews* (1850) 15 QB 756) of the statement, to record facts of public interest (*Sturla v Freccia* (1880) 5 App Cas 623, HL; *R v Halpin* [1975] QB 907, [1975] 2 All ER 1124, CA) for retention for the public's benefit, and so as to be available for consultation by members of the public (*Heyne v Fischel & Co* (1913) 30 TLR 190; *Mercer v Denne* [1904] 2 Ch 534; affd [1905] 2 Ch 538, CA; *Irish Society v Bishop of Derry* (1846) 12 Cl & Fin 641, HL; *A-G v Horner (No 2)* [1913] 2 Ch 140, CA; *Ioannou v Demetriou* [1952] AC 84, [1952] 1 All ER 179, PC; *White v Taylor* [1969] 1 Ch 150, [1967] 3 All ER 349).

5 See the Civil Evidence Act 1995 s 7(2). As to the description of a rule of law in s 7 see s 7(4), cited in PARA 820 note 4.

6 As to the meaning of 'hearsay' see PARA 808.

7 See the Civil Evidence Act 1995 s 1(4); and PARA 811.

8 See PARA 890.

9 See PARA 907.

10 See PARA 902.

11 See PARA 896.

12 See PARA 940.

13 See PARA 941.

14 See PARA 942.

15 See PARA 944.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(ii) Admissibility under the Civil Evidence Act 1995/D. EVIDENCE FORMERLY ADMISSIBLE AT COMMON LAW/822. Records.

822. Records.

In civil proceedings¹ records, for example the records of certain courts², treaties³, Crown grants⁴, pardons⁵ and commissions⁶, are admissible as evidence of facts stated in them⁷. This was a rule of the common law⁸ which continues to have effect⁹. Such evidence is admissible without the statutory safeguards applying to hearsay¹⁰ evidence admitted under the Civil Evidence Act 1995¹¹.

1 As to the meaning of 'civil proceedings' see PARA 808 note 1.

2 As to the proof of proceedings in superior courts see PARA 936.

3 See PARA 899.

4 See **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 849 et seq.

5 See **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 823 et seq.

6 See PARA 785.

7 See the Civil Evidence Act 1995 s 7(2)(c).

8 Ie a rule effectively preserved by the Civil Evidence Act 1968 s 9(1), (2)(d) (repealed).

9 See the Civil Evidence Act 1995 s 7(2). As to the description of a rule of law in s 7 see s 7(4), cited in PARA 820 note 4.

10 As to the meaning of 'hearsay' see PARA 808.

11 See the Civil Evidence Act 1995 s 1(4); and PARA 808.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(ii) Admissibility under the Civil Evidence Act 1995/D. EVIDENCE FORMERLY ADMISSIBLE AT COMMON LAW/823. Reputation and family tradition.

823. Reputation and family tradition.

Certain common law rules as to the admissibility of evidence of reputation and family tradition continue to apply¹. These are discussed elsewhere in this title².

¹ See the Civil Evidence Act 1995 s 7(3)(b).

² See PARA 827 et seq. See also the Civil Evidence Act 1995 s 7(3)(a) (evidence of reputation as a means of proving good or bad character); and PARA 1083.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(iii) Admissibility Otherwise than under the Civil Evidence Act 1995/824. Admissibility under other statutes.

(iii) Admissibility Otherwise than under the Civil Evidence Act 1995

824. Admissibility under other statutes.

Nothing in the Civil Evidence Act 1995¹ affects the proof of documents² by means other than those specified in the relevant provisions³ of that Act⁴ or affects the operation of the enactments regarding:

- 21 (1) the mode of proving certain official documents⁵;
- 22 (2) documents printed under the superintendence of Her Majesty's Stationery Office⁶;
- 23 (3) the proof of statutes of certain colonial legislatures⁷;
- 24 (4) the proof and effect of registers and official certificates of certain foreign countries, dominions and colonies⁸;
- 25 (5) provision in respect of the public registers of other countries⁹.

Further, nothing in the Civil Evidence Act 1995 affects the admissibility of evidence admissible otherwise than as hearsay¹⁰ under its provisions¹¹.

In addition to the enactments referred to in heads (1) to (5) above, there are many other statutory provisions regarding documentary evidence; for example under the Births and Deaths Registration Act 1953, a certified copy of an entry in the register is admissible as evidence of the facts contained in it¹². Documentary evidence is discussed in more detail elsewhere in this title¹³.

Under the Children Act 1989, the Lord Chancellor may by order make provision for the admissibility of evidence which would otherwise be inadmissible under any rule of law relating to hearsay¹⁴.

1 le the Civil Evidence Act 1995 ss 1-16: see PARA 808 et seq.

2 As to the meaning of 'document' see PARA 810 note 15.

3 le specified in the Civil Evidence Act 1995 ss 8, 9: see PARAS 816-817.

4 Civil Evidence Act 1995 s 14(1).

5 le the Documentary Evidence Act 1868 s 2: see PARAS 892-893.

6 le the Documentary Evidence Act 1882 s 2: see PARA 889.

7 le the Evidence (Colonial Statutes) Act 1907 s 1: see PARA 898.

8 le the Evidence (Foreign, Dominion and Colonial Documents) Act 1933 s 1: see PARA 923.

9 Civil Evidence Act 1995 s 14(2). The provision referred to in head (5) in the text is the provision made in the Oaths and Evidence (Overseas Authorities and Countries) Act 1963 s 5: see PARA 922.

10 As to the meaning of 'hearsay' see PARA 808.

11 See the Civil Evidence Act 1995 s 1(3); and PARA 808.

12 See the Births and Deaths Registration Act 1953 s 34(6); and PARA 1094.

13 See PARA 864 et seq.

14 See the Children Act 1989 s 96(3)-(6) (s 96(3) amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 203, 207); the Children (Admissibility of Hearsay Evidence) Order 1993, SI 1993/621, art 2; PARA 806 text and note 10; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 228.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(3) HEARSAY EVIDENCE/(iii) Admissibility Otherwise than under the Civil Evidence Act 1995/825. Admissibility at common law.

825. Admissibility at common law.

At common law, there were a number of exceptions to the general rule excluding hearsay evidence in civil proceedings¹. The exceptions with regard to published works, published documents, records, and certain evidence of reputation or family tradition have been expressly preserved by statute².

The common law rule allowing the admissibility of informal adverse admissions has been expressly stated to be superseded by the provisions of the Civil Evidence Act 1995³. Other exceptions to the general common law rule excluding hearsay evidence in civil proceedings were *res gestae* statements⁴ and evidence given in former proceedings; neither of these common law exceptions is preserved by statute. Although these exceptions are not expressly stated to be superseded, it is apprehended that evidence falling under these former common law exceptions is now admissible in civil proceedings subject to the statutory safeguards⁵.

1 As to the general rule at common law see PARA 806.

2 See the Civil Evidence Act 1995 s 7(2)-(4); and PARAS 820-823.

3 See the Civil Evidence Act 1995 s 7(1); and PARA 819.

4 As to the *res gestae* see PARAS 759, 1066.

5 See PARA 811 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(4) EVIDENCE OF OPINION AND BELIEF; IN GENERAL/(i) Introduction/826. Evidence of opinion and belief.

(4) EVIDENCE OF OPINION AND BELIEF; IN GENERAL

(i) Introduction

826. Evidence of opinion and belief.

The judge's task is first to establish the facts (if there is no jury)¹ relevant to the issue before him, and secondly to decide whether these facts are such as to entitle a party to a particular legal remedy². For both these tasks it may be necessary to draw conclusions from evidence deposed to by witnesses³. Thus the task of drawing conclusions is primarily a judicial one⁴. Where, however, the opinion or belief of a witness is relevant to an issue⁵ or is a way of conveying facts personally perceived by him⁶ he may give evidence of it. Reputation evidence⁷, expert evidence⁸ and lay evidence with regard to handwriting⁹ provide examples of admissible opinion evidence. Expert evidence is considered in a subsequent section of this title¹⁰.

1 As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

2 See the Law Reform Committee (17th Report) *Evidence of Opinion and Expert Evidence* 1970 (Cmnd 4489) paras 1-2.

3 As to witnesses see PARA 966 et seq.

4 *North Cheshire and Manchester Brewery Co Ltd v Manchester Brewery Co Ltd* [1899] AC 83, HL; and see *Carter v Boehm* (1766) 3 Burr 1905; *Rigg v Manchester, Sheffield and Lincolnshire Rly Co* (1866) 12 Jur NS 525; *The Solway* (1885) 10 PD 137; *Joseph Crosfield & Sons Ltd v Techno-Chemical Laboratories Ltd* (1913) 29 TLR 378; *Sherrard v Jacob* [1965] NI 151, CA. Evidence of a witness's opinion or belief was sometimes said to be irrelevant: see eg *Hollington v F Hewthorn & Co Ltd* [1943] KB 587, [1943] 2 All ER 35, CA.

5 See eg *Mansell v Clements* (1874) LR 9 CP 139, where a witness was allowed to state, in reply to a question by the judge, that he would not have taken a house but for an agent's card to view; *R v King* [1897] 1 QB 214, CCR (witness's opinion on the meaning of an alleged false pretence made to him). A witness will not always be able to give evidence of his own sanity: *Bootle v Blundell* (1815) 19 Ves 494; but see also *Hunter v Edney (otherwise Hunter)* (1881) 10 PD 93; *Harnett v Bond* [1925] AC 669, HL.

6 See PARA 831.

7 See PARA 827 et seq.

8 See PARA 835 et seq.

9 See PARA 832.

10 See note 8.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(4) EVIDENCE OF OPINION AND BELIEF; IN GENERAL/(ii) General Reputation/827. Reputation generally.

(ii) General Reputation

827. Reputation generally.

Evidence of reputation or family tradition¹ is admissible in any civil proceedings for the purpose of proving or disproving the existence of any public or general right², or of identifying any person or thing³, and in any such proceedings involving a question of pedigree or the existence of a marriage for the purpose of proving or disproving pedigree or the existence of the marriage⁴.

1 Where any rule of the common law effectively preserved by the Civil Evidence Act 1968 s 9(3), (4) (repealed) authorising the court to treat evidence of reputation or family tradition as proving or disproving the matters mentioned in the text applies, reputation or family tradition is to be treated, for the purposes of the Civil Evidence Act 1995 (see PARA 808 et seq) as a fact and not as a statement or multiplicity of statements about the matter in question: s 7(3). As to the construction of a description contained in s 7(3) see PARA 820 note 4. As to the common law rules relating to evidence of reputation see PARA 1083.

2 See PARA 828.

3 Civil Evidence Act 1995 s 7(3)(b)(ii): see PARA 829. See also note 4.

4 Civil Evidence Act 1995 s 7(3)(b)(i): see PARA 830. The rules set out in the text are common law rules effectively preserved by the Civil Evidence Act 1968 s 9(3), (4) (repealed) and continuing to have effect by virtue of the Civil Evidence Act 1995 s 7(3). The common law principle retained by s 7(3)(b) will not often be of importance as evidence of reputation may also be tendered as hearsay evidence under s 1 (see PARA 808) subject to the statutory safeguards (see ss 2-4; and PARAS 811-815). However, where the evidence is admissible by virtue of s 7(3)(b), the statutory safeguards do not apply: see s 1(3), (4); and PARA 808.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(4) EVIDENCE OF OPINION AND BELIEF; IN GENERAL/(ii) General Reputation/828. Reputation to prove or disprove public or general right.

828. Reputation to prove or disprove public or general right.

Evidence of reputation or family tradition¹ is admissible² to prove or disprove the existence of any public or general right³. 'Public right' imports a right exercisable by every member of the community, for example a right of highway⁴ or of fishery in tidal rivers⁵, or a right of way⁶. A general right is one which affects some considerable section of the community, for example a right of common⁷, or the right to elect the churchwardens of a parish⁸.

In order for such evidence to be admissible⁹ the declarant must be dead, the declaration must have been made before the dispute in which it is tendered had arisen¹⁰, and it must in general¹¹ directly assert or deny the right in question¹² and not relate merely to particular facts which support or deny it¹³.

1 As to reputation as a fact see PARA 827 note 1.

2 As to admissibility under the Civil Evidence Act 1995 s 7(3) see PARA 827.

3 Civil Evidence Act 1995 s 7(3)(b)(ii); and see *Barraclough v Johnson* (1838) 8 Ad & El 99; *Crease v Barrett* (1835) 1 Cr M & R 919. It does not affect private rights: *R v Antrobus* (1835) 2 Ad & El 788. Reputation does not mean evidence of particular acts, which ought not to be permitted: *Mercer v Denne* [1905] 2 Ch 538, CA.

4 *Crease v Barrett* (1835) 1 Cr M & R 919; *Vyner v Wirral RDC* (1909) 73 JP 242, DC; *A-G v Horner (No 2)* [1913] 2 Ch 140, CA.

5 *Neill v Duke of Devonshire* (1882) 8 App Cas 135, HL.

6 *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1973] 3 All ER 902, [1973] 1 WLR 1572; affd [1975] 1 All ER 772, [1975] 1 WLR 468, CA. As to whether a landing place is public see *Drinkwater v Porter* (1835) 7 C & P 181.

7 *Lord Dunraven v Llewellyn* (1850) 15 QB 791, Ex Ch; *Nicholls v Parker* (1805) 14 East 331n.

8 *Berry v Banner* (1792) Peake 156.

9 See also **BOUNDARIES; HIGHWAYS, STREETS AND BRIDGES**.

10 *Berkeley Peerage Case* (1811) 4 Camp 401, HL; *Davies v Lowndes* (1843) 6 Man & G 471, Ex Ch; *Butler v Viscount Mountgarret* (1859) 7 HL Cas 633; *Lovat Peerage* (1885) 10 App Cas 763, HL. Cf *Gee v Ward* (1857) 7 E & B 509 (declarations in previous litigation on different issue admissible). This requirement is strictly enforced: *Berkeley Peerage Case* (1811) 4 Camp 401, HL; *Shedden v A-G* (1860) 30 LJP & A 217; affd sub nom *Shedden v Patrick and A-G* (1869) LR 1 Sc & Div 470, HL. Declarations made before a dispute has arisen for the purpose of preventing controversy have been held admissible: *Berkeley Peerage Case* (1811) 4 Camp 401, HL; *Monkton v A-G* (1831) 2 Russ & M 147; affd sub nom *Robson v A-G* (1843) 10 Cl & Fin 471, HL; *Shedden v A-G* (1860) 30 LJP & A 217.

11 Declarations made in the obvious interests of the declarant will generally be rejected (*Brocklebank v Thompson* [1903] 2 Ch 344), but the mere fact that a declaration may tend to support the declarant's title will be insufficient by itself to exclude the declaration (*Doe d Jenkins v Davies* (1847) 10 QB 314).

12 *Crease v Barrett* (1835) 1 Cr M & R 919; *R v Bliss* (1837) 7 Ad & El 550; *Mercer v Denne* [1905] 2 Ch 538, CA; *Radcliffe v Marsden UDC* (1908) 72 JP 475; *Fowke v Berington* [1914] 2 Ch 308; and see *Read v Bishop of Lincoln* [1892] AC 644, PC.

13 *R v Lordsmere District Inhabitants* (1886) 16 Cox CC 65, CCR. However, omissions in documents may be evidence of non-existence of rights in question: *Marquis of Anglesey v Lord Hatherton* (1842) 10 M & W 218; *Duke of Portland v Hill* (1866) LR 2 Eq 765. As to documents see PARA 864 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(4) EVIDENCE OF OPINION AND BELIEF; IN GENERAL/(ii) General Reputation/829. Reputation to identify a person or thing.

829. Reputation to identify a person or thing.

Evidence of reputation¹ or family tradition is admissible² to identify any person or thing³. Such evidence has been admitted to identify a legatee⁴, the subject of a libel⁵, or a devise⁶, and to identify a picture⁷.

1 As to reputation as a fact see PARA 827 note 1.

2 As to admissibility under the Civil Evidence Act 1995 s 7(3) see PARA 827.

3 Civil Evidence Act 1995 s 7(3)(b)(ii). As to identity generally see PARA 1076.

4 *Re Gregory's Settlement and Will* (1865) 34 Beav 600.

5 *Jozwiak v Sadek* [1954] 1 All ER 3, [1954] 1 WLR 275.

6 *Anstee v Nelms* (1856) 1 H & N 225; cf *Re Steel, Wappett v Robinson* [1903] 1 Ch 135.

7 *Burton v Agnew* (1913) Times, 4 February.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(4) EVIDENCE OF OPINION AND BELIEF; IN GENERAL/(ii) General Reputation/830. Reputation in questions of pedigree or the existence of a marriage.

830. Reputation in questions of pedigree or the existence of a marriage.

Reputation¹ or family tradition is admissible² in certain circumstances for the purpose of proving or disproving pedigree or the existence of a marriage³.

In matters of pedigree there must be a genealogical question in issue in the proceedings; the rule does not apply to proof of the facts which constitute a pedigree when they have to be proved for other purposes⁴. The reputation must relate either directly⁵ or to some incident of family history required for the proof of such an issue⁶. The declaration must have been made before the onset of the dispute⁷ by a person who has since died⁸, and the declarant must have been related to the person whose pedigree is in question⁹. A person related must be either a blood relative, or the spouse of one¹⁰.

Where the existence of a marriage is in question, evidence of reputation is receivable, not only from blood relatives but also from friends and neighbours¹¹, to prove the existence of the marriage¹². The evidence must remain general and not merely be founded on particular assertions¹³.

1 As to reputation as a fact see PARA 827 note 1.

2 As to admissibility under the Civil Evidence Act 1995 s 7(3) see PARA 827.

3 Civil Evidence Act 1995 s 7(3)(b)(i).

4 *Haines v Guthrie* (1884) 13 QBD 818, CA; *Re Davy* [1935] P 1 at 8.

5 *Kidney v Cockburn* (1831) 1 Russ & M 167 (age); *Haines v Guthrie* (1884) 13 QBD 818, CA (relationship); *R v St Mildred's, Canterbury* (1838) 2 Jur 46 (identity); *Eggleton v Eggleton* (1843) 1 LTOS 529 (circumstances of births, marriages and deaths); *Shields v Boucher* (1847) 1 De G & Sm 40 (provenance, trade).

6 See eg *Doe, Lessee of Banning v Griffin* (1812) 15 East 293; *Re Thompson* (1887) 12 PD 100. Similar evidence is admissible on issues of legitimacy: *Re Perton, Pearson v A-G* (1885) 53 LT 707.

7 *Berkeley Peerage Case* (1811) 4 Camp 401, HL. As to when a dispute begins see *Lovat Peerage* (1885) 10 App Cas 763, HL. See also *Shedden v A-G* (1860) 30 LJP & A 217.

8 *Butler v Viscount Mountgarret* (1859) 7 HL Cas 633; *Smith v Tebbitt* (1867) LR 1 P & D 354.

9 *Johnson v Lawson* (1824) 2 Bing 86; *Monkton v A-G* (1831) 2 Russ & M 147; *Doe d Jenkins v Davies* (1847) 10 QB 314; *Plant v Taylor* (1861) 7 H & N 211; *A-G v Köhler* (1861) 9 HL Cas 654; *Smith v Tebbitt* (1867) LR 1 P & D 354. This issue is one for the judge: *Doe d Jenkins v Davies* (1847) 10 QB 314.

10 *Johnson v Lawson* (1824) 2 Bing 86; *Shrewsbury Peerage* (1858) 7 HL Cas 1. Illegitimate relations were not usually admissible at common law (*Doe d Bamford v Barton* (1837) 2 Mood & R 28; *Crispin v Doglioni* (1863) 3 Sw & Tr 44), but this rule was relaxed in cases of legitimacy declarations (*Re Davy* [1935] P 1; *Battle v A-G* [1949] P 358; *Scappaticci v A-G* [1955] P 47, [1955] 1 All ER 193n (domicile)).

11 *Elliott v Totnes Union* (1892) 57 JP 151. Discordant reputation will naturally affect the weight given to the evidence: *Andrewes v Uthwatt* (1886) 2 TLR 895; *Re Haynes, Haynes v Carter* (1906) 94 LT 431.

12 See *Sastry Velaidar Aronegary v Sembecutty Vaigalie* (1881) 6 App Cas 364, PC; and see *Porteous v Dorn* (1974) 45 DLR (3d) 596 (Can SC). As to the normal means of proving marriages see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 21 et seq.

13 The more strict requirements of pedigree must be complied with: *Shedden v A-G* (1860) 30 LJPM & A 217. But cf *Porteous v Dorn* (1974) 45 DLR (3d) 596 (Can SC), where a statement of claim for wages as a housekeeper was held admissible as a declaration made before the dispute bearing directly on the pedigree of the plaintiff, in that it went to negative marriage between her mother and the defendant in the action for wages.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(4) EVIDENCE OF OPINION AND BELIEF; IN GENERAL/(iii) Opinions of Ordinary Witnesses/831. Opinions of non-expert witnesses conveying facts personally perceived.

(iii) Opinions of Ordinary Witnesses

831. Opinions of non-expert witnesses conveying facts personally perceived.

Where a person is called as a witness¹ in any civil proceedings², a statement of opinion by him on any relevant matter³ on which he is not qualified to give expert evidence⁴, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived⁵. Nothing in these provisions, however, prejudices any power of a court⁶, in any civil proceedings, to exclude evidence, whether by preventing questions from being put or otherwise, at its discretion⁷ or the operation of any agreement, whenever made, between the parties to any civil proceedings as to the evidence which is to be admissible, whether generally or for any particular purpose, in those proceedings⁸.

1 As to witnesses see PARA 966 et seq.

2 As to the meaning of 'civil proceedings' for these purposes see PARA 1088 note 4.

3 'Relevant matter' includes an issue in the proceedings in question: Civil Evidence Act 1972 s 3(3). As to the distinction between evidence as to fact and a mere opinion see *R v Davies*[1962] 3 All ER 97, [1962] 1 WLR 1111, C-MAC; *Sherrard v Jacob*[1965] NI 151.

4 As to expert evidence see PARA 835 et seq.

5 Civil Evidence Act 1972 s 3(2); and cf *Sherrard v Jacob*[1965] NI 151. Witnesses have long given evidence of quasi-opinion on such matters as identity (see PARA 1076), age (see PARA 1077), affection between two people (*Greenslade v Dare* (1855) 20 Beav 284; *Wright v Tatham* (1838) 5 Cl & Fin 670, HL; *R v Loake*(1911) 7 Cr App Rep 71, CCA) and speed. In road traffic cases, a person prosecuted for a speeding offence is not liable to be convicted solely on the evidence of one witness to the effect that, in the opinion of the witness, the person prosecuted was driving the vehicle at a speed exceeding a specified limit: see the Road Traffic Regulation Act 1984 s 89(2); and **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 856. In a case where copyright infringement is alleged, evidence of infringement has been given by the person who knew the original picture, without it being produced: *Lucas v Williams & Sons*[1892] 2 QB 113, CA. A witness may give his opinion as to whom expressions were understood by him to refer: *Bourke v Warren* (1826) 2 C & P 307; *Broome v Gosden* (1845) 1 CB 728; *R v Barnard, ex p Lord Gower*(1879) 43 JP 127; *E Hulton & Co v Jones*[1910] AC 20, HL; *R v Hendry* (1850) 4 Cox CC 243 (threat). As to what evidence may be given where words are alleged to be used other than with their ordinary meaning see **LIBEL AND SLANDER**.

6 As to the meaning of 'court' for these purposes see PARA 1088 note 4.

7 Civil Evidence Act 1972 s 5(3)(a). As to the court's general power to control evidence see PARA 791.

8 Civil Evidence Act 1972 s 5(3)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(4) EVIDENCE OF OPINION AND BELIEF; IN GENERAL/(iii) Opinions of Ordinary Witnesses/832. Handwriting; in general.

832. Handwriting; in general.

The proof of handwriting may¹ require either lay or expert evidence², or both, depending upon the point at issue. A person's handwriting may be proved by the opinion of witnesses who are acquainted with it³. The knowledge necessary for this purpose may have been acquired by the witness at any time⁴ having (1) seen the party write; or (2) received communications purporting to come from him⁵ in answer to those addressed to him by the witness; or (3) observed documents purporting to be in the party's handwriting in the ordinary course of business⁶. Knowledge, however, acquired before or during the trial by a non-expert witness for the express purpose of qualifying him to prove the party's handwriting at the trial will not suffice to make the evidence admissible⁷. Testimony thus admitted is considered to be primary and not secondary in its nature⁸. While evidence of opinion or belief is admitted for the purpose of proving handwriting where direct evidence of one who was present when the document was written is not available⁹, and familiarity with the handwriting in question may be slight¹⁰, an opinion based on mere inference is insufficient¹¹.

The opinions of handwriting experts¹² are admissible to decipher words beneath obliterations, erasures or alterations¹³, although it is for the court to determine what the words are. Experts may also give their opinions as to whether handwriting is natural or imitated¹⁴, and whether it shows points of comparison¹⁵, but it is for the court to determine whether a particular piece of writing is to be assigned to a particular person¹⁶, and documents may be submitted to the court for comparisons to be made¹⁷. The weight to be attached to any expert evidence depends upon the skill of the expert¹⁸ and the evidence of a lay witness may be preferred to that of a handwriting expert¹⁹.

1 The name, in a signature, may be itself sufficient proof of the identity of the signatory: *Roden v Ryde* (1843) 4 QB 626. As to proof of handwriting generally see PARA 864.

2 As to expert evidence generally see PARA 835 et seq.

3 As to proof of handwriting in criminal cases see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1488. As to proof of the writing of a justice of the peace or of the writing in documents relating to magistrates' court proceedings see the Magistrates' Courts Rules 1981, SI 1981/552, r 67(1).

4 There must have been sufficient opportunity to acquire a knowledge of the handwriting to make the evidence admissible: *R v O'Brien* (1911) 7 Cr App Rep 29, CCA; *Pitre v R* [1933] 1 DLR 417. See also *Burr v Harper* (1816) Holt NP 420, and *Warren v Anderson* (1839) 8 Scott 384.

5 *Harrington v Fry* (1824) 1 C & P 289; and see *Gould v Jones* (1762) 1 Wm Bl 384.

6 *Doe d Mudd v Suckermore* (1837) 5 Ad & El 703; *Re Clarence Hotel, Ilfracombe, Ltd* (1909) 54 Sol Jo 117; *R v O'Brien* (1911) 7 Cr App Rep 29, CCA.

7 *R v Crouch* (1850) 4 Cox CC 163; *Stranger v Searle* (1793) 1 Esp 13; *R v Rickard* (1918) 119 LT 192, CCA.

8 *Lucas v Williams & Sons* [1892] 2 QB 113, CA.

9 See *Sayer v Glossop* (1848) 2 Exch 409; *Wright v Cobb* (1885) 1 TLR 555, DC; *Carey v Pitt* (1797) Peake Add Cas 130; *Batchelor v Honeywood* (1799) 2 Esp 715; *Greaves v Hunter* (1826) 2 C & P 477; *Drew v Prior* (1843) 5 Man & G 264; *Chant v Brown* (1852) 9 Hare 790; *Smith v Sainsbury* (1832) 5 C & P 196; *Doe d Mudd v Suckermore* (1837) 5 Ad & El 703.

10 It is sufficient if the witness has acted on letters received from the person whose handwriting is in dispute: *Harrington v Fry* (1824) 1 C & P 289; *Tharpe v Gisburne* (1825) 2 C & P 21; *R v Slaney* (1832) 5 C & P 213; *Murieta v Wolfhagen* (1849) 2 Car & Kir 744; *Ovenston v Wilson* (1845) 2 Car & Kir 1. A signature may be proved by a witness who has only seen the surname written on some other occasion: *Lewis v Sapio* (1827) Mood & M 39, disapproving *Powell v Ford* (1817) 2 Stark 164; *Willman v Worrall* (1838) 8 C & P 380; cf *Eagleton and Coventry v Kingston* (1803) 8 Ves 438; *R v Crouch* (1850) 4 Cox CC 163 (constable and prisoner).

11 *Mendes da Costa v Pym* (1797) Peake Add Cas 144. A witness who bases his belief as to handwriting on the contents of a paper and on other circumstances may be asked what those circumstances are: *R v Murphy and Douglas* (1837) 8 C & P 297.

12 A police officer is not as such a handwriting expert: *R v Crouch* (1850) 4 Cox CC 163; *R v Rickard* (1918) 119 LT 192, CCA.

13 *R v Williams* (1838) 8 C & P 434; *Ffinch v Combe* [1894] P 191; *Re Brasier* [1899] P 36.

14 *Goodtitle d Revett v Braham* (1792) 4 Term Rep 497; *R v Cator* (1802) 4 Esp 117; *R v Shepherd* (1845) 1 Cox CC 237.

15 For observations on the dangers of comparisons of handwriting by persons unqualified to do so see *R v O'Sullivan* [1969] 2 All ER 237, [1969] 1 WLR 497, CA; and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1488.

16 *Wakeford v Bishop of Lincoln* (1921) 90 LJPC 174; *Cresswell v Jackson* (1864) 4 F & F 1. As to handwriting in forgery cases see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1488; and see *Dass (an infant) v Masih* [1968] 2 All ER 226, [1968] 1 WLR 756, CA (expert's opinion admissible that postscript to a letter admittedly written by defendant was a forgery).

17 See the Criminal Procedure Act 1865 s 8, which applies to civil as well as criminal cases; and PARA 834. As to the standard of proof see *R v Ewing* [1983] QB 1039, [1983] 2 All ER 645, CA.

18 *R v Silverlock* [1894] 2 QB 766, CCR. It may not be great: *Robson v Rocke* (1824) 2 Add 53.

19 See eg *Fuller v Strum* [2000] All ER (D) 2392; revsd on other grounds [2001] EWCA Civ 1879, [2002] 2 All ER 87, [2002] 1 WLR 1097.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(4) EVIDENCE OF OPINION AND BELIEF; IN GENERAL/(iii) Opinions of Ordinary Witnesses/833. Handwriting in ancient documents.

833. Handwriting in ancient documents.

When necessary¹, the handwriting in ancient documents may be proved in the same way as in other documents², or by comparison with other documents the authenticity of which is not disputed³, or even (where by reason of lapse of time no witness acquainted with the handwriting can be found, and no strict proof can be given of the genuineness of other documents with which comparison might be made) by a witness who, in the course of his business, has acquired a knowledge of the character of the handwriting and the person whose handwriting is in dispute, from his acquaintance with a number of documents purporting to have been written or signed by that person⁴; but it is otherwise when the knowledge is acquired not in the course of business but from a study of such other documents for the purpose of giving evidence⁵.

1 As to ancient documents proving themselves see PARA 869.

2 See PARA 832; and *Morewood v Wood* (1791) 14 East 327; *Taylor v Cook* (1820) 8 Price 650; *Doe d Mudd v Suckermore* (1837) 5 Ad & El 703; *Fitzwalter Peerage* (1844) 10 Cl & Fin 193, HL. As to proof of documents more than 20 years old see PARA 869; and see *Fenwick v Reed* (1821) 6 Madd 7; *Camoy's Peerage* (1839) 6 Cl & Fin 789, HL; *Doe d Jenkins v Davies* (1847) 10 QB 314.

3 As to proof by comparison with other handwriting see PARA 834.

4 See PARA 832; and *Fitzwalter Peerage* (1844) 10 Cl & Fin 193, HL; *Doe d Jenkins v Davies* (1847) 10 QB 314.

5 See PARA 832.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(4) EVIDENCE OF OPINION AND BELIEF; IN GENERAL/(iii) Opinions of Ordinary Witnesses/834. Comparison of handwriting.

834. Comparison of handwriting.

Comparison of a disputed writing with any writing proved to the judge's satisfaction to be genuine may be permitted to be made by witnesses¹; and such writings, and the evidence of witnesses respecting them, may be submitted to the court as evidence of the genuineness or otherwise of the writing in dispute². It is wrong for a jury³ to be invited to compare handwriting without the assistance of an expert⁴. It is immaterial that the writing with which the comparison is made is not and cannot be made evidence in the case⁵.

1 As to witnesses generally see PARA 966 et seq.

2 Criminal Procedure Act 1865 s 8. This applies in both civil and criminal courts: s 1. The recurrence in different writings of an identical misspelling tends to prove the identity of the writers: *Brookes v Tichborne* (1850) 5 Exch 929; and see *R v Voisin* [1918] 1 KB 531, CCA. As to the evidence required on a charge of forgery to show that the part of a document which is forged is in the handwriting of the accused see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1488. As to the standard of proof see *R v Ewing* [1983] QB 1039, [1983] 2 All ER 645, CA. The opinion of a handwriting expert based on comparison with a photocopy of the document is admissible under the Criminal Procedure Act 1865 s 8: *Lockheed-Arabia Corp v Owen* [1993] QB 806, [1993] 3 All ER 641, CA.

3 As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

4 *R v Tilley* [1961] 3 All ER 406, [1961] 1 WLR 1309, CCA; *R v Harden* [1963] 1 QB 8, [1963] 1 All ER 286, CCA; *R v O'Sullivan* [1969] 2 All ER 237, [1969] 1 WLR 497, CA.

5 *Birch v Ridgway* (1858) 1 F & F 270; *Cresswell v Jackson* (1860) 2 F & F 24. The comparison may be made by the jury (*Cobbett v Kilminster* (1865) 4 F & F 490; *Scard v Jackson* (1875) 24 WR 159) or, when there is no jury, by the judge (*R v Smith* (1909) 3 Cr App Rep 87, CCA); and may be made with a document written in court for this purpose (*Doe d Devine v Wilson* (1855) 10 Moo PCC 502; *Cobbett v Kilminster* (1865) 4 F & F 490). There is old authority to the effect that proof of genuineness must be given at the trial itself, and cannot be ordered during preliminary proceedings: see *Wilson v Thornbury* (1874) LR 17 Eq 517; however, it is doubtful that this would now be followed. As to the court's general discretionary power to control the evidence see PARA 791.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/(i) Introduction/835. Subjects of expert evidence; in general.

(5) EXPERT EVIDENCE

(i) Introduction

835. Subjects of expert evidence; in general.

Courts frequently have to decide upon matters requiring specialised knowledge¹ and, in appropriate cases, the court will admit expert evidence². Where a person is called as a witness³ in any civil proceedings⁴ his opinion⁵ is admissible⁶ on any relevant matter⁷, including an issue in the proceedings⁸, on which he is qualified⁹ to give expert evidence, but subject to important procedural limitations¹⁰. If the subject under investigation does not require specialist knowledge, expert evidence will generally be excluded¹¹, although a specialist witness may be both an expert witness and a witness of fact¹².

Expert medical evidence¹³ is particularly significant in personal injury cases¹⁴ and cases involving children¹⁵. Expert evidence is admitted on questions of foreign law¹⁶. Other subjects on which expert evidence has been admitted include matters of science, art and trade¹⁷, handwriting¹⁸, forestry¹⁹, alterations in wills²⁰, military usage²¹, engineering²², shipbuilding²³, accountancy and actuarial matters²⁴, patent specifications²⁵, banking management issues²⁶ and underwriting²⁷. The court may also accept evidence of canons of taste, it having no judicial knowledge of such matters itself²⁸. These examples do not purport to be a comprehensive list.

The court also has power to appoint one or more assessors to assist it in dealing with a matter in which the assessor has skill or experience²⁹.

1 A court does not have to act in accordance with an expert's approach to a subject; eg on a claim for damages for the loss of expectation of life, actuarial principles may be eschewed (see *Fletcher v Autocar Transporters Ltd*[1968] 2 QB 322, [1968] 1 All ER 726, CA) although the use of the Ogden Tables is encouraged (see PARA 818). Where there is a conflict in the expert evidence, a judge is entitled to exercise his judgment in resolving it, although, in rejecting a coherent and reasoned opinion, he is required to give a coherent and reasoned explanation for doing so and for accepting the opposing evidence: *Lowe v Haverling NHS Trust* (2001) 62 BMLR 69, [2001] All ER (D) 253 (Jun); *Glicksman v Redbridge Healthcare NHS Trust*[2001] EWCA Civ 1097, 63 BMLR 109, [2001] All ER (D) 149 (Jul); and see *Re B (children: non-accidental injury)*[2002] EWCA Civ 902, [2002] 2 FCR 654, [2002] All ER (D) 452 (May); *Re N-B (children) (residence: expert evidence)* [2002] EWCA Civ 1052, [2002] 3 FCR 259, [2002] All ER (D) 51 (Jul) (in a child care case, a judge is entitled to depart from the experts in relation to issues of management, placement and welfare, but he must explain fully his departure). Cf *Abada v Gray* (1997) 40 BMLR 116, CA (a judge does not have to give reasons for his conclusion, particularly where it may have depended upon his assessment of the skill, knowledge and experience of expert witnesses, nor does he have to state why he prefers one expert's evidence to that of another); *Lahey v Merton, Sutton and Wandsworth Health Authority* (1999) 48 BMLR 18, CA (a judge does not necessarily have to explain why he found the contributions of expert witnesses partisan and unhelpful); and see *Fuller v Strum*[2000] All ER (D) 2392 (no obligation on judge to prefer evidence of handwriting expert over that of lay witness; revsd on other grounds [2001] EWCA Civ 1879, [2002] 2 All ER 87, [2002] 1 WLR 1097); *JD Williams & Co Ltd v Michael Hyde & Associates Ltd* [2000] All ER (D) 930, CA (judge was entitled to come to the conclusion that the exercise of deciding whether further investigation of the risk of discoloration of the defendant's stock was or was not required was not something which required any special architectural skills, and made no error of law in doing so). As to the power of a judge to prefer one body of evidence to another on the ground that the other is not capable of withstanding logical analysis see *Calver v Westwood Veterinary Group* (2000) 58 BMLR 194, [2000] All ER (D) 1973, CA; and **NEGLIGENCE** vol 78 (2010) PARA 23.

See also *Youssif v Jordan*[2003] EWCA Civ 1852, (2004) Times, 22 January; and *Coopers Payen Ltd v Southampton Container Terminal Ltd*[2003] EWCA Civ 1223, [2004] 1 Lloyd's Rep 331. The judge should consider the expert evidence before reaching any conclusions on the facts: *Hall v Jakto Transport Ltd*[2005] EWCA Civ 1327, [2005] All ER (D) 123 (Nov), (2005) Times, 28 November.

2 The weight to be attached to expert evidence is a matter for the court: *R v Rivett*(1950) 34 Cr App Rep 87, CCA. Courts have heard expert evidence since at least the sixteenth century: *Buckley v Rice Thomas* (1554) 1 Plowd 118. They do not always accept the view of the proffered expert: see *Davie v Edinburgh Magistrates*1953 SC 34; and see the cases cited in note 1.

3 As to expert witnesses see PARA 836 et seq; and as to witnesses generally see PARA 966 et seq.

4 As to the meaning of 'civil proceedings' for these purposes see PARA 1088 note 4.

5 See, however, *R v Deputy Industrial Injuries Comr, ex p Moore*[1965] 1 QB 456, [1965] 1 All ER 81, CA (expert's adoption of previous expert testimony as his own). See also *R v Abadom*[1983] 1 All ER 364, CA. An expert should not give hearsay evidence of facts of transactions of which he has no personal knowledge: *English Exporters (London) Ltd v Eldonwall Ltd*[1973] Ch 415, [1973] 1 All ER 726 (expert valuer allowed to give his opinion on values, although a substantial contribution to the formation of those opinions had been made by hearsay). An expert may refresh his memory by reference to works on the subject of his skill: *Sussex Peerage Case* (1844) 11 Cl & Fin 85, HL; *Collier v Simpson* (1831) 5 C & P 73; *Clark v Adie (No 2)* (1877) 2 App Cas 423, HL.

6 le subject to any rules of court made in pursuance of the Civil Evidence Act 1972: s 3(1) (amended by the Civil Evidence Act 1995 s 15(2), Sch 2).

7 Civil Evidence Act 1972 s 3(1) (as amended: see note 6).

8 Civil Evidence Act 1972 s 3(3); and see *Re M and R (minors) (expert opinion: evidence)*[1996] 4 All ER 239, [1996] 2 FCR 617, CA. See also *DPP v A and BC Chewing Gum Ltd*[1968] 1 QB 159, [1967] 2 All ER 504, DC. For the possible dangers of admitting expert opinion see *Joseph Crosfield & Sons Ltd v Techno-Chemical Laboratories Ltd* (1913) 29 TLR 378. As to the limits of admissibility of expert evidence in criminal proceedings see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

9 It is for the judge to decide whether a witness has sufficient knowledge or expertise to qualify as an expert; there is no need for it to have been acquired professionally: *R v Silverlock*[1894] 2 QB 766, CCR, where a solicitor gave expert evidence as an amateur handwriting expert. In each case the decision will be one of fact and degree: *R v Somers*[1963] 3 All ER 808, [1963] 1 WLR 1306, CCA. Evidence of foreign law does not now have to be given by persons who have practised in it: see the Civil Evidence Act 1972 s 4(1); and PARA 1088. The grounds of an expert's opinion may always be investigated by examination, fact and experiment: *Birrell v Dryer*(1884) 9 App Cas 345, HL; *R v Heseltine* (1873) 12 Cox CC 404. The court should be slow to find that a professional person has breached his duty of skill and care without evidence from those within the same profession; where the case is not 'open and shut' the evidence of a structural engineer is not expert evidence on the issue of the surveyor's negligence within the meaning of the Civil Evidence Act 1972 s 3: *Sansom v Metcalfe Hambleton & Co* [1998] 26 EG 154, CA. See also *Field v Leeds County Council* (1999) 32 HLR 618, [2000] 1 EGLR 54, CA (employee who was properly qualified to give evidence allowed to be an expert witness for his employer); *Southwark London Borough Council v Simpson* [2000] EHLR 43, DC (surveyor not qualified to give expert evidence on connection between dampness and mould growth, and adverse effects on health); *Liverpool Roman Catholic Archdiocese Trustees Incorporated v Goldberg (No 2)*[2001] 4 All ER 950, sub nom *Liverpool Roman Catholic Archdiocese Trustees Incorporated v Goldberg (No 3)* [2001] 1 WLR 2337 (evidence of expert witness, who had close personal and professional relationship with defendant, inadmissible on ground of public policy); *Clarke v Marlborough Fine Art (London) Ltd (No 3)* [2002] All ER (D) 105 (Jan) (evidence of art lawyer without personal experience of relevant negotiations not admitted as expert report). In child care cases, judges should be cautious in receiving supportive testimony from adult psychiatrists called on behalf of a vulnerable patient and with little experience of child care and child placement: *Re D (simultaneous applications for care and freeing orders)*[1999] 3 FCR 65, CA.

10 As to the restrictions on adducing expert evidence see PARAS 838-840. The High Court has an inherent jurisdiction to determine the admissibility of expert evidence at a pre-trial review: *Woodford & Ackroyd (a firm) v Burgess*(1999) Times, 1 February, CA. A private pre-trial review between expert witnesses does not infringe a party's right to a fair trial: *Hubbard v Lambeth, Southwark and Lewisham Health Authority* [2001] EWCA Civ 1455, [2001] All ER (D) 11 (Sep), (2001) Times, 8 October. A single joint expert should not, however, meet with one party only: see PARA 849. Furthermore, there may be a breach of the right to a fair trial if a litigant is denied the opportunity to examine and comment on evidence being considered by a single expert before he produces his report: see PARA 840 text and notes 17-18.

11 *United States Shipping Board v The St Albans*[1931] AC 632, PC; and see *Process Church of the Final Judgment v Rupert Hart-Davis Ltd*(1975) Times, 29 January, CA; *M O'Donnell & Sons (Huddersfield) Ltd v HSBC Bank plc (formerly Midland Bank plc)* [2001] EWCA Civ 2108, [2001] All ER (D) 439 (Nov) (judge correct not to allow expert evidence to be admitted when construing the phrase 'other debts').

12 *Seyfang v GD Searle & Co*[1973] QB 148, [1973] 1 All ER 290.

13 For examples of cases where expert medical evidence has been admitted see *R v Wright* (1821) Russ & Ry 456; *Richmond v Richmond* (1914) 111 LT 273; *Yorke v Yorkshire Insurance Co* [1918] 1 KB 662; *R v Somers* [1963] 3 All ER 808, [1963] 1 WLR 1306, CCA; *DPP v A and BC Chewing Gum Ltd* [1968] 1 QB 159, [1967] 2 All ER 504, DC.

14 As to obtaining medical opinions before the commencement of proceedings see PARA 841.

15 The essence of case management in proceedings relating to children is that the process should be transparent and that each party should know the case it has to meet. It is for the court to decide what expert evidence ought to be obtained in any case, and it is quite contrary to the spirit and letter of the approach to expert evidence developed since the Children Act 1989 that one party, without notice to the other or the court, should commission a report from an expert which neither the court nor the other party knows anything about: *Re A (children) (contact: expert evidence)* [2001] 1 FLR 723, [2001] All ER (D) 56 (Feb). See also *Re M (Minors) (Care Proceedings: Conflict of Children's Wishes: Instruction of Expert Witnesses)* [1994] 1 FCR 866, [1994] 1 FLR 749; *Re G (Minors) (Expert Witnesses)* [1994] 2 FCR 106, [1994] 2 FLR 291; *Re S and B (Minors) (Child Abuse: Evidence)* [1991] FCR 175, [1990] 2 FLR 489, CA (whether evidence of specialist social worker as to patient's credibility should be accepted as expert evidence); and see PARA 768 note 17. A clear boundary must be drawn between a medical decision for doctors to determine what is clinically required for the treatment of a child, and a forensic decision, which is a case management decision for the judge, as to what is necessary to ensure the proper determination of an issue: *Re M (A Child) (Injured Child: Evidence)* [2007] EWCA Civ 589, [2007] 2 FCR 797, [2007] 2 FLR 1006. As to the use of experts and the instruction of experts in family proceedings see *Practice Direction (experts in family proceedings relating to children)* [2008] All ER (D) 18 (May).

16 See PARA 1088.

17 *Carter v Boehm* (1766) 3 Burr 1905; *Jameson v Drinkald* (1826) 12 Moore CP 148; *Ramadge v Ryan* (1832) 9 Bing 333; *Rich v Pierpont* (1862) 3 F & F 35.

18 See PARAS 832-834.

19 *Weld-Blundell v Wolseley* [1903] 2 Ch 664.

20 *Ffinch v Combe* [1894] P 191.

21 *Bradley v Arthur* (1825) 4 B & C 292.

22 *Folkes v Chadd* (1782) 3 Doug KB 157.

23 *Thornton v Royal Exchange Assurance Co* (1790) Peake 25; *Beckwith v Sydebotham* (1807) 1 Camp 116; *The Robin* [1892] P 95.

24 *Bond v Barrow Haematite Steel Co* [1902] 1 Ch 353.

25 As to the correct scope of expert evidence in construing patent specifications see *American Cyanamid Co v Ethicon Ltd* [1979] RPC 215.

26 *Barings plc (in liquidation) v Coopers & Lybrand (a firm), Barings Futures (Singapore) Pte Ltd (in liquidation) v Mattar* [2001] Lloyd's Rep Bank 85, [2001] All ER (D) 110 (Feb).

27 *Ionides v Pender* (1874) LR 9 QB 531.

28 See *Re Pinion, Westminster Bank Ltd v Pinion* [1965] Ch 85, [1964] 1 All ER 890, CA. The meaning of 'technical terms' can often be decided by means other than the calling of expert evidence: *Baldwin and Francis Ltd v Patents Appeal Tribunal* [1959] AC 663, [1959] 2 All ER 433, HL. The opinions of nautical witnesses as to proper navigation will be admissible provided that the court is not sitting with assessors (*Sills v Brown* (1840) 9 C & P 601; *Fenwick v Bell* (1844) 1 Car & Kir 313; *The Kestrel* (1881) 6 PD 182; *The Assyrian* (1890) 63 LT 91, CA); and cf *Lewis v Port of London Authority* (1914) 111 LT 776, CA, where such evidence was admitted where a judge was assisted by a medical assessor.

29 See PARA 863.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/(i) Introduction/836. Membership organisations for expert witnesses.

836. Membership organisations for expert witnesses.

It is for the judge to decide whether a witness has sufficient knowledge or expertise to qualify as an expert¹. However, there are various membership organisations for expert witnesses which offer accreditation and training. Among these are the Expert Witness Institute ('EWI')², the Academy of Experts³ and the Society of Expert Witnesses⁴. All these organisations maintain internet sites on the World Wide Web where details of their aims and objectives, rules and membership may be found, but none has a statutory basis and there is no statutory requirement that an expert witness be a member of such an organisation.

The Council for the Registration of Forensic Practitioners is a professional regulatory body which prepares and manages a register of currently competent forensic practitioners in certain specialties⁵. The council maintains an internet site on the World Wide Web which gives details of its organisation, aims and objectives and provides a searchable register⁶. At the date at which this title states the law, the majority of practitioners registered were concerned mainly with work in the criminal courts and coroners' courts; however, the council was in consultation with interested bodies on the possibility of extending registration to cover specialities mainly relevant to civil proceedings⁷.

1 See PARA 835 note 9.

2 The Expert Witness Institute is located at 7 Warwick Court, London WC1R 5DJ. At the date at which this title states the law, the EWI maintained an internet site at www.ewi.org.uk.

3 The Academy of Experts is located at 3 Gray's Inn Square, London WC1R 5AH. At the date at which this title states the law, the Academy maintained an internet site at www.academy-experts.org.

4 The Society of Expert Witnesses can be contacted at PO Box 345, Newmarket Suffolk CB8 7TU. At the date at which this title states the law, the society maintained an internet site at www.sew.org.uk.

5 The council is located at Tavistock House, Tavistock Square WC1H 9HX. At present, the register is open to forensic practitioners in science, scene examination, fingerprint examination and odontology but it is envisaged that it will be extended to physicians (police surgeons), paediatricians and specialists in traffic accident investigation, fire investigation, information and communications technology, imaging and human identification.

6 At the date at which this title states the law, the council maintained an internet site at www.crfp.org.uk.

7 Information available at www.crfp.org.uk. For a discussion of this proposal see Simon Carne 'Registering the Experts' [2002] NLJ 365.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/(i) Introduction/837. The Protocol for the Instruction of Experts to give evidence in civil claims and civil court guides.

837. The Protocol for the Instruction of Experts to give evidence in civil claims and civil court guides.

The Civil Justice Protocol for the Instruction of Experts to give evidence in civil claims, published in June 2005 and approved by the Master of the Rolls¹, offers guidance to experts and to those instructing them in the interpretation of and compliance with Part 35 of the Civil Procedure Rules and its associated practice direction and to further the objectives of the Civil Procedure Rules in general². The protocol is intended to assist in the interpretation of those provisions in the interests of good practice but it does not replace them. It sets out standards for the use of experts and the conduct of experts and those who instruct them³.

Some courts have published their own guides which supplement the Civil Procedure Rules for proceedings in those courts⁴. These contain provisions affecting expert evidence⁵ and an expert witness must be familiar with them when they are relevant to his evidence⁶.

Certain other bodies have also produced expert witness protocols⁷.

¹ *Protocol for the Instruction of Experts to give evidence in civil claims* para 1. The protocol is annexed to *Practice Direction--Experts and Assessors* PD 35 and replaces the *Protocol for the Instruction of Experts to give evidence in civil claims* (2001). The protocol applies to any steps taken for the purpose of civil proceedings by experts or those who instruct them on or after 5 September 2005: *Protocol for the Instruction of Experts to give evidence in civil claims* para 3.1.

² *Protocol for the Instruction of Experts to give evidence in civil claims* para 2.1.

³ *Protocol for the Instruction of Experts to give evidence in civil claims* para 2.1. The protocol applies to all experts who are, or who may be, governed by CPR Pt 35 and to those who instruct them: *Protocol for the Instruction of Experts to give evidence in civil claims* para 3.2. Courts may take into account any failure to comply with the protocol when making orders in relation to costs, interest, time limits, the stay of proceedings and whether to order a party to pay a sum of money into court: para 3.4. Relevant provisions of the protocol are set out in PARA 838 et seq.

⁴ See PARA 757 note 4. As to the status of such court guides see PARA 16.

⁵ See eg *The Admiralty and Commercial Courts Guide* (7th Edn, 2006) para H2.7 cited in PARA 852.

⁶ *Protocol for the Instruction of Experts to give evidence in civil claims* paras 2, 3.1.

⁷ See eg the *Technology and Construction Solicitors Association's Expert Witness Protocol*, available at the date at which this title states the law at www.tecsa.org.uk.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/(ii) Restrictions on Expert Evidence/838. In general.

(ii) Restrictions on Expert Evidence

838. In general.

Provision may be made by rules of court as to the conditions subject to which oral expert evidence may be given in civil proceedings¹.

Under the Civil Procedure Rules, expert² evidence must be restricted to that which is reasonably required to resolve the proceedings³ and no party may call an expert or put in evidence an expert's report without the court's permission⁴.

When a party applies for such permission he must identify the field in which he wishes to rely on expert evidence and, where practicable, the expert in that field on whose evidence he wishes to rely⁵. If such permission is granted it will be in relation only to the expert so named or the field so identified⁶.

The court may limit the amount of the expert's fees and expenses that the party who wishes to rely on the expert may recover from any other party⁷.

These restrictions apply to all ancillary relief proceedings⁸. At the trial of a matrimonial cause, the court may order that not more than a specified number of expert witnesses may be called⁹. In proceedings under the Children Act 1989, no person may, without the leave of the court, cause the child to be medically or psychiatrically examined, or otherwise assessed, for the purpose of the preparation of expert evidence for use in the proceedings¹⁰. Where the leave of the court has not been given, no evidence arising out of an examination or assessment to which this restriction applies may be adduced without the leave of the court¹¹. In such proceedings where there is a serious allegation against a parent it is wrong in principle to refuse parents the opportunity to go to an expert; moreover the instruction of an expert on behalf of a party does not necessarily either elaborate or elongate litigation¹².

1 Civil Evidence Act 1972 s 2(4). As to the meaning of 'civil proceedings' for these purposes see PARA 1088 note 4. Without prejudice to the generality of s 2(4), rules of court made in pursuance thereof may make provision for prohibiting a party who fails to comply with a direction given as mentioned in s 2(3)(b) (disclosure of experts' reports: see PARA 856) from adducing, except with the leave of the court, any oral expert evidence whatsoever with respect to matters of any class specified in the direction: s 2(5). Any rules of court made in pursuance of s 2 may make different provision for different classes of cases, for expert reports dealing with matters of different classes, and for other different circumstances: s 2(6). References in s 2 to an expert report are references to a written report by a person dealing wholly or mainly with matters on which he is (or would if living be) qualified to give expert evidence: s 2(7). As to expert evidence in magistrates' courts see the Criminal Procedure Rules 2005, SI 2005/384, Pt 33; and **MAGISTRATES** vol 29(2) (Reissue) PARA 727.

2 As to the meaning of 'expert' see PARA 791 note 10. If an expert is properly qualified to give evidence, the fact that he is employed by a local authority does not disqualify him from giving evidence on the authority's behalf: *Field v Leeds City Council* (1999) 32 HLR 618, [2000] 1 EGLR 54, CA.

3 CPR 35.1. This rule applies to claims allocated to the small claims track, as do CPR 35.3 (experts; overriding duty to the court: see PARA 848); CPR 35.7 (court's power to direct that evidence is to be given by a single joint expert: see PARA 840); and CPR 35.8 (instructions to a single joint expert: see PARA 847); but the remainder of CPR Pt 35 (see PARA 838 et seq) does not apply to small claims: see CPR 27.2(1)(e). As to cases allocated to the small claims track see PARAS 267, 274 et seq. As to the application of the CPR see generally PARA 32.

The spirit and effect of the CPR require the court to look even more closely at the need for expert evidence: see eg *Thermos Ltd v Aladdin Sales & Marketing Ltd* [2000] IP & T 41, [2000] FSR 402 per Jacob J; affd [2001] EWCA

Civ 667, [2001] IP & T 1085, [2001] All ER (D) 129 (May). See also *JP Morgan Chase Bank v Springwell Navigation Corp*[2006] EWHC 2755 (Comm), [2007] 1 All ER (Comm) 549 (expert evidence strayed outside relevant issue).

4 CPR 35.4(1). As to the meaning of 'court' see PARA 22. As to the exercise of this discretion see eg *Re a Company (No 24 of 2000)* [2000] All ER (D) 2370; *Mann v Chetty and Patel* [2001] Lloyd's Rep PN 38, [2000] All ER (D) 1531, CA; *Nessa v Walsall Metropolitan Borough Council* [2000] All ER (D) 2351, CA; *Ahmed v Stanley A Coleman and Hill*[2002] EWCA Civ 935, [2002] All ER (D) 117 (Jun). As to expert evidence in asylum claims see eg *Budak v Secretary of State for the Home Department* [2000] All ER (D) 1662, CA; and see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**. As to expert evidence in employment tribunal cases see *De Keyser Ltd v Wilson* [2001] IRLR 324, [2001] All ER (D) 237 (Mar), EAT; and **EMPLOYMENT** vol 41 (2009) PARA 1429. See also *Heyward v Plymouth Hospital NHS Trust*[2005] EWCA Civ 939, [2005] All ER (D) 212 (Jun), (2005) Times, 1 August (occupational stress).

5 CPR 35.4(2).

6 CPR 35.4(3).

7 CPR 35.4(4). See also CPR 1.1(2)(a), which requires the court, so far as practicable, to ensure that the parties are on an equal footing; and PARA 791.

8 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.61C (added by SI 1999/3491); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 932.

9 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.28(3)(c); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 837. 'Matrimonial cause' has the meaning assigned to it by the Matrimonial and Family Proceedings Act 1984 s 32 (see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 317); Family Proceedings Rules 1991, SI 1991/1247, SI 1991/1247 r 1.2(1) (definition added by SI 2005/2922).

10 See the Family Proceedings Rules 1991, SI 1991/1247, r 4.18(1); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 18(1); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 207. As to the exercise of this discretion see eg *Re M (judge's discretion)* [2001] EWCA Civ 1428, [2002] 1 FLR 730, [2001] All ER (D) 16 (Sep) (judge in error in refusing leave to instruct a clinical psychologist at an early stage and with limited knowledge of the case, and in the face of agreement that an expert opinion was required). Any instructions for a forensic report must be impartial and, wherever possible, be joint and agreed with the other side: *Re B (sexual abuse: expert's report)* [2000] 2 FCR 8, CA.

11 See the Family Proceedings Rules 1991, SI 1991/1247, r 4.18(3); the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395, r 18(3); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 207.

12 See *Re S (children) (contact order)*[2000] All ER (D) 2517, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/(ii) Restrictions on Expert Evidence/839. Expert evidence generally to be given in a written report.

839. Expert evidence generally to be given in a written report.

Under the Civil Procedure Rules, expert¹ evidence is to be given in a written report, unless the court² directs otherwise³. If a claim is on the fast track⁴, the court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice⁵.

An expert's report must comply with the requirements set out in the relevant practice direction⁶ and, in addition, with the requirements of the approved protocol⁷. At the end of an expert's report there must be a statement that the expert understands his duty to the court and that he has complied with that duty⁸.

The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written⁹. Such instructions will not be privileged¹⁰ against disclosure¹¹ but the court will not, in relation to those instructions:

- 26 (1) order disclosure of any specific document; or
- 27 (2) permit any questioning in court, other than by the party who instructed the expert,

unless it is satisfied that there are reasonable grounds to consider the statement of instructions given¹² to be inaccurate or incomplete¹³. If the court is so satisfied, it will allow cross-examination of the expert on the contents of his instructions where it appears to be in the interests of justice to do so¹⁴.

An expert's report must be verified by a statement of truth¹⁵.

In nullity proceedings, where the evidence of a medical inspector or medical inspectors is not given at the trial, his or their report is treated as information furnished to the court by a court expert and is given such weight as the court thinks fit¹⁶.

1 As to the meaning of 'expert' see PARA 791 note 10.

2 As to the meaning of 'court' see PARA 22.

3 CPR 35.5(1). This applies to ancillary relief proceedings: see the Family Proceedings Rules 1991, SI 1991/1247, r 2.61C (added by SI 1999/3491); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 932. As to the application of the CPR see generally PARA 32. As to late service of an expert's report see *Baron v Lovell* [1999] CPLR 630, CA.

4 As to claims allocated to the fact track see PARAS 268, 286 et seq.

5 CPR 35.5(2).

6 CPR 35.10(1). As to the form of the report see PARA 852.

7 See the *Protocol for the Instruction of Experts to give evidence in civil claims* annexed to *Practice Direction--Experts and Assessors* PD 35. As to the protocol and its status see PARA 837.

8 CPR 35.10(2).

9 CPR 35.10(3).

10 As to the meaning of 'privilege' see PARA 551 note 1.

11 As to the meaning of 'disclosure' see PARA 538.

12 le under CPR 35.10(3): see the text and note 9.

13 CPR 35.10(4).

14 *Practice Direction--Experts and Assessors* PD 35 para 4.

15 *Practice Direction--Experts and Assessors* PD 35 para 2.3. As to the form of the statement of truth see PARA 852 note 25. As to statements of truth see generally CPR Pt 22; and PARA 613. As to the consequences of verifying a document containing a false statement without an honest belief in its truth see CPR 32.14; and PARA 988.

16 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.23(6); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 808.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/(ii) Restrictions on Expert Evidence/840. Court's power to direct that evidence is to be given by a single joint expert.

840. Court's power to direct that evidence is to be given by a single joint expert.

Under the Civil Procedure Rules ('CPR'), where two or more parties wish to submit expert¹ evidence on a particular issue, the court² may direct that the evidence on that issue is to be given by one expert only³. This is encouraged, and wherever possible a joint report should be obtained⁴.

The parties wishing to submit the expert evidence are called the 'instructing parties'⁵. Where the instructing parties cannot agree who should be the expert, the court may select the expert from a list prepared or identified by the instructing parties⁶ or direct that the expert be selected in such other manner as the court may direct⁷.

Where the court has directed that the evidence on a particular issue is to be given by one expert only but there are a number of disciplines relevant to that issue, a leading expert in the dominant discipline should be identified as the single expert. He should prepare the general part of the report and be responsible for annexing or incorporating the contents of any reports from experts in other disciplines⁸.

In many Admiralty and commercial cases, the use of a single joint expert is not appropriate and each party will generally be given permission to call one expert in each field requiring expert evidence⁹. When the use of a single joint expert is contemplated, the court will expect the parties to co-operate in developing, and agreeing to the greatest possible extent, terms of reference for that expert¹⁰.

In very many cases in the Queen's Bench Division of the High Court¹¹ it is possible for the question of expert evidence to be dealt with by a single expert. Single experts are, for example, often appropriate to deal with questions of quantum in cases where the primary issues are as to liability. Likewise, where expert evidence is required in order to acquaint the court with matters of expert fact, as opposed to opinion, a single expert will usually be appropriate. There remains, however, a body of cases where liability will turn upon expert opinion evidence and where it will be appropriate for the parties to instruct their own experts; for example, in cases where the issue for determination is as to whether a party acted in accordance with proper professional standards, it will often be of value to the court to hear the opinions of more than one expert as to the proper standard in order that the court becomes acquainted with the range of views existing upon the question and in order that the evidence can be tested in cross-examination¹². It is not necessarily a sufficient objection to the making by the court of an order for a single joint expert that the parties have already appointed their own experts¹³.

In ancillary relief proceedings in the Family Division¹⁴, the introduction of expert evidence is likely to increase costs substantially and consequently the court will use its powers to restrict the unnecessary use of experts. Accordingly, where expert evidence is sought to be relied upon, parties should if possible agree upon a single expert whom they can jointly instruct. Where parties are unable to agree upon the expert to be instructed, the court will consider using the powers set out above to direct that evidence be given by one expert only. In such cases parties must be in a position at the first appointment or when the matter comes to be considered by the court to provide the court with a list of suitable experts or to make submissions as to the method by which the expert is to be selected¹⁵.

Where a single expert has been appointed, there is generally no need for that expert's evidence to be amplified by oral evidence or tested in cross-examination¹⁶. However, it has been held in the context of care proceedings in the Family Division, to which the CPR do not apply, that where a jointly instructed or other sole expert's report, although not binding on the court, is likely to have a preponderant influence on the court's assessment of fact, there may be a breach of the right to a fair trial¹⁷ if a litigant is denied the opportunity, before the expert report is produced, to examine and comment on the documents being considered by the expert and cross-examine witnesses interviewed by the expert and on whose evidence the report is based¹⁸.

1 As to the meaning of 'expert' see PARA 791 note 10.

2 As to the meaning of 'court' see PARA 22.

3 CPR 35.7(1). This applies to small claims: see PARA 838 note 3. As to the application of the CPR see generally PARA 32. The appointment of a single joint expert does not prevent parties from instructing their own experts to advise (but the costs of such expert advisers may not be recoverable in the case): *Protocol for the Instruction of Experts to give evidence in civil claims* para 17.6. Experts who have previously advised a party (whether in the same case or otherwise) should only be proposed as single joint experts if other parties are given all relevant information about the previous involvement: para 17.5. As to disclosure of experts' reports see PARA 856. As to circumstances in which a party, who has agreed to the appointment of a single joint expert and who does not accept his opinion, may be given permission to instruct, and even rely upon, a report from a further expert and, where permission is given, as to the procedure to be followed see *Daniels v Walker* [2000] 1 WLR 1382, [2000] CPLR 462, CA; *Cosgrove v Pattison* [2000] All ER (D) 2007, [2001] CPLR 177; *Layland v Fairview New Homes plc* [2002] EWHC 1350 (Ch), [2002] All ER (D) 102 (Jul); and PARA 847 note 5. There is no presumption in favour of the appointment of a single joint expert: *Oxley v Penwarden* [2001] CPLR 1, CA.

Where the single joint expert is unable to complete his report in accordance with the instructions given, an alternative expert may be appointed: see *Kranidiotes v Paschali* [2001] EWCA Civ 357, [2001] All ER (D) 342 (Mar). See also *Re W (A Child) (Non-Accidental Injury: Expert Evidence)* [2005] EWCA Civ 1247, [2005] 3 FCR 513.

4 *Protocol for the Instruction of Experts to give evidence in civil claims* para 17.2. Consideration should therefore be given by all parties to the appointment of single joint experts in all cases where a court might direct such an appointment. Single joint experts are the norm in cases allocated to the small claims track and the fast track: para 17.2. Where, in the early stages of a dispute, examinations, investigations, tests, site inspections, experiments, preparation of photographs, plans or other similar preliminary expert tasks are necessary, consideration should be given to the instruction of a single joint expert, especially where such matters are not, at that stage, expected to be contentious as between the parties. The objective of such an appointment should be to agree or to narrow issues: para 17.3.

5 CPR 35.7(2).

6 CPR 35.7(3)(a).

7 CPR 35.7(3)(b).

8 *Practice Direction--Experts and Assessors* PD 35 para 6.

9 *The Admiralty and Commercial Courts Guide* (7th Edn, 2006) para H2.2; and see *Voaden v Champion and the Owners of the Ship Timbuktu* [2001] 1 Lloyd's Rep 739.

10 *The Admiralty and Commercial Courts Guide* (7th Edn, 2006) para H2.3.

11 As to the Queen's Bench Division see **COURTS** vol 10 (Reissue) PARA 613.

12 See *The Queen's Bench Guide* (2007 Edn) para 7.9.5.

13 See *The Queen's Bench Guide* (2007 Edn) para 7.9.6. An order for a single joint expert does not prevent a party from having his or her own expert to advise him or her, but he or she may well be unable to recover the cost of employing his or her own expert from the other party: para 4.13. The duty of an expert who is called to give evidence is to help the court: para 4.13; and see PARA 848.

14 As to the Family Division see **COURTS** vol 10 (Reissue) PARA 617.

15 *Practice Direction (ancillary relief)* [2000] 3 All ER 379, [2000] 2 FCR 216 para 4.1.

16 Nevertheless, the court may permit amplification or cross-examination, to be carried out with restraint, where the need arises: see *Austen v Oxfordshire County Council* [2002] All ER (D) 97 (Apr).

17 As to the right to a fair trial see the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) art 6, now given direct effect in domestic law by the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 6; and PARAS 5, 792.

18 See *Re C (care proceedings: disclosure of local authority's decision-making process)* [2002] EWHC 1379 (Fam), [2002] 2 FCR 673, [2002] All ER (D) 226 (Jul).

UPDATE

840 Court's power to direct that evidence is to be given by a single joint expert

TEXT AND NOTES 1-7--CPR 35.7 substituted: SI 2009/2092.

NOTES 9, 10--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para H2.2-H2.3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/ (iii) Instructions and Reports/A. INSTRUCTIONS TO EXPERTS BEFORE COMMENCEMENT OF PROCEEDINGS/841. Expert opinions in clinical negligence or personal injury cases.

(iii) Instructions and Reports

A. INSTRUCTIONS TO EXPERTS BEFORE COMMENCEMENT OF PROCEEDINGS

841. Expert opinions in clinical negligence or personal injury cases.

In clinical negligence disputes expert opinions may be needed (1) on breach of duty and causation; (2) on the patient's condition and prognosis; and (3) to assist in valuing aspects of the claim¹. Obtaining expert evidence will often be an expensive step and may take time, especially in specialised areas of medicine where there are limited numbers of suitable experts. Patients and healthcare providers, and their advisers, will therefore need to consider carefully how best to obtain any necessary expert help quickly and cost-effectively. Assistance with locating a suitable expert is available from a number of sources².

In personal injury claims joint selection of, and access to, experts is encouraged by the relevant pre-action protocol³. The protocol promotes the practice of the claimant obtaining a medical report and disclosing it to the defendant who then asks questions and/or agrees it and does not obtain his own report⁴. The protocol provides for nomination of the expert by the claimant in personal injury claims because of the early stage of the proceedings and the particular nature of such claims. If proceedings have to be issued, a medical report must be attached to those proceedings. However, if necessary after proceedings have commenced and with the permission of the court, the parties may obtain further expert reports. It would be for the court to decide whether the costs of more than one expert's report should be recoverable⁵. Some solicitors choose to obtain medical reports through medical agencies, rather than directly from a specific doctor or hospital. The defendant's prior consent to the action must be sought and, if the defendant so requests, the agency should be asked to provide in advance the names of the doctor or doctors whom they are considering instructing⁶.

Once a claimant and his solicitors consent to an examination by a doctor chosen by the other party, there is no requirement for any further consent by them before disclosure to the other party of the medical report prepared consequent to that examination⁷.

A pre-action protocol now sets out a code of good practice which parties should follow in all personal injury claims where the injury is not as a result of an accident but takes the form of an illness or disease⁸. The protocol covers disease claims which are likely to be complex and frequently not suitable for fast track procedures, even though they may fall within fast track limits⁹. The protocol is not limited to diseases occurring in the workplace but will embrace diseases occurring in other situations for example through occupation of premises or the use of products. It is not intended to cover those cases, which are dealt with as a 'group' or 'class' action¹⁰. In disease claims expert opinions will usually be needed (a) on knowledge, fault and causation; (b) on condition and prognosis; and (c) to assist in valuing aspects of the claim¹¹. Although the civil justice reforms and the Civil Procedure Rules encourage economy in the use of experts and a less adversarial expert culture, the protocol recognises that in disease claims, the parties and their advisers will require flexibility in their approach to expert evidence. Decisions on whether experts might be instructed jointly, and on whether reports might be disclosed sequentially or by exchange, should rest with the parties and their advisers. Sharing

expert evidence may be appropriate on various issues including those relating to the value of the claim. However, the protocol does not attempt to be prescriptive on issues in relation to expert evidence¹². Obtaining expert evidence will often be an expensive step and may take time, especially in specialised areas where there are limited numbers of suitable experts. Claimants, defendants and their advisers, will therefore need to consider carefully how best to obtain any necessary expert help quickly and cost-effectively¹³. A flexible approach must be adopted in the obtaining of medical reports in disease claims. There will be very many occasions where the claimant will need to obtain a medical report before writing the letter of claim. In such cases the defendant will be entitled to obtain his own medical report. In some other instances it may be more appropriate to send the letter of claim before the medical report is obtained. Defendants will usually need to see a medical report before they can reach a view on causation¹⁴.

1 *Pre-action Protocol for the Resolution of Clinical Disputes* (Clinical Disputes Forum) para 4.1. As to the pre-action protocols see generally PARA 107 et seq. The role of a clinical case manager is that of witness of fact rather than expert witness: *Wright v Sullivan* [2005] EWCA Civ 656, [2006] RTR 116.

2 *Pre-action Protocol for the Resolution of Clinical Disputes* (Clinical Disputes Forum) para 4.3. As to membership organisations for expert witnesses see PARA 836. The civil justice reforms and the Civil Procedure Rules ('CPR') will encourage economy in the use of experts and a less adversarial expert culture. It is recognised that in clinical negligence disputes, the parties and their advisers will require flexibility in their approach to expert evidence. Decisions on whether experts might be instructed jointly, and on whether reports might be disclosed sequentially or by exchange, should rest with the parties and their advisers. Sharing expert evidence may be appropriate on issues relating to the value of the claim. However, the protocol does not attempt to be prescriptive on issues in relation to expert evidence: para 4.2. As to the application of the CPR see PARA 32. As to the civil justice reforms see PARA 24 et seq.

3 *Pre-action Protocol for Personal Injury Claims*, Notes of Guidance para 2.14. Most frequently this will apply to the medical expert, but on occasions also to liability experts, eg engineers: Notes of Guidance para 2.14. Before any party instructs an expert he should give the other party a list of the name(s) of one or more experts in the relevant speciality whom he considers are suitable to instruct: *Pre-action Protocol for Personal Injury Claims* para 3.15. Where a medical expert is to be instructed the claimant's solicitor will organise access to relevant medical records: para 3.16. See also the specimen letter of instruction at Annex C to the protocol. Within 14 days the other party may indicate an objection to one or more of the named experts. The first party should then instruct a mutually acceptable expert. It must be emphasised that if the claimant nominates an expert in the original letter of claim, the defendant has 14 days to object to one or more of the named experts after expiration of the period of 21 days within which he has to reply to the letter of claim: para 3.17. If the second party objects to all the listed experts, the parties may then instruct experts of their own choice. It would be for the court to decide subsequently, if proceedings are issued, whether either party had acted unreasonably: para 3.17. If the second party does not object to an expert nominated, he is not entitled to rely on his own expert evidence within that particular speciality unless (1) the first party agrees; (2) the court so directs; or (3) the first party's expert report has been amended and the first party is not prepared to disclose the original report: para 3.19. Either party may send to an agreed expert written questions on the report, relevant to the issues, via the first party's solicitors. The expert should send answers to the questions separately and directly to each party: para 3.20. The cost of a report from an agreed expert will usually be paid by the instructing first party: the costs of the expert replying to questions will usually be borne by the party which asks the questions: para 3.21.

4 However, on a true understanding of the protocol, a defendant's non-objection to a nominated expert cannot of itself transform that expert, once instructed, into a single joint expert whose report is accordingly available to both parties. Although the protocol clearly encourages and promotes the voluntary disclosure of medical reports, it does not specifically require that. Accordingly, withholding a medical report does not constitute non-compliance with the protocol, although the instruction of another consultant without first giving a defendant an opportunity to object plainly does: *Carlson v Townsend* [2001] EWCA Civ 511, [2001] 3 All ER 663, [2001] 1 WLR 2415. As to the disclosure of experts' reports see further PARA 856.

5 *Pre-action Protocol for Personal Injury Claims*, Notes for Guidance para 2.14. Where the defendant admits liability in whole or in part, before proceedings are issued, any medical report obtained by agreement under the *Pre-action Protocol for Personal Injury Claims* must be disclosed to the other party. The claimant must delay issuing proceedings for 21 days from disclosure of the report, to enable the parties to consider whether the claim is capable of settlement. CPR Pt 36 permits claimants and defendants to make offers to settle pre-proceedings: see PARA 729 et seq. Parties should always consider before issuing proceedings if it is appropriate to make an offer under CPR Pt 36. If such an offer is made, the party making the offer must always supply

sufficient evidence and/or information to enable the offer to be properly considered: *Pre-action Protocol for Personal Injury Claims* para 5.2.

6 *Pre-action Protocol for Personal Injury Claims*, Notes for Guidance para 2.15.

7 *Kapadia v Lambeth London Borough Council* [2000] IRLR 699, 57 BMLR 170, CA (to allow a medical practitioner a veto on disclosure on the ground that the claimant has not consented to it would constitute an impediment to the fair and expeditious conduct of the litigation as good practice requires disclosure of such reports for use in court); and see *Department of Health v Bird* [2001] All ER (D) 478 (Jul), EAT; cf *Cornelius v De Taranto* [2001] EWCA Civ 1511, 66 BMLR 62, [2001] All ER (D) 227 (Oct) (claimant not consenting to dissemination of medico-legal report by expert instructed by her to other health officials).

8 *Pre-action Protocol for Disease and Illness Claims* paras 2.1, 4.

9 *Pre-action Protocol for Disease and Illness Claims* para 2.2. Disease for the purpose of the protocol primarily covers any illness physical or psychological, any disorder, ailment, affliction, complaint, malady, or derangement other than a physical or psychological injury solely caused by an accident or other similar single event: para 2.2.

10 *Pre-action Protocol for Disease and Illness Claims* para 2.3.

11 *Pre-action Protocol for Disease and Illness Claims* para 9.1.

12 *Pre-action Protocol for Disease and Illness Claims* para 9.2.

13 *Pre-action Protocol for Disease and Illness Claims* para 9.3.

14 *Pre-action Protocol for Disease and Illness Claims* para 9.4. Where the parties agree the nomination of a single expert is appropriate, before any party instructs an expert he should give the other party a list of the name(s) of one or more experts in the relevant speciality whom he considers are suitable to instruct. The parties are encouraged to agree the instruction of a single expert to deal with discrete areas such as cost of care: para 9.5. Within 14 days the other party may indicate an objection to one or more of the named experts. The first party should then instruct a mutually acceptable expert. If the claimant nominates an expert in the original letter of claim, the 14 days is in addition to the 21 days within which the defendant must reply to the letter of claim: see para 9.6. If the second party objects to all the listed experts, the parties may then instruct experts of their own choice. It would be for the court to decide subsequently, if proceedings are issued, whether either party had acted unreasonably: para 9.7. If the second party does not object to an expert nominated, he will not be entitled to rely on his own expert evidence within that particular speciality unless the first party agrees, or the court so directs, or the first party's expert report has been amended and the first party is not prepared to disclose the original report: para 9.8. Either party may send to an agreed expert written questions on the report, relevant to the issues, via the first party's solicitors. The expert should send answers to the questions separately and directly to each party: para 9.9. The cost of a report from an agreed expert will usually be paid by the instructing first party: the costs of the expert replying to questions will usually be borne by the party which asks the questions: para 9.10. Where the defendant admits liability in whole or in part, before proceedings are issued, any medical report obtained under the protocol which the claimant relies upon, should be disclosed to the other party: para 9.11. Where the defendant admits liability in whole or in part before proceedings are issued, any medical report obtained under the protocol which the defendant relies upon, should be disclosed to the claimant: para 9.12.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/ (iii) Instructions and Reports/A. INSTRUCTIONS TO EXPERTS BEFORE COMMENCEMENT OF PROCEEDINGS/842. Expert opinions in a construction or engineering dispute.

842. Expert opinions in a construction or engineering dispute.

Prior to commencing proceedings in a construction or engineering dispute, the claimant or his solicitor must send to each proposed defendant a copy of a letter of claim which must contain, among other specified information, the names of any experts already instructed by the claimant on whose evidence he intends to rely, identifying the issues to which that evidence will be directed¹. The defendant's letter of response to the claimant must similarly contain the names of any experts already instructed on whose evidence it is intended to rely, identifying the issues to which that evidence will be directed². If the parties are unable to agree on a means of resolving the dispute other than by litigation they should use their best endeavours to agree whether, if there is any area where expert evidence is likely to be required, a joint expert may be appointed, and if so, who that should be³.

1 *Pre-action Protocol for Construction and Engineering Disputes* para 3(vii). As to the pre-action protocols see generally PARA 107 et seq.

2 *Pre-action Protocol for Construction and Engineering Disputes* para 4.3.1(vi)

3 *Pre-action Protocol for Construction and Engineering Disputes* para 5.5(i). As to joint experts see PARA 840.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/ (iii) Instructions and Reports/A. INSTRUCTIONS TO EXPERTS BEFORE COMMENCEMENT OF PROCEEDINGS/843. Expert opinions in professional negligence claims.

843. Expert opinions in professional negligence claims.

In professional negligence claims, as soon as the claimant decides that there are grounds for a claim against the professional, he must write a detailed letter of claim to the professional which must give, among other specified information, confirmation whether or not an expert has been appointed and if so, provide the identity and discipline of the expert, together with the date upon which the expert was appointed¹. Where the claim raises an issue of professional expertise whose resolution requires expert evidence, then if the claimant has obtained expert evidence prior to sending the letter of claim, the professional will have an equal right to obtain expert evidence prior to sending his letter of response or letter of settlement². If the claimant has not obtained expert evidence prior to sending the letter of claim, the parties are encouraged to appoint a joint expert. If they agree to do so, they should seek to agree the identity of the expert and the terms of the expert's appointment³. If agreement about a joint expert cannot be reached, all parties are free to appoint their own experts⁴.

Expert evidence is not always needed, although the use and role of experts in professional negligence claims is often crucial⁵.

1 *Professional Negligence Pre-action Protocol* paras B2.1, B2.2(f). As to the pre-action protocols see generally PARA 107 et seq.

2 *Professional Negligence Pre-action Protocol* para B7.1.

3 *Professional Negligence Pre-action Protocol* para B7.2. If a joint expert is used the parties are left to decide issues such as the payment of the expert, whether joint or separate instructions are used, how and to whom the expert is to report, how questions may be addressed to the expert and how the expert should respond, whether an agreed statement of facts is required, and so on: *Professional Negligence Pre-action Protocol*, Guidance Notes para C6.2. Even if a joint expert is appointed, it is possible that parties will still want to instruct their own experts. The protocol does not prohibit this: Guidance Notes para C6.4. As to joint experts see PARA 840.

4 *Professional Negligence Pre-action Protocol* para B7.3. If separate experts are used, the parties are left to decide issues such as: whether the experts' reports should be exchanged, whether there should be an experts' meeting, and so on: Guidance Notes para C6.3.

5 *Professional Negligence Pre-action Protocol*, Guidance Notes para C6.1. However, the way in which expert evidence is used in an insurance brokers' negligence case is not necessarily the same as in an accountants' case. Similarly, the approach to be adopted in a £10,000 case does not necessarily compare with the approach in a £10m case. The protocol therefore is designed to be flexible and does not dictate a standard approach. On the contrary it envisages that the parties will bear the responsibility for agreeing how best to use experts: Guidance Notes para C6.1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/ (iii) Instructions and Reports/B. INSTRUCTIONS TO EXPERTS FOR PURPOSES OF CIVIL PROCEEDINGS/844. Appointment of expert.

B. INSTRUCTIONS TO EXPERTS FOR PURPOSES OF CIVIL PROCEEDINGS

844. Appointment of expert.

The Protocol for the Instruction of Experts to give evidence in civil claims¹ recommends that those intending to instruct an expert to give or prepare evidence for the purpose of civil proceedings should consider whether expert evidence is appropriate, taking account of the principles set out in Parts 1 and 35 of the Civil Procedure Rules², and in particular whether:

- 28 (1) the evidence is relevant to a matter which is in dispute between the parties;
- 29 (2) the evidence is reasonably required to resolve the proceedings³;
- 30 (3) the expert has expertise relevant to the issue on which an opinion is sought;
- 31 (4) the expert has the experience, expertise and training appropriate to the value, complexity and importance of the case;
- 32 (5) the relevant objects referred to under heads (1) to (4) above can be achieved by the appointment of a single joint expert⁴.

Those instructing experts are also reminded that although the court's permission is not generally required to instruct an expert, the court's permission is required⁵ before experts can be called to give evidence or their evidence can be put in⁶.

1 The Protocol for the Instruction of Experts to give evidence in civil claims. As to the protocol and its status see PARA 837.

2 As to CPR Pt 1 (the overriding objective) see PARA 791; and as to CPR Pt 35 (expert evidence) see PARA 838 et seq, PARA 852 et seq. As to the application of the CPR see PARA 32.

3 See CPR 35.1; and PARA 838.

4 *Protocol for the Instruction of Experts to give evidence in civil claims* para 6.1(a)-(e). See eg *Rollinson v Kimberly Clark Ltd* [1999] CPLR 581, [1999] All ER (D) 617, CA (not acceptable when a trial date was fairly imminent for a solicitor to seek to instruct an expert without checking the availability of that expert for the trial). As to single joint experts see PARA 840.

5 See CPR 35.4(1); and PARA 838.

6 *Protocol for the Instruction of Experts to give evidence in civil claims* para 6.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/ (iii) Instructions and Reports/B. INSTRUCTIONS TO EXPERTS FOR PURPOSES OF CIVIL PROCEEDINGS/845. Terms of appointment and payment.

845. Terms of appointment and payment.

The Protocol for the Instruction of Experts to give evidence in civil claims recommends that terms of appointment are agreed at the outset¹ and should include:

- 33 (1) the capacity in which the expert is to be appointed (for example, party appointed expert, single joint expert or expert adviser);
- 34 (2) the services required of the expert (for example, provision of expert's report, answering questions in writing, attendance at meetings and attendance at court);
- 35 (3) time for delivery of the report;
- 36 (4) the basis of the expert's charges (either daily or hourly rates and an estimate of the time likely to be required, or a total fee for the services);
- 37 (5) travelling expenses and disbursements;
- 38 (6) cancellation charges;
- 39 (7) any fees for attending court;
- 40 (8) time for making the payment;
- 41 (9) whether fees are to be paid by a third party; and
- 42 (10) if a party is publicly funded, whether or not the expert's charges will be subject to assessment by a costs officer².

The protocol further recommends that, when necessary, arrangements should be made for dealing with questions to experts³ and discussions between experts⁴, including any directions given by the court, and provision should be made for the cost of this work⁵. The protocol states that payments contingent upon the nature of the expert evidence given in legal proceedings, or upon the outcome of a case, must not be offered or accepted; to do so would contravene the expert's overriding duty⁶ to the court and compromise his duty of independence⁷. Agreement to delay payment of an expert's fee until after the conclusion of the case is, however, permissible as long as the amount of the fee does not depend on the outcome of the case⁸.

1 *Protocol for the Instruction of Experts to give evidence in civil claims* para 7.2. As to the protocol and its status see PARA 837.

2 *Protocol for the Instruction of Experts to give evidence in civil claims* para 7.2(a)-(j).

3 As to questions to experts see PARA 857.

4 As to discussions between experts see PARAS 859-861.

5 *Protocol for the Instruction of Experts to give evidence in civil claims* para 7.4.

6 As to the expert's overriding duty see PARA 848.

7 *Protocol for the Instruction of Experts to give evidence in civil claims* para 7.6.

8 *Protocol for the Instruction of Experts to give evidence in civil claims* para 7.7.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/ (iii) Instructions and Reports/B. INSTRUCTIONS TO EXPERTS FOR PURPOSES OF CIVIL PROCEEDINGS/846. Instructions.

846. Instructions.

The Protocol for the Instruction of Experts to give evidence in civil claims recommends that those instructing experts ensure that they give clear instructions¹, including the following:

- 43 (1) basic information, such as names, addresses, telephone numbers, dates of birth and dates of incidents;
- 44 (2) the nature and extent of the expertise which is called for;
- 45 (3) the purpose of requesting the advice or report, a description of the matter(s) to be investigated, the principal known issues and the identity of all parties;
- 46 (4) the statement or statements of case² (if any), those documents which form part of standard disclosure³ and witness statements⁴ which are relevant to the advice or report;
- 47 (5) where proceedings have not been started⁵, whether proceedings are being contemplated and, if so, whether the expert is asked only for advice;
- 48 (6) an outline programme, consistent with good case management and the expert's availability, for the completion and delivery of each stage of the expert's work; and
- 49 (7) where proceedings have been started, the dates of any hearings (including any case management conferences and/or pre-trial reviews⁶), the name of the court, the claim number and the track to which the claim has been allocated⁷.

Experts who do not receive clear instructions should request clarification and may indicate that they are not prepared to act unless and until such clear instructions are received⁸.

The protocol states that experts must neither express an opinion outside the scope of their field of expertise, nor accept any instructions to do so⁹. Experts should confirm without delay whether or not they accept instructions¹⁰. They should also inform those instructing them (whether on initial instruction or at any later stage) without delay if:

- 50 (a) instructions are not acceptable because, for example, they require work that falls outside their expertise, impose unrealistic deadlines, or are insufficiently clear;
- 51 (b) they consider that instructions are or have become insufficient to complete the work;
- 52 (c) they become aware that they may not be able to fulfil any of the terms of appointment;
- 53 (d) the instructions and/or work have, for any reason, placed them in conflict with their duties as an expert; or
- 54 (e) they are not satisfied that they can comply with any orders that have been made¹¹.

An expert's instructions are not privileged from disclosure when given for the purposes of court proceedings¹².

In cases under the Children Act 1989, it is essential for the proper working relationship between solicitors and expert witnesses that experts are told explicitly both that the court has given permission for them to be instructed and what the terms of their instructions are. It is contrary

to good practice to seek to avoid the need for permission from the court to instruct an expert by providing information anonymously, and bad practice for expert witnesses who understand that their opinion is required for court proceedings to accept anonymous instructions¹³. Any instructions for a forensic report must be impartial and, wherever possible, be joint and agreed with the other side¹⁴.

1 *Protocol for the Instruction of Experts to give evidence in civil claims* para 8.1. As to the protocol and its status see PARA 837.

2 As to statements of case see PARA 1065 note 1.

3 As to standard disclosure see PARA 963; and PARA 542.

4 As to the meaning of 'witness statement' see PARA 751 note 1.

5 As to instructions before the commencement of proceedings see further PARAS 841-843.

6 As to case management conferences and pre-trial reviews see PARA 295.

7 *Protocol for the Instruction of Experts to give evidence in civil claims* para 8.1(a)-(g). As to allocation to track see PARA 260 et seq.

8 *Protocol for the Instruction of Experts to give evidence in civil claims* para 8.2.

9 *Protocol for the Instruction of Experts to give evidence in civil claims* para 9.2.

10 *Protocol for the Instruction of Experts to give evidence in civil claims* para 9.1.

11 *Protocol for the Instruction of Experts to give evidence in civil claims* para 9.1(a)-(e).

12 See PARA 852.

13 *Re A (Family Proceedings: Expert Witnesses)* [2001] 1 FLR 723, [2001] All ER (D) 56 (Feb). The Civil Procedure Rules do not apply: see PARA 32. *Practice Direction (experts in family proceedings relating to children)* [2008] All ER (D) 18 (May) sets out guidance that deals with the use of expert evidence and the instructions of experts in family proceedings.

14 *Re B (sexual abuse: expert's report)* [2000] 2 FCR 8, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/ (iii) Instructions and Reports/B. INSTRUCTIONS TO EXPERTS FOR PURPOSES OF CIVIL PROCEEDINGS/847. Instructions to a single joint expert.

847. Instructions to a single joint expert.

Where the court¹ gives a direction² for a single joint expert³ to be used, each instructing party⁴ may give instructions to the expert⁵. When an instructing party gives instructions to the expert he must, at the same time, send a copy of the instructions to the other instructing parties⁶. The Protocol for the Instruction of Experts to give evidence in civil claims recommends that the parties should try to agree joint instructions to single joint experts, but, in default of agreement, each party may give instructions⁷.

The court may give directions about the payment of the expert's fees and expenses⁸ and any inspection, examination or experiments which the expert wishes to carry out⁹ and may, before an expert is instructed, limit the amount that can be paid by way of fees and expenses to the expert¹⁰ and, except in ancillary relief proceedings¹¹, direct that the instructing parties pay that amount into court¹². Unless the court otherwise directs, the instructing parties are jointly and severally liable¹³ for the payment of the expert's fees and expenses¹⁴.

1 As to the meaning of 'court' see PARA 22.

2 le under CPR 35.7: see PARA 840.

3 As to the meaning of 'expert' see PARA 791 note 10.

4 As to the meaning of 'instructing parties' see CPR 35.7(2); and para 840.

5 CPR 35.8(1). As to the application of CPR Pt 35 see PARA 32. The correct approach is to regard a joint instruction as the first step in obtaining expert evidence on a particular issue; if, having obtained the report of the joint expert, one of the parties wishes, for reasons which are not fanciful, to obtain further information before making a decision whether he wishes to challenge a particular part of, or the whole of, that report, he should be allowed to obtain such further information subject to the court's discretion: see *Daniels v Walker* [2000] 1 WLR 1382, [2000] CPLR 462, CA. In determining whether to allow the evidence of a second expert, in addition to the evidence of an expert instructed jointly under CPR Pt 35, the factors to be considered are (1) the nature of the dispute; (2) the number of disputes on which the expert evidence is relevant; (3) the reason for requiring the second report; (4) the amount at stake or the nature of the issues at stake; (5) the effect of permitting a second expert report on the conduct of the trial; (6) the delay that might be caused in the conduct of proceedings; (7) any other special features; and (8) the overall justice to the parties in the context of the litigation: see *Cosgrove v Pattison* [2000] All ER (D) 2007, [2001] CPLR 177 per Neuberger J. See also eg *Alderson v Stillorgan Sales Ltd* [2001] EWCA Civ 1060, [2001] All ER (D) 104 (Jun).

6 CPR 35.8(2).

7 *Protocol for the Instruction of Experts to give evidence in civil claims* para 17.7. In particular, all parties should try to agree what documents should be included with instructions and what assumptions single joint experts should make: para 17.7. As to the protocol and its status see PARA 837.

8 CPR 35.8(3)(a).

9 CPR 35.8(3)(b).

10 CPR 35.8(4)(a).

11 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.61C (added by SI 1999/3491); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 932.

12 CPR 35.8(4)(b).

13 Parties who are jointly liable share a single liability and each party can be held liable for the whole of it, whilst a person who is severally liable with others may remain liable for the whole claim even where judgment has been obtained against the others: see CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31.

14 CPR 35.8(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/ (iii) Instructions and Reports/B. INSTRUCTIONS TO EXPERTS FOR PURPOSES OF CIVIL PROCEEDINGS/848. Experts' duties; in general.

848. Experts' duties; in general.

It is the duty of an expert¹ to help the court² on the matters within his expertise³. This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid⁴.

The Protocol for the Instruction of Experts to give evidence in civil claims points out that assistance from an expert may be needed at various stages of a dispute and for different purposes. The expert always owes a duty to exercise reasonable skill and care to the person instructing him, and to comply with any relevant professional code of ethics⁵.

Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation⁶. An expert must assist the court by providing objective, unbiased opinion on matters within his expertise, and should not assume the role of an advocate⁷. He must consider all material facts, including those which might detract from his opinion⁸ and should make it clear when a question or issue falls outside his expertise and when he is not able to reach a definite opinion, for example because he has insufficient information⁹. If, after producing a report¹⁰, an expert changes his view on any material matter, such change of view must be communicated to all the parties without delay, and when appropriate to the court¹¹.

The Protocol for the Instruction of Experts to give evidence in civil claims warns that the expert should be aware that any failure by him to comply with the Civil Procedure Rules or court orders or any excessive delay for which the expert is responsible may result in the party who instructed him being penalised in costs and even in extreme cases being debarred from placing the expert's evidence before the court¹².

It is settled law that where an expert witness makes a statement preliminary to his report, he is protected by immunity from suit¹³.

1 As to the meaning of 'expert' see PARA 791 note 10.

2 As to the meaning of 'court' see PARA 22.

3 CPR 35.3(1). An expert's report should be addressed to the court and not to the party from whom the expert has received his instructions: see *Practice Direction--Experts and Assessors* PD 35 para 2.1; and PARA 852. The report must contain a statement that he understands his duty to the court and has complied and will continue to comply with it: see CPR 35.10(2); *Practice Direction--Experts and Assessors* PD 35 para 2.2(9); and PARA 852. This applies to small claims: see PARA 756. As to cases allocated to the small claims track see PARAS 267, 274 et seq. As to the application of CPR Pt 35 see generally PARA 32.

For a pre-CPR analysis of the role of the expert witness see *National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1993] 2 Lloyd's Rep 68 (revsd on other grounds [1995] 1 Lloyd's Rep 455, CA). CPR Pt 35 underlines a pre-existing duty which an expert owes to the court as well as to the party which he represents: see *Stevens v Gullis (Pile, third party)* [2000] 1 All ER 527, [1999] BLR 394, CA; *Anglo Group plc v Winther Brown & Co Ltd* (2000) 72 Con LR 118, [2000] All ER (D) 294.

4 CPR 35.3(2); *Practice Direction--Experts and Assessors* PD 35 para 1.1. See also CPR 35.12(5) (an agreement between experts during their discussions does not bind the parties, unless the parties agree) and PARA 860; this is because of the experts' overriding obligation to the court. Cf the position where an advisory expert is consulted privately: see *Department of Health v Bird* [2001] All ER (D) 478 (Jul), EAT. See also *Toth v Jarman* [2006] EWCA Civ 1520, [2006] 4 All ER 1276.

5 *Protocol for the Instruction of Experts to give evidence in civil claims* para 4.1. As to the protocol and its status see PARA 837. As to the duty of experts when expressing opinions in child abuse cases see *Re J (child abuse: expert evidence)* [1991] FCR 193, sub nom *Re R (a minor) (expert's evidence)* [1991] 1 FLR 291n.

6 *Practice Direction--Experts and Assessors* PD 35 para 1.2.

7 *Practice Direction--Experts and Assessors* PD 35 para 1.3.

8 *Practice Direction--Experts and Assessors* PD 35 para 1.4.

9 *Practice Direction--Experts and Assessors* PD 35 para 1.5.

10 As to experts' reports see PARAS 852-857.

11 *Practice Direction--Experts and Assessors* PD 35 para 1.6.

12 *Protocol for the Instruction of Experts to give evidence in civil claims* para 4.7. For a case where an expert witness was debarred from giving evidence see *Stevens v Gullis (Pile, third party)* [2000] 1 All ER 527, [1999] BLR 394, CA. Courts may also make orders for costs (under the Supreme Court Act 1981 s 51: see PARAS 721, 1732) directly against expert witnesses who by their evidence cause significant expense to be incurred, and do so in flagrant and reckless disregard of their duties to the court: see *Phillips v Symes* [2004] EWHC 2330 (Ch), [2005] 4 All ER 519, [2005] 1 WLR 2043. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

13 See *Raiss v Palmano* [2001] Lloyd's Rep PN 341, [2000] All ER (D) 1266. As to witness immunity see PARA 978.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/ (iii) Instructions and Reports/B. INSTRUCTIONS TO EXPERTS FOR PURPOSES OF CIVIL PROCEEDINGS/849. Duties of single joint expert; in general.

849. Duties of single joint expert; in general.

The Protocol for the Instruction of Experts to give evidence in civil claims states that single joint experts¹ also have an overriding duty to the court². They are the parties' appointed experts and therefore owe an equal duty³ to all parties: they should maintain independence, impartiality and transparency at all times⁴. They should not attend any meeting or conference which is not a joint one, unless all the parties have agreed in writing or the court has directed that such a meeting may be held and who is to pay the experts' fees for the meeting⁵.

1 As to single joint experts see PARA 840.

2 As to the expert's overriding obligation to the court see PARA 848.

3 As to the expert's duty of professional competence see PARA 848.

4 *Protocol for the Instruction of Experts to give evidence in civil claims* para 17.12. As to the protocol and its status see PARA 837. Single joint experts should keep all instructing parties informed of any material steps that they may be taking by, for example, copying all correspondence to those instructing them: para 17.11.

5 *Protocol for the Instruction of Experts to give evidence in civil claims* para 17.13. See also *Peet v Mid-Kent Healthcare NHS Trust* [2001] EWCA Civ 1703, [2002] 3 All ER 688, [2002] 1 WLR 210 (organisation of conference by one party with single joint expert; inconsistent with procedure requiring such evidence to be in a written report).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/ (iii) Instructions and Reports/B. INSTRUCTIONS TO EXPERTS FOR PURPOSES OF CIVIL PROCEEDINGS/850. Expert's right to ask court for directions.

850. Expert's right to ask court for directions.

An expert¹ may file² a written request for directions to assist him in carrying out his function as an expert³. Unless the court⁴ orders otherwise, he must provide a copy of any proposed request for such directions to the party instructing him, at least seven days before he files the request⁵. He must provide a copy of the request to all other parties at least four days before he files it⁶.

The court, when it gives directions, may also direct that a party be served⁷ with a copy of the directions⁸.

1 As to the meaning of 'expert' see PARA 791 note 10.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 CPR 35.14(1). As to the application of CPR Pt 35 see PARA 32. Single joint experts may request directions from the court: *Protocol for the Instruction of Experts to give evidence in civil claims* para 17.14. As to the protocol and its status see PARA 837.

4 As to the meaning of 'court' see PARA 22.

5 CPR 35.14(2)(a). As to the calculation of time and the court's general discretion to extend time limits see PARA 88 et seq.

6 CPR 15.14(2)(b).

7 As to the meaning of 'service' see PARA 138 note 2.

8 CPR 35.14(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/ (iii) Instructions and Reports/B. INSTRUCTIONS TO EXPERTS FOR PURPOSES OF CIVIL PROCEEDINGS/851. Court's power to direct a party to provide information.

851. Court's power to direct a party to provide information.

Where a party has access to information which is not reasonably available to the other party, the court¹ may direct the party who has access to the information to prepare and file² a document recording the information and serve³ a copy of that document on the other party⁴.

The document served must include sufficient details of all the facts, tests, experiments and assumptions which underlie any part of the information to enable the party on whom it is served to make, or to obtain, a proper interpretation of the information and an assessment of its significance⁵.

The Protocol for the Instruction of Experts to give evidence in civil claims recommends that if experts require such information which has not been disclosed, they should discuss the position with those instructing them without delay, so that a request for the information can be made, and, if not forthcoming, an application can be made to the court⁶.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 As to the meaning of 'service' see PARA 138 note 2.

4 CPR 35.9. As to the application of CPR Pt 35 see PARA 32.

5 *Practice Direction--Experts and Assessors* PD 35 para 3.

6 *Protocol for the Instruction of Experts to give evidence in civil claims* para 12.2. Unless a document appears to be essential, experts should assess the cost and time involved in the production of a document and whether its provision would be proportionate in the context of the case: para 12.2. As to the protocol and its status see PARA 837.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/ (iii) Instructions and Reports/C. EXPERTS' REPORTS/852. Form and contents of expert's report.

C. EXPERTS' REPORTS

852. Form and contents of expert's report.

An expert's¹ report must comply with the requirements set out in the relevant practice direction². The report should be addressed to the court³ and not to the party from whom the expert has received his instructions⁴.

The Protocol for the Instruction of Experts to give evidence in civil claims requires that in preparing their reports, experts should maintain professional objectivity and impartiality at all times⁵. When addressing questions of fact and opinion, experts should keep the two separate and discrete⁶. Where there are material facts in dispute, experts should express separate opinions on each hypothesis put forward⁷. They should not express a view in favour of one or other disputed version of the facts unless, as a result of particular expertise and experience, they consider one set of facts as being improbable or less probable, in which case they may express that view, and should give reasons for holding it⁸.

An expert's report must:

- 55 (1) give details of the expert's qualifications⁹;
- 56 (2) give details of any literature or other material which the expert has relied on in making the report¹⁰;
- 57 (3) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based¹¹;
- 58 (4) make clear which of the facts stated in the report are within the expert's own knowledge¹²;
- 59 (5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision¹³;
- 60 (6) where there is a range of opinion on the matters dealt with in the report, summarise the range of opinion and give reasons for his own opinion¹⁴;
- 61 (7) contain a summary of the conclusions reached¹⁵;
- 62 (8) if the expert is not able to give his opinion without qualification, state the qualification¹⁶; and
- 63 (9) contain a statement that the expert understands his duty to the court¹⁷ and has complied and will continue to comply with that duty¹⁸.

The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written¹⁹. Such instructions will not be privileged²⁰ against disclosure²¹ but the court will not, in relation to those instructions:

- 64 (a) order disclosure of any specific document; or
- 65 (b) permit any questioning in court, other than by the party who instructed the expert,

unless it is satisfied that there are reasonable grounds to consider the statement of instructions given²² to be inaccurate or incomplete²³. If the court is so satisfied, it will allow cross-examination of the expert on the contents of his instructions where it appears to be in the interests of justice to do so²⁴.

An expert's report must be verified by a statement of truth²⁵ as well as containing the statements required by heads (8) and (9) above²⁶.

In complex matters it is useful if the report contains a glossary of technical terms²⁷.

1 As to the meaning of 'expert' see PARA 791 note 10.

2 CPR 35.10(1). See *Practice Direction--Experts and Assessors* PD 35 para 2.2; and *Protocol for the Instruction of Experts to give evidence in civil claims* paras 13.1, 13.3. Model forms of experts' reports are available from bodies such as the Academy of Experts or the Expert Witness Institute: see para 13.4. As to the protocol and its status see PARA 837. As to the application of CPR Pt 35 see PARA 32.

3 As to the meaning of 'court' for these purposes see PARA 22.

4 *Practice Direction--Experts and Assessors* PD 35 para 2.1.

5 *Protocol for the Instruction of Experts to give evidence in civil claims* para 13.2.

6 *Protocol for the Instruction of Experts to give evidence in civil claims* para 13.9. Experts must state those facts (whether assumed or otherwise) upon which their opinions are based. They must distinguish clearly between those facts which experts know to be true and those facts which they assume: para 13.10.

7 *Protocol for the Instruction of Experts to give evidence in civil claims* para 13.11.

8 *Protocol for the Instruction of Experts to give evidence in civil claims* para 13.11.

9 *Practice Direction--Experts and Assessors* PD 35 para 2.2(1).

10 *Practice Direction--Experts and Assessors* PD 35 para 2.2(2).

11 *Practice Direction--Experts and Assessors* PD 35 para 2.2(3).

12 *Practice Direction--Experts and Assessors* PD 35 para 2.2(4).

13 *Practice Direction--Experts and Assessors* PD 35 para 2.2(5).

14 *Practice Direction--Experts and Assessors* PD 35 para 2.2(6).

15 *Practice Direction--Experts and Assessors* PD 35 para 2.2(7).

16 *Practice Direction--Experts and Assessors* PD 35 para 2.2(8).

17 As to the expert's duty to the court see PARA 848.

18 See CPR 35.10(2); *Practice Direction--Experts and Assessors* PD 35 para 2.2(9). A summary of conclusions is mandatory. The summary should be at the end of the report after all the reasoning, although there may be cases where the benefit to the court is heightened by placing a short summary at the beginning of the report whilst giving the full conclusions at the end: *Protocol for the Instruction of Experts to give evidence in civil claims* para 13.14.

19 CPR 35.10(3); and see head (3) in the text.

20 As to the meaning of 'privilege' see PARA 551 note 1.

21 As to disclosure see PARA 963; and PARA 538 et seq.

22 Ie under CPR 35.10(3): see the text and note 20.

23 CPR 35.10(4); and see the *Protocol for the Instruction of Experts to give evidence in civil claims* para 3. The power to order disclosure may in certain circumstances extend to instructions or advice that were

privileged when they were given: see para 4. As to the exercise of this discretion see eg *Re Bank of Credit and Commerce International SA* [2001] All ER (D) 227 (Nov).

24 *Practice Direction--Experts and Assessors* PD 35 para 4.

25 The form of the statement of truth is as follows: 'I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion': *Practice Direction--Experts and Assessors* PD 35 para 2.4. This wording is mandatory and must not be modified: see *Protocol for the Instruction of Experts to give evidence in civil claims* para 13.5. As to statements of truth see generally CPR Pt 22; and PARA 613. As to the consequences of verifying a document containing a false statement without an honest belief in its truth see CPR 32.14; and PARA 988.

26 *Practice Direction--Experts and Assessors* PD 35 para 2.3. As to statements of truth see generally CPR Pt 22; and PARA 613; and as to the consequences of verifying a document containing a false statement without an honest belief in its truth see CPR 32.14; and PARA 988.

27 See *The Admiralty and Commercial Courts Guide* (7th Edn, 2006) para H2.7.

UPDATE

852 Form and contents of expert's report

NOTE 27--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para H2.7.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/ (iii) Instructions and Reports/C. EXPERTS' REPORTS/853. Single joint expert's report.

853. Single joint expert's report.

The Protocol for the Instruction of Experts to give evidence in civil claims requires that single joint experts¹ should serve their reports simultaneously on all instructing parties. They should provide a single report even though they may have received instructions which contain areas of conflicting fact or allegation². The expert may be questioned and must provide answers in the same manner as a party's expert³. The single joint expert may also seek further information and directions⁴ from the court⁵.

1 As to single joint experts see PARA 840.

2 *Protocol for the Instruction of Experts to give evidence in civil claims* para 17.15. If conflicting instructions lead to different opinions (for example, because the instructions require experts to make different assumptions of fact), reports may need to contain more than one set of opinions on any issue. It is for the court to determine the facts: para 17.15. As to the protocol and its status see PARA 837. As to the form and contents of experts' reports see PARA 852.

3 See the *Protocol for the Instruction of Experts to give evidence in civil claims* para 17.16. As to questions to experts see PARA 857.

4 As to an expert's right to ask the court for directions see PARA 850.

5 See *Protocol for the Instruction of Experts to give evidence in civil claims* para 11.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/ (iii) Instructions and Reports/C. EXPERTS' REPORTS/854. Amendment of expert's report.

854. Amendment of expert's report.

The Protocol for the Instruction of Experts to give evidence in civil claims states that experts should not be asked to, and should not, amend, expand or alter any part of the report in a manner which distorts the expert's true opinion, but may be invited to amend or expand a report to ensure accuracy and internal consistency, completeness, relevance to the issues and clarity¹. When experts intend to amend their reports, they should inform those instructing them without delay and give reasons. They should provide the amended version (or an addendum or memorandum) clearly marked as such as quickly as possible². If those instructing experts become aware of material changes in circumstances or that relevant information within their control was not previously provided to experts, they should without delay instruct experts to review, and if necessary, update the contents of their reports³.

Where experts significantly alter their opinion, as a result of new evidence or because evidence on which they relied has become unreliable, or for any other reason, they should amend their reports to reflect that fact. Amended reports should include reasons for amendments. In such circumstances those instructing experts should inform other parties as soon as possible of any change of opinion⁴.

¹ *Protocol for the Instruction of Experts to give evidence in civil claims* para 15.2. As to the protocol and its status see PARA 837.

² *Protocol for the Instruction of Experts to give evidence in civil claims* para 15.5.

³ *Protocol for the Instruction of Experts to give evidence in civil claims* para 14.4.

⁴ *Protocol for the Instruction of Experts to give evidence in civil claims* para 15.4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/ (iii) Instructions and Reports/C. EXPERTS' REPORTS/855. Procedure after completion of report; in general.

855. Procedure after completion of report; in general.

The Protocol for the Instruction of Experts to give evidence in civil claims¹ recommends that experts should be informed regularly about deadlines for all matters concerning them and that those instructing experts should promptly send them copies of all court orders and directions which may affect the preparation of their reports or any other matters concerning their obligations². It also recommends that following the receipt of experts' reports, those instructing them should advise the experts as soon as reasonably practicable whether, and if so when, the report will be disclosed to other parties; and, if so disclosed, the date of actual disclosure³. If experts' reports are to be relied upon, and if experts are to give oral evidence, those instructing them should give the experts the opportunity to consider and comment upon other reports within their area of expertise and which deal with relevant issues at the earliest opportunity⁴, and that those instructing experts should keep experts informed of the progress of cases, including amendments to statements of case⁵ relevant to experts' opinion⁶. Where experts significantly alter their opinion and amend their reports, those instructing experts should inform other parties as soon as possible of any change of opinion⁷.

Counsel and solicitors have a duty, particularly in public law proceedings involving children, to ensure that expert witnesses are kept up to date with the events of the case, and in particular, that before expert witnesses are called to give oral evidence, they have been sent and have read all relevant documents, especially those which have emerged since their reports were written⁸.

1 I.e. the Protocol for the Instruction of Experts to give evidence in civil claims. As to the protocol and its status see PARA 837.

2 *Protocol for the Instruction of Experts to give evidence in civil claims* para 7.5.

3 *Protocol for the Instruction of Experts to give evidence in civil claims* para 14.1. As to disclosure of experts' reports see PARA 856.

4 *Protocol for the Instruction of Experts to give evidence in civil claims* para 14.2.

5 As to statements of case see PARA 1065 note 1.

6 *Protocol for the Instruction of Experts to give evidence in civil claims* para 14.3.

7 *Protocol for the Instruction of Experts to give evidence in civil claims* para 15.4.

8 See *Re G (children) (care proceedings: wasted costs)* [2000] Fam 104, [1999] 4 All ER 371. The Civil Procedure Rules do not apply to such proceedings: see PARA 32.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/ (iii) Instructions and Reports/C. EXPERTS' REPORTS/856. Disclosure of experts' reports.

856. Disclosure of experts' reports.

Notwithstanding any enactment or rule of law by virtue of which documents prepared for the purpose of pending or contemplated civil proceedings¹ or in connection with the obtaining or giving of legal advice are in certain circumstances privileged from disclosure², provision may be made by rules of court:

- 66 (1) for enabling the court³ in any civil proceedings to direct, with respect to medical matters or matters of any other class which may be specified in the direction, that the parties or some of them shall each by such date as may be so specified, or such later date as may be permitted or agreed in accordance with the rules, disclose to the other or others in the form of one or more expert reports the expert evidence on matters of that class which he proposes to adduce as part of his case at the trial⁴; and
- 67 (2) for prohibiting a party who fails to comply with a direction given in any such proceedings under rules of court made by virtue of head (1) above from adducing in evidence, except with the leave of the court, any statement, whether of fact or opinion, contained in any expert report whatsoever in so far as that statement deals with matters of any class specified in the direction⁵.

The Civil Procedure Rules provide that a party who fails to disclose an expert's report⁶ may not use the report at the trial or call the expert to give evidence orally unless the court gives permission⁷. Where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial⁸.

In appropriate cases the court may direct that experts' reports are disclosed sequentially rather than simultaneously⁹.

1 As to the meaning of 'civil proceedings' for these purposes see PARA 1088 note 4.

2 As to legal professional privilege see PARA 972; and PARA 558 et seq.

3 As to the meaning of 'court' for these purposes see PARA 1088 note 4.

4 Civil Evidence Act 1972 s 2(3)(a).

5 Civil Evidence Act 1972 s 2(3)(b) (amended by the Civil Evidence Act 1995 s 15(2), Sch 2). As to the application of the Civil Evidence Act 1972 s 2 and the making of rules thereunder see further PARA 838.

6 As to experts' reports see PARAS 852-854; and as to the meaning of 'expert' see PARA 791 note 10.

7 CPR 35.13. As to the meaning of 'court' for these purposes see PARA 22. As to the application of CPR Pt 35 see PARA 32.

8 CPR 35.11. Once a claimant and his solicitors consent to an examination by a doctor chosen by the other party, there is no requirement for any further consent by them before disclosure to the other party of the medical report prepared consequent to that examination: see *Kapadia v Lambeth London Borough Council* [2000] IRLR 699, 57 BMLR 170, CA.

9 See *The Chancery Guide* (2005 Edn) para 4.14; *The Admiralty and Commercial Courts Guide* (7th Edn, 2006) para H2.11.

UPDATE

856 Disclosure of experts' reports

NOTE 9--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para H2.11.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/ (iii) Instructions and Reports/C. EXPERTS' REPORTS/857. Written questions to experts.

857. Written questions to experts.

A party may put to an expert¹ instructed by another party, or a single joint expert², written questions about his report³. Such written questions may be put once only, must be put within 28 days of service⁴ of the expert's report and must be for the purpose only of clarification of the report⁵, unless in any case the court gives permission or the other party agrees⁶. An expert's answers to questions so put will be treated as part of the expert's report⁷.

The party or parties instructing the expert must pay any fees charged by that expert for answering questions so put; but this does not affect any decision of the court as to the party who is ultimately to bear the expert's costs⁸.

Where a party has put a written question to an expert instructed by another party in accordance with these provisions and the expert does not answer that question, the court may make one or both of the following orders in relation to the party who instructed the expert⁹:

- 68 (1) that the party may not rely on the evidence of that expert¹⁰; or
- 69 (2) that the party may not recover the fees and expenses of that expert from any other party¹¹.

The procedure of putting written questions to experts is not intended to interfere with the procedure for an exchange of professional opinion in discussions between experts¹² or to inhibit that exchange of professional opinion. If questions that are oppressive in number or content are put or questions are put without permission for any purpose other than clarification of an expert's report, the court will not hesitate to disallow the questions and to make an appropriate order for costs against the party putting them¹³. Nor is the procedure intended to permit reports prepared for interim applications which have been determined to be the basis of questions for use at trial, when the reports themselves are not to be relied on at trial, either because the experts will be serving new reports, or because the experts who prepared the reports are not the experts whose reports will be relied on at trial¹⁴.

1 As to the meaning of 'expert' see PARA 791 note 10.

2 I.e a single joint expert appointed under CPR 35.7: see PARA 840.

3 CPR 35.6(1). As to the application of CPR Pt 35 see PARA 32. Where a party sends a written question or questions direct to an expert, a copy of the questions must, at the same time, be sent to the other party or parties: *Practice Direction--Experts and Assessors* PD 35 para 5.2. As to experts' reports and their contents see PARAS 852-854. As to the admission of such written questions in evidence at the trial see eg *Mutch v Allen* [2001] EWCA Civ 76, [2001] All ER (D) 121 (Jan), [2001] CPLR 200; and see the text and note 14.

4 As to the meaning of 'service' see PARA 138 note 2. As to the calculation of time and the court's general discretion to extend time limits see PARA 88 et seq.

5 CPR 35.6(2)(a)-(c). As to the meaning of 'court' see PARA 22.

6 CPR 35.6(2)(i), (ii).

7 CPR 35.6(3).

8 *Practice Direction--Experts and Assessors* PD 35 para 5.3.

9 CPR 35.6(4).

10 CPR 35.6(4)(i).

11 CPR 35.6(4)(ii). See also the *Protocol for the Instruction of Experts to give evidence in civil claims* para 16.1. As to the protocol and its status see PARA 837.

12 As to discussions between experts see PARAS 859-861.

13 See *The Chancery Guide* (2005 Edn) para 4.18; *The Admiralty and Commercial Courts Guide* (7th Edn, 2006) para H2.19.

14 *Re MMR and MR Vaccine Litigation (No 4)* [2002] EWHC 1213 (QB), [2002] All ER (D) 143 (Jun).

UPDATE

857 Written questions to experts

NOTE 13--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para H2.19.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/(iv) Expert's Liability in Negligence/858. Liability of experts in negligence.

(iv) Expert's Liability in Negligence

858. Liability of experts in negligence.

Witnesses in legal proceedings have immunity both in relation to evidence given in court and to the work principally and proximately leading to it¹. An expert, however, is not only a witness but a professional adviser and owes a duty of care to the person who pays for his services. It has been held that a person retained as an expert in relation to court proceedings is not entitled to complete immunity for the advice he gives; he will only be immune in respect of statements that are closely connected with the proceedings². The public interest in facilitating full and frank discussion between experts before trial requires that each should be free to make proper concessions without fear that any departure from advice previously given to the party who had retained him would be seen as evidence of negligence, and it is needed in order to avoid the tension between a desire to assist the court and fear of the consequences of a departure from previous advice³.

However, an expert may be made liable for wasted costs caused by flagrant disregard of his duty to the court⁴, and an expert is not immune from professional disciplinary procedures in relation to evidence given at trial⁵.

1 See *Meadow v General Medical Council*[2006] EWCA Civ 1390, [2007] QB 462, [2007] 1 All ER 1.

2 See *Stanton v Callaghan*[2000] QB 75, [1998] 4 All ER 961, CA. See also *Palmer v Durnford Ford (a firm)* [1992] QB 483, [1992] 2 All ER 122.

3 *Stanton v Callaghan*[2000] QB 75, [1998] 4 All ER 961, CA. Therefore, the immunity extends not only to evidence given in court, but also to the preparation of reports and joint statements which are adopted as evidence.

4 *Phillips v Symes (No 2)*[2004] EWHC 2330 (Ch), [2005] 4 All ER 519, [2005] 1 WLR 2043.

5 *Meadow v General Medical Council*[2006] EWCA Civ 1390, [2007] QB 462, [2007] 1 All ER 1.

UPDATE

858 Liability of experts in negligence

NOTE 2--See *Jones v Kaney*[2010] EWHC 61 (QB), [2010] All ER (D) 131 (Jan).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/(v) Miscellaneous Procedural Matters/A. CONFERENCES AND DISCUSSIONS/859. Conferences and discussions with or between experts; in general.

(v) Miscellaneous Procedural Matters

A. CONFERENCES AND DISCUSSIONS

859. Conferences and discussions with or between experts; in general.

The Protocol for the Instruction of Experts to give evidence in civil claims recommends that before experts are formally instructed or the court's permission to appoint named experts is sought, it should be established that they can produce a report, deal with questions and have discussions with other experts within a reasonable time and at a cost proportionate to the matters in issue¹. When necessary, arrangements should be made for dealing with questions to experts and discussions between experts, including any directions given by the court, and provision should be made for the cost of this work².

The purpose of discussions between experts should be, wherever possible, to:

- 70 (1) identify and discuss the expert issues in the proceedings;
- 71 (2) reach agreed opinions on those issues, and, if that is not possible, to narrow the issues in the case;
- 72 (3) identify those issues on which they agree and disagree and summarise their reasons for disagreement on any issue; and
- 73 (4) identify what action, if any, may be taken to resolve any of the outstanding issues between the parties³.

Arrangements for discussions between experts should be proportionate to the value of cases⁴.

¹ See the *Protocol for the Instruction of Experts to give evidence in civil claims* para 7.1(c). As to the protocol and its status see PARA 837.

² *Protocol for the Instruction of Experts to give evidence in civil claims* para 7.4. As to the court's power to direct discussions between experts see PARA 860.

³ *Protocol for the Instruction of Experts to give evidence in civil claims* para 18.3.

⁴ *Protocol for the Instruction of Experts to give evidence in civil claims* para 18.4. Guidelines for the arrangements are given in paras 18.4-18.12: see PARA 861.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/(v) Miscellaneous Procedural Matters/A. CONFERENCES AND DISCUSSIONS/860. Court's power to direct discussion between experts.

860. Court's power to direct discussion between experts.

The court¹ may, at any stage, direct a discussion between experts² for the purpose of requiring the experts to identify and discuss the expert issues in the proceedings³ and, where possible, reach an agreed opinion on those issues⁴. The court may specify the issues which the experts must discuss⁵ and may direct that, following a discussion between the experts, they must prepare a statement for the court showing those issues on which they agree⁶, those issues on which they disagree and a summary of their reasons for disagreeing⁷.

The content of the discussion between the experts must not be referred to at the trial unless the parties agree⁸.

Where experts reach agreement on an issue during their discussions, the agreement will not bind the parties unless the parties expressly agree to be bound by the agreement⁹.

The Protocol for the Instruction of Experts to give evidence in civil claims requires that those instructing experts must not instruct experts to avoid reaching agreement (or to defer doing so) on any matter within the experts' competence and provides that experts are not permitted to accept such instructions¹⁰.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'expert' see PARA 791 note 10.

3 CPR 35.12(1)(a). As to the application of CPR Pt 35 see PARA 32.

4 CPR 35.12(1)(b). An objection by one party to a meeting of experts is not sufficient in itself to prevent a direction that such a meeting take place; further, it is in the interests of justice for any concessions by experts to be made before rather than during a trial: *Hubbard v Lambeth Southwark and Lewisham Health Authority* [2001] EWCA Civ 1455, [2001] All ER (D) 11 (Sep), (2001) Times, 8 October.

5 CPR 35.12(2).

6 CPR 35.12(3)(a).

7 CPR 35.12(3)(b); and see the *Protocol for the Instruction of Experts to give evidence in civil claims* para 18. As to the protocol and its status see PARA 837. As to whether a joint statement by experts expressed to be an 'interim' statement is admissible see *Robin Ellis Ltd v Malwright Ltd* [1999] All ER (D) 100, [1999] CPLR 286 (a case decided before the CPR came into force). As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2. As to immunity from suit when a party's expert prepares a joint statement in conjunction with the expert instructed by the other party for the purpose of indicating what matters are or are not at issue between them see *Stanton v Callaghan* [2000] QB 75, [1998] 4 All ER 961, CA. As to whether it is an abuse of process for a party to withdraw instructions from an expert and instruct a new expert after a draft interim joint statement has been prepared by the other party see *Stephen Hill Partnership Ltd v Supaglazing Ltd* [2002] All ER (D) 229 (Oct).

8 CPR 35.12(4). It is good practice for any such agreement to be in writing: *Protocol for the Instruction of Experts to give evidence in civil claims* para 18.9.

9 CPR 35.12(5). This is because the expert's duty to the court overrides any obligation to the person from whom he has received instructions or by whom he is paid: see CPR 35.3; and PARA 848. However, in view of the overriding objective, parties should give careful consideration before refusing to be bound by such an agreement and be able to explain their refusal should it become relevant to the issue of costs: *Protocol for the Instruction of Experts to give evidence in civil claims* para 18.12. As to whether such agreement has been

reached see eg *Britannia Zinc Ltd v Southern Electric Contracting Ltd* [2002] EWHC 606 (TCC), [2002] All ER (D) 68 (Apr). As to the overriding objective see PARA 791.

10 *Protocol for the Instruction of Experts to give evidence in civil claims* para 18.7.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/(v) Miscellaneous Procedural Matters/A. CONFERENCES AND DISCUSSIONS/861. Recommended procedure for discussion between experts.

861. Recommended procedure for discussion between experts.

The Protocol for the Instruction of Experts to give evidence in civil claims recommends that the parties, their lawyers and experts should co-operate to produce the agenda for any discussion between experts, although primary responsibility for preparation of the agenda should normally lie with the parties' solicitors¹. The agenda should indicate what matters have been agreed and summarise concisely those which are in issue. It is often helpful for it to include questions to be answered by the experts. If agreement cannot be reached promptly or a party is unrepresented, the court may give directions for the drawing up of the agenda. The agenda should be circulated to experts and those instructing them to allow sufficient time for the experts to prepare for the discussion².

In small claims and fast track cases³ there should not normally be meetings between experts and where discussion is justified in such cases, telephone discussion or an exchange of letters should, in the interests of proportionality⁴, usually suffice⁵. In multi-track cases, discussion may be face to face, but the practicalities or the proportionality principle may require discussions to be by telephone or video conference⁶. The parties' lawyers may only be present at discussions between experts if all the parties agree or the court so orders. If lawyers do attend, they should not normally intervene except to answer questions put to them by the experts or to advise about the law⁷.

At the conclusion of any discussion between experts, a statement should be prepared setting out:

- 74 (1) a list of issues that have been agreed, including, in each instance, the basis of agreement;
- 75 (2) a list of issues that have not been agreed, including, in each instance, the basis of disagreement;
- 76 (3) a list of any further issues that have arisen that were not included in the original agenda for discussion;
- 77 (4) a record of further action, if any, to be taken or recommended, including as appropriate the holding of further discussions between experts⁸.

The statement should be agreed and signed by all the parties to the discussion as soon as may be practicable⁹.

1. See the Protocol for the Instruction of Experts to give evidence in civil claims para 18.5. As to the protocol and its status see PARA 837.

2. *Protocol for the Instruction of Experts to give evidence in civil claims* para 18.6.

3. As to allocation to track see PARA 260 et seq.

4. As to the proportionality principle see CPR 1.1(2)(c); and PARA 33.

5. *Protocol for the Instruction of Experts to give evidence in civil claims* para 18.4.

6. *Protocol for the Instruction of Experts to give evidence in civil claims* para 18.4.

- 7 *Protocol for the Instruction of Experts to give evidence in civil claims* para 18.8.
- 8 *Protocol for the Instruction of Experts to give evidence in civil claims* para 18.10.
- 9 *Protocol for the Instruction of Experts to give evidence in civil claims* para 18.11.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/(v) Miscellaneous Procedural Matters/B. ATTENDANCE AT TRIAL/862. Attendance of experts at trial; in general.

B. ATTENDANCE AT TRIAL

862. Attendance of experts at trial; in general.

Expert evidence is to be given in a written report unless the court directs otherwise¹. However, the Protocol for the Instruction of Experts to give evidence in civil claims notes that experts instructed in cases have an obligation to attend court if called upon to do so and recommends that accordingly they should ensure that those instructing them are always aware of their dates to be avoided and take all reasonable steps to be available². It recommends that those instructing experts should:

- 78 (1) ascertain the availability of experts before trial dates are fixed;
- 79 (2) keep experts updated with timetables (including the dates and times experts are to attend) and the location of the court;
- 80 (3) give consideration, where appropriate, to experts giving evidence via a video-link.
- 81 (4) inform experts immediately if trial dates are vacated³.

Experts should normally attend court without the need for the service of witness summonses⁴, but on occasion they may be served to require attendance⁵. The use of witness summonses does not affect the contractual or other obligations of the parties to pay experts' fees⁶.

In Admiralty and commercial cases, the evidence of expert witnesses at trial is usually taken as a block, after the evidence of witnesses of fact has been given⁷.

1 See CPR 35.5(1); and PARA 839.

2 *Protocol for the Instruction of Experts to give evidence in civil claims* para 19.1. As to the protocol and its status see PARA 837.

3 *Protocol for the Instruction of Experts to give evidence in civil claims* para 19.2. As to the use of audio-visual facilities see PARAS 1032-1035.

4 As to the service of witness summonses see PARA 1007.

5 *Protocol for the Instruction of Experts to give evidence in civil claims* para 19.3.

6 *Protocol for the Instruction of Experts to give evidence in civil claims* para 19.3.

7 See *The Admiralty and Commercial Courts Guide* (7th Edn, 2006) para H2.22.

UPDATE

862 Attendance of experts at trial; in general

NOTE 7--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para H2.22.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(5) EXPERT EVIDENCE/(v) Miscellaneous Procedural Matters/C. ASSESSORS/863. Assessors; in general.

C. ASSESSORS

863. Assessors; in general.

Both the High Court and a judge in the county court have statutory power to appoint assessors with special qualifications to assist the court in hearing and disposing of a claim or other matter¹. Where the court² appoints one or more persons to be an assessor, the assessor is required to assist the court in dealing with a matter in which the assessor has skill and experience³. Not less than 21 days before making any such appointment, the court will notify each party in writing of the name of the proposed assessor, of the matter in respect of which the assistance of the assessor will be sought and of the qualifications of the assessor to give that assistance⁴. Where any person has been proposed for appointment as an assessor, objection to him, either personally or in respect of his qualification, may be taken by any party⁵.

An assessor will take such part in the proceedings as the court may direct and in particular the court may direct the assessor (1) to prepare a report for the court on any matter at issue in the proceedings⁶; and (2) to attend the whole or any part of the trial to advise the court on any such matter⁷.

If the assessor prepares a report for the court before the trial has begun the court will send a copy to each of the parties⁸ and the parties may use it at trial⁹. The assessor will not, however, give oral evidence or be open to cross-examination¹⁰ or questioning¹¹.

The remuneration to be paid to the assessor for his services must be determined by the court and forms part of the costs of the proceedings¹². The court may order any party to deposit in the court office a specified sum in respect of the assessor's fees and, where it does so, the assessor will not be asked to act until the sum has been deposited¹³. These provisions concerning remuneration and fees do not, however, apply where the remuneration of the assessor is to be paid out of money provided by Parliament¹⁴.

In Admiralty proceedings, the court may sit with assessors when hearing collision claims or other claims involving issues of navigation or seamanship, and the parties will not be permitted to call expert witnesses unless the court orders otherwise¹⁵.

An assessor may be appointed to assist the court in determining the amount of a receiver's remuneration¹⁶.

1 See the Supreme Court Act 1981 s 70; the County Courts Act 1984 s 63 (amended by SI 1998/2940; prospectively amended by the Courts and Legal Services Act 1990 s 14 as from a day to be appointed; at the date at which this title states the law, no such day had been appointed). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

As to the functions of judge and jury in a civil trial see PARA 795 et seq; and as to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

2 As to the meaning of 'court' see PARA 22.

3 CPR 35.15(1), (2). As from a day to be appointed, CPR 35.15(1) is amended by virtue of the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2) to substitute a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981. At the date at which this title states the law, no such day had been appointed. As to the application of CPR Pt 35 see PARA 32.

4 *Practice Direction--Experts and Assessors* PD 35 para 7.1.

5 *Practice Direction--Experts and Assessors* PD 35 para 7.2. Any such objection must be made in writing and filed with the court within seven days of receipt of the notification referred to in para 7.1 (see the text to note 4) and will be taken into account by the court in deciding whether or not to make the appointment: para 7.3; and see the County Courts Act 1984 s 63(5). As to the meaning of 'filing' see PARA 1832 note 8.

6 CPR 35.15(3)(a).

7 CPR 35.15(3)(b). See further PARA 1133.

8 CPR 35.15(4)(a).

9 CPR 35.15(4)(b).

10 As to the meaning of 'cross-examination' see PARA 50 note 4.

11 *Practice Direction--Experts and Assessors* PD 35 para 7.4.

12 CPR 35.15(5).

13 CPR 35.15(6).

14 CPR 35.15(7). See eg the County Courts Act 1984 s 63(4) (assessors assisting in hearings relating to the assessment of costs) (s 63(4) is, however, prospectively substituted: see note 1); the Supreme Court Act 1981 s 70(3), (4) (advisers assisting the Patents Court).

15 CPR 61.13. See further **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 205.

16 See *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 9.5(2); and PARA 1506; **RECEIVERS**.

UPDATE

863 Assessors; in general

TEXT AND NOTES 1-14--CPR 35.15 substituted: SI 2009/2092.

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(i) Proof of Execution of Documents/A. MODERN DOCUMENTS/864. Proof of handwriting.

(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE

(i) Proof of Execution of Documents

A. MODERN DOCUMENTS

864. Proof of handwriting.

Except when judicial notice is taken of official signatures¹, or where an apparent or purported signature is deemed by statute to be the actual signature², the handwriting³ or signature⁴ of unattested documents may be proved in the following ways: (1) by calling the writer; or (2) by a witness who saw the document written or signed; or (3) by a witness who has a general knowledge of the writing, acquired in any of the ways mentioned earlier⁵; or (4) by comparison of the disputed document with other documents proved to the judge's satisfaction to be genuine⁶; or (5) by the admissions of the party against whom the document is tendered⁷; or (6) in particular cases, by a document purporting to be a solemn declaration in a prescribed form made before a prescribed person⁸.

1 See PARA 790.

2 See eg the Army Act 1955 s 223; the Dentists Act 1984 s 52(3). As to electronic signatures see PARA 948.

3 As to the admissibility of opinions of expert and ordinary witnesses as to handwriting see PARA 832.

4 Where proof is required of the signing by the means of a rubber stamp bearing a facsimile of a signature, the affixing of this stamp must be proved either by the person who affixed it or by a witness who saw it being affixed: see *State (A-G) v Judge Roe*[1951] IR 172.

5 See PARA 832.

6 Criminal Procedure Act 1865 s 8: see PARA 834.

7 As to formal admissions see PARAS 776-778.

8 See eg the Magistrates' Courts Rules 1981, SI 1981/552, r 67 (amended by SI 2003/1236); and **MAGISTRATES** vol 29(2) (Reissue) PARA 691.

UPDATE

864 Proof of handwriting

NOTE 2--Army Act 1955 repealed: Armed Forces Act 2006 Sch 17.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(i) Proof of Execution of Documents/A. MODERN DOCUMENTS/865. Proof of sealing.

865. Proof of sealing.

The sealing¹ of a document may be the subject of judicial notice², proof³ or presumption. Any rule of law which requires a seal for the valid execution of an instrument as a deed by an individual⁴ was abolished by the Law of Property (Miscellaneous Provisions) Act 1989 in relation to instruments delivered as deeds on or after 31 July 1990⁵. The reference to the execution of a deed by an individual does not, however, include execution by a corporation sole⁶ or a body corporate, to which the common law rule continues to apply⁷. Where an instrument under seal that constitutes a deed is required for the purposes of an Act passed before 31 July 1990, the provisions relating to deeds and their execution⁸ have effect as to signing, sealing or delivery of an instrument by an individual⁹ in place of any provision of that Act as to signing, sealing or delivery¹⁰. There is in general a presumption in favour of a purchaser that a seal was affixed with due regard to all requisite preliminary formalities or, when there are no special formalities required, with sufficient authority¹¹. In general, a corporation seal may be proved by anyone familiar with it, without calling a witness who saw it affixed¹²; but where attestation is required by law, the signature of an independent witness is probably necessary, since those of the directors and secretary when affixing the common seal of a company merely form part of the execution of the document¹³.

1 As to the sealing of documents see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 27.

2 See PARA 789.

3 See eg the Magistrates' Courts Rules 1968, SI 1981/552, r 67 (amended by SI 2003/1326); and **MAGISTRATES** vol 29(2) (Reissue) PARA 691.

4 For modes of execution see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 27 et seq; and see also **EXECUTORS AND ADMINISTRATORS; WILLS** vol 50 (2005 Reissue) PARA 303. As to the conditional delivery of a document as an escrow see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 37-39; and *Kingston v Ambrian Investments Co Ltd* [1975] 1 All ER 120, [1975] 1 WLR 161, CA; *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609, [1969] 2 All ER 941, CA; *Longman v Viscount Chelsea* (1989) 58 P & CR 189, CA.

5 Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b).

6 Law of Property (Miscellaneous Provisions) Act 1989 s 1(10).

7 As to the execution of deeds by or on behalf of corporations see the Law of Property Act 1925 s 74; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 40-42. As to execution by a corporation aggregate see also s 74A (added by SI 2005/1906); and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1265.

8 Ie the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 7-8): see s 1(7).

9 The reference to signing, sealing or delivery by an individual does not include signing, sealing or delivery by a corporation sole: Law of Property (Miscellaneous Provisions) Act 1989 s 1(10).

10 Law of Property (Miscellaneous Provisions) Act 1989 s 1(7). As to the application of s 1(7) see s 1(9); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 7.

11 See **CORPORATIONS; COMPANIES**. As to estoppel against a corporation in respect of documents to which its seal is affixed see PARA 964 note 2; and **CORPORATIONS**. Where a solicitor, duly certificated notary public or licensed conveyancer, or an agent or employee of a solicitor, duly certificated notary public or licensed conveyancer, in the course of or in connection with a transaction, purports to deliver an instrument as a deed

on behalf of a party to the instrument, it must be conclusively presumed in favour of a purchaser that he is authorised so to deliver the instrument: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(5) (amended by the Courts and Legal Services Act 1990 s 125(2), Sch 17 para 20; by SI 2005/1906; and, as from a day to be appointed, by the Legal Services Act 2007 s 208(1), Sch 21 para 81; at the date at which this title states the law, no such day had been appointed); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 34.

12 *Moises v Thornton* (1799) 8 Term Rep 303; but cf *Doe d Bank of England v Chambers* (1836) 4 Ad & El 410; *Deffell v White* (1866) LR 2 CP 144 (bill of sale given by company).

13 See PARA 866.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(i) Proof of Execution of Documents/A. MODERN DOCUMENTS/866. Proof of attestation.

866. Proof of attestation.

Wills and other testamentary documents¹ must, if necessary², be proved by evidence from one of the attesting witnesses³ or, if no attesting witness is conveniently available, from any other person who was present when the will was executed⁴. Instruments which are required by law to be attested⁵, except wills and other testamentary documents⁶, may, instead of being proved by an attesting witness, be proved as if no attesting witness were alive⁷.

It is not necessary to prove by an attesting witness any instrument for the validity of which attestation is not required, and such an instrument may be proved as if there had been no attesting witness⁸.

1 The word 'will' extends to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to an appointment by will of a guardian of a child and to any other testamentary disposition: see the Wills Act 1837 s 1; and **WILLS** vol 50 (2005 Reissue) PARA 301.

2 In practice, such proof is only required where the authenticity of the document is disputed or uncertain: see the Non-Contentious Probate Rules 1987, SI 1987/2024, rr 12, 13 (amended by SI 1991/1876); and **EXECUTORS AND ADMINISTRATORS; WILLS**. A district judge or registrar may accept a will for proof without the evidence of an attesting witness or other person present when the will was executed if he is satisfied that the distribution of the estate is not thereby affected: Non-Contentious Probate Rules 1987, SI 1987/2024, r 12(3) (as so amended).

3 It is not necessary to call more than one of several attesting witnesses: *Holdfast d Anstey v Dowsing* (1746) 2 Stra 1253; *Forster v Forster* (1864) 33 LJP & A 113. Where an attesting witness must be called, the rule applies even if the document is lost, cancelled or destroyed, provided the names of the witnesses are known: *Breton v Cope* (1791) Peake 29; *Gillies v Smither* (1819) 2 Stark 528. It is otherwise where the names or handwriting of the attesting witnesses are unknown: see *Keeling v Ball* (1796) Peake Add Cas 88; *R v St Giles, Camberwell, Inhabitants* (1853) 1 E & B 642; *R v Fordingbridge Inhabitants* (1858) 27 LJMC 290. An attesting witness who has become blind may still provide evidence of attestation: *Cronk v Frith* (1839) 9 C & P 197; *Rees v Williams* (1847) 1 De G & Sm 314; but cf *Wood v Drury* (1699) 1 Ld Raym 734; *Pedler v Paige* (1833) 1 Mood & R 258. As to persons blind at the time the document is executed see note 5.

4 Non-Contentious Probate Rules 1987, SI 1987/2024, r 12(1) (as amended: see note 2). If no affidavit evidence can be obtained in accordance with r 12(1), the district judge or registrar may accept evidence on affidavit from any person he may think fit to show that the signature on the will is in the handwriting of the deceased, or of any other matter which may raise a presumption in favour of due execution of the will, and may if he thinks fit require that notice of the application be given to any person who may be prejudiced by the will: r 12(2) (as so amended).

5 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1753; **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 36. In general, a person who is competent to testify (see PARA 966) is competent to attest. Exceptions include parties to a deed (see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 36) or a bill of sale (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1753), a proxy with regard to the instrument appointing him (*Re Parrot, ex p Cullen* [1891] 2 QB 151, DC), and a blind person (*Re Gibson* [1949] P 434, [1949] 2 All ER 90). Attestation means that the witness is present and sees the instrument signed: *Shamu Patter v Abdul Kadir Ravuthan* (1912) 28 TLR 583, PC. But the mere presence of a person at the execution of a deed does not necessarily make him an attesting witness: *Cussons v Skinner* (1843) 11 M & W 161; and see *M'Craw v Gentry* (1812) 3 Camp 232. It is a question of fact whether a person who signed a document signed as an attesting witness, and extrinsic evidence is admissible: *Kitcat v King* [1930] P 266; *Re Bravda* [1967] 2 All ER 1233, [1967] 1 WLR 1080; revsd [1968] 2 All ER 217, [1968] 1 WLR 479, CA. Where a corporation affixes its seal, the officer who affixes it and verifies it with his signature is not an attesting witness: *Doe d Bank of England v Chambers* (1836) 4 Ad & El 410; and see PARA 865; and **CORPORATIONS**.

6 See the Evidence Act 1938 s 3 proviso.

7 Evidence Act 1938 s 3. This does not prejudice the admissibility of any evidence which would otherwise be admissible: s 6(2)(a). As to the mode of proof where no attesting witness is alive see PARA 867.

8 See the Criminal Procedure Act 1865 s 7, which applies to both criminal and civil proceedings (see s 1). But if the proceedings are without notice, and all the parties are not before the court, it may be necessary to call the attesting witness or to prove his handwriting: *Re Rice* (1886) 32 ChD 35, CA; and see *Re Reay's Estate* (1855) 3 WR 312; *Re Mair's Estate* (1873) 42 LJ Ch 882; *Worthington v Moore* (1891) 64 LT 338.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(i) Proof of Execution of Documents/A. MODERN DOCUMENTS/867. Strict proof.

867. Strict proof.

When an attesting witness must be called, the party against whom the instrument is tendered may demand strict proof of it¹. It has been said that he cannot himself be called as a witness by his opponent for the purpose of obtaining admission of its due execution². An attesting witness who denies attestation or execution may be contradicted by other evidence³, and an attesting witness to a will may be cross-examined⁴ by the party calling him⁵. Other evidence of attestation⁶ is admissible in any civil or criminal proceedings in which proof of due attestation of a document is required, when it is impossible to call an attesting witness at the trial⁷ owing to death⁸, insanity⁹, absence¹⁰ or, possibly, illness¹¹.

1 *Abbot v Plumbe* (1779) 1 Doug KB 216; *Breton v Cope* (1791) Peake 29; *Johnson v Mason* (1794) 1 Esp 89; *Call v Dunning* (1803) 4 East 53; *R v Harringworth Inhabitants* (1815) 4 M & S 350; *Gillies v Smither* (1819) 2 Stark 528; *Mounsey v Burnham* (1841) 1 Hare 15.

2 *Whyman v Garth* (1853) 8 Exch 803. As to when an admission of execution dispenses with the necessity for proof see PARA 868.

3 *Lemon v Dean* (1810) 2 Camp 636n; *Fitzgerald v Elsee* (1811) 2 Camp 635; *Talbot v Hodson* (1816) 7 Taunt 251; *Coles v Coles and Brown* (1866) LR 1 P & D 70; *Bowman v Hodgson* (1867) LR 1 P & D 362; *Re Ovens* (1892) 29 LR Ir 451; *Dayman v Dayman* (1894) 71 LT 699; *Pilkington v Gray* [1899] AC 401, PC; *Re Vere-Wardale, Vere-Wardale v Johnson* [1949] P 395, [1949] 2 All ER 250.

4 As to cross-examination generally see PARA 1042 et seq.

5 This is because the witness is not the witness of either party but of the court: *Re Brock, Jones v Jones* (1908) 24 TLR 839; *Oakes v Uzzell* [1932] P 19; and see *Coles v Coles and Brown* (1866) LR 1 P & D 70. The witness may be cross-examined by the party calling him even on issues collateral to that of due execution: *Re Webster, Webster v Webster* [1974] 3 All ER 822n, [1974] 1 WLR 1641.

6 Other evidence of attestation would normally be evidence of an attester's handwriting, supplemented by evidence to identify the maker of the instrument, but other secondary evidence of due execution is admissible: see the cases cited in notes 8-11. See also the Non-Contentious Probate Rules 1987, SI 1987/2024, r 12, cited in PARA 866.

7 See *Palin v Ponting* [1930] P 185.

8 *Anon* (1701) 12 Mod Rep 607; *Adam v Kerr* (1798) 1 Bos & P 360; *Nelson v Whittall* (1817) 1 B & Ald 19; *Doe d Wheeldon v Paul* (1829) 3 C & P 613; *Whitelocke v Musgrove* (1833) 1 Cr & M 511; *Jones v Jones* (1841) 9 M & W 75; *R v St Giles, Camberwell, Inhabitants* (1853) 1 E & B 642; *Clarke v Clarke* (1879) 5 LR Ir 47, CA; *Byles v Cox* (1896) 74 LT 222; *Re Peverett* [1902] P 205; *Keohane v Byrne* [1935] NI 63, CA. As to presumptive evidence of execution see *Stobart v Dryden* (1836) 1 M & W 615; and as to ancient documents see PARA 869.

9 *Currie v Child* (1812) 3 Camp 283.

10 If either abroad (*Barnes v Trompowsky* (1797) 7 Term Rep 265; *Prince v Blackburn* (1802) 2 East 250; *Ward v Wells* (1809) 1 Taunt 461; *Glubb v Edwards* (1840) 2 Mood & R 300; *Davidson v Carr* (1843) 2 Dowl NS 1034), or when he cannot be found (*Cunliffe v Sefton* (1802) 2 East 183; *Crosby v Percy* (1808) 1 Taunt 364; *Wardell v Fermor* (1809) 2 Camp 282; *Parker v Hoskins* (1810) 2 Taunt 223; *Burt v Walker* (1821) 4 B & Ald 697; *Kay v Brookman* (1828) 3 C & P 555; *Morgan v Morgan* (1832) 9 Bing 359; *Willman v Worral* (1838) 8 C & P 380; *Earl of Falmouth v Roberts* (1842) 9 M & W 469; *Spooner v Payne* (1847) 4 CB 328; *Austin v Rumsey* (1849) 2 Car & Kir 736; *Baxendale v De Valmer* (1887) 57 LT 556; *Palin v Ponting* [1930] P 185).

11 *Jones v Brewer* (1811) 4 Taunt 46; *Harrison v Blades* (1813) 3 Camp 457.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(i) Proof of Execution of Documents/A. MODERN DOCUMENTS/868. Exceptions to strict proof.

868. Exceptions to strict proof.

There are general exceptions to the rule¹ requiring strict proof in cases where the instrument is more than 20 years old and is produced from proper custody²; where the other party refuses to produce the instrument after notice to do so³; where, although the other party produces it, even though he refuses to relinquish possession of it⁴, he claims under it a subsisting⁵ interest in the subject matter of the claim⁶; where the attestation was required merely by reason of a rule of court, and the court has subsequently acted upon the instrument so attested, thereby recognising its validity⁷; where the instrument is tendered against a public officer whose duty it was to procure its execution and who has treated it as duly executed⁸; or where it is tendered against a party who has admitted its execution in the course of proceedings for the purposes of the trial⁹, or who is estopped from denying its validity¹⁰. It is said also that instruments which have been enrolled under a statute may be proved merely by proof of enrolment¹¹.

1 The rule is now largely abrogated, and applies only to testamentary documents: see PARA 866.

2 See PARA 869 et seq.

3 *Cooke v Tanswell* (1818) 8 Taunt 450; *Poole v Warren* (1838) 8 Ad & El 582.

4 *Vacher v Cocks* (1830) 1 B & Ad 145; *Carr v Burdiss* (1835) 4 LJ Ex 60. The older rule was that the production of an instrument after notice by the adverse party superseded in all cases the necessity of calling attesting witnesses: *R v Middlezoy Inhabitants* (1787) 2 Term Rep 41; *Bowles v Langworthy* (1793) 5 Term Rep 366, overruled by *Gordon v Secretan* (1807) 8 East 548.

5 *Collins v Bayntun* (1841) 1 QB 117; *Fuller v Patrick* (1849) 18 LJQB 236. It may be that his interest in the suit must be the same as that claimed by his opponent: *Knight v Martin* (1818) Gow 26.

6 The validity of an instrument is necessarily admitted where an interest is claimed under it: *Pearce v Hooper* (1810) 3 Taunt 60. See also *Orr v Morice* (1821) 3 Brod & Bing 139; *Doe d Tyndale v Heming* (1826) 9 Dow & Ry KB 15; *Doe d Wilkins v Marquis of Cleveland* (1829) 9 B & C 864; *Bradshaw v Bennett* (1831) 1 Mood & R 143; *Carr v Burdiss* (1835) 4 LJ Ex 60; *Doe d Rowlandson v Wainwright* (1836) 5 Ad & El 520; *Bell v Chaytor* (1843) 1 Car & Kir 162.

7 See *Bailey v Bidwell* (1844) 13 M & W 73.

8 *Bailey v Bidwell* (1844) 13 M & W 73; *Plumer v Brisco* (1847) 11 QB 46.

9 *Whyman v Garth* (1853) 8 Exch 803.

10 See PARA 1168; *Laing v Kaine* (1800) 2 Bos & P 85; *Randall v Lynch* (1809) 2 Camp 352; *Bringloe v Goodson* (1839) 5 Bing NC 738; *Freeman v Steggall* (1849) 14 QB 202; *Fishmongers' Co v Dimsdale* (1852) 12 CB 557. An admission in a former action (now known as a 'claim': see PARA 18) does not estop a party from denying execution of an instrument tendered in evidence against him: *Call v Dunning* (1803) 4 East 53; *Whyman v Garth* (1853) 8 Exch 803.

11 See *Thurle v Madison* (1655) Sty 462; *Smart v Williams* (1694) 3 Lev 387; *Holcroft v Smith* (1702) Freem Ch 259; *Doe d Williams v Lloyd* (1839) 5 Bing NC 741.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(i) Proof of Execution of Documents/B. ANCIENT DOCUMENTS/869. Ancient documents which prove themselves.

B. ANCIENT DOCUMENTS

869. Ancient documents which prove themselves.

Written documents proved or purporting to be not less than 20 years old¹, which are produced from proper custody², are presumed, in the absence of circumstances of suspicion, to have been duly signed, sealed, attested, delivered or published according to their purport³. The period of 20 years is reckoned from the time of their signature or execution to the time of their production in court, whether they are wills or other instruments⁴. Such documents, in other words, are said to prove themselves⁵.

1 The period after which this presumption is raised in respect of documents was reduced to not less than 20 years by the Evidence Act 1938 s 4, in the case of documents of like character to those for which, before the commencement of that Act (ie 1 September 1938), the applicable period was not less than 30 years. Pedigrees appear to be an exception to the presumption; the handwriting must be proved, even if they purport to be 90 years old; and, if they are admitted, they are not proof that all the statements contained in them are true: see *Fitzwalter Peerage* (1844) 10 Cl & Fin 193, HL; *Fort v Clarke* (1826) 1 Russ 601.

2 As to what constitutes proper custody see PARA 871.

3 *R v Farringdon Inhabitants* (1788) 2 Term Rep 466; *Wynne v Tyrwhitt* (1821) 4 B & Ald 376 (entries in steward's book over 30 years old); *Doe d Oldham v Wolley* (1828) 8 B & C 22; *M'Kenire v Fraser* (1803) 9 Ves 5 (will); *Doe d Spilsbury v Burdett* (1835) 4 Ad & El 1 (will); *Doe d Thomas v Beynon* (1840) 12 Ad & El 431 (letters); *Man v Ricketts* (1844) 7 Beav 93 (will); *Doe d Jenkins v Davies* (1847) 10 QB 314 (curate's signature to copy of marriage certificate); *Exeter Corp'n v Warren* (1844) 5 QB 773 (accounts); *Doe d Lord Ashburnham v Michael* (1851) 17 QB 276 (accounts); *Foster v Plumbers' Co* (1900) 44 Sol Jo 211 (accounts); *A-G v Stephens* (1855) 6 De GM & G 111; *R v Bathwick Inhabitants* (1831) 2 B & Ad 639 (certificate of ordination).

4 *Doe d Oldham v Wolley* (1828) 8 B & C 22; *Man v Ricketts* (1844) 7 Beav 93.

5 The rule applies notwithstanding the fact that one of the subscribing witnesses is alive (*Doe d Oldham v Wolley* (1828) 8 B & C 22) or in court (*Marsh v Collnett* (1798) 2 Esp 665).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(i) Proof of Execution of Documents/B. ANCIENT DOCUMENTS/870. Presumption of regularity.

870. Presumption of regularity.

There is a general presumption in favour of the regularity and validity of ancient documents. No evidence need be given that they were made on the date they bear¹. Upon proof of the signature of a deed, sealing (where required) and delivery are presumed; similarly delivery is presumed on proof of sealing and signature². The rule applies to private documents of every kind³.

1 *Re Adamson* (1875) LR 3 P & D 253: a date attached to an alteration is not in itself sufficient to establish that the alteration was made at that time.

2 *Hall v Bainbridge* (1848) 12 QB 699; *Re Sandilands* (1871) LR 6 CP 411. As to seals see PARA 865.

3 *Wynne v Tyrwhitt* (1821) 4 B & Ald 376. A copy of a document produced from proper custody may after the lapse of time be admitted, but not if the original is in existence and a copy can be obtained and proved by the person making it: *Permanent Trustee Co of New South Wales v Fels* [1918] AC 879, PC.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(i) Proof of Execution of Documents/B. ANCIENT DOCUMENTS/871. Proper custody of ancient documents.

871. Proper custody of ancient documents.

Documents are said to be produced from proper custody when they have been in the keeping of some person who might reasonably and naturally be expected to have possession of them¹, although he need not necessarily be the most appropriate person².

For documents the custody of which is imposed on a certain person, proper custody has been held to be the custody of that person³; for court rolls, the custody of the lord of the manor or of the steward⁴; for a case for counsel's opinion, the family papers of a descendant of the person who submitted it⁵; for ancient grants, the custody of some person connected with the estate to which they relate⁶; for a deed creating a term to attend the inheritance, the custody of the solicitor for the administrator of the trustee of the term⁷; for an expired lease, the custody of the lessor⁸ or lessee⁹; for a settlement, the custody of the trustees or even the settlor himself¹⁰; for a bond, the custody of the person in whose favour it was made¹¹; for a schedule setting out payment of tithes, the custody of the solicitor for the last purchaser of the tithes¹²; for a receipt by a rector for money payments in lieu of tithes, the custody of the solicitor for the lord of the manor by whose predecessor in the title the payments had been made¹³; for diocesan documents, the diocesan registry¹⁴ or the bishop's private papers¹⁵; for an ordination certificate, the clergyman's private papers¹⁶; for a parish certificate, the parish chest¹⁷ or the custody of the local authority¹⁸; for the endowment of a vicarage, the registry of the diocese in which it is kept¹⁹ or the augmentation office²⁰; for a family Bible, the custody of a member of the family²¹; for books relating to the estate of an ancient monastery, the custody of a person owning part of its estates²²; for steward's books, the custody of the steward²³; and for an expired apprenticeship indenture, the custody of the apprentice or master²⁴.

1 See *R v Ryton Inhabitants* (1793) 5 Term Rep 259; *R v Netherthong Inhabitants* (1814) 2 M & S 337; *Brett v Beales* (1829) Mood & M 416; *Evans v Rees* (1839) 10 Ad & El 151; *Doe d Jacobs v Phillips* (1845) 8 QB 158; *Doe d Earl of Shrewsbury v Keeling* (1848) 11 QB 884. Cf *Bidder v Bridges* (1885) 34 WR 514. A grant of property is not in proper custody for this purpose if it is in the keeping of a person who has no direct or indirect connection with the property: *Lygon v Strutt* (1795) 2 Anst 601; *Swinnerton v Marquis of Stafford* (1810) 3 Taunt 91; *Bidder v Bridges* (1885) 34 WR 514.

2 *Bishop of Meath v Marquess of Winchester* (1836) 3 Bing NC 183, HL.

3 *Doe d Lord Arundel v Fowler* (1850) 14 QB 700.

4 See **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 701 et seq.

5 *Bishop of Meath v Marquess of Winchester* (1836) 3 Bing NC 183, HL.

6 *Swinnerton v Marquis of Stafford* (1810) 3 Taunt 91.

7 *Doe d Jacobs v Phillips* (1845) 8 QB 158.

8 *Plaxton v Dare* (1829) 10 B & C 17; *Rees v Walters* (1838) 3 M & W 527; *Hall v Ball* (1841) 3 Man & G 242; *Doe d Earl of Shrewsbury v Keeling* (1848) 11 QB 884.

9 *Hall v Ball* (1841) 3 Man & G 242.

10 *Doe d Neale v Samples* (1838) 8 Ad & El 151.

11 *Governor & Co of Chelsea Waterworks Co v Cowper* (1795) 1 Esp 275.

- 12 *Foster v Plumbers' Co* (1900) 44 Sol Jo 211. See also *Fox v Pett* [1918] 2 KB 196.
- 13 *Bertie v Beaumont* (1816) 2 Price 303.
- 14 See *Doe d Lord Arundel v Fowler* (1850) 14 QB 700.
- 15 *Bishop of Meath v Marquess of Winchester* (1836) 3 Bing NC 183, HL. But it seems that this only applies where the document is dated prior to the establishment of the registry: see *Doe d Lord Arundel v Fowler* (1850) 14 QB 700 (parish clerk's house not the proper place for parish registers). See also the text and note 17.
- 16 *R v Bathwick Inhabitants* (1831) 2 B & Ad 639.
- 17 *R v Ryton Inhabitants* (1793) 5 Term Rep 259. For statutory provisions relating to the custody of parish registers and records by ministers or in diocesan record offices see **ECCLESIASTICAL LAW**. See also PARA 909.
- 18 *R v Netherthong Inhabitants* (1814) 2 M & S 337 (certificate in custody of overseers of the poor). As to the transfer of poor law functions to local authorities see **LOCAL GOVERNMENT** vol 69 (2009) PARA 3.
- 19 *Bullen v Michel* (1816) 2 Price 399, HL, explained in *Bishop of Meath v Marquess of Winchester* (1836) 3 Bing NC 183 at 201-202, HL.
- 20 This was apparently the more regular mode: see *Bishop of Meath v Marquess of Winchester* (1836) 3 Bing NC 183, HL.
- 21 *Hubbard v Lees and Purden* (1866) LR 1 Exch 255.
- 22 *Bullen v Michel* (1816) 2 Price 399, HL.
- 23 *Wynne v Tyrwhitt* (1821) 4 B & Ald 376.
- 24 Cf *Hall v Ball* (1841) 3 Man & G 242.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(i) Proof of Execution of Documents/B. ANCIENT DOCUMENTS/872. Nature of custody required.

872. Nature of custody required.

It will be seen that the custody required for an ancient document to prove itself¹ is not necessarily that which is most strictly proper; the custody, however, should be one in which the document may reasonably be expected to be found, and this must depend on the facts of each particular case². In the case of documents of which the custody is by statute imposed on a particular person the rule is perhaps more strict, and any unusual custody must be properly accounted for³. The custody of parish books is provided for by statute⁴. The fact of custody must be properly established by evidence; it is not enough that the document be produced in court⁵, but when the fact of proper custody is established there is no need to inquire what happened to the document between execution and production⁶.

1 See PARA 869.

2 *Bertie v Beaumont* (1816) 2 Price 303; *Doe d Neale v Samples* (1838) 8 Ad & El 151; *Doe d Jacobs v Phillips* (1845) 8 QB 158; *Doe d Earl of Shrewsbury v Keeling* (1848) 11 QB 884; and see *Bullen v Michel* (1816) 2 Price 399, HL; *Bishop of Meath v Marquess of Winchester* (1836) 3 Bing NC 183, HL; *Doe d Lord Arundel v Fowler* (1850) 14 QB 700. For a case very near the line see *Croughton v Blake* (1843) 12 M & W 205. See also *R v Norfolk County Council* (1910) 26 TLR 269.

3 See *Doe d Lord Arundel v Fowler* (1850) 14 QB 700, where the document in question was a parish register. For modern statutory provisions see **ECCELSIASTICAL LAW**.

4 As to secular parish books see the Local Government Act 1972 s 226; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 537. See also *Lewis v Poole* [1898] 1 QB 164, DC; *R v Powell, ex p Williams* [1899] 1 QB 396; *Fox v Pett* [1918] 2 KB 196. As to parish registers and other church records see PARA 909.

5 *Evans v Rees* (1839) 10 Ad & El 151.

6 See *Doe d Jacobs v Phillips* (1845) 8 QB 158; *Slater v Hodgson* (1846) 9 QB 727.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(i) Proof of Execution of Documents/B. ANCIENT DOCUMENTS/873. Custody which is not regarded as proper.

873. Custody which is not regarded as proper.

The British Museum has not been regarded as proper custody¹ for the purpose of the rule regarding ancient documents proving themselves² in respect of private maps³, ancient grants⁴, notes of a case tried at the time of Henry III or for a priory register⁵.

An ancient grant contained in a manuscript preserved in the Bodleian Library at Oxford has been rejected as not coming from a proper custody⁶; an ancient manuscript, found in the Herald's Office, purporting to be an account of the possessions of a monastery, was not admissible evidence of that fact⁷; and an old grant of common, given to one of the parties by a person unconnected with the estate, was not admissible⁸.

1 It may be presumed that if it could be shown that the possession of a document had come to the possessor from a person who had the proper custody, this would be sufficient: see *Randolph v Gordon* (1818) 5 Price 312.

2 See PARA 869.

3 *Bidder v Bridges* (1885) 34 WR 514; *Mercer v Denne* [1904] 2 Ch 534.

4 *Swinnerton v Marquis of Stafford* (1810) 3 Taunt 91.

5 *Bidder v Bridges* (1885) 34 WR 514.

6 *Michell v Rabbetts* (1810) cited in 3 Taunt 91.

7 *Lygon v Strutt* (1795) 2 Anst 601.

8 *Swinnerton v Marquis of Stafford* (1810) 3 Taunt 91.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(i) Proof of Execution of Documents/B. ANCIENT DOCUMENTS/874. Documents executed under power of attorney.

874. Documents executed under power of attorney.

Although the rule in respect of ancient documents proving themselves applies to all documents which are 20 years old or more¹, where such a document purports to have been executed under a power of attorney, while the actual execution is presumed to have been regular, it must be shown that the attorney was duly authorised², unless perhaps execution was a merely ministerial act³.

1 See PARA 869.

2 *Re Airey, Airey v Stapleton* [1897] 1 Ch 164, where the deed produced purported to be an exercise by attorney of a special power of appointment. As to the construction of powers of attorney see **AGENCY** vol 1 (2008) PARA 31 et seq.

3 *Re Airey, Airey v Stapleton* [1897] 1 Ch 164.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(i) Proof of Execution of Documents/B. ANCIENT DOCUMENTS/875. Ancient documents as acts of ownership.

875. Ancient documents as acts of ownership.

An ancient document, such as a lease or licence, coming from proper custody, and purporting upon its face to show exercise of ownership, was at common law admissible without proof of possession or payment of rent as being in itself an ownership¹. Ancient leases may be admissible as evidence of value².

1 *Malcomson v O'Dea* (1863) 10 HL Cas 593; *Bristow v Cormican* (1878) 3 App Cas 641, HL; also *Rogers v Allen* (1808) 1 Camp 309; cf *Blandy-Jenkins v Earl of Dunraven* [1899] 2 Ch 121, CA, where a document compromising an action for trespass was admitted on similar grounds. See also PARA 1071.

2 See *Bullen v Michel* (1816) 2 Price 399, HL.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(ii) Proof of Contents of Documents/A. PRIMARY EVIDENCE/876. Production of documents at trial.

(ii) Proof of Contents of Documents

A. PRIMARY EVIDENCE

876. Production of documents at trial.

When the authenticity of a document which is in the possession of one of the parties is not in dispute, it is usual to take steps to secure the production and admission of it, or evidence of its contents, at the trial through the processes of disclosure and inspection which are discussed elsewhere in this title¹. A party is deemed to admit the authenticity of a document disclosed to him unless he serves notice that he wishes the document to be proved at trial².

Correspondence is frequently agreed between the parties³.

The court⁴ may give directions requiring the parties to use their best endeavours to agree a bundle or bundles of documents for use at any hearing⁵. All documents contained in bundles which have been agreed for use at a hearing are admissible at that hearing as evidence of their contents, unless either the court orders otherwise or a party gives written notice of objection to the admissibility of particular documents⁶.

1 See PARA 538 et seq.

2 See CPR 32.19(1); and PARA 778. As to the application of the CPR see PARA 32. See also eg *Bentley v Jones Harris & Co* [2001] EWCA Civ 1724, [2001] All ER (D) 37 (Nov) (claimant contending for first time during the course of his cross-examination on the second day of the trial that attendance notes disclosed to him had been manufactured by the defendant to fit the circumstances of the case; judge entitled to find that attendance notes were a contemporaneous record of what had taken place and that their authenticity had been deemed to be admitted as there had been no objection to them earlier).

3 If agreed translations are used, care must be taken when pleading to raise any rule of construction peculiar to the law involved: *Ascherberg Hopwood and Crew Ltd v Casa Musicale Sonzogno Di Piero, Ostali Societa in Nome Collettivo* [1971] 1 All ER 577, [1971] 1 WLR 173; affd [1971] 3 All ER 38, [1971] 1 WLR 1128, CA.

4 As to the meaning of 'court' see PARA 22.

5 *Practice Direction--Written Evidence* PD 32 para 27.1.

6 *Practice Direction--Written Evidence* PD 32 para 27.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(ii) Proof of Contents of Documents/A. PRIMARY EVIDENCE/877. Proof of authenticity.

877. Proof of authenticity.

Where a document is not in the possession of either of the parties, or because its authenticity is in dispute or for some other reason it is not possible to secure the admission of it or of an agreed copy of it at the trial, it may become necessary not only to secure its production, but also to give evidence that it is what it purports to be, or is tendered as being¹. The methods by which such evidence may in general be given have already been considered², but in respect of some classes of documents these methods may be replaced by some other method which, on grounds of public policy, is established either as the best and therefore the only method, or as an alternative method, of proving the contents³.

1 Where the document is a deed or record, this involves the production of the original document, except in cases where this is dispensed with. The signature of a surveyor to an estimate under the Metropolis Management Act 1855 (repealed) is some evidence that the document is authentic and that the sum named in it has been duly determined: *Hobman v Greenwich District Board of Works* (1894) 58 JP 703, CA. As to the production of documents filed in or in the custody of a court office see PARA 1010. As to documents improperly obtained see PARA 765.

2 See PARA 864 et seq.

3 See PARA 884 et seq. As to the proof of wills see **EXECUTORS AND ADMINISTRATORS; WILLS**. As to statements proposed to be given in evidence under the Civil Evidence Act 1995 see PARA 879.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(ii) Proof of Contents of Documents/B. SECONDARY EVIDENCE OF PRIVATE DOCUMENTS/878. General rule at common law.

B. SECONDARY EVIDENCE OF PRIVATE DOCUMENTS

878. General rule at common law.

At common law, secondary evidence¹ of the contents of private² documents is inadmissible³ if primary evidence is available⁴. Before secondary evidence is tendered it is, therefore, usually necessary to account for the absence of the original⁵, and for this purpose proof that primary evidence is not available may be required.

1 As to the nature of secondary evidence see PARA 762; and as to the admissibility of such evidence see PARA 879 et seq.

2 As to particular private documents see PARA 945 et seq. As to copies of public documents see PARA 884 et seq.

3 *Garton v Hunter*[1969] 2 QB 37, [1969] 1 All ER 451, CA; *Bowskill v Dawson*[1954] 1 QB 288, [1953] 2 All ER 1393; on appeal on another point [1955] 1 QB 13, [1954] 2 All ER 649, CA.

4 *Jones v Tarleton* (1842) 9 M & W 675; *R v Frankland* (1863) Le & Ca 276; *R v Francis*(1874) LR 2 CCR 128. Thus, where lands or premises are occupied under a written agreement, the agreement itself must be produced, and oral evidence is not receivable to prove the terms of the tenancy or the amount of rent (*R v Holy Trinity, Kingston-upon-Hull, Inhabitants* (1827) 1 Man & Ry KB 444), or to show by whom the tenant was let into possession (*Doe v Harvey* (1832) 8 Bing 239), or to whom the premises were in fact let (*R v Rawden Inhabitants* (1828) 8 B & C 708). As to the admissibility of extrinsic evidence in relation to written documents generally see **DEEDS AND OTHER INSTRUMENTS**; and in relation to commercial documents on matters of usage see **CUSTOM AND USAGE**. As to proof by oral evidence of a partnership without production of the partnership deed see **PARTNERSHIP**.

5 The admission of the contents of a document may make it unnecessary to account for the absence of the original: see PARA 808 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(ii) Proof of Contents of Documents/B. SECONDARY EVIDENCE OF PRIVATE DOCUMENTS/879. Proof of statements contained in documents.

879. Proof of statements contained in documents.

Under the Civil Evidence Act 1995, a statement contained in a document may be proved by the production of that document or, whether or not that document is still in existence, by the production of a copy of that document, or the material part of it, authenticated in such manner as the court may approve¹. These provisions are discussed elsewhere in this title².

1 Civil Evidence Act 1995 s 8(1).

2 See PARA 816.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(ii) Proof of Contents of Documents/B. SECONDARY EVIDENCE OF PRIVATE DOCUMENTS/880. Proof of lost or destroyed document.

880. Proof of lost or destroyed document.

Where a document has been lost¹ or destroyed², and cannot be found after due search³, secondary evidence of its contents⁴ is admissible⁵. The court must be satisfied that the document existed⁶, that the loss or destruction has in fact taken place⁷, and that a reasonable explanation of this has been given⁸. Thus, a diligent search must have been made in good faith in the place where the instrument would most properly be found⁹, but not necessarily in every possible place¹⁰; nor need the search have been made recently or for the purpose of the cause¹¹. Objections as to the sufficiency of the search must be taken at the trial and cannot be raised afterwards¹².

The question of the sufficiency of the search is for the judge¹³, and must vary with the circumstances of each case¹⁴. Thus, if the document is of considerable value¹⁵ or is of recent date¹⁶, or if the party who ought to produce it appears to have some interest in withholding it, greater diligence must have been shown before secondary evidence can be admitted; whereas if the document is valueless¹⁷, very little search will suffice¹⁸; and no search is required where direct proof of the destruction or irretrievable loss of the instrument is given¹⁹.

1 *Goodier v Lake* (1737) 1 Atk 446; *Saltern v Melhuish* (1754) Amb 247; *Bullen v Michel* (1816) 2 Price 399, HL; *Hall v Dawson* (1862) 7 LT 519; *Sugden v Lord St Leonards* (1876) 1 PD 154, CA. As to obtaining probate of the contents of a lost will see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 110.

2 *Delany v Tenison* (1758) 3 Bro Parl Cas 659, HL; *Brandon v Barlow* (1865) 13 LT 6; *R v Robinson* [1917] 2 KB 108, CCA. If part of a document is lost or destroyed by accident, the part which is preserved is admissible, on the mutilation being properly accounted for, and secondary evidence may be given of the remainder: *Doe d Godsoe v Jack* (1849) 1 All ER 476.

3 It is very difficult to lay down any general rule as to the degree of diligence necessary to be used in searching for an original document, to entitle the party to give secondary evidence of its contents. That must depend, in great measure, upon the circumstances of each particular case: see *Brewster v Sewell* (1820) 3 B & Ald 296; and the text and notes 10-19.

4 Where secondary evidence of the material trusts of a lost settlement was sufficient, the court ordered the payment of the fund in court to the applicant: *Hansell v Spink* [1943] Ch 396. In the case of a settlement deed and trust documents destroyed by enemy action, the court, not being satisfied as to the trusts, refused to declare them but ordered that until further order the trustees were entitled to hold the investments on trusts specified: *Perch v Robertson* (1943) 87 Sol Jo 66. See also *Re Knapp's Settlement*, *Cowan v Knapp* [1952] 1 All ER 458n.

5 Thus secondary evidence, either by parol or written memorandum, has been admitted where a contract was contained in documents which had been lost (*Jameson v Stein* (1855) 21 Beav 5; *Prole v Soady* (1859) 2 Giff 1; *Gilchrist v Herbert* (1872) 26 LT 381; see *Peyton v M'Dermott* (1837) 1 Dr & Wal 198); and secondary evidence will be admitted even though the contents are required by statute to have been in writing (*Read v Price* [1909] 2 KB 724, CA; *Barber v Rowe* [1948] 2 All ER 1050, CA). See also *Springsteen v Masquerade Music Ltd* [2001] EWCA Civ 563, [2001] EMLR 654 (admissibility depended on weight to be attached to secondary evidence).

6 *Whitfield v Fausset* (1750) 1 Ves Sen 387; *Askew v Poulterers Co* (1750) 2 Ves Sen 89.

7 *Saltern v Melhuish* (1754) Amb 247; *Doe d Johnson v Johnson* (1818) 2 Chit 196; *Fitz v Rabbits* (1837) 2 Mood & R 60; cf *Gilchrist v Herbert* (1872) 20 WR 348. See also *Parkins v Cobbet* (1824) 1 C & P 282; *R v Hall* (1872) 12 Cox CC 159.

8 *Saltern v Melhuish* (1754) Amb 247; *Gilchrist v Herbert* (1872) 20 WR 348.

9 *R v Denio Inhabitants* (1827) 7 B & C 620; *Hart v Hart* (1841) 1 Hare 1; *Green v Bailey* (1847) 15 Sim 542; *R v St Mary, Islington Overseers* (1852) 1 WR 34; *R v Hinckley Overseers* (1863) 3 B & S 885; *R v Saffron Hill Inhabitants* (1852) 1 E & B 93. Where the document belonged to a deceased person, inquiry of his personal representatives is in general necessary (*R v Rawden Inhabitants* (1834) 2 Ad & El 156); but where the management of his affairs and the custody of his papers have been taken over by his solicitor, inquiry of the solicitor is sufficient, and it is not necessary to inquire of the widow (*R v Piddlehinton Inhabitants* (1832) 3 B & Ad 460). Where the document is a settlement, inquiry should be made of all the trustees: *Doe d Richards v Lewis* (1851) 11 CB 1035. For other cases in relation to search see *R v Stourbridge Inhabitants* (1828) 8 B & C 96; *Minshall v Lloyd* (1837) 2 M & W 450; *Pardoe v Price* (1844) 13 M & W 267; *R v Kenilworth Inhabitants* (1845) 7 QB 642; *Gathercole v Miall* (1846) 15 M & W 319.

10 *M'Gahey v Alston* (1836) 2 M & W 286; cf *Brewster v Sewell* (1820) 3 B & Ald 296; *Hart v Hart* (1841) 1 Hare 1. In *Bligh v Wellesley* (1826) 2 C & P 400, and *R v Rastrick* (1846) 2 Cox CC 39, secondary evidence was not admitted where the search had been made only in one place.

11 *Fitz v Rabbits* (1837) 2 Mood & R 60.

12 *Williams v Wilcox* (1838) 8 Ad & El 314.

13 *Waldy v Gray* (1875) LR 20 Eq 238; *R v Kenilworth Inhabitants* (1845) 7 QB 642; and see *Fernley v Worthington* (1840) 1 Man & G 491; *R v Braintree Inhabitants* (1858) 1 E & E 51; *R v Hinckley Overseers* (1863) 3 B & S 885.

14 See note 3.

15 *Brewster v Sewell* (1820) 3 B & Ald 296; cf *Freeman v Arkell* (1824) 2 B & C 494; *Quilter v Jorss* (1863) 14 CBNS 747; *Gully v Bishop of Exeter* (1827) 4 Bing 290.

16 *R v Hinckley Overseers* (1863) 3 B & S 885.

17 Eg an insurance policy on which a claim has been paid: see *Brewster v Sewell* (1820) 3 B & Ald 296.

18 *Brewster v Sewell* (1820) 3 B & Ald 296; cf *Freeman v Arkell* (1824) 2 B & C 494.

19 *Ex p Raine* (1816) 19 Ves 589; *Quilter v Jorss* (1863) 14 CBNS 747; *Blackie v Pidding* (1848) 6 CB 196; *Atkins v Owen* (1834) 2 Ad & El 35.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(ii) Proof of Contents of Documents/B. SECONDARY EVIDENCE OF PRIVATE DOCUMENTS/881. Proof of document impossible or difficult to produce.

881. Proof of document impossible or difficult to produce.

Secondary evidence is admissible where it is impossible or highly inconvenient to produce the original document. This occurs where the original is a fixed inscription, such as that on a tombstone¹, or a placard posted on a wall², or (it seems) an inscription or device on a banner or flag displayed at a public meeting³.

Where the document is abroad in the hands of a foreign functionary who is forbidden to produce it, secondary evidence may be given⁴, but it seems that an application should first have been made to the person having the legal, even though not the actual, custody of the document, and must be shown to have been unsuccessful⁵. Similarly, where the document is abroad in private hands, application must be made to the person in possession of it, and the purpose for which it is required should be disclosed⁶.

Where a party is entitled to put a document in evidence and the original document is in the possession of a person who, by virtue of privilege⁷ or otherwise, is not compellable to produce it⁸, secondary evidence is admissible provided that person has been served with a notice to produce or witness summons and expressly claims his privilege⁹. If the document is filed in a court in England and Wales, secondary evidence is inadmissible¹⁰. The procedure for producing documents filed, lodged or held in a court office is discussed elsewhere in this title¹¹.

1 *Tracy Peerage Case* (1843) 10 Cl & Fin 154, HL; *Mortimer v M'Callan* (1840) 6 M & W 58.

2 *Bruce v Nicolopulo* (1855) 11 Exch 129 (foreign proclamations); *Owner v Bee Hive Spinning Co Ltd* [1914] 1 KB 105 (placard on factory wall, affixed under statute); and see *Bartholomew v Stephens* (1839) 8 C & P 728 (notice board fixed on pole). If, however, the notice is a portable one, the notice itself must be produced: *Jones v Tarleton* (1842) 9 M & W 675.

3 *R v Hunt* (1820) 3 B & Ald 566. As to this case see *R v Hinley* (1843) 1 Cox CC 12 at 13 per Maule J; and see *Doe d Coyle v Cole* (1834) 6 C & P 359; *Jones v Tarleton* (1842) 9 M & W 675; *Mortimer v M'Callan* (1840) 6 M & W 58.

4 *Re Lemme* [1892] P 89; *Re Von Linden* [1896] P 148 (cases of wills deposited abroad); cf *Burnaby v Baillie* (1889) 42 ChD 282 (foreign registers of birth, as to which see PARA 917 et seq); *Permanent Trustee Co of New South Wales v Fels* [1918] AC 879, PC.

5 *Crispin v Doglioni* (1863) 32 LJPM & A 109, where the document was filed in a foreign court, but it is apprehended that the principle is of general application.

6 *Boyle v Wiseman* (1855) 10 Exch 647; cf *Crispin v Doglioni* (1863) 32 LJPM & A 109. In *Hunt v Alewyn* (1828) 1 Moo & P 433 secondary evidence was admitted of a bill of exchange in possession of the acceptors (who had paid it) abroad, it being treated as lost.

7 See PARA 970 et seq.

8 *Hibberd v Knight* (1848) 2 Exch 11; *Newton v Chaplin* (1850) 10 CB 356. As to objections to production see PARA 555 et seq. As to bankers' books see PARA 939.

9 *Lloyd v Mostyn* (1842) 10 M & W 478. This is so even where the secondary evidence was obtained by improper means, but the use of secondary evidence so obtained may be restrained by injunction: see PARA 765.

10 *Williams v Munnings* (1824) Ry & M 18; but not if a foreign court has custody and the legal system there does not permit a deposited document to be removed: *Alivon v Furnival* (1834) 1 Cr M & R 277.

11 See PARA 85. See also PARA 1010.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(ii) Proof of Contents of Documents/B. SECONDARY EVIDENCE OF PRIVATE DOCUMENTS/882. Proof of document not produced after notice.

882. Proof of document not produced after notice.

Secondary evidence is admissible in the case of documents in the hands of an adversary who fails to produce them after being served with a notice to produce at the trial¹.

A notice to produce documents for proof at the trial² must be served³ by the latest date for serving witness statements⁴ or within seven days of disclosure⁵ of the document, whichever is the later⁶.

1 *R v Watson* (1788) 2 Term Rep 199; *Sharpe v Lamb* (1840) 11 Ad & El 805; *Robb v Starkey* (1845) 2 Car & Kir 143; *R v Boucher* (1859) 1 F & F 486. An adversary who fails to produce a document after being served with a notice to produce will not normally be allowed to put it in evidence: *Doe d Thompson v Hodgson* (1840) 12 Ad & El 135; *Collins v Gashon* (1860) 2 F & F 47; *Roupell v Waite* (1862) 3 F & F 511; *Cyr v De Rosier* (1910) 40 NBR 373; but see *Boyle v Wiseman* (1855) 11 Exch 360. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

2 Unless such a notice is served, a party is deemed to admit the authenticity of a document disclosed to him: see PARA 778.

3 As to the meaning of 'service' see PARA 138 note 2.

4 As to the meaning of 'witness statement' see PARA 751 note 1; and as to serving witness statements see PARA 982. As to the calculation of time and the court's general discretion to extend time limits see PARA 88 et seq.

5 As to disclosure see PARA 963; and PARA 538 et seq.

6 See CPR 32.19(2); and PARA 778. An adversary should generally be served with a notice to produce; if this is not done, secondary evidence of the contents of the documents in the adversary's control is inadmissible: *R v Doran* (1791) 1 Esp 127; *Dwyer v Collins* (1852) 7 Exch 639; *Goodered v Armour* (1842) 3 QB 956; *Bate v Kinsey* (1834) 1 Cr M & R 38; *R v Recorder of Lichfield* (1849) 13 LTOS 255; *R v Morgan* [1925] 1 KB 752, CCA. Moreover, where a document is proved to have come into the adversary's hands, the opposite party cannot give evidence of its loss or destruction until he has served a notice to produce: *Doe d Phillips v Morris* (1835) 3 Ad & El 46. A party who has served a notice to produce a document will not be entitled to give secondary evidence of it unless he establishes at the trial that it was, at the time of the service of the notice, in the possession of the person on whom the notice was served, or of some agent or other person over whom the person served had some authority and from whom he could have obtained the document: *Sharpe v Lamb* (1840) 11 Ad & El 805; *Lloyd v Mostyn* (1842) 10 M & W 478; *Partridge v Coates* (1824) Ry & M 153; *Burton v Payne* (1827) 2 C & P 520; *Baldney v Ritchie* (1816) 1 Stark 338; *Sinclair v Stevenson* (1824) 1 C & P 582; *Taplin v Atty* (1825) 3 Bing 164; *Suter v Burrell* (1858) 2 H & N 867; *Martin v Bell* (1816) 1 Stark 413; *Parry v May and Morrit* (1833) 1 Mood & R 279; *Evans v Sweet* (1824) Ry & M 83; *Knight v Martin* (1819) Gow 103; *Henry v Leigh* (1813) 3 Camp 499. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

Notice to produce is not necessary where the document is itself a notice which has been served upon the adversary: *Robinson v Brown* (1846) 3 CB 754 at 762 per Maule J, where the ground on which the exception is based is stated to be that it is not necessary to give any other notice to the defendant than that which is given by the proceedings, the defendant being sufficiently warned by the issue that the plaintiff means to give secondary evidence of the contents of the notice unless the defendant produces it himself. See also *R v Turner* [1910] 1 KB 346, CCA; *Andrews v Wirral RDC* [1916] 1 KB 863, CA; and see *Kine v Beaumont* (1822) 3 Brod & Bing 288; *Swain v Lewis* (1835) 4 LJ Ex 249; *Lanauze v Palmer* (1827) Mood & M 31; *Robinson v Brown* (1846) 3 CB 754; cf *Colling v Treweek* (1827) 6 B & C 394 (notice of dishonour in an action on a bill); *Doe d Fleming v Somerton* (1845) 7 QB 58; cf *Philipson v Chase* (1809) 2 Camp 110; *Colling v Treweek* (1827) 6 B & C 394 (a notice to quit in an action for possession); *Surtees v Hubbard* (1802) 4 Esp 203 (a notice of assignment in an action by an assignee of a debt). Such notice has also been held to be unnecessary when the document is an instrument in the nature of a notice (*Colling v Treweek* (1827) 6 B & C 394; *Anderson v May* (1800) 2 Bos & P 237; *Gotlieb v Danvers* (1796) 1 Esp 455; but cf *Grove v Ware* (1817) 2 Stark 174) or where the defendant's possession of the document forms the basis of the action so that the action itself acts as a notice (*How v Hall*

(1811) 14 East 274; cf *R v Elworthy* (1867) LR 1 CCR 103; *Marshall v Ford* (1908) 99 LT 796; *Machin v Ash* (1950) 49 LGR 87, DC); or where the document is not a mere document, but is a chattel as well as a document, eg a driving licence or a certificate of insurance (see *Marshall v Ford* (1908) 99 LT 796; *Martin v White* [1910] 1 KB 665; *Williams v Russell* (1933) 149 LT 190, DC). Notice to produce the original is also unnecessary where the document sought to be put in is a counterpart original (*Philipson v Chase* (1809) 2 Camp 110; *Surtees v Hubbard* (1802) 4 Esp 203; *R v Watson* (1817) 2 Stark 116; *Burleigh v Stibbs* (1793) 5 Term Rep 465; *Roe d West v Davis* (1806) 7 East 363; cf *Kine v Beaumont* (1822) 3 Brod & Bing 288; *Colling v Treweek* (1827) 6 B & C 394; *Houghton v Koenig* (1856) 18 CB 235) or perhaps even a copy made contemporaneously (see *Kine v Beaumont* (1822) 3 Brod & Bing 288; *Philipson v Chase* (1809) 2 Camp 110; *Gotlieb v Danvers* (1796) 1 Esp 455; cf *Andrews v Wirral RDC* [1916] 1 KB 863, CA). Where a proper notice to produce has been served and a new trial is subsequently ordered, a fresh notice is unnecessary: *Hope v Beadon* (1851) 17 QB 509. All these authorities must, however, now be treated with caution: see PARA 33 text and note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(ii) Proof of Contents of Documents/B. SECONDARY EVIDENCE OF PRIVATE DOCUMENTS/883. Statute or order.

883. Statute or order.

Secondary evidence is admissible in particular cases by statutory provisions. For example, copies are admissible in certain circumstances¹, photographic copies of documents in the custody of a local authority or parish meeting are admissible although the court may require the production of the original if it is still in existence², while in proceedings relating to children a copy of an entry in a wages book is admissible to prove the payment of wages³. The High Court and county courts have a general discretionary power to give directions as to the nature of the evidence which they require and the way in which it is to be placed before the court⁴.

1 See the Civil Evidence Act 1995 s 8(1); and PARA 816.

2 See the Local Government Act 1972 s 229(4), (6), (8) (s 229(8) amended by the Local Government Act 1985 s 84, Sch 14 para 25; the Education Reform Act 1988 s 237, Sch 13 Pt I; the Police and Magistrates' Courts Act 1994 s 43, Sch 4 Pt I para 14(a); the Police Act 1996 s 103, Sch 7 para 1(2)(h); the Police Act 1997 s 88, Sch 6 para 9; the Greater London Authority Act 1999 s 325, Sch 27 para 31; the Criminal Justice and Police Act 2001 ss 128(1), 137, Sch 6 Pt 2 paras 22, 31(a), Sch 7 Pt 5(1); and the Local Government and Public Involvement in Health Act 2007 s 209(2), Sch 13 Pt 1 paras 1, 17); and **LOCAL GOVERNMENT** vol 69 (2009) PARA 540.

3 See the Children and Young Persons Act 1933 s 100; and **CHILDREN AND YOUNG PERSONS**.

4 See CPR 32.1(1); and PARA 791.

UPDATE

883 Statute or order

NOTE 2--Local Government Act 1972 s 229(8) further amended: Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 28.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(ii) Proof of Contents of Documents/C. SECONDARY EVIDENCE OF PUBLIC DOCUMENTS/884. Copies of public documents.

C. SECONDARY EVIDENCE OF PUBLIC DOCUMENTS

884. Copies of public documents.

At common law, documents admissible in evidence as public documents¹ could be proved by the production of properly authenticated copies². By statute, where any book or other document is of such a public nature as to be admissible in evidence on its mere production from proper custody, and no statute exists rendering its contents provable by means of a copy, any copy or extract from such book or other document is admissible in evidence in any court of justice, or before any person having by law or by consent of the parties authority to hear, receive and examine evidence, provided the copy or extract is proved to be an examined copy or extract³ or provided it purports to be signed and certified as a true copy or extract⁴ by the officer to whose custody the original is entrusted⁵. In addition, many public documents may be proved by means of copies⁶ by virtue of particular statutory provisions⁷.

Copies of public documents which are admissible in evidence fall under one or other of the following five heads: (1) official copies⁸; (2) examined copies⁹; (3) certified copies¹⁰; (4) copies printed by authority¹¹; (5) copies admitted in evidence under certain provisions of the Civil Evidence Act 1995¹².

1 See the various categories of document discussed in PARA 889 et seq. Such documents are now admissible (where no other statute provides for their admissibility) by virtue of the Civil Evidence Act 1995 s 7(2)(b): see PARA 821.

2 *Lynch v Clerke* (1697) 3 Salk 154; *Mortimer v M'Callan* (1840) 6 M & W 58; *Sayer v Glossop* (1848) 2 Exch 409; and see PARA 909 note 7.

Proof of the contents of a public or judicial record by production of an exemplification (a copy either under the Great Seal or under the seal of the court where the record is kept) is now no longer known. Judicial records are now proved by production of official copies or certified copies: see PARAS 885, 887. As to exemplifications see Bull NP 226; *Beverley Corpn v Craven* (1838) 2 Mood & R 140; *Whitehead v Thompson* (1861) 23 Durl (Ct of Sess) 772.

3 See PARA 886.

4 See PARA 887.

5 Evidence Act 1851 s 14; *R v Weaver* (1873) LR 2 CCR 85.

6 The statute usually specifies the means of proof. For a general provision relating to the proof of copies see the Evidence Act 1845 s 1: and PARA 887.

7 See eg the provisions mentioned in PARAS 887, 892-893, 906, 913, 915-916, 919-923.

8 See PARA 885.

9 See PARA 886.

10 See PARA 887.

11 See PARA 888.

12 See PARA 879.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(ii) Proof of Contents of Documents/C. SECONDARY EVIDENCE OF PUBLIC DOCUMENTS/885. Official copies.

885. Official copies.

Official copies are copies of documents in the custody of a superior court made and authenticated by an officer of the court who has the authority to supply copies¹. Official copies of court documents must not be exhibited in evidence because they prove themselves².

Every document purporting to be sealed or stamped with the seal or stamp of the Supreme Court or of any office of the Supreme Court³ must be received in evidence in all parts of the United Kingdom without further proof⁴ as must a document purporting to bear the seal of a county court⁵. A party to proceedings may generally obtain from the records of the court⁶ a copy of any document relating to the proceedings⁷ and a non-party may obtain certain documents from the court records⁸, in either case subject to particular rules⁹.

An office copy¹⁰ of an entry in a local land charges register is admissible in evidence to the same extent as the original would be admissible¹¹. Similarly, an official copy of, or of a part of, the register of title, any document which is referred to in the register of title and kept by the registrar, any other document kept by the registrar which relates to an application to him, or the register of cautions against first registration, is admissible in evidence to the same extent as the original¹². Statutory provision is also made, for example, for the admission of office copies of instruments creating or verifying the execution of a power of attorney deposited in the Central Office of the Supreme Court before 1 October 1971¹³. Where copies are required of original wills or other documents, such copies may be facsimile copies sealed with the seal of the court and issued either as office copies or certified under the hand of a district judge or registrar to be true copies¹⁴.

1 Before the Supreme Court of Judicature Acts 1873 to 1875 (repealed), office copies were admitted as evidence in the same court and the same cause without proof that they had been examined: see *Denn v Lucas v Fulford* (1761) 2 Burr 1177; *Jack v Boyle v Kiernan* (1840) 2 Jebb & S 231; *Davenport v Townsend* (1867) 15 LT 528.

2 *Practice Direction--Written Evidence* PD 32 para 13.2. As to exhibits see PARA 990 note 16.

3 As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

4 Supreme Court Act 1981 s 132 (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 4 para 26(1), (2), to refer to the Senior Courts; at the date at which this title states the law, no such day had been appointed). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to the meaning of 'United Kingdom' see PARA 221 note 2.

5 See CPR 2.6(3), cited in PARA 789. As to the meaning of 'seal' see PARA 81 note 2.

6 As to the meaning of 'court' see PARA 22.

7 See CPR 5.4B.

8 See CPR 5.4C.

9 As to the supply of documents from court records see PARA 82.

10 In more recent statutes, the term 'official copy' rather than 'office copy' is used: see eg note 12.

11 See the Local Land Charges Act 1975 s 12; and **LAND CHARGES** vol 26 (Reissue) PARA 707.

12 Land Registration Act 2002 s 67(1). A person who relies on an official copy in which there is a mistake is not liable for loss suffered by another by reason of the mistake: s 67(2). Rules may make provision for the issue of official copies and may, in particular, make provision about the form of official copies, who may issue official copies, applications for official copies and the conditions to be met by applicants for official copies, including conditions requiring the payment of fees: s 67(3). See the Land Registration Rules 2003, SI 2003/1417; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 1096.

13 A document purporting to be an office copy of any such instrument is sufficient evidence, without further proof, of the contents of the instrument and as having been deposited as mentioned in the text: see the Supreme Court Act 1981 s 134(3); and **AGENCY**.

14 See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 59; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 132.

UPDATE

885 Official copies

NOTES 3, 4--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(ii) Proof of Contents of Documents/C. SECONDARY EVIDENCE OF PUBLIC DOCUMENTS/886. Examined copies.

886. Examined copies.

An examined copy is a copy of a document which a witness swears he has compared with the original (or with what the officer of the court having custody of the original or any other person read as the contents of the original) and swears is a correct copy¹. Examined copies are admissible in evidence in all cases where the original is a public document², and in many other cases where such copies are made admissible by statute³. Before such a copy can be read in evidence it must be proved that the original came from the proper place of deposit or out of the hands of the officer in whose custody it was kept⁴.

1 *Reid v Margison* (1808) 1 Camp 469; *Gyles v Hill* (1809) 1 Camp 471n; *Rolf v Dart* (1809) 2 Taunt 52; *R v M'Donald* (1841) Arm M & O 112; *R v Hughes* (1839) 1 Craw & D 13; but see *Slane Peerage* (1835) 5 Cl & Fin 23, HL. An examined copy must not contain abbreviations which are not in the original: *R v Christian* (1842) Car & M 388. Cf *Anderdon v Lord Foley* (1833) 2 LJKB 214 (office copies containing abbreviations admitted). Where the document is ancient the witness should be able to read and understand it: *Crawford and Lindsay Peerages* (1848) 2 HL Cas 534.

2 See the Evidence Act 1851 s 14; and PARA 884. It is now more usual to prove copies of public documents by means of certified copies: see PARA 887.

3 See eg PARA 939 (examined copies of entries in bankers' books).

4 *Adamthwaite v Synge* (1816) 1 Stark 183; *Bannister v Lambert* (1832) 1 LJKB 179; *Doe d Lord Arundel v Fowler* (1850) 14 QB 700.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(ii) Proof of Contents of Documents/C. SECONDARY EVIDENCE OF PUBLIC DOCUMENTS/887. Certified copies.

887. Certified copies.

A copy of a public document or an extract from it is admissible in evidence, provided it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted¹. A copy of or extract from a public record in the Public Record Office (now known as the National Archives)² purporting to be examined and certified as true and authentic by the proper officer³ and to be sealed with the seal of the Public Record Office is admissible as evidence in any proceedings without any further or other proof if the original record would have been admissible as evidence in those proceedings⁴. Similarly, an electronic copy of or extract from a public record in the Public Record Office which purports to have been examined and certified as true and authentic by the proper officer and appears on a website purporting to be one maintained by or on behalf of the Public Record Office is, when viewed on that website, admissible as evidence in any proceedings without further or other proof if the original record would have been admissible as evidence in those proceedings⁵.

In addition numerous statutes make admissible in evidence copies of particular documents certified by officials who have the custody of the originals⁶. Where any statute makes a certified copy of any document admissible in evidence, the copy is to be admitted, provided it purports to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed as directed by any such statute, without any proof of the seal or stamp or of the signature or of the official character of the person appearing to have signed it, in every case in which the original record could have been received in evidence⁷.

1 See the Evidence Act 1851 s 14; and PARA 884. If such a copy is not properly certified it may be proved by oral evidence to be an examined copy: *R v Manwaring* (1856) Dears & B 132, CCR.

2 In 2003 the Public Records Office and the Historical Manuscripts Commission merged to form the National Archives. The Public Records Act 1958 has not been amended to reflect this change.

3 For these purposes, any reference to the proper officer is a reference to the Keeper of Public Records or any other officer of the Public Record Office authorised in that behalf by the Keeper of Public Records, and, in the case of copies and extracts made before 1 January 1959, the deputy keeper of the records or any assistant record keeper appointed under the Public Record Office Act 1838 (repealed): Public Records Act 1958 s 9(4) (renumbered as such and amended by SI 2001/4058).

4 Public Records Act 1958 s 9(2). It is the duty of the Keeper of Public Records to arrange that reasonable facilities are available to the public for inspecting and obtaining copies of public records in the Public Record Office which fall to be disclosed in accordance with the Freedom of Information Act 2000: Public Records Act 1958 s 5(3) (substituted by the Freedom of Information Act 2000 s 67, Sch 5 para 2(1), (3)). As to public records see further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 835 et seq. For provisions relating to manorial documents see PARA 924. As to Welsh public records see the Government of Wales Act 2006 ss 146-148; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. The copy of the Commonwealth of Australia Constitution Act 1900 which on 29 June 1990 was on loan to the Commonwealth of Australia is no longer included in the public records to which the Public Records Act 1958 applies: Australian Constitution (Public Record Copy) Act 1990 s 1.

5 Public Records Act 1958 s 9(3) (added by SI 2001/4058).

6 See eg the Wildlife and Countryside Act 1981 s 56(4) (copy of definitive map or statement: see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (Reissue) PARA 592); the Army Act 1955 s 198(2), (5) (attestation papers and records in service books: see **ARMED FORCES**).

7 Evidence Act 1845 s 1. See *R v Parsons* (1866) LR 1 CCR 24; *State (A-G) v Judge Roe* [1951] IR 172.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(ii) Proof of Contents of Documents/C. SECONDARY EVIDENCE OF PUBLIC DOCUMENTS/888. Copies printed by authority.

888. Copies printed by authority.

Certain Acts of Parliament and various official documents may be proved by copies purporting to be printed by the Queen's Printer, the Government Printer, or under the superintendence or authority of Her Majesty's Stationery Office¹, or, in the case of parliamentary journals, by the printer to either House of Parliament².

1 See PARAS 889, 892.

2 See PARA 890.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/A. STATUTES, PARLIAMENTARY PROCEEDINGS, ORDERS AND BYELAWS/889. Acts of Parliament etc.

(iii) Particular Public or Official Documents

A. STATUTES, PARLIAMENTARY PROCEEDINGS, ORDERS AND BYELAWS

889. Acts of Parliament etc.

Public statutes are judicially noticed¹ and no proof of them is required². By statute, every Act passed after 1850 is a public Act and is to be judicially noticed as such unless the Act itself provides expressly to the contrary³. Acts of the Scottish Parliament are likewise judicially noticed⁴. Similarly, the validity of any proceedings leading to the enactment of an Act of the Northern Ireland Assembly must not be called into question in any legal proceedings⁵. A document purporting to be duly executed under the seal of the Welsh Ministers, or signed on behalf of the Welsh Ministers, is to be received in evidence and, unless the contrary is proved, is to be taken to be so executed or signed⁶.

Local, personal and private Acts passed before 1 January 1851, unless they contain provisions that they are to be deemed public Acts and judicially noticed as such⁷, or that they are to be printed by the Queen's Printer, in which case a copy purporting to be so printed is to be admitted as evidence⁸, must be pleaded and proved⁹ by an exemplification under the Great Seal or by a copy sworn to have been compared with the Parliament roll¹⁰. Copies of local, personal and private Acts, not being public Acts, if purporting to be printed¹¹ by the Queen's Printer, are to be admitted as evidence without proof that they were so printed¹², and when directed by any enactment to be evidence or conclusive evidence or to have any other effect, when purporting to be printed by the government printer, the Queen's Printer or the Queen's Printer for Scotland or a printer authorised by Her Majesty or otherwise under Her Majesty's authority, are to be evidence or conclusive evidence or to have that other effect if purporting to be printed under the superintendence or authority of Her Majesty's Stationery Office¹³.

1 See PARA 779 et seq.

2 Co Litt 98b; Co Inst 98a; *Lord Cromwell's Case* (1581) 4 Co Rep 12b; *Holland's Case* (1597) 4 Co Rep 75a; *Lovell v Plomer* (1812) 15 East 320; *R v Sutton* (1816) 4 M & S 532; *Forman v Dawes* (1841) Car & M 127; *Aiton v Stephen* (1876) 1 App Cas 456, HL; *Chilton v London Corp* (1878) 7 ChD 735. The Parliament roll may be inspected to test the accuracy of any print produced: see *R v Jefferies* (1721) 1 Stra 446; *Price v Hollis* (1813) 1 M & S 105.

3 Interpretation Act 1978 s 3, Sch 2 para 2.

4 See the Scotland Act 1998 s 28(6); and PARA 783.

5 Northern Ireland Act 1998 s 5(5). Devolved government was suspended on 14 October 2002.

6 Government of Wales Act 2006 s 90(3). Welsh Assembly legislation is made by Assembly measures (see s 93(1)), which are to be judicially noted (see s 93(3)).

7 See as in *Woodward v Cotton* (1834) 6 C & P 491; *Baumont v Mountain* (1834) 10 Bing 404; *Hargreaves v Lancaster and Preston Junction Rly Co* (1838) 1 Ry & Can Cas 416. Such a clause in a private Act did not fix strangers with notice of it: *Brett v Beales* (1829) Mood & M 416; *Ballard v Way* (1836) 1 M & W 520; *A-G v Marrett* (1846) 10 I Eq R 167.

8 See the Evidence Act 1845 s 3; and the text to note 10.

9 *Kirk v Nowill* (1786) 1 Term Rep 118; *Samuel v Evans* (1788) 2 Term Rep 569; and see *R v Nott*(1843) 4 QB 768.

10 *The Prince's Case* (1606) 8 Co Rep 1a. After the royal assent was given the Clerk of the Parliaments transcribed every public Act on to a roll, which was delivered into Chancery and was considered the only record: *Wiltes' Claim of Peerage*(1869) LR 4 HL 126. Private Acts were not enrolled without the suit of the party (Thomas's note to *The Prince's Case* in 4 Coke's Reports 180, published 1826 by Butterworth & Son), and the difficulties of proof which might arise if the private Act has not been enrolled and was lost may be seen from the evidence offered and rejected in *Doe d Bacon v Lady Brydges* (1843) 6 Man & G 282. The practice of engrossing Acts, whether public or private, upon rolls of Parliament was discontinued soon after the passing of the Evidence Act 1845, since when the recognised record is the copy printed by the Queen's Printer (*Claydon v Green*(1868) LR 3 CP 511); but there are still two prints on vellum made, signed by the Clerk of the Parliaments or his deputy, one of which is preserved in the House of Lords Record Office, and the other in the Public Record Office (now known as the National Archives): see **PARLIAMENT** vol 34 (Reissue) PARA 836.

11 In *R v Wallace* (1866) 14 WR 462, CCR (Ir), a gazette made admissible if purporting to be printed 'by the Queen's Printers' or 'by the Queen's authority' was held inadmissible if it did not give the style of the printer as the Queen's Printer or state that it was printed by the Queen's authority.

12 Evidence Act 1845 s 3 (amended by the Statute Law Revision Act 1891). The court may, however, still refer to the Parliament roll: *Barrow v Wadkin (No 2)* (1857) 24 Beav 327; *R v Haslingfield*(1874) LR 9 QB 203; and see note 2. As to Commonwealth statutes see PARA 898.

13 Documentary Evidence Act 1882 s 2 (amended by SI 1999/1042); cf *Re Yarmouth and Ventnor Rly Co* [1871] WN 236. The operation of the Documentary Evidence Act 1882 s 2 is not affected by the enactment of the Civil Evidence Act 1995 (for the provisions of which see PARA 808 et seq): s 14(3)(b). Examined copies are also admissible. As to these see PARA 886. Her Majesty's Stationery Office is now part of the Office of Public Sector Information, which itself is part of the National Archives.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/A. STATUTES, PARLIAMENTARY PROCEEDINGS, ORDERS AND BYELAWS/890. Admissibility of statements in statutes and other public documents.

890. Admissibility of statements in statutes and other public documents.

Statements contained in any public statute, speech from the throne¹, royal proclamation², parliamentary journal³, government gazette⁴ or state paper⁵ are admissible in evidence⁶ to prove facts of a public nature⁷. On the other hand, private Acts of Parliament are of no greater evidential value, for the purpose of proving facts recited in them, than recitals in private deeds⁸.

The journals of either House of Parliament are proved by copies purporting to be printed by the printer to either House⁹, and are admissible as evidence of the facts relating to parliamentary procedure recorded in them¹⁰.

1 *R v Francklin* (1731) 17 State Tr 625.

2 *R v Sutton* (1816) 4 M & S 532; *R v De Berenger* (1814) 3 M & S 67.

3 *A-G v Bradlaugh* (1885) 14 QBD 667, CA; *Forbes v Samuel* [1913] 3 KB 706.

4 *R v Holt* (1793) 5 Term Rep 436; *A-G v Theakstone* (1820) 8 Price 89.

5 Eg an official dispatch: see *Thelluson v Cosling* (1803) 4 Esp 266.

6 Such statements are not conclusive evidence: see *R v Greene* (1837) 6 Ad & El 548; *R v Francklin* (1731) 17 State Tr 625.

7 At common law such statements were admissible as being statements in public documents. They are now admissible in civil cases by virtue of the Civil Evidence Act 1995 s 7(2)(b): see PARA 821.

8 *Ballard v Way* (1836) 1 M & W 520; *Duke of Beaufort v Smith* (1849) 4 Exch 450; *Polini v Gray*, *Sturla v Freccia* (1879) 12 ChD 411, CA; affd sub nom *Sturla v Freccia* (1880) 5 App Cas 623, HL. See further **DEEDS AND OTHER INSTRUMENTS; STATUTES**.

9 Evidence Act 1845 s 3. No proof is required that such copies were in fact so printed: s 3.

10 *A-G v Bradlaugh* (1885) 14 QBD 667, CA. When a cause is being tried in London, and a journal of the House is required in evidence, it is usual for an officer of the House to attend with the necessary volume; in other cases a certified copy of the required entry in the journals can be obtained from the Journal Office of the House; see *Erskine May's Parliamentary Practice* (23rd Edn, 2004) pp 253, 258. The test roll of the House of Commons and the official copy of the division lists are admissible in evidence: *Forbes v Samuel* [1913] 3 KB 706. As to judicial notice of Parliamentary proceedings see PARA 785.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/A. STATUTES, PARLIAMENTARY PROCEEDINGS, ORDERS AND BYELAWS/891. Documents relating to the European Union.

891. Documents relating to the European Union.

The matters relating to the European Union of which judicial notice¹ is to be taken, and the proof of relevant instruments and documents, are discussed elsewhere in this title².

1 As to judicial notice see PARA 779 et seq.

2 See PARAS 1087, 780.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/A. STATUTES, PARLIAMENTARY PROCEEDINGS, ORDERS AND BYELAWS/892. Proclamations, orders and regulations.

892. Proclamations, orders and regulations.

In addition to any other powers of proving documents given by statute or existing at common law¹, prima facie evidence of any proclamation, order² or regulation issued at any time by Her Majesty or by the Privy Council³ or by or under the authority of a government department or officer or office-holder in the Scottish Administration⁴, and also of certain documents of various public bodies⁵, may be given (1) by production of a copy of the Gazette⁶ purporting to contain the proclamation, order or regulation; or (2) by production of such a copy purporting to be printed by the government printer⁷, or under the superintendence or authority of Her Majesty's Stationery Office⁸; or (3) by a certified copy or extract⁹.

Statutory instruments, if they come within the categories of document referred to, are provable in any of the ways described¹⁰. With certain exceptions¹¹, all statutory instruments are required to be printed by or under the authority of the Queen's Printer¹². A copy of a list published by Her Majesty's Stationery Office, purporting to bear the imprint of the Queen's Printer, and showing the date of issue of statutory instruments, is receivable in evidence as a true copy, and an entry in such a list is conclusive evidence of the date on which any statutory instrument was first issued by that office¹³.

1 See the Documentary Evidence Act 1868 s 6. Emanations from the Crown pursuant to statute were judicially noticed at common law: see PARA 780 text and note 2. As to statutory instruments see the text and notes 10-13.

2 The word 'order' in the Documentary Evidence Act 1868 should be given a wide meaning covering at any rate any executive act of government performed by the bringing into existence of a public document for the purpose of giving effect to an Act of Parliament; it is not restricted to a document which amounts to subordinate or delegated legislation: *R v Clarke* [1969] 2 QB 91 at 97, [1969] 1 All ER 924 at 927, CA.

3 As to the meaning of 'Privy Council' see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 521.

4 'Office-holder in the Scottish Administration' has the same meaning as in the Scotland Act 1998: Documentary Evidence Act 1868 s 5(1) (numbered as such by SR & O 1937/230; definition added by SI 1999/1042). The government departments and officers to whom the Documentary Evidence Act 1868 s 2 originally applied and the departments to which the operation of that section has been extended are named in PARA 894.

5 See PARA 894.

6 'Gazette' includes the London Gazette, the Edinburgh Gazette and the Belfast Gazette or any of those gazettes (Documentary Evidence Act 1868 s 5(1) (as renumbered: see note 4); General Adaptation of Enactments (Northern Ireland) Order 1921, SR & O 1921/1804, art 7.

7 'Government printer' means and includes the printer to Her Majesty, the Queen's Printer for Scotland and any printer purporting to be the printer authorised to print the statutes, ordinances, acts of state or other public acts of any British colony or possession, or otherwise to be the government printer of the colony or possession; and 'British colony and possession' includes the Channel Islands, the Isle of Man and all other of Her Majesty's dominions: Documentary Evidence Act 1868 s 5(1) (as renumbered (see note 4); and amended by SI 1999/1042). In the application of the Documentary Evidence Act 1868 to Ireland, 'government printer' includes the officer appointed to print the Acts of the former Parliament of Northern Ireland or the Acts of the Northern Ireland Assembly: Documentary Evidence Act 1882 s 4; Government of Ireland (Adaptation of Enactments) (No 3) Order 1922, SR & O 1922/183, art 39; Northern Ireland Act 1998 s 5.

8 See the Documentary Evidence Act 1882 s 2; and PARA 889. Her Majesty's Stationery Office is now part of the Office of Public Sector Information, which itself is part of the National Archives.

9 Documentary Evidence Act 1868 s 2 (amended by SI 1999/1042). Nothing in the Civil Evidence Act 1995 (see PARA 808 et seq) affects the operation of the Documentary Evidence Act 1868 s 2 (as so amended): Civil Evidence Act 1995 s 14(3)(a).

As to the form of copies and extracts under the Documentary Evidence Act 1868 s 2 see PARA 893. The courts will not act on such proclamations, orders or regulations unless they are proved in one of the ways set out or in some other legitimate way: *Duffin v Markham* (1918) 88 LJB 581, DC; *Tyrrell v Cole* (1918) 120 LT 156; *Todd v Anderson* 1912 SC (J) 105; and cf *Snell v Unity Finance Co Ltd* [1964] 2 QB 203, [1963] 3 All ER 50, CA. However, formal proof of a well known instrument should not be insisted upon (*Palastanga v Solman* [1962] Crim LR 334, DC), and it may often be right to grant an adjournment to afford a prosecutor an opportunity of providing such proof (see *Royal v Prescott-Clarke* [1966] 2 All ER 366, [1966] 1 WLR 788, DC).

10 As to the meaning of 'statutory instruments' see the Statutory Instruments Act 1946 s 1; and **STATUTES** vol 44(1) (Reissue) PARA 1503. Some statutory instruments are to be judicially noticed: see PARA 780 text and notes 3-4. Proof of some others is provided for in a particular way: see eg the Emergency Laws (Re-enactments and Repeals) Act 1964 s 8(4); and **WAR AND ARMED CONFLICT**. Statutory instruments may also be proved as public documents by means of certified copies under the Evidence Act 1851 s 14 (see PARA 884) and the Evidence Act 1845 s 1 (see PARA 887).

As to bringing statutory instruments to the notice of persons affected see the Statutory Instruments Act 1946 s 3(2); *R v Sheer Metalcraft Ltd* [1954] 1 QB 586, [1954] 1 All ER 542; and **STATUTES** vol 44(1) (Reissue) PARA 1511.

The English and Welsh texts of (1) any Assembly Measure or Act of the Assembly which is in both English and Welsh when it is enacted; or (2) any subordinate legislation which is in both English and Welsh when it is made, are to be treated for all purposes as being of equal standing: Government of Wales Act 2006 s 156(1). As to the admissibility of Welsh Assembly documents see PARA 889.

11 See the Statutory Instruments Act 1946 s 2(1); the Statutory Instruments Regulations 1947, SI 1948/1, regs 5-8; and **STATUTES** vol 44(1) (Reissue) PARA 1506.

12 Statutory Instruments Act 1946 s 2(1) (ss 2, 3 amended by the Statutory Instruments (Production and Sale) Act 1996 s 1(1)).

13 See the Statutory Instruments Act 1946 s 3(1) (as amended: see note 12); the Statutory Instruments Regulations 1947, SI 1948/1, reg 10(2) (annual lists); and **STATUTES** vol 44(1) (Reissue) PARA 1507.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/A. STATUTES, PARLIAMENTARY PROCEEDINGS, ORDERS AND BYELAWS/893. Form and certification of copies or extracts.

893. Form and certification of copies or extracts.

Any copy of or extract from any proclamation, order or regulation issued by Her Majesty or the Privy Council¹ or by or under the authority of certain government departments, officers or office-holders² may be in print or in writing or partly in print and partly in writing. No proof is required of the handwriting or official position of any person certifying to the truth of any copy of or extract from any proclamation, order or regulation³. Certification of a copy or extract must be made by the designated officer⁴. Copies of royal proclamations and those issued by the Privy Council must be certified by the clerk to the council or one of the members of the council⁵.

¹ As to the meaning of 'Privy Council' see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 521.

² See the Documentary Evidence Act 1868 s 2, Schedule; and PARAS 892, 894.

³ Documentary Evidence Act 1868 s 2 (amended by SI 1999/1042). Nothing in the Civil Evidence Act 1995 (see PARA 808 et seq) affects the operation of the Documentary Evidence Act 1868 s 2 (as so amended): Civil Evidence Act 1995 s 14(3)(a).

⁴ See the Documentary Evidence Act 1868 s 2(3), Schedule; and PARA 894.

⁵ Documentary Evidence Act 1868 s 2(3) (as amended: see note 3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/A. STATUTES, PARLIAMENTARY PROCEEDINGS, ORDERS AND BYELAWS/894. Departments and offices affected.

894. Departments and offices affected.

The departments to whose proclamations, orders, regulations and documents the provisions as to proof¹ apply are as follows:

- 82 (1) the Treasury²;
- 83 (2) the Admiralty, the Army Council and the Air Council³;
- 84 (3) Secretaries of State⁴;
- 85 (4) the Board of Trade⁵;
- 86 (5) the Charity Commission for England and Wales⁶;
- 87 (6) the Chief Inspector of Education and Training in Wales⁷;
- 88 (7) the Chief Inspector of Education, Children's Services and Skills⁸;
- 89 (8) the Chief Land Registrar⁹;
- 90 (9) the Commissioners for Revenue and Customs¹⁰;
- 91 (10) the Crown Estate Commissioners¹¹;
- 92 (11) the Defence Council¹²;
- 93 (12) the First Minister and deputy First Minister of Northern Ireland¹³;
- 94 (13) the Forestry Commissioners¹⁴;
- 95 (14) the Gas and Electricity Markets Authority¹⁵;
- 96 (15) the Lord President of the Council¹⁶;
- 97 (16) The Lord Privy Seal¹⁷;
- 98 (17) the Office for Standards in Education, Children's Services and Skills¹⁸;
- 99 (18) the Office of Communications¹⁹;
- 100 (19) the Postal Services Commission²⁰;
- 101 (20) the Registrar of Public Lending Right²¹;
- 102 (21) the Social Security, Child Support and Pensions Joint Authority²²;
- 103 (22) any office holder in the Scottish Administration²³;
- 104 (23) the Statistics Board (formerly the Office for National Statistics)²⁴; and
- 105 (24) the Welsh Ministers, the First Minister, a Welsh Minister and the Counsel General²⁵.

In addition, the provisions have been specifically applied to certain Secretaries of State and ministers²⁶.

The provisions have also been extended to facilitate the proof of certain byelaws²⁷, maps²⁸ and authorisations²⁹.

1 le the provisions of the Documentary Evidence Act 1868 s 2: see PARAS 892-893.

2 Documentary Evidence Act 1868 s 2, Schedule col 1 (amended by the Statute Law Revision Act 1893; the Statute Law (Repeals) Act 1989; and SI 1999/1042). The certifying officers for these purposes are any commissioner, secretary or assistant secretary of the Treasury: Documentary Evidence Act 1868 Schedule col 2 (as so amended).

3 Documentary Evidence Act 1868 Schedule col 1 (as amended: see note 2); modified by the Defence (Transfer of Functions) (No 1) Order 1964, SI 1964/488, art 2(1), (3), Sch 1 Pt I, providing that the Documentary Evidence Act 1868 s 2, Schedule (as so amended) (1) continues to have effect in relation to instruments issued

by or under the authority of the Minister of Defence or the Admiralty, but as if a Secretary or Under-Secretary of State were mentioned as the certifying officer in relation to the Admiralty and to the Minister of Defence; (2) continues to have effect in relation to instruments issued by or under the authority of the Army Council or the Air Council but as if a member of or Secretary to the Defence Council were mentioned as the certifying officer in relation to the Army Council and to the Air Council; (3) has effect as if the Defence Council, Admiralty Board, Army Board and Air Force Board were included and as if a member of or Secretary to the council or board were mentioned as the certifying officer in relation to the council or board; (4) has effect in relation to the Secretary of State for Defence and in relation to the Defence Council or any of those Boards as if the regulations referred to in the 1868 Act included any document issued by him or them.

4 Documentary Evidence Act 1868 Schedule col 1 (as amended: see note 2). Any Secretary or Under-Secretary of State is mentioned as the certifying officer: Schedule col 2 (as so amended). See also note 3; and the text and note 26.

5 Documentary Evidence Act 1868 Schedule col 1 (as amended: see note 2). Any member of the Board or any secretary or assistant secretary is mentioned as the certifying officer: see Schedule col 2 (as so amended). As to the construction of references to the Board of Trade see **TRADE AND INDUSTRY** vol 97 (2010) PARA 802.

6 See the Charities Act 1993 s 1, Sch 1A para 9, extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to the Commission and providing that they have effect as if any member or member of staff of the Commission authorised to act on behalf of the Commission were mentioned as the certifying officers and as if the regulations referred to in that Act included any document issued by or under the authority of the Commission; and **CHARITIES** vol 8 (2010) PARA 544.

7 See the Education Act 2005 s 19, Sch 2 para 6, extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to the chief inspector providing that they have effect as if as if the chief inspector and any person authorised to act on his behalf were mentioned in the list of certifying officers and as if the regulations referred to in that Act included any document issued by him or any such person. See **EDUCATION** vol 15(2) (2006 Reissue) PARA 966.

8 See the Education and Inspections Act 2006 s 115, Sch 12 para 5, extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to the Chief Inspector and providing that they have effect as if he and any person authorised to act on his behalf were mentioned as certifying officers and as if the regulations referred to in that Act included any document issued by him or any such person. See **EDUCATION** vol 15(2) (2006 Reissue) PARA 1346.

9 See the Land Registration Act 2002 s 99(4), Sch 7 para 6, extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to the registrar and providing that they have effect as if the registrar and any person authorised to act on his behalf were mentioned as certifying officers and as if the regulations referred to in that Act included any form or direction issued by the registrar or by any such person. See **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 1066.

10 See the Commissioners for Revenue and Customs Act 2005 s 24(5), (6), extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to the Commissioners in respect of a Revenue and Customs document and providing that they have effect as if a Commissioner and a person acting on his authority were mentioned as certifying officers; and see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 1203.

11 See the Crown Estate Act 1961 s 1(7), Sch 1 para 6, extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to the commissioners and providing that they have effect as if any person authorised under para 2 to sign documents on behalf of the commissioners were mentioned as certifying officers; and **CROWN PROPERTY** vol 12(1) (Reissue) PARA 282.

12 See note 3.

13 See the Northern Ireland (Modification of Enactments) (No 1) Order 1999, SI 1999/663, art 4, extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to the First Minister and deputy First Minister and providing that they have effect as if those ministers or a person authorised by them to act on their behalf were mentioned as certifying officers and as if the regulations referred to in the 1868 Act included any document issued by them; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. However, devolved government was suspended on 14 October 2002.

14 See the Forestry Act 1967 s 2(4), Sch 1 para 5(2), extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to the commissioners and providing that they have effect as if the chairman or any other commissioner, or the secretary, or any person authorised to act on behalf of the secretary, were mentioned as certifying officers and as if the regulations referred to in the 1868 Act included any document issued by the commissioners; and **FORESTRY** vol 52 (2009) PARA 34.

15 See the Consumers, Estate Agents and Redress Act 2007 s 60(8), (10), extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to the authority and providing that they have effect as if the authority and persons authorised to act on the authority's behalf were mentioned as certifying officers. See **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 708 et seq.

16 See the Transfer of Functions (Arts, Libraries and National Heritage) Order 1986, SI 1986/600, art 4, extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to the Lord President and providing that they have effect as if he or any person authorised to act on his behalf were mentioned as a certifying officer and as if the regulations referred to in the 1868 Act included any document issued by the Lord President; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

17 See the Transfer of Functions (Equality) Order 2007, SI 2007/2914, art 4(5), extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to the Lord Privy Seal and providing that they have effect as if any person authorised to act on behalf of the Lord Privy Seal were mentioned as a certifying officer and as if references to any regulation issued by or under the authority of an officer included references to any document issued by or under the authority of the Lord Privy Seal. See **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 527.

18 See the Education and Inspections Act 2006 s 112(4), Sch 11 para 11, extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to the Office and providing that they have effect as if any member or other person authorised to act on behalf of the Office were mentioned as certifying officers and as if the regulations referred to in that Act included any document issued by or under the authority of the Office. See **EDUCATION**.

19 See the Communications Act 2003 s 403(8), extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to OFCOM and providing that they have effect as if OFCOM and persons authorised to act on its behalf were mentioned as certifying officers; and **TELECOMMUNICATIONS** vol 97 (2010) PARA 45.

20 See the Consumers, Estate Agents and Redress Act 2007 s 60(8), (10), extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to the commission and providing that they have effect as if the commission and persons authorised to act on the commission's behalf were mentioned as certifying officers. See **POST OFFICE** vol 36(2) (Reissue) PARA 10.

21 See the Public Lending Right Act 1979 s 1(3), Schedule para 6, extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to the registrar and providing that they have effect as if the registrar and any person authorised to act on his behalf were mentioned as certifying officers and as if the regulations referred to in the 1868 Act included any documents issued by the registrar or by any such person; and **LIBRARIES AND OTHER SCIENTIFIC AND CULTURAL INSTITUTIONS** vol 28 (Reissue) PARA 444.

22 See the Northern Ireland Act 1998 s 88(6), extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to the joint authority and providing that they have effect as if any member or the secretary, or any person authorised to act on behalf of the secretary, of the joint authority were mentioned as certifying officers and as if the regulations referred to in the 1868 Act included any document issued by the joint authority; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS; SOCIAL SECURITY AND PENSIONS**. See also note 13.

23 Documentary Evidence Act 1868 Schedule col 1 (as amended: see note 2). A member of the staff of the Scottish Administration is a certifying officer: see Schedule col 2 (as so amended).

24 See the Transfer of Functions (Economic Statistics) Order 1989, SI 1989/992, art 6(1) (extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to the Central Statistical Office and providing that they apply as if the Chancellor or any person authorised to act on his behalf were mentioned in relation to that office as the certifying officer and as if the regulations referred to in the 1868 Act included any document issued by that office); the Transfer of Functions (Registration and Statistics) Order 1996, SI 1996/273, art 5(3); the Statistics and Registration Service Act 2007; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 605.

25 See the Government of Wales Act 2006 s 90(7), extending the provisions of the Documentary Evidence Act 1868 s 2, Schedule to the Welsh Ministers, the First Minister, a Welsh Minister appointed under s 48 and the Counsel General and providing that they have effect as if a member of the staff of the Welsh Assembly Government were mentioned as a certifying officer and as if the reference to regulations issued by or under the authority of an officer included a reference to any document issued by or under the authority of the Welsh Ministers, the First Minister, a Welsh Minister or the Counsel General. See **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

26 See note 3; and see eg the Secretaries of State for Education and Skills and Work and Pensions Order 2002, SI 2002/1397, arts 3(5), 4(5); the Secretaries of State for Children, Schools and Families, for Innovation, Universities and Skills and for Business, Enterprise and Regulatory Reform Order 2007, SI 2007/3224, arts 3(5)(b), 4(5)(b), 5(5)(b); the Secretary of State for Justice Order 2007, SI 2007/2128, art 4(5).

27 See the Military Lands Act 1892 s 17(3); and **ARMED FORCES** vol 2(2) (Reissue) PARA 124. As to proof of byelaws generally see PARA 895.

28 Eg main river maps: see the Water Resources Act 1991 s 193(3)(b); and **WATER AND WATERWAYS** vol 101 (2009) PARA 574.

29 Eg authorisations given in writing by the Secretary of State for the purposes of the Terrorism Act 2000: see the Terrorism Act 2000 s 120(4); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 453.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/A. STATUTES, PARLIAMENTARY PROCEEDINGS, ORDERS AND BYELAWS/895. Byelaws.

895. Byelaws.

Byelaws may generally be proved in some particular manner by the statute under which they are made¹. Where no statutory provision exists, proof must usually be given of the fulfilment of the conditions precedent to the validity of the byelaws², or such fulfilment may be presumed in appropriate circumstances, including perhaps sufficiently long use³.

1 As to proof of local authority byelaws see eg the Local Government Act 1972 s 238; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 568. As to the byelaws of other corporations see **COMPANIES; CORPORATIONS**. As to byelaws relating to parks, open spaces and historic buildings see **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 1068 et seq; **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 501 et seq. As to byelaws by harbour authorities see **SHIPPING AND MARITIME LAW**. As to byelaws made by the Channel Tunnel concessionaires see the Channel Tunnel Act 1987 s 20. As to byelaws under the Military Lands Act 1892 see PARA 894 note 27.

2 See *Motteram v Eastern Counties Rly Co* (1859) 7 CBNS 58, where byelaws of a railway company, duly made and confirmed, were treated as public documents.

3 See *R v Powell* (1854) 3 E & B 377; and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1198.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/B. OFFICIAL CERTIFICATES/896. Admissibility of certificates.

B. OFFICIAL CERTIFICATES

896. Admissibility of certificates.

At common law the general rule was that certificates were not admissible in evidence to prove the facts stated in them¹. Some certificates, however, were admissible at common law, and are now admissible in civil cases by statute², as being public documents³. Certain other certificates were admissible at common law as exceptions to the rule against hearsay⁴; they are now only admissible in civil cases to prove the facts stated in them if they comply with the provisions of the Civil Evidence Act 1995⁵.

Where the court acts upon a certificate by the Secretary of State as to the existence or non-existence of a state of war, or as to the sovereign status of a foreign power or individual, the proper view is that it is not receiving evidence, but is taking judicial notice⁶.

1 *Omichund v Barker* (1745) Willes 538 at 549, 550.

2 See the Civil Evidence Act 1995 s 7(2)(b), (c); and PARAS 821-822.

3 For the principles which determine whether a document is admissible as a public document made for the public benefit see PARAS 902-905. Visitations of heralds for the purposes of the Court of Chivalry fall into this category: *Sturla v Freccia* (1880) 5 App Cas 623, HL; but cf the observations made in the Court of Appeal in that case: see (1879) 12 ChD 411, CA, and PARA 905 notes 13-14. Justices' certificates as to encroachments on, or repairs to, highways are admissible as evidence of those facts: see *R v Randall* (1662) 1 Keb 256; *R v Mawbey* (1796) 6 Term Rep 619.

4 See *London Corpn v Cox* (1867) LR 2 HL 239 (Recorder of London's certificate as to customs of London); *Ilderton v Ilderton* (1793) 2 Hy BI 145 (bishop's certificate as to marriage or excommunication); *Ferguson v Benyon* (1867) IR 1 Eq 475 (certificate of Secretary of State for India to prove local official's competence to administer oaths); *Whaley v Carlisle* (1866) 17 ICLR 792 (passport signed by Secretary of State used to prove that the person described was abroad on a certain date); *Re Klingemann* (1862) 32 LJPM & A 16; *Re Prince Peter Oldenburg* (1884) 9 PD 234 (ambassador's certificate to prove foreign law); cf *Rothschild v Austrian Property Administrator* [1923] 2 Ch 542 (certificate issued by Austrian Federal Chancery as to nationality law rejected).

5 See the Civil Evidence Act 1995 ss 2-4; and PARAS 811-815.

6 See PARA 786. Cf *Krajina v Tass Agency* [1949] 2 All ER 274, CA, where an ambassador's certificate was admitted to prove the status of the Tass agency as an organ of the former Soviet state. If the court had not been taking judicial notice but had been receiving evidence, then such a certificate would now be admissible only in the same way as those mentioned in the text and notes 4-5.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/B. OFFICIAL CERTIFICATES/897. Certificates admissible by statute.

897. Certificates admissible by statute.

Various statutes have provided for certain facts to be proved by certificate¹ or notice. The evidential effect of a certificate or notice given in accordance with a particular statute depends on the wording of the statute. Thus a certificate or notice may be declared to be conclusive evidence², sufficient evidence³, or merely evidence⁴ of the facts certified. Where a certificate is said to be conclusive, no evidence may be given in contradiction of it⁵; a certificate said to be sufficient evidence has in certain contexts been held to be conclusive⁶, but it is more usual for it to be conclusive only if there is no evidence to the contrary⁷.

1 Certified copies of public documents are received as secondary evidence of the originals. As to such certified copies see PARA 887.

2 See eg the Diplomatic Privileges Act 1964 s 4 (Secretary of State's certificate relating to diplomatic privilege or immunity); and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 282; the Animal Health Act 1981 s 17(3) (notice served in pursuance of directions of the minister or of a local authority by virtue of an order made under s 17); and **ANIMALS** vol 2 (2008) PARA 1072; the British Nationality Act 1981 s 45(4) (certificate given by or on behalf of the Secretary of State that a person was at any time in Crown service under the government of the United Kingdom or that a person's recruitment for such service took place in the United Kingdom); and **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 39; the Companies Act 1985 s 13(7) (certificate of incorporation); and **COMPANIES** vol 14 (2009) PARA 119.

3 See eg the Air Force Act 1955 s 2(4) (recruiting officer's certificate that he is satisfied person offering to enlist has or has not attained appropriate minimum age); and **ARMED FORCES**; the Civil Aviation Act 1982 s 95(3) (certificate that person charged with offence was present at making of deposition); and **AIR LAW** vol 2 (2008) PARA 618; the Food Safety Act 1990 s 30(8) (certificate of food analyst or examiner); and **FOOD**; the Finance Act 1993 s 35(1) (certificate of Commissioners for Revenue and Customs given for certain purposes); and **INCOME TAXATION**; the Lands Clauses Consolidation Act 1845 s 17 (justices' certificate of subscription of capital); the Representation of the People Act 1983 s 180A (certificate of electoral registration); and **ELECTIONS AND REFERENDUMS** vol 15(4) (2007 Reissue) PARA 884.

4 See eg the Architects Act 1997 s 3(6) (certificate of registration); the Army Act 1955 s 187(4A) (certificate stating that a person is a member of, and illegally absent from, the regular forces, and purporting to be signed by an officer who, if that person were charged with an offence, would be either his commanding officer or authorised to act as his appropriate superior authority); and **ARMED FORCES**; the Channel Tunnel Act 1987 s 20(8) (certificate relating to byelaws made by the concessionaires); the Companies Act 2006 s 768(1) (certificate under the common seal of the company specifying any shares held by a member is prima facie evidence of his title to them); and **COMPANIES** vol 14 (2009) PARA 381; the Freedom of Information Act 2000 s 25(2) (document purporting to be certified by or on behalf of a Minister of the Crown as a true copy of a certificate issued by that minister under s 23(2) or s 24(3)); the Highways Act 1980 s 14C (certificate by or on behalf of Transport for London that any highway or proposed highway is, or is not, for the time being a GLA road); and **HIGHWAYS, STREETS AND BRIDGES**. As to certificates of convictions for certain purposes of the Powers of Criminal Courts (Sentencing) Act 2000 see s 113; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

5 *Hammond v Prentice Bros Ltd* [1920] 1 Ch 201; *Kerr v John Mottram Ltd* [1940] Ch 657, [1940] 2 All ER 629; and see *A-G v Bournemouth Corpn* [1902] 2 Ch 714, CA. See PARA 767.

6 *Ystalyfera Iron Co v Neath and Brecon Rly Co* (1873) LR 17 Eq 142; *Lewis v Leonard* (1880) 5 ExD 165, CA.

7 See *Barracrough v Greenhough* (1867) LR 2 QB 612, Ex Ch; *R v Fordham* (1873) LR 8 QB 501; *Board of Trade v Sailing Ship Glenpark* [1904] 1 KB 682, CA; *Garbutt v Durham Joint Committee* [1906] AC 291, HL; *Re Duce and Boots Cash Chemists (Southern) Ltd's Contract* [1937] Ch 642, [1937] 3 All ER 788; *Preston v Fennell* [1951] 1 KB 16, [1950] 1 All ER 1099, DC (decided under the Food and Drugs Act 1938 (repealed)).

Where a certificate is said merely to be evidence, it is thought that a court would not be obliged as a matter of law to accept the facts certified, even if there were no evidence to the contrary; cf *Société Generale de Paris v*

Walker (1855) 11 App Cas 20 at 42, HL, per Lord Fitzgerald ('prima facie evidence' in the Companies Act 1862 s 31 (repealed), means evidence that is to be taken as correct until the contrary is made to appear); and see the authorities cited in PARA 767, PARA 908 note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/C. COMMONWEALTH AND FOREIGN ACTS OF STATE, STATUTES AND JUDGMENTS/898. Commonwealth enactments.

C. COMMONWEALTH AND FOREIGN ACTS OF STATE, STATUTES AND JUDGMENTS

898. Commonwealth enactments.

Copies of colonial laws or reserved bills, certified by the clerk or other proper officer of the legislative body of the colony¹ as true copies, are prima facie evidence that the copies are true copies and that the laws have been duly and properly passed and assented to, or that the bills have been duly and properly passed and presented to the Governor for the signification of Her Majesty's pleasure; and a proclamation purporting to be published by the authority of the Governor in any newspaper in the relevant colony and signifying disallowance of the law or assent to a reserved bill is prima facie evidence of the disallowance or assent².

Copies of Acts, ordinances and statutes passed by the legislature of any British possession³, or any prescribed British protectorate⁴, and of such orders, regulations and of orders, regulations and other instruments issued or made under the authority of any such Act, ordinance or statute, are to be received in evidence by all courts of justice in the United Kingdom, if purporting to be printed by the government printer⁵, without any proof being given that the copies were so printed⁶.

Without prejudice to the above provisions⁷, any Act of Tynwald or other instrument forming part of the law of the Isle of Man may, in any proceedings in the United Kingdom relating to a common duty or to importation or exportation into or from the United Kingdom or the Isle of Man, be proved by producing a copy of the Act or instrument authenticated by a certificate purporting to be signed by or on behalf of the Attorney General for the Island⁸. Any provision contained in or having effect under an Act of Tynwald which (1) prescribes the mode or burden of proof with respect to any matter in proceedings relating to a common duty chargeable under the law of the Isle of Man; and (2) corresponds to a provision of United Kingdom law for similar purposes, applies to any proceedings in the United Kingdom relating to that duty⁹.

1 In the Colonial Laws Validity Act 1865 'colony' includes all Her Majesty's possessions abroad in which a legislature exists, except the Channel Islands and the Isle of Man: Colonial Laws Validity Act 1865 s 1 (amended by the Burma Independence Act 1947 s 5, Sch 2; and the Statute Law (Revision) Act 1976). The Colonial Laws Validity Act 1865 does not apply to any law made after 11 December 1931 by the parliament of a dominion (Statute of Westminster 1931 s 2(1)), nor does it apply to laws of any former colony made after independence (see **COMMONWEALTH**). As to the proving of certain Acts of Tynwald or other instruments forming part of the law of the Isle of Man see the Isle of Man Act 1979 s 12; and the text and notes 7-9. 'Legislature' in the Colonial Laws Validity Act 1865 means the authority, other than the Imperial Parliament of Her Majesty in Council, competent to make laws for any colony: s 1. As to the disapplication of the 1865 Act for certain purposes see also the Australia Act 1985 s 3.

2 Colonial Laws Validity Act 1865 s 6. As to the means of proving legislative acts of foreign powers see *Re Amand*[1941] 2 KB 239, DC. As to the proof of foreign law generally see PARAS 1085-1093.

3 'British possession' means any part of Her Majesty's dominions exclusive of the United Kingdom, and, where parts of those dominions are under both a central and a local legislature, it includes both all parts under the central legislature and each part under a local legislature: Evidence (Colonial Statutes) Act 1907 s 1(3). As to the meaning of 'United Kingdom' see PARA 221 note 2.

4 The Evidence (Colonial Statutes) Act 1907 may be extended by Order in Council to Cyprus and any British protectorate: s 1(5). It was extended to a number of protectorates and to Cyprus by Order in Council dated 18 October 1909, SR & O 1909/1230 (amended by SR & O 1922/418). The protectorates to which the 1907 Act was applied by those orders are now no longer protectorates and Cyprus is now an independent republic but the Order in Council may still be relevant to the application of the 1907 Act to the sovereign base areas of Akrotiri and Dhekelia which were retained when Cyprus became independent. See further **COMMONWEALTH**.

5 'Government printer' means, as respects any British possession, the printer purporting to be the printer authorised to print the Acts, ordinances or statutes of the legislature of that possession or otherwise to be the government printer of that possession: Evidence (Colonial Statutes) Act 1907 s 1(3). Where the imprint of the government printer was omitted, a colonial statute was received in evidence on proof that a copy of the statute had been supplied by the Colonial Office to the Bar library at the Royal Courts of Justice: *Taylor v Taylor and Hooper* (1923) 129 LT 30.

6 Evidence (Colonial Statutes) Act 1907 s 1(1). Nothing in the 1907 Act affects the Colonial Laws Validity Act 1865 (see the text and notes 1-2) (Evidence (Colonial Statutes) Act 1907 s 1(4)); and its operation is not affected by the enactment of the Civil Evidence Act 1995 (see s 14(3)(c)). As to the Civil Evidence Act 1995 see PARA 808 et seq. For examples of the use of the Evidence (Colonial Statutes) Act 1907 s 1(1) see *Gibson v Gibson* (1920) 37 TLR 124; *Waterfield v Waterfield and Pretorius* (1929) 73 Sol Jo 300; and see *Jasiewicz v Jasiewicz* [1962] 3 All ER 1017, [1962] 1 WLR 1426 (court entitled to construe statute once it has been proved). As to the admissibility in evidence of documents relating to the European Union see PARAS 1087, 780, 891.

7 le without prejudice to the Evidence (Colonial Statutes) Act 1907: see the text and notes 3-6.

8 Isle of Man Act 1979 s 12(1).

9 Isle of Man Act 1979 s 12(2). For the purposes of any proceedings in the United Kingdom relating to a common duty, an order may be made under the Bankers' Books Evidence Act 1879 (see PARA 939) in respect of books and persons in the Isle of Man: Isle of Man Act 1979 s 12(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/C. COMMONWEALTH AND FOREIGN ACTS OF STATE, STATUTES AND JUDGMENTS/899. Colonial and foreign acts of state and judicial documents.

899. Colonial and foreign acts of state and judicial documents.

Proclamations, treaties and other acts of state¹ of any foreign state or British colony², all judgments, decrees, orders, and other judicial proceedings of any colonial³ or foreign⁴ court, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of the parties authority to hear, receive and examine evidence, either by examined⁵ or by authenticated copies⁶.

The authenticated copy of a proclamation, treaty or other act of state must purport to be sealed with the seal of the state or colony to which the original document belongs; and the authenticated copy of a judgment, decree, order, or other judicial proceeding, or an affidavit, pleading or other legal document filed or deposited in the court of any foreign state or British colony must purport either to be sealed with the seal of the court to which the original document belongs, or, if the court has no seal, to be signed by the judge or one of the judges of the court, who must attach to his signature a statement on the copy that the court has no seal⁷.

For the purposes of the Extradition Act 2003, certain legal documents are provable by authenticated copies⁸.

1 'Act of state' has been construed so as to include a Belgian patent: see *Re Bett's Patent* (1862) 1 Moo PCCNS 49. As to acts of state see further **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 22 et seq.

2 'British colony' in the Evidence Act 1851 includes the islands of Guernsey, Jersey, Alderney, Sark and Man, and all other possessions of the British Crown wheresoever and whatsoever: s 19 (amended by the Statute Law Revision Act 1875; and the Statute Law Revision Act 1892). The Evidence Act 1851 does not extend to Scotland: s 18. Sections 7, 11 and the British Law Ascertainment Act 1859 (see PARAS 1092-1093) may be extended by Order in Council to any foreign country in which Her Majesty has jurisdiction for the time being: see the Foreign Jurisdiction Act 1890 s 5, Sch 1. These Acts were in the past extended to a number of territories which have now become independent countries; whether they remain in force in those countries depends on the law of those countries. As to facilities for the ascertainment in England of the law of countries which are members of the Commonwealth see **COMMONWEALTH**.

3 As to proof of Commonwealth enactments see PARA 898; and as to proof of foreign law generally see PARAS 1085-1093.

4 As to recognition and enforcement in this jurisdiction of foreign judgments see generally **CONFLICT OF LAWS**.

5 As to examined copies see *Motteram v Eastern Counties Rly Co* (1859) 7 CBNS 58; and see PARA 886.

6 Evidence Act 1851 s 7. The methods of proving foreign acts of state provided by s 7 are not exhaustive, and where it is not possible to obtain from the proper source examined copies or the form of proof required by the Act, the best secondary evidence of an act of state may be given: see *Finska Angfartygs AB v Baring Bros & Co Ltd* (1937) 157 LT 585. Certified copies of resolutions and certificates extracted from nationality proceedings in Czechoslovakia were not admitted in evidence in *Rothschild v Austrian Property Administrator* [1923] 2 Ch 542. As to proof of foreign and Commonwealth registers see PARAS 917-923.

7 Evidence Act 1851 s 7. If an authenticated copy purports to be sealed or signed as directed, it is to be admitted in evidence in every case in which the original could have been received, without proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached to it, where such a signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement: s 7. See also *Leishman v Cochrane* (1863) 1 Moo PCCNS 315 (copies of orders of the Supreme Court of Calcutta); *Loibl v Strampfer* (1867) 16 LT 720 (seal of Austrian court used for purpose of

cancelling stamps and authentication); *Cavan v Stewart* (1816) 1 Stark 525 (worn out court seal to be used although no longer capable of making an impression). In *R v Beadon* (1933) 24 Cr App Rep 59, CCA, a photostatic copy of an American certificate of nationalisation was not admitted in evidence, as it was authenticated by the seal of the United States of America and not by the seal of the court or the signature of the judge.

8 See the Extradition Act 2003 s 202; PARA 790; and **EXTRADITION**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/C. COMMONWEALTH AND FOREIGN ACTS OF STATE, STATUTES AND JUDGMENTS/900. Northern Ireland judicial documents.

900. Northern Ireland judicial documents.

Documents which by law are admissible in any court of justice in Northern Ireland without proof of the seal or stamp or signature authenticating them or of the judicial or official character of the persons appearing to have signed them, are admissible similarly in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having there by law or by consent of the parties authority to receive evidence¹.

¹ Evidence Act 1851 s 10 (modified by the Irish Free State (Consequential Adaptation of Enactments) Order 1923, SR & O 1923/405, art 2); and see *Re Mahon's Trust* (1852) 9 Hare 459 (affidavit sworn before a master in Ireland admissible).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/C. COMMONWEALTH AND FOREIGN ACTS OF STATE, STATUTES AND JUDGMENTS/901. Depositions taken abroad.

901. Depositions taken abroad.

Statutory provisions have been made as to the admissibility and proof of depositions and other documents¹ taken abroad².

1 Many foreign documents, formerly inadmissible, are now admissible, subject to certain requirements, by virtue of the Civil Evidence Act 1995 ss 2-4: see PARAS 811-815.

2 As to evidence taken before an examiner or furnished pursuant to letters of request see PARAS 992 et seq, 1055 et seq. As to the admissibility of duly authenticated documents in proceedings under the Extradition Act 2003 see s 202; PARA 790; and **EXTRADITION**. See also the Merchant Shipping Act 1995 s 286 (admissibility of deposition when witness cannot be produced); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 1108.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/D. PUBLIC SURVEYS, INQUIRIES, ASSESSMENTS AND REPORTS/902. Admissibility of contents.

D. PUBLIC SURVEYS, INQUIRIES, ASSESSMENTS AND REPORTS

902. Admissibility of contents.

Surveys, assessments, inquiries and reports are evidence of the truth of the matters stated if made under public authority and concerning matters of public interest¹. To render such a document admissible there must have been a judicial² or quasi-judicial duty to inquire, undertaken by a public officer, the matter must have been required to be ascertained for a public purpose, and the document must have been made for the purpose of the public³ making use of it and being able to refer to it⁴.

Although the document may be properly of a public nature, it is not admissible as such to prove any facts stated in it which do not fall within the scope of the writer's authority⁵. Moreover, a document made under public authority and concerning matters of public interest is not necessarily admissible to prove the facts stated in it for every purpose; whether or not this is so must depend upon the nature of the document and the objects for which it was drawn up⁶.

1 As to public documents, orders etc as evidence of boundaries see **BOUNDARIES**. As to definitive maps or statements as conclusive evidence of the existence of footpaths, bridleways or roads used as public paths see the Wildlife and Countryside Act 1981 s 56; PARA 955; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 592.

2 At common law judges' notes were not admissible as evidence of what occurred at the trial: *Griffin's Divorce Bill*[1896] AC 133, HL; cf *Houston v Marquis of Sligo*(1885) 29 ChD 448, CA, where the court admitted an official report made by the judge for the use of a higher court. Such documents may now be admissible to prove what took place at the trial by virtue of the Civil Evidence Act 1995: see PARA 808 et seq. Law reports are not admissible as evidence of the facts of cases reported in them: *Shepherd v Bray*[1906] 2 Ch 235; on appeal [1907] 2 Ch 571, CA.

3 'The public' in this context does not mean the whole world, but all persons concerned, for instance all persons interested in a manor in the case of an entry in the books of a manor: *Sturla v Freccia*(1880) 5 App Cas 623 at 643, HL, per Lord Blackburn.

4 The limits within which such documents are admissible are laid down by Lord Blackburn in *Sturla v Freccia*(1880) 5 App Cas 623 at 643, HL. See also *Ioannou v Demetriou*[1952] AC 84, [1952] 1 All ER 179, PC; *Mercer v Denne*[1905] 2 Ch 538, CA; *North Staffordshire Rly Co v Hanley Corpn*(1909) 73 JP 477, CA; *Daniel v Wilkin*(1852) 7 Exch 429. The document must be brought into existence for the purpose of its being retained indefinitely as a document of record available for inspection by the public: *White v Taylor*[1969] 1 Ch 150, [1967] 3 All ER 349. See also the cases cited in PARA 908 notes 3-4.

5 *Nothard v Pepper* (1864) 17 CBNS 39. See also *A-G v Antrobus*[1905] 2 Ch 188; *Glossop v Pole* (1814) 3 M & S 175; cf *Leighton v Leighton* (1720) 1 Stra 308; *Latkow v Eamer* (1795) 2 Hy Bl 437.

6 *Wilberforce v Hearfield*(1877) 5 ChD 709 (tithe commutation map rejected in case of disputed ownership). See also *Copstake v West Sussex County Council*[1911] 2 Ch 331; *Stoney v Eastbourne RDC* [1927] 1 Ch 367, CA; distinguish *Giffard v Williams*(1869) LR 8 Eq 494. For other instances of inadmissibility see *The Little Lizzie*(1870) LR 3 A & E 56 (Board of Trade inquiry as to negligence of master under Merchant Shipping Act 1854 (repealed) not admissible against the owners); *The Solway* (1885) 10 PD 137 (letter of master admissible against owners as evidence of facts stated but not of opinion); cf *Admiralty v Aberdeen Steam Trawling and Fishing Co*1909 SC 335; *Coleman v Kirkaldy* [1882] WN 103 (ordnance map inadmissible in case of disputed title; as to ordnance survey maps see PARA 943); *The Princess Juliana*, as reported in [1936] P 139 (report by Trinity House pilot not admissible against owners of vessel piloted). As to maps attached to enclosure awards see *Collis v Amphlett*[1918] 1 Ch 232, CA, revsd on other grounds [1920] AC 271, HL (enclosure award map not conclusive as to boundaries of common, it being no part of the valuer's duty to adjust any boundaries); cf *Frost*

v Richardson (1910) 103 LT 22; affd 103 LT 416, CA (tithe maps not evidence, but map annexed to enclosure award may be evidence against owner of land comprised in award).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/D. PUBLIC SURVEYS, INQUIRIES, ASSESSMENTS AND REPORTS/903. Documents made on behalf of the Crown.

903. Documents made on behalf of the Crown.

Records relating to Crown property or directly affecting the revenues of the Crown¹, and surveys of Crown property made for public purposes², are public documents for the purpose of the rule as to admissibility³. The same applies to records in the Exchequer of acts done by officers of the Crown in assertion or derogation of the royal title⁴, returns to a commission directing an inquiry as to Crown land⁵, ancient extents of Crown land⁶, and accounts of receivers general and other Crown officers⁷, but not to documents made on behalf of the Crown for merely temporary or private purposes⁸, such as a survey of Walmer Castle taken by direction of the Lord Warden of the Cinque Ports, or an estimate made by the royal engineer for the repair of Walmer Castle, or depositions taken in an information by the Attorney General against persons claiming to be entitled to the manor of Walmer⁹. Surveys of land which only devolved on the Crown after, and not before, the survey are not admissible under this head¹⁰.

1 *Mercer v Denne* [1905] 2 Ch 538, CA; cf *Sturla v Freccia* (1880) 5 App Cas 623, HL; *Duke of Beaufort v Smith* (1849) 4 Exch 450; *Daniel v Wilkin* (1852) 7 Exch 429; *Rowe v Brenton* (1828) 8 B & C 737 cited in note 2; *Duke of Newcastle v Broxtowe Hundred* (1832) 4 B & Ad 273. A vehicle registration book does not directly affect the revenues of the Crown within the principle enunciated by these cases: *R v Sealby* [1965] 1 All ER 701. As to vehicle registration documents see **ROAD TRAFFIC** vol 40(1) (2007 Reissue) PARAS 529-541.

2 See *Smith v Earl Brownlow* (1870) LR 9 Eq 241; cf *Duke of Beaufort v Smith* (1849) 4 Exch 450; *Daniel v Wilkin* (1852) 7 Exch 429; *Manchester Corp'n v Lyons* (1882) 22 ChD 287, CA. Generally, all documents coming under this head which relate to the possessions or revenues of the Duchies of Cornwall and Lancaster are admissible as public documents owing to the special interest which the Crown has in the duchies: *Rowe v Brenton* (1828) 8 B & C 737; cf *Brisco v Lomax* (1838) 8 Ad & El 198; *Blandy-Jenkins v Earl of Dunraven* (1898) 62 JP 661.

3 Such documents are distinguishable from admissions by the Crown: see eg *Irish Society v Bishop of Derry* (1846) 12 Cl & Fin 641, HL. For the rule as to the admissibility of documents made under public authority and concerning matters of public interest see PARA 902.

4 *Mercer v Denne* [1905] 2 Ch 538, CA.

5 *Rowe v Brenton* (1828) 8 B & C 737.

6 *Rowe v Brenton* (1828) 8 B & C 737; *Doe d William IV v Roberts* (1844) 13 M & W 520.

7 *Doe d William IV v Roberts* (1844) 13 M & W 520; *A-G v Lord Hotham* (1823) Turn & R 209.

8 *Mercer v Denne* [1905] 2 Ch 538, CA; and see *Duke of Beaufort v Smith* (1849) 4 Exch 450; *Phillips v Hudson* (1867) 2 Ch App 243.

9 *Mercer v Denne* [1905] 2 Ch 538, CA.

10 *Daniel v Wilkin* (1852) 7 Exch 429.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/D. PUBLIC SURVEYS, INQUIRIES, ASSESSMENTS AND REPORTS/904. Documents prepared by public officials.

904. Documents prepared by public officials.

There are numerous instances of documents which have been regarded as admissible as public documents made under public authority and concerning matters of public interest¹. Some examples are:

- 106 (1) documents drawn up by public commissioners², surveyors³, valuers⁴ or customs house searchers⁵ appointed under statute or otherwise⁶;
- 107 (2) the Domesday Book⁷;
- 108 (3) returns made by a bishop in obedience to Exchequer writs⁸;
- 109 (4) entries made by a bishop on his visitation, if he had a right to make them⁹;
- 110 (5) the report of a committee of the General Medical Council acting under statutory authority, which was held to be admissible, though not conclusive evidence of professional misconduct on the part of a dentist¹⁰;
- 111 (6) public surveys taken under an order of the Crown¹¹ or the Commonwealth Parliament¹²;
- 112 (7) the taxation of Pope Nicholas made in 1291¹³;
- 113 (8) an inquisition on the writ of ad quod damnum made in 1363¹⁴;
- 114 (9) extracts from hundred rolls taken by special commissioners in 1275¹⁵; and
- 115 (10) presentments in a manor court setting forth the bounds of the manor¹⁶.

In the case of a return to a royal commission, the document is not admissible as a public document unless signed and sealed by the commissioners¹⁷.

Additional examples are provided by statements and reports made by persons in a public position, or having competent means of knowledge¹⁸ as to matters in which the public are interested, such as memoranda entered by a former vicar in an ancient parochial register¹⁹; papers handed over to an incumbent by the representatives of his predecessor as papers belonging to the parish²⁰; answers by a clergyman to questions addressed by the bishop on the occasion of an augmentation by the governors of Queen Anne's Bounty²¹; the schedules of the temporal possessions of parochial churches and chapels known as ecclesiastical terriers²²; and plans deposited by a railway undertaking with a local authority in connection with a proposal to make a light railway²³.

The confidential report of a committee appointed by a public department of a foreign state to ascertain the fitness of a candidate for a public office in that state has been rejected as evidence of the candidate's age and family history, the authority not being a legal one for a public purpose, and the facts stated not being of a public nature²⁴; nor may a coroner's inquisition be received as evidence of the cause of death, because of the preliminary nature and limited scope of a coroner's inquest²⁵.

1 For such documents to be admissible, the question must be one relating to public and general rights as opposed to private rights, and must be one within the duty of the person who made the document: *Knight v David* [1971] 3 All ER 1066, [1971] 1 WLR 1671. See also the cases cited in PARA 902 notes 5-6.

2 Eg (1) the commissioners acting under the Tithe Commutation Acts (see now the Tithe Act 1936) (*Giffard v Williams* (1869) 38 LJ Ch 597; *A-G v Antrobus* [1905] 2 Ch 188; *A-G and Croydon RDC v Moorsom-Roberts*

(1907) 72 JP 123; *Stoney v Eastbourne Rural Council* [1927] 1 Ch 367, CA; *Kent County Council v Loughlin* (1975) 119 Sol Jo 528, CA; but the admissibility of such documents will depend upon the purpose for which they are to be adduced: see PARA 902 note 6); (2) the Commissioners of Sewers (*R v Leigh* (1839) 10 Ad & El 398; *New Romney Corp v New Romney Sewers Comrs* [1892] 1 QB 840, CA). In *Doe d Strode v Seaton* (1834) 2 Ad & El 171, assessments by Commissioners of Land Tax showing that at a certain date property was assessed in a certain name were admitted to show that the property at that date belonged to a person of that name; cf *Duke of Newcastle v Broxtowe Hundred* (1832) 4 B & Ad 273; *Doe d Smith v Cartwright* (1824) 1 C & P 218; *Johnson v Thompson* (1850) 15 LTOS 437. Such assessments, if irregularly kept, are not evidence as to the seisin of land: *Doe d Stansbury v Arkwright* (1833) 2 Ad & El 182n.

3 *Evans v Merthyr Tydfil UDC* [1899] 1 Ch 241, CA, distinguishing *Phillips v Hudson* (1867) 2 Ch App 243; cf *R v Norfolk County Council* (1910) 26 TLR 269, cited in PARA 905 note 4. See also **BOUNDARIES**.

4 Valuation lists were conclusive evidence of the value of the hereditaments included in the lists for the purpose of rates under the General Rate Act 1967 s 67(6) (repealed). As to valuation lists for the purposes of non-domestic rates and council tax see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARAS 118 et seq, 268 et seq.

5 *Johnson v Ward* (1806) 6 Esp 47.

6 Other examples are an inquisition under an order of the House of Commons as to fees payable in certain offices (*Green v Hewett* (1793) Peake 182), and an inquisition under the Exchequer seal as to seisin of land (*Tooker v Duke of Beaufort* (1757) 1 Burr 146).

7 *AB v --* (1617) Hob 188; *Rowe v Brenton* (1828) 8 B & C 737; *Duke of Newcastle v Broxtowe Hundred* (1832) 4 B & Ad 273. Extracts from Domesday Book were given in evidence in *Alcock v Cooke* (1829) 5 Bing 340, and in *Duke of Beaufort v John Aird & Co* (1904) 20 TLR 602. See also **BOUNDARIES**.

8 *Irish Society v Bishop of Derry* (1846) 12 Cl & Fin 641, HL.

9 *Sturla v Freccia* (1880) 5 App Cas 623, HL.

10 *Hill v Clifford* [1907] 2 Ch 236, CA; affd on other grounds sub nom *Clifford v Timms* [1908] AC 12, HL.

11 Eg the survey of 26 Hen 8 (1534); *Bullen v Michel* (1816) 2 Price 399, HL; *Lord Graves v Fisher* (1834) 3 Cl & Fin 1, HL; *Armstrong v Hewitt* (1817) 4 Price 216; cf *Drake v Smyth* (1818) 5 Price 369. See also **BOUNDARIES**.

12 *Freeman v Read* (1863) 4 B & S 174, where the de facto authority of the Commonwealth Parliament appears to have been the ground on which the document was received; distinguish *Duke of Beaufort v Smith* (1849) 4 Exch 450, where the document was rejected not because it was made under order of the Commonwealth Parliament, but because it was a private document being a survey of a manor and seignory granted by Parliament to Oliver Cromwell.

13 *Bullen v Michel* (1816) 2 Price 399, HL, where this survey was held admissible as to the rate and value at which the persons employed on it thought fit to estimate the living; cf *Drake v Smyth* (1818) 5 Price 369.

14 *Bullen v Michel* (1816) 2 Price 399, HL, where the inquisition was only held admissible to prove contemporary reputation as to the value of the land in question.

15 *Duke of Newcastle v Broxtowe Hundred* (1832) 4 B & Ad 273.

16 *Evans v Rees* (1839) 10 Ad & El 151.

17 *Slane Peerage* (1835) 5 Cl & Fin 23, HL.

18 *Vyner v Wirral RDC* (1909) 73 JP 242, DC. Important considerations as to admissibility are the public nature of the fact in issue, the purpose for which the document was made and the duty of its maker: see PARA 902 notes 4-6, note 1, and PARA 908 notes 3-4.

19 *Drake v Smyth* (1818) 5 Price 369.

20 *Earl v Lewis* (1801) 4 Esp 1, where the boundary of the parish was the question in issue.

21 *Carr v Mostyn* (1850) 5 Exch 69. The functions of Queen Anne's Bounty have been transferred to the Church Commissioners: see **ECCLESIASTICAL LAW**.

22 *Drake v Smyth* (1818) 5 Price 369; *R v Hall* (1866) LR 1 QB 632. The terrier must be signed by parishioners or parish officers: *Earl v Lewis* (1801) 4 Esp 1. As to terriers see **BOUNDARIES**.

23 *A-G v Antrobus* [1905] 2 Ch 188, where the question was whether a certain track was a public way; plans were admitted to show that the undertaking proposed to carry its line upon an embankment across it without making provision for continuing the alleged way.

24 *Sturla v Freccia* (1880) 5 App Cas 623, HL.

25 *Grime v Fletcher* [1915] 1 KB 734, CA; *Bird v Keep* [1918] 2 KB 692, CA; *Calmenson v Merchants' Warehousing Co* (1921) 90 LJPC 134, HL; *Barnett v Cohen* [1921] 2 KB 461; *Re Sigsworth, Bedford v Bedford* [1935] Ch 89; *Re Pollock, Pollock v Pollock* [1941] Ch 219, [1941] 1 All ER 360. The rule was at one time different: see *R v Eriswell Inhabitants* (1790) 3 Term Rep 707. See further **CORONERS** vol 9(2) (2006 Reissue) PARA 949 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/D. PUBLIC SURVEYS, INQUIRIES, ASSESSMENTS AND REPORTS/905. Private documents excluded.

905. Private documents excluded.

Where the document is of a private nature it is not admissible under the common law rule as being made under public authority and concerning matters of public interest¹. For the purpose of this rule private documents include books and pedigrees drawn up by the College of Heralds otherwise than in the discharge of an official duty², a certificate by a customs house officer certifying the measurement and tonnage of a vessel or a report by the master of a foreign vessel made to customs house officers as to the burthen of his ship and the number of the crew³, maps and plans prepared in the seventeenth century by direction of the Board of Ordnance⁴, an old chart in possession of the Admiralty but not shown to be an Admiralty chart⁵, ancient private maps⁶, a confidential report by a magistrate or other public person made under the direction of the Crown or the executive⁷, a private survey of land⁸, and an old collection of monumental inscriptions in country churches⁹. The report of a public analyst is not admissible as a public document to prove the facts stated in the report¹⁰, nor are the returns of the Meteorological Office which are based upon information supplied by volunteer observers in different districts¹¹. In peerage cases before the Committee of Privileges¹², however, numerous documents are admissible as public documents which are in the nature of certificates¹³, and would not be admitted as public documents in other cases¹⁴.

1 It may be admissible under some other head; eg under the provisions of the Civil Evidence Act 1995: see PARA 808 et seq.

2 *Shrewsbury Peerage* (1858) 7 HL Cas 1.

3 *Huntley v Donovan* (1850) 15 QB 96.

4 *Mercer v Denne* [1904] 2 Ch 534; affd [1905] 2 Ch 538, CA. In *R v Norfolk County Council* (1910) 26 TLR 269, Jelf J admitted ancient maps purporting to have been made by 'The King's Geographer'; see also *Trafford v St Faith's RDC* (1910) 74 JP 297, which was disapproved in *A-G v Horner (No 2)* [1913] 2 Ch 140, CA, and *Meacher v Blair-Oliphant* 1913 SC 417. As to maps see PARAS 943, 954.

5 *Mercer v Denne* [1904] 2 Ch 534; affd [1905] 2 Ch 538, CA.

6 *Hammond v Bradstreet* (1854) 10 Exch 390. As to private maps see PARA 954.

7 *Sturla v Freccia* (1880) 5 App Cas 623, HL; see also the report of that case in the Court of Appeal sub nom *Polini v Gray*, *Sturla v Freccia* (1879) 12 ChD 411.

8 *Daniel v Wilkin* (1852) 7 Exch 429.

9 *Shrewsbury Peerage* (1858) 7 HL Cas 1 (inadmissible to show what had been the inscription on a partly defaced tomb). As to inscriptions see further PARA 956.

10 *Shortt v Robinson* (1899) 63 JP 295; but see PARA 897 note 3.

11 *Burrows v Bedford School Board* (1902) 18 TLR 292. Cf *The Catherina Maria* (1866) LR 1 A & E 53.

12 See **COURTS** vol 10 (Reissue) PARAS 357-358.

13 See *Polini v Gray*, *Sturla v Freccia* (1879) 12 ChD 411, CA; *Shrewsbury Peerage* (1858) 7 HL Cas 1; *Slane Peerage* (1835) 5 Cl & Fin 23, HL; and as to certificates see PARA 896.

14 *Polini v Gray, Sturla v Freccia* (1879) 12 ChD 411, CA; but see that case on appeal sub nom *Sturla v Freccia* (1880) 5 App Cas 623, HL.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/E. REGISTERS OF BIRTHS, MARRIAGES AND DEATHS/906. In general.

E. REGISTERS OF BIRTHS, MARRIAGES AND DEATHS

906. In general.

A certified copy of an entry in a register purporting to be sealed or stamped with the seal of the General Register Office, relating to births, deaths and marriages in England and Wales¹, is to be received as evidence of the birth, death or marriage to which it relates, without any further or other proof of the entry². Subject to certain exceptions³, an entry or a certified copy of an entry of a birth or death in a register, or in a certified copy of a register, is not evidence of the birth or death unless the entry purports to be signed by some person professing to be the informant and to be such a person as might be required or permitted by law at the date of the entry to give to the registrar information concerning that birth or death⁴.

In order that an entry or a certified copy of the entry of a birth of a child in the register, or in a certified copy of the register, may be evidence of the birth, where the original entry was made after 1874 and more than three but less than 12 months have intervened between the date of the birth or the date when any living new-born child or still-born child was found exposed and the date of registration, the entry must purport either to be signed by the superintendent registrar as well as by the registrar or to have been made with the authority of the Registrar General⁵. Where more than 12 months have intervened the entry must purport to have been made with the authority of the Registrar General⁶.

In order that an entry of a death, a certified copy of it, or a certified copy of a register may be evidence of a death, where the original entry was made after 1874 and more than 12 months have intervened between the date of the death or the finding of the dead body and the date of registration, the entry must purport to have been made with the authority of the Registrar General⁷.

Certified copies of entries in registers of births and deaths and certified copies of the registers are deemed to be true copies notwithstanding differences in form between the original entries and the copies, provided there are no differences of substance⁸.

1 As to foreign and Commonwealth registers see PARA 917 et seq. As to parish and non-parochial registers see PARA 909 et seq.

2 Marriage Act 1949 s 65(3); Births and Deaths Registration Act 1953 s 34(6); *R v Weaver*(1873) LR 2 CCR 85; *Hubbard v Lees and Purden*(1866) LR 1 Exch 255. See also **CREMATION AND BURIAL; ECCLESIASTICAL LAW; REGISTRATION CONCERNING THE INDIVIDUAL**. As to births, deaths and marriages outside England and Wales see PARA 918.

3 The signature by the informant is not required (1) in relation to an entry of a birth which, not being an entry signed by a person professing to be a superintendent registrar, purports to have been made with the authority of the Registrar General; or (2) in relation to an entry of a death which purports to have been made upon a certificate from a coroner; or (3) in relation to an entry of a birth or death which purports to have been made in pursuance of the enactments with respect to the registration of births and deaths at sea; or (4) in relation to the re-registration of a birth under the Births and Deaths Registration Act 1953 s 9(5): s 34(2) (s 34(2), (3) amended by the Children Act 1975 s 108(1), Sch 3 para 13; the Births and Deaths Registration Act 1953 s 34(2) also amended by the Family Law Reform Act 1987 s 33(1), Sch 2 para 17, Sch 3 para 1).

4 Births and Deaths Registration Act 1953 s 34(1), (2) (as amended: see note 3). As to the persons who are required or permitted to give information to the registrar in respect of a birth or a death see **REGISTRATION CONCERNING THE INDIVIDUAL**.

5 Births and Deaths Registration Act 1953 s 34(3)(a) (as amended: see note 3).

6 Births and Deaths Registration Act 1953 s 34(3)(b) (as amended: see note 3).

7 Births and Deaths Registration Act 1953 s 34(4).

8 Births and Deaths Registration Act 1953 s 34(5). See further **REGISTRATION CONCERNING THE INDIVIDUAL**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/E. REGISTERS OF BIRTHS, MARRIAGES AND DEATHS/907. Facts of which entries and certified copies are evidence.

907. Facts of which entries and certified copies are evidence.

Entries in registers of births, marriages or deaths, certified copies of those entries and certified copies of the registers are prima facie, although not conclusive, proof of the particulars of all matters required by statute to be entered in them¹, except the cause of death². Thus a certificate of the Registrar General of a birth is prima facie evidence of the fact³, place and date of birth, the names and sex of the person born, the parents' names, usual addresses and dates of birth and the parents' occupations⁴. A certificate of the Registrar General of a death proves the fact⁵, place and date of death, and the sex, age and occupation of the dead person⁶, but is not admissible as evidence of the cause of death⁷. A certificate of the Registrar General of a marriage proves the fact⁸, place and date of the celebration of the marriage, the name, age, occupation and residence of each of the parties, and the name and occupation of the father of each of the parties⁹.

1 See *Brierley v Brierley and Williams* [1918] P 257; *Re Stollery, Weir v Treasury Solicitor* [1926] Ch 284, CA; *Jackson v Jackson and Pavan* [1964] P 25, [1960] 3 All ER 621.

2 See note 7.

3 *Brierley v Brierley and Williams* [1918] P 257; *Wilton & Co v Phillips* (1903) 19 TLR 390; *Re Goodrich, Payne v Bennett* [1904] P 138; *Re Stollery, Weir v Treasury Solicitor* [1926] Ch 284, CA. For similar provisions as to the date of birth entered in the Adopted Children Register see the Adoption and Children Act 2002 s 77(5); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 383. Birth or death certificates of children may, in conjunction with other evidence, be evidence of a lawful marriage of the parents: *Re Stollery, Weir v Treasury Solicitor* [1926] Ch 284, CA; and see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

4 See the Births and Deaths Registration Act 1953 s 34(6); the Registration of Births and Deaths Regulations 1987, SI 1987/2088, regs 7-14, Sch 2, Form 1; and **REGISTRATION CONCERNING THE INDIVIDUAL**. In relation to a birth occurring in Wales see the Registration of Births and Deaths (Welsh Language) Regulations 1987, SI 1987/2089; and **REGISTRATION CONCERNING THE INDIVIDUAL**.

5 *Parkinson v Francis* (1846) 15 Sim 160; *Trail v Kibblewhite* (1846) 10 Jur 107; *Riseley v Shepherd* (1873) 21 WR 783; *Re Valter's Trust* [1887] WN 128. Cf *Re Butler's Settlement Trusts* [1942] Ch 403, [1942] 2 All ER 191.

6 See the Births and Deaths Registration Act 1953 s 34(6); the Registration of Births and Deaths Regulations 1987, SI 1987/2088, regs 39-47, Sch 2, Forms 13-16; and **CREMATION AND BURIAL; REGISTRATION CONCERNING THE INDIVIDUAL**. In relation to a death occurring in Wales see the Registration of Births and Deaths (Welsh Language) Regulations 1987, SI 1987/2089; and **REGISTRATION CONCERNING THE INDIVIDUAL**.

7 *Bird v Keep* [1918] 2 KB 692, CA. This exception to the admissibility of particulars stated in entries in registers and in certificates was explained in *Re Stollery, Weir v Treasury Solicitor* [1926] Ch 284 at 321-322, CA, per Scrutton LJ, on the ground of the distinction of the registrar's duty in relation to receiving information for registration. Whereas, in general, he must make inquiry and is entitled to reject information which he thinks to be untrue, in the case of coroners' certificates or medical certificates giving the cause of death, the registrar must enter the cause of death as stated in the certificate: see the Births and Deaths Registration Act 1953 ss 22, 23; and **REGISTRATION CONCERNING THE INDIVIDUAL**.

8 *R v Hawes* (1847) 1 Den 270. As to the presumption of validity of a marriage see *Re Peete, Peete v Crompton* [1952] 2 All ER 599; PARA 1102; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 7.

9 See the Marriage Act 1949 s 65(3); the Registration of Marriages Regulations 1986, SI 1986/1442, regs 10-13, Sch 1, Form 13; and **REGISTRATION CONCERNING THE INDIVIDUAL**. For the equivalent provisions where the

entries are made in the Welsh language see the Registration of Marriages (Welsh Language) Regulations 1999, SI 1999/1621; and **REGISTRATION CONCERNING THE INDIVIDUAL**.

UPDATE

907 Facts of which entries and certified copies are evidence

NOTES 4, 6--SI 1987/2088 regs 7-13, 42, Sch 2 Form 1 amended: SI 2009/2165.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/F. OTHER PUBLIC REGISTERS/908. Entries in public registers generally.

F. OTHER PUBLIC REGISTERS

908. Entries in public registers generally.

Entries in public registers¹ are evidence² of the facts recorded, provided the register was required by law to be kept for public reference and the entries were made promptly and by the proper officer³. There must be a public duty to keep the register, and the information must be required to be preserved for the public use and benefit; registers kept under private authority, or for the benefit or information merely of private individuals, are inadmissible⁴. Such public registers, formerly admissible at common law, are now admissible in civil cases by virtue of the Civil Evidence Act 1995⁵.

1 As to the admissibility of copies of entries in public registers see PARA 884.

2 In some cases evidence contradicting an entry has been received: see *The Recepta* (1889) 14 PD 131; *Kemp v Elisha*[1918] 1 KB 228, CA; *Re Peete, Peete v Crompton*[1952] 2 All ER 599.

3 *Doe d France v Andrews*(1850) 15 QB 756; *Doe d Warren v Bray* (1828) 8 B & C 813; *Sturla v Freccia*(1880) 5 App Cas 623, HL. It is sufficient if the function of making the record has been fulfilled by two different officials, the first having knowledge of the facts and being under a statutory duty to record that knowledge and forward it to the second, who, in his turn, is under a duty to preserve the document for public inspection: *R v Halpin*[1975] QB 907, [1975] 2 All ER 1124, CA.

4 *Heyne v Fischel & Co* (1913) 110 LT 264; *Henry v Leigh* (1813) 3 Camp 499; *Huntley v Donovan*(1850) 15 QB 96; *Irish Society v Bishop of Derry* (1846) 12 Cl & Fin 641, HL; *Sturla v Freccia*(1880) 5 App Cas 623, HL; *Lilley v Pettit*[1946] KB 401, sub nom *Pettit v Lilley*[1946] 1 All ER 593, DC; *Andrews v Cordiner*[1947] KB 655, [1947] 1 All ER 777, DC; *Ioannou v Demetriou*[1952] AC 84, [1952] 1 All ER 179, PC.

5 Civil Evidence Act 1995 s 7(2)(b); see PARA 821.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/F. OTHER PUBLIC REGISTERS/909. Entries in parish registers.

909. Entries in parish registers.

Parish registers of baptisms, marriages and burials¹, being public documents², are admissible in evidence to prove the facts stated in them³. The registers must be kept in proper custody⁴, and the facts stated in them must have been properly and regularly recorded with reasonable promptness by the person whose duty it was to make such entries, or his deputy⁵. Errors, irregularities and erasures of a trifling character will not, in general, exclude the entries, but will merely affect their weight⁶.

Duly authenticated copies of entries in such registers are admissible as proof of the contents of the entries⁷. A short certificate of baptism in the prescribed form⁸ is valid for all purposes for which a certificate of baptism of any person compiled from a register of baptisms would have been valid⁹.

1 For the duty to keep parochial registers of baptisms and burials see the Parochial Registers and Records Measure 1978. As to parochial registers of marriages before 2 March 1837 see the Parochial Registers Act 1812 (repealed). As to the duty of the officiating clergyman to register a marriage in the case of a marriage according to the rites of the Church of England see the Marriage Act 1949 s 53(a). As to parochial registers generally see **ECCLESIASTICAL LAW**. As to registers of births, marriages and deaths in Ireland see PARA 918.

2 *Sturla v Freccia* (1880) 5 App Cas 623, HL; and see *Doe d Wollaston v Barnes* (1834) 1 Mood & R 386. See further PARA 908.

3 I.e. the facts that the person keeping the register has a duty to record. Cf *Doe d France v Andrews* (1850) 15 QB 756. As to the matters which must be recorded see PARA 910.

4 As to proper custody see PARA 871 et seq; and **ECCLESIASTICAL LAW**. The better view is that the official copy of the parish register deposited in the diocesan registry under the Canons Ecclesiastical (1603) canon 70 (repealed) is an original public document, and thus admissible without proof of the loss or destruction of the original parish register; cf *Walker v Countess of Beauchamp* (1834) 6 C & P 552; and see *Doe d Wood v Wilkins* (1846) 2 Car & Kir 328. For the modern law as to the deposit of registers in diocesan record offices see **ECCLESIASTICAL LAW**.

5 *Walker v Wingfield* (1812) 18 Ves 443; *Doe d Warren v Bray* (1828) 8 B & C 813; *Lyell v Kennedy* (1887) 56 LT 647, CA; cf *Bidder v Bridges* (1885) 54 LT 529.

6 *Lyell v Kennedy* (1889) 14 App Cas 437, HL.

7 Evidence Act 1851 s 14; see PARA 884. See also *Re Hall's Estate* (1852) 22 LJ Ch 177 (wrongly reported in 2 De GM & G 748) (extracts from parish registers of baptisms, marriages and deaths purporting to be signed severally by the incumbent, rector, vicar or curate admissible); followed in *Re Porter's Trusts* (1856) 25 LJ Ch 688 (extract signed by curate admissible).

8 Baptismal Registers Measure 1961 s 2(1), Schedule. The particulars to be inserted in the numbered spaces of the prescribed form are (1) the name of the parish or other place of which the register of baptisms in question is or was the register; (2) the Christian names of the baptised person as recorded in the entry followed by the surname of his father as recorded in the entry or if more than one such surname is so recorded or if his mother appears from the entry to have borne a different surname at the date of his baptism, such one of those surnames of his father or mother as the applicant may request: see Schedule Pt II paras (1), (2).

9 Baptismal Registers Measure 1961 s 2(2). All such short certificates which purport to be signed by the custodian of the register from which the certificate is compiled must be received as evidence of the baptism without further or other proof of the entry: s 2(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/F. OTHER PUBLIC REGISTERS/910. Facts proved by parochial registers of baptisms, marriages and burials.

910. Facts proved by parochial registers of baptisms, marriages and burials.

A register of baptisms proves a baptism according to the rites of the Church of England, its date, the child's Christian name¹, and the parents' names². In the case of baptisms since 1812, it is evidence of the parents' abode and quality, trade or profession (now expressed as the parents' address and occupation)³. It is not evidence of the date of birth⁴, even when a date purporting to be the date of birth appears in the register⁵, or of connected matters⁶. Although not itself evidence of the place of birth⁷, an entry in a baptismal register may assist in proving the place of birth where, for example, it is shown by other evidence that the child was extremely young when baptised⁸.

An entry in a parochial register of burials is evidence of the death of the person named in it⁹, and probably of his abode, but not, it seems, of the age of that person¹⁰.

A parochial register of marriages proves the fact and date of the celebration of a marriage in a parish or chapel according to the rites of the Church of England before 2 March 1837¹¹, and the names of the parties married¹². An entry of marriage is receivable as evidence of the marriage, even if the entry is only attested by one witness¹³.

1 *Webb v Haycock* (1854) 19 Beav 342.

2 Parochial Registers and Records Measure 1978 s 2, Sch 1 Form 1 (s 2, Sch 1 amended by the Church of England (Miscellaneous Provisions) Measure 1992 s 4, Sch 1 paras 2-4, 11); but as to the short form of certificate of baptism see PARA 909 note 8.

Provision has been made for the annotation of parochial registers when a person has been legitimated after baptism and the birth has been reregistered: see the Baptismal Registers Measure 1961 s 1, Schedule Pt I (s 1 amended by the Parochial Registers and Records Measure 1978 s 26(1), Sch 3 para 5); and **ECCLESIASTICAL LAW**. As to reregistration see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 552 et seq.

3 Parochial Registers Act 1812 ss 1-3, Sch (A) (repealed); Parochial Registers and Records Measure 1978 s 2, Sch 1 Form 1 (as amended: see note 2).

4 *Robinson v Duke of Buccleuch and Queensberry* (1887) 3 TLR 472, CA; *Wiher v Law* (1821) 3 Stark 63; *R v Clapham* (1829) 4 C & P 29; *Burghart v Angerstein* (1834) 6 C & P 690; and see *Huet v Le Mesurier* (1786) 1 Cox Eq Cas 275. A baptismal certificate verified by a person interested in settled funds has been admitted as evidence that he had attained 21 years: *Re Bulley's Settlement* [1886] WN 80.

5 The date of birth must also now be entered in the register: see the Parochial Registers and Records Measure 1978 s 2, Sch 1 Form 1 (as amended: see note 2). Such an entry might, however, be admissible as hearsay evidence under the Civil Evidence Act 1995: see PARA 808 et seq.

6 See *Morris v Davies* (1828) 1 Mood & R 271, note (b); *Cope v Cope* (1833) 1 Mood & R 269; *Thrussell v Barker* (1868) 17 LT 665; *Re Turner, Glenister v Harding* (1885) 29 ChD 985; but cf *Robinson v Duke of Buccleugh and Queensberry* (1887) 3 TLR 472, CA. See also *Ryan v Ring* (1889) 25 LR Ir 184.

7 *R v Creech St Michael's Inhabitants* (1774) Burr SC 765; *R v North Petherton* (1826) 5 B & C 508.

8 *R v North Petherton* (1826) 5 B & C 508; *R v Birmingham Inhabitants*, called also *R v Aston Inhabitants* (1829) 8 LJOSMC 41; *R v Parish or Precinct of St Katherine* (1831) 5 B & Ad 970n; *R v Lubbenham Inhabitants* (1834) 5 B & Ad 968; *R v Crediton Inhabitants* (1858) EB & E 231.

9 *Doe d France v Andrews* (1850) 15 QB 756.

10 The particulars required to be entered in the register are the name of the deceased, his abode, date of burial and age, and the name of the person by whom the ceremony of burial was performed: Parochial Registers and Records Measure 1978 s 3, Sch 1, Form 2 (as amended: see note 2). See further **CREMATION AND BURIAL** vol 10 (Reissue) PARA 1109 et seq. In *Robinson v Duke of Buccleuch and Queensberry* (1887) 3 TLR 472, CA, the court held that neither a certificate of baptism nor of burial was evidence of the age of the person named in it. However, the date of birth was not then required to be entered in a baptismal register, although it was required to be entered in a register of burials. As to non-parochial registers of burials see PARA 914.

11 See PARA 909 note 1.

12 Parochial Registers Act 1812 ss 1-3, Sch (B) (repealed); Births and Deaths Registration Act 1836 s 1 (repealed); *Doe d Wollaston v Barnes* (1834) 1 Mood & R 386; *Doe d Jenkins v Davies* (1847) 10 QB 314. An entry in a marriage register is not conclusive evidence of the facts stated in it: *Draycott v Talbot* (1718) 3 Bro Parl Cas 564, HL. As to public registers of marriages see PARA 906.

13 *Doe d Blayney v Savage* (1844) 1 Car & Kir 487. Entries in marriage registers must be attested by two witnesses: see the Marriage Act 1949 s 55(2).

Where a marriage has been celebrated under special licence, the licence need not be produced in addition to an extract from the register in order to prove the marriage: *Doe d Earl of Egremont v Grazebrook* (1843) 4 QB 406.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/F. OTHER PUBLIC REGISTERS/911. Non-parochial registers formerly admissible at common law.

911. Non-parochial registers formerly admissible at common law.

At common law certain non-parochial registers, or duly certified extracts from them, were admissible in evidence if they came within the description of public documents¹; for example a bishop's register was admissible as evidence of the facts properly and regularly recorded in it². Where, however, the register was not one required to be kept for the public benefit, it was not admissible in evidence³; for example, registers kept at dissenting chapels⁴, or the registers of marriages kept at the Fleet and King's Bench prisons, and at the May Fair, Mint and Savoy chapels⁵.

The common law rule is preserved by the Civil Evidence Act 1995⁶.

1 *Lynch v Clerke* (1697) 3 Salk 154; *Birt v Barlow* (1779) 1 Doug KB 171. As to the requisites of a public register see PARA 908.

2 *Humble v Hunt* (1817) Holt NP 601 (register of leases admitted to prove lease where original and counterpart lost); *Arnold v Bishop of Bath and Wells* (1829) 5 Bing 316 (bishop's register evidence of business transacted at visitation); *Hartley v Cook* (1832) 5 C & P 441 (register admitted to prove right to appoint parish clerk). See also *R v Martin* (1809) 2 Camp 100 (vestry books admitted to prove due election of treasurer); *Bullen v Michel* (1816) 2 Price 399, HL (ancient entries made by monks in a register kept at an abbey admitted as evidence of facts stated).

3 *R v Debenham Inhabitants* (1818) 2 B & Ald 185 (entry in parish book made by parish officer purporting to relieve parish of its liability to support a pauper, rejected as concerning merely a dispute between two parishes); *Merrick v Wakley* (1838) 8 Ad & El 170 (register of attendances of medical officer of a union, kept under the Poor Law Commissioners' Orders, inadmissible for the same reason).

4 *Newham v Raithby* (1811) 1 Phillim 315; *Ex p Taylor* (1820) 1 Jac & W 483; *Whittuck v Waters* (1830) 4 C & P 375; *Re Woodward, Kenway v Kidd* [1913] 1 Ch 392; and see *Davis v Lloyd* (1844) 1 Car & Kir 275 (entry, in the handwriting of the chief rabbi, in a register of circumcision); *D'Aglié v Fryer* (1844) 13 LJ Ch 398 (certified copy of baptismal register kept at the chapel of the Sardinian ambassador in London). Registers of many religious bodies have long been admissible by statute: see PARA 912.

5 See *Morris v Miller* (1767) 4 Burr 2057; *Reed v Passer* (1794) Peake 231; *Lloyd v Passingham* (1809) 16 Ves 59; *Doe d Davies v Gatacre* (1838) 8 C & P 578. Cf *Lawrance v Dixon* (1792) Peake 185; *Doe d Orrel v Madox* (1794) 1 Esp 197.

6 See the Civil Evidence Act 1995 s 7(2)(b); and PARA 821.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/F. OTHER PUBLIC REGISTERS/912. Non-parochial registers admissible by statute.

912. Non-parochial registers admissible by statute.

Certain non-parochial registers of births, baptisms, deaths, burials or marriages, inadmissible at common law, have been made admissible by statute to prove the facts stated in them¹. These registers are receivable in evidence upon proof of deposit with the Registrar General, entry in his list, and due notice to the opposite party of an intention to produce them². Those registers which were deposited in the registry of the Bishop of London in 1821, for example those of the Fleet and King's Bench prisons, although transferred to the custody of the Registrar General, are not made receivable in evidence by the statutory provisions referred to above³ although evidence of their contents may now be admissible as hearsay under the provisions of the Civil Evidence Act 1995⁴.

1 See the Non-parochial Registers Act 1840 ss 6, 9-17 (s 11 amended by the Courts Act 1971 s 56(4), Sch 11 Pt IV); see also the Births and Deaths Registration Act 1858 ss 1-3 (repealed). A full account of these registers will be found in the reports dated 18 June 1838 and 31 December 1857 by commissions appointed to inquire into non-parochial registers. For a list of registers made evidence under the former Act see 9 C & P 793. See also **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 605.

2 See the Non-parochial Registers Act 1840 ss 6, 9-17 (as amended: see note 1); and see *Re Woodward, Kenway v Kidd* [1913] 1 Ch 392.

3 Non-parochial Registers Act 1840 ss 6, 20.

4 See the Civil Evidence Act 1995 ss 1-4; and PARA 808 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/F. OTHER PUBLIC REGISTERS/913. Production of non-parochial register or extract.

913. Production of non-parochial register or extract.

Any non-parochial register or record which is admissible in evidence under the relevant statutory provisions¹ must be produced by the Registrar General on subpoena or order of any competent court or tribunal, on payment of a reasonable sum for the loss of time and travelling and other expenses of the officer producing it². The production of any such register or record which is in the custody of the proper officer of the Registrar General is sufficient proof that the register or record is one deposited with the Registrar General in pursuance of the statutory provisions³.

A certified extract from any such register or record is also admissible without further proof in all civil cases, provided it purports to be sealed or stamped with the seal of the General Register Office⁴, and provided the extract contains a description of the register or record from which it is taken and expresses that it is one of the registers or records deposited with the Registrar General in pursuance of the statutory provisions⁵; but in criminal cases the original register or record must be produced⁶.

The party intending to use in evidence on the hearing of any matter which is not a criminal case any such certified extract must give written notice of his intention to the opposite party and at the same time deliver a copy of the extract and certificate, in sufficient time before the hearing to enable the opposite party to inspect the original register or record⁷; but if he intends to use the original register or record he must simply give notice and deliver a copy of a certified extract of the entry he intends to use in evidence⁸.

1 See PARA 912.

2 Non-parochial Registers Act 1840 s 6. As to witness summonses and writs of subpoena see PARA 1003 et seq.

3 Non-parochial Registers Act 1840 s 10.

4 Non-parochial Registers Act 1840 s 9.

5 Non-parochial Registers Act 1840 s 10.

6 Non-parochial Registers Act 1840 s 17.

7 Non-parochial Registers Act 1840 ss 11, 13 (s 11 amended by the Courts Act 1971 s 56(4), Sch 11 Pt IV).

8 Non-parochial Registers Act 1840 ss 12, 14. As to interlocutory proceedings (referred to in the Civil Procedure Rules as 'interim proceedings') see the Non-parochial Registers Act 1840 s 15 (certified extract accompanied by affidavit required).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/F. OTHER PUBLIC REGISTERS/914. Non-parochial registers of burials.

914. Non-parochial registers of burials.

Registers of burials are required to be kept under various Acts¹ relating to cemeteries and burial grounds². These registers, or copies or extracts from them, are to be received in all courts as evidence of the burials entered in them³.

1 The Local Government Act 1972, and regulations made under it, provide for burial authorities with powers to provide and maintain public cemeteries: see **CREMATION AND BURIAL** vol 10 (Reissue) PARA 908 et seq. The Cemeteries Clauses Act 1847 provides a separate statutory code applicable in certain circumstances: see **CREMATION AND BURIAL** vol 10 (Reissue) PARA 910.

2 See **CREMATION AND BURIAL** vol 10 (Reissue) PARA 1115 et seq. The registration of cremations is separately provided for: see **CREMATION AND BURIAL** vol 10 (Reissue) PARA 977 et seq.

3 See **CREMATION AND BURIAL** vol 10 (Reissue) PARA 1116.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/F. OTHER PUBLIC REGISTERS/915. Particular public registers.

915. Particular public registers.

Other registers¹ which are kept pursuant to statute are usually receivable as evidence (and sometimes as conclusive evidence) of the facts recorded. These registers, which are dealt with elsewhere in this work, include the registers relating to business names and companies², copyright and designs³, friendly societies⁴, title to land⁵, licensing⁶, motor vehicles and driving licences⁷, newspapers⁸, patents⁹, ships¹⁰, trade marks¹¹ and voters¹².

1 As to colonial and foreign registers see PARA 917 et seq. Certain military documents are admissible as evidence of the facts stated in them: see the Army Act 1955 s 198(5); the Air Force Act 1955 s 198(5); and **ARMED FORCES**.

2 See **COMPANIES**.

3 See **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS; PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 699 et seq.

4 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2149 et seq.

5 See **LAND REGISTRATION**.

6 See **INTOXICATING LIQUOR**.

7 See **ROAD TRAFFIC**.

8 See **PRESS, PRINTING AND PUBLISHING**.

9 See **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 585 et seq.

10 See **SHIPPING AND MARITIME LAW**.

11 See **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 19 et seq.

12 See **ELECTIONS AND REFERENDUMS**.

UPDATE

915 Particular public registers

NOTE 1--Army Act 1955 and Air Force Act 1955 repealed: Armed Forces Act 2006 Sch 17.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/F. OTHER PUBLIC REGISTERS/916. Registers of professional persons.

916. Registers of professional persons.

Authorised copies of registers kept pursuant to statute relating to persons qualified to practise in various professional capacities¹ are usually receivable as evidence of the registration or non-registration of any person. Some examples of such registers are those relating to architects², dentists³, doctors⁴, opticians⁵, solicitors holding practising certificates⁶ and veterinary surgeons⁷.

1 In some cases certificates by the persons appointed to keep the registers are admissible as to the facts stated in them.

2 See the Architects Act 1997 s 3.

3 See the Dentists Act 1984 s 14; and **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 417 et seq.

4 See the Medical Act 1983 s 34; and **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 34 et seq.

5 See the Opticians Act 1989 s 11; and **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 837 et seq.

6 See the Solicitors Act 1974 s 18; and **LEGAL PROFESSIONS** vol 65 (2008) PARA 672. As to solicitors in Scotland see s 30.

7 See the Veterinary Surgeons Act 1966 s 9; and **ANIMALS** vol 2 (2008) PARA 1133 et seq.

UPDATE

916 Registers of professional persons

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/G. REGISTERS IN OTHER JURISDICTIONS/917. Admissibility at common law.

G. REGISTERS IN OTHER JURISDICTIONS

917. Admissibility at common law.

At common law, colonial and foreign registers (including those of Scotland, Ireland and the Channel Islands) were admissible in courts in England and Wales to prove the facts stated in them, provided they were required to be kept by the law of the country to which they belonged, or by English law¹. When such registers themselves were admissible in evidence, certified and examined copies² of entries in them were also admissible³, but the court required to be satisfied⁴ that a certificate or other official document was in the form required by the law⁵ of the colony or foreign country⁶.

Such registers, formerly admissible at common law, are now admissible by virtue of the Civil Evidence Act 1995⁷, although specific statutory provisions have made entries in the public registers of many countries admissible as evidence in English and Welsh courts⁸.

1 *Alsop v Bowtrell* (1619) Cro Jac 541 (Utrecht); *Earl of Roscommon's Claim* (1828) 6 Cl & Fin 97, HL (Ireland); *Milligan v Mitchell* (1837) 3 My & Cr 72 (Scotland); *Coode v Coode* (1838) 1 Curt 755 (Barbados); *O'Connor v Malone* (1839) 6 Cl & Fin 572, HL; *Malone v L'Estrange* (1839) 2 I Eq R 16 (Ireland); *Earldom of Perth* (1848) 2 HL Cas 865 (France); *Re Forbes* (1852) 1 WR 32 (Madeira); *Ratcliffe v Ratcliffe and Anderson* (1859) 1 Sw & Tr 467 (India); *Abbott v Abbott and Godoy* (1860) 29 LJP & A 57 (Chile); *Evans v Ball* (1878) 38 LT 141; on appeal (1882) 47 LT 165, HL (Novia Scotia); *Lauderdale Peerage* (1885) 10 App Cas 692, HL (New York); *Burnaby v Baillie* (1889) 42 ChD 282 (France); *Wallace v Wallace* (1896) 74 LT 253 (Ireland).

2 As to certified and examined copies of public documents see PARA 884.

3 *Lyell v Kennedy, Kennedy v Lyell* (1889) 14 App Cas 437, HL; *Burnaby v Baillie* (1889) 42 ChD 282; and see *Evans v Ball* (1878) 38 LT 141.

4 See *Brown v Brown* (1917) 116 LT 702; *Mondschein v Mondschein* (1921) 37 TLR 665.

5 Eg a local statute: see *Bonhote v Bonhote* (1920) 89 LJP 140. See also *Coode v Coode* (1838) 1 Curt 755; *L (otherwise B) v L* (1919) 36 TLR 148; *Taylor v Taylor and Hooper* (1923) 129 LT 30.

6 *Waterfield v Waterfield and Pretorius* (1929) 73 Sol Jo 300. See also *Smith v Smith* (1913) 109 LT 744; *Roe v Roe* (1916) 115 LT 792; *Higgs v Higgs* (1920) 124 LT 382; *Wright v Wright and Boothman* (1923) 129 LT 832; *Matthews v Matthews* (1930) 99 LJP 142; cf *Finlay v Finlay and Rudall* (1862) 31 LJP & A 149.

7 See the Civil Evidence Act 1995 s 7(2)(b); and PARA 821. Such registers may also be admissible as hearsay under ss 1-4: see PARA 808 et seq.

8 See PARAS 922-923.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/G. REGISTERS IN OTHER JURISDICTIONS/918. Registers of births, marriages and deaths outside England and Wales.

918. Registers of births, marriages and deaths outside England and Wales.

Provision is made by the British Nationality Act 1981 and regulations made under that Act for the registration of the births and deaths (1) of British citizens, British overseas territories citizens, British Nationals (Overseas), British Overseas citizens, British subjects and British protected persons born or dying in a Commonwealth country to be registered there by the High Commissioner for Her Majesty's government in the United Kingdom or by members of his official staff¹; (2) of such persons born or dying in a foreign country to be registered there by consular officers or other officers in the service of Her Majesty's government in the United Kingdom² or, in the case of births and deaths in any country in which Her Majesty's government in the United Kingdom has for the time being no diplomatic or consular representation, to be registered either by persons serving in the diplomatic, consular or other foreign service of a country which, by arrangement with Her Majesty's government in the United Kingdom, has undertaken to represent that government's interest in that country or by a person authorised in that behalf by the Secretary of State³. Any entry in a register made under these provisions or under any of the former nationality Acts is to be received as evidence of the matters stated in the entry⁴ and may be proved by the production of a certified copy⁵.

In the case of births, marriages and deaths in Scotland, certified copies purporting to be sealed or stamped with the seal of the General Register Office in Edinburgh of entries in certified copies of register books kept in that office are admissible in evidence to prove the facts stated in those entries⁶.

Entries in registers of births, marriages and deaths in Northern Ireland⁷ may be proved by certified copies⁸.

The master of a ship registered in the United Kingdom⁹ is required to make returns of births and deaths occurring in his ship, and the master of a ship not registered in the United Kingdom which calls at a port in the United Kingdom is required to make returns of any birth or death of any British citizen, British overseas territories citizen or British Overseas citizen which has occurred in his ship during the voyage¹⁰. Certified copies of such returns are sent to the appropriate Registrar General to be recorded in the marine register¹¹; and the enactments relating to the registration of births and deaths in England have effect as if the marine register were a register of births and deaths or certified copies of entries in such a register, and had been transmitted to the Registrar General in accordance with those enactments¹². Similar provision has been made with respect to births and deaths occurring in any aircraft or hovercraft registered in Great Britain and Northern Ireland¹³.

Particular statutory provision was made with regard to the proof of marriages in certain former colonies and protectorates¹⁴.

1 See the British Nationality Act 1981 s 41(1)(g); the Registration of Overseas Births and Deaths Regulations 1982, SI 1982/1123, reg 4(1), (2); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARAS 591-592. As to the meaning of 'United Kingdom' see PARA 221 note 2.

2 See the British Nationality Act 1981 s 41(1)(h); the Registration of Overseas Births and Deaths Regulations 1982, SI 1982/1123, reg 4(1), (2); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARAS 591-592.

3 See the British Nationality Act 1981 s 41(1)(i) (amended by the British Overseas Territories Act 2002 s 2(2) (b); and by SI 1986/948); the Registration of Overseas Births and Deaths Regulations 1982, SI 1982/1123, reg 4(3) (amended by SI 1985/1574); and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARAS 591-592. The Secretary of State may also make provision by regulation as to the consequences of failure to comply with provision made under any of the British Nationality Act 1981 s 41(g)-(i): s 41(1)(j) (added by the Immigration, Asylum and Nationality Act 2006 s 50(4)). As to the births and deaths that may be registered see further the Registration of Overseas Births and Deaths Regulations 1982, SI 1982/1123, regs 5-11; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 593 et seq.

4 See the British Nationality Act 1981 s 45(3). 'Former nationality Acts' means (1) the British Nationality Acts 1948 to 1965 (repealed); (2) the British Nationality and Status of Aliens Acts 1914 to 1943 (repealed); and (3) any Act repealed by those Acts of 1914 to 1943 or by the Naturalisation Act 1870 (repealed): British Nationality Act 1981 s 50(1).

5 See the British Nationality Act 1981 s 45(1), (2); the Registration of Overseas Births and Deaths Regulations 1982, SI 1982/1123, reg 16; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 599.

6 *Lyell v Kennedy, Kennedy v Lyell* (1889) 14 App Cas 437, HL; *Wigley v Treasury Solicitor* [1902] P 233; Evidence Act 1851 s 14 (see PARA 884). See also *Drew v Drew* [1912] P 175; *Daniels v Daniels* (1916) 33 TLR 149, which are instances of irregular marriages. Another such instance is *Winterbottom v Winterbottom (otherwise Appleton)* (1922) 38 TLR 813, where the validity of the marriage was disputed on the ground of non-residence, and it was held that prima facie evidence of validity and term of residence was not displaced; cf *Bain v Mason* (1824) 1 C & P 202; *Nokes v Milward* (1824) 2 Add 386; *Patrickson v Patrickson* (1865) LR 1 P & D 86 (Gretna Green marriages registers not admissible, save perhaps as evidence of declarations); and see *Hewitt v A-G* (1910) Times, 22 October; *Curry v Curry* [1958] CLY 1066, (1958) Times, 13 December.

7 Since the creation of the Irish Free State, now the Republic of Ireland, the enactments relating to the proof of Irish documents apply only to Northern Ireland, and documents from the republic must be proved like any other foreign documents: see the Irish Free State (Consequential Adaptation of Enactments) Order 1923, SR & O 1923/405; *Todd v Todd* [1961] 2 All ER 881, [1961] 1 WLR 951. As to proof of colonial and foreign registers see PARA 917.

8 Evidence Act 1851 ss 10, 14. As to the operation of s 14 see PARA 884. See *Wallace v Wallace* (1896) 74 LT 253; *Whitton v Whitton* [1900] P 178; *Guillet v Guillet* (1911) 27 TLR 416; *Lemon v Lemon* (1920) 123 LT 585.

9 As to births and deaths occurring aboard Her Majesty's ships and aircraft see PARA 920 text and note 4; and as to the registration of ships see **SHIPPING AND MARITIME LAW**.

10 See the Merchant Shipping Act 1995 s 108 (amended by virtue of the British Overseas Territories Act 2002 s 2(3)); the Merchant Shipping (Returns of Births and Deaths) Regulations 1979, SI 1979/1577; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 578 et seq; **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 29.

11 See the Merchant Shipping Act 1995 s 108(4), (8)(a). Particulars of births or deaths on offshore installations outside the United Kingdom may also be recorded in the marine register: see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 581.

12 See the Merchant Shipping Act 1995 s 108(8). The main enactment referred to is the Births and Deaths Registration Act 1953: see PARAS 906-907; and **REGISTRATION CONCERNING THE INDIVIDUAL**. The effect of the Merchant Shipping Act 1995 s 108(8) is that entries in the marine register may be proved by certified copies: see PARAS 906-907.

13 See **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARAS 582-583.

14 See the Indian Christian Marriage Act 1872 (No XV of 1872) (India) (marriages of Christians in India and Pakistan before 15 August 1947 might be proved by certified copies of registers); *Regan v Regan* (1892) 67 LT 720; *Westmacott v Westmacott* [1899] P 183; *De Gruyther v De Gruyther* (1900) Times, 2 November; *Braid v Braid* (1909) 25 TLR 646; *Pawson v Pawson* (1930) 99 LJ 142; cf *Ratcliffe v Ratcliffe and Anderson* (1859) 1 Sw & Tr 467 (a case under previous legislation). See also 27 & 28 Vict c 77 (Ionian States Act of Parliament) (1864) (a marriage solemnised in the Ionian Islands before the relinquishment of Her Majesty's protectorate over those islands might be proved by a certified copy of an entry in the register book transmitted to the Registrar General in pursuance of that Act: see ss 7-10).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/G. REGISTERS IN OTHER JURISDICTIONS/919. Evidence of marriages under the Foreign Marriage Acts.

919. Evidence of marriages under the Foreign Marriage Acts.

Marriages of British subjects solemnised in foreign countries by marriage officers under the Foreign Marriage Act 1892¹ are required to be registered in accordance with the relevant statutory provisions². Any register of such marriages in the custody of a marriage officer or sent by a marriage officer to a Secretary of State for transmission to the Registrar General for England and Wales is admissible in evidence on its mere production from the custody of the marriage officer or Registrar General³; and any copy or extract from such a register is admissible if it purports to be signed and certified as a true copy or extract by the marriage officer, or stamped or sealed with the seal of the General Register Office, as the case may be⁴.

1 The Foreign Marriage Act 1892 has been amended by the Foreign Marriage Act 1947 and the Foreign Marriage (Amendment) Act 1988. As to marriages under those Acts see **CONFLICT OF LAWS**.

2 As to registration of marriages by chaplains of Her Majesty's forces see **CONFLICT OF LAWS; REGISTRATION CONCERNING THE INDIVIDUAL**.

3 See the Foreign Marriage Act 1892 ss 10, 16(1); and **CONFLICT OF LAWS**.

4 See the Foreign Marriage Act 1892 ss 10, 16(1), 17; the Evidence Act 1851 s 14.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/G. REGISTERS IN OTHER JURISDICTIONS/920. Births, marriages and deaths in Her Majesty's forces.

920. Births, marriages and deaths in Her Majesty's forces.

Records maintained in accordance with the Queen's Regulations for the registration of births, marriages and deaths¹ are evidence of the facts stated in them, and a copy of such a record, purporting to be certified as a true copy by a person stated in the certificate to have custody of the book or other document containing the record, is evidence of the record².

In addition, statutory provision has been made for the keeping of records of births and deaths occurring, and of marriages solemnised and civil partnerships formed, outside the United Kingdom among, or among the families of, members of Her Majesty's naval, military or air forces³, and of births and deaths occurring in any part of the world on board Her Majesty's ships and service aircraft⁴, and for the transmission of certified copies of such records to the Registrar General for England and Wales⁵. All such registers and copies of entries in registers or records as have been duly transmitted to the Registrar General for England and Wales⁶ are known as the 'Service Departments Registers'⁷, and the enactments relating to the registration of births, marriages and deaths in England and Wales have effect as if the Service Departments Registers were certified copies or duplicate registers transmitted to the Registrar General in accordance with those enactments⁸.

1 See *Adams v Adams* [1900] WN 32; *Gleen v Gleen* (1900) 17 TLR 62.

2 See the Army Act 1955 s 198(5); the Air Force Act 1955 s 198(5); and **ARMED FORCES**. As to certified copies of documents generally see PARA 887.

3 See the Registration of Births, Deaths and Marriages (Special Provisions) Act 1957 s 1 (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 21); the Service Departments Registers Order 1959, SI 1959/406; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 584 et seq. Provision may be made also for the records to include persons serving Her Majesty in or otherwise employed in any capacity connected with Her Majesty's naval, military or air forces, or persons belonging to or employed by any organisation concerned with the welfare of members of those forces: see the Registration of Births, Deaths and Marriages (Special Provisions) Act 1957 s 1(1)(b) (substituted, as from a day to be appointed, by the Armed Forces Act 2006 s 378(1), Sch 16 para 39(1), (2)(b), to apply instead to civilians subject to service discipline); the Service Departments Registers Order 1959, SI 1959/406; and **REGISTRATION CONCERNING THE INDIVIDUAL**. For provisions relating to the registration of marriages solemnised by chaplains of Her Majesty's Forces see **CONFLICT OF LAWS**.

4 See the Registration of Births, Deaths and Marriages (Special Provisions) Act 1957 s 2; the Service Departments Registers Order 1959, SI 1959/406; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 584.

5 See the Registration of Births, Deaths and Marriages (Special Provisions) Act 1957 ss 1(2)(a), 2(2)(a); the Service Departments Registers Order 1959, SI 1959/406; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 589.

6 Ie in pursuance of the Registration of Births, Deaths and Marriages (Special Provisions) Act 1957 or of the Registration of Births, Deaths and Marriages (Army) Act 1879 s 2 (repealed), or of the Births and Deaths Registration Act 1874 s 37 (repealed): Registration of Births, Deaths and Marriages (Special Provisions) Act 1957 s 3(1).

7 Registration of Births, Deaths and Marriages (Special Provisions) Act 1957 s 3(1).

8 Registration of Births, Deaths and Marriages (Special Provisions) Act 1957 s 3(2). As to the registration of births, deaths and marriages in England and Wales see the Births and Deaths Registration Act 1953; the Marriage Act 1949 ss 53-67; and **REGISTRATION CONCERNING THE INDIVIDUAL**. As to the admissibility of a certified

copy of an entry in a register, purporting to be sealed or stamped with the seal of the General Register Office, relating to births, deaths and marriages, see PARAS 906-907. The effect of the provisions mentioned in this paragraph is that entries in the 'Service Departments Registers' may be proved by certified copies.

UPDATE

920 Births, marriages and deaths in Her Majesty's forces

NOTE 2--Army Act 1955 and Air Force Act 1955 repealed: Armed Forces Act 2006 Sch 17.

NOTE 3--Registration of Births, Deaths and Marriages (Special Provisions) Act 1957 s 1 further amended: Armed Forces Act 2006 Sch 16 para 39.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/G. REGISTERS IN OTHER JURISDICTIONS/921. Other foreign marriages and relationships.

921. Other foreign marriages and relationships.

The general rule is that in order to prove a foreign marriage where no statutory provisions facilitating proof apply¹, evidence is required of the validity of the marriage according to local law².

However, Anglican marriages in British territory may usually be proved by the certificate of the officiating clergyman, together with evidence of identity³. It has also been provided by rules of court that, in matrimonial causes where the validity of the marriage is not disputed, its validity under the law of the country where it was celebrated may be proved by the evidence of one of the parties to the marriage and the production of a document purporting to be a marriage certificate or similar document or a certified copy of an entry in a register of marriages⁴. Further, the formation of an overseas relationship other than a marriage, outside England and Wales and its validity under the law of the country where it was formed may, in any family proceedings in which the existence and validity of that relationship is not disputed, be proved by the evidence of one of the parties to it and the production of either a document purporting to be a certificate or similar document issued under the law in force in that country evidencing its formation or a certified copy of an entry in a register of such relationships kept under the law in force in that country⁵.

In addition, a marriage certificate or a certified copy of an entry in a register may be admitted as hearsay evidence under the Civil Evidence Act 1995 as evidence of the validity of the marriage⁶.

1 For such provisions see PARAS 918-920, 922-923. In respect of countries to which the Evidence (Colonial Statutes) Act 1907 applies (see PARA 898), production of the relevant local statute proved in accordance with that Act, together with a marriage certificate, normally suffices to prove the validity of the marriage: see eg *Gibson v Gibson* (1920) 37 TLR 124; *Bonhote v Bonhote* (1920) 89 LJP 140; *Pawson v Pawson* (1930) 99 LJP 142. See also *Jasiewicz v Jasiewicz* [1962] 3 All ER 1017, [1962] 1 WLR 1426, where the authorities are reviewed.

2 See eg *Wilson v Wilson* [1903] P 157 (Malta); *Brice v Brice* (1919) 35 TLR 486 (Germany); *Westlake v Westlake (otherwise Williams)* [1910] P 167 (Channel Islands); *Rohmann v Rohmann* (1908) 25 TLR 78; *Roberts v Brennan* [1902] P 143 (Isle of Man); *Todd v Todd* [1961] 2 All ER 881, [1961] 1 WLR 951 (Republic of Ireland).

If a foreign marriage has been proved to be valid in matrimonial proceedings in England and Wales in the High Court or a county court, it is not necessary to adduce evidence of its validity in subsequent proceedings: *Cowley v Cowley* [1913] P 154; *Verney v Verney* (1920) 36 TLR 203; cf *Bater v Bater* [1907] P 333.

3 See *Ward v Dey* (1846) 1 Rob Eccl 759; *Eden v Eden and Batterick* (1908) 24 TLR 602; *Boughey v Boughey and Foan* (1917) 86 LJP 89; *Browning v Browning* (1918) 35 TLR 159; *Pritchard v Pritchard* (1920) 37 TLR 104 (Channel Islands in diocese of Winchester); *Perry v Perry* [1920] P 361; *De Mowbray v De Mowbray* (1921) 37 TLR 830; cf *Westlake v Westlake (otherwise Williams)* [1910] P 167.

4 Family Proceedings Rules 1991, SI 1991/1247, r 10.14(1). Where a document so produced is not in English it must, unless otherwise directed, be accompanied by a translation certified by a notary public or authenticated by affidavit: r 10.14(2) (amended by SI 2005/2922).

5 Family Proceedings Rules 1991, SI 1991/1247, r 10.14(1A) (added by SI 2005/2922). As to translation of the document see note 4.

6 See the Civil Evidence Act 1995 ss 1-4; and PARA 808 et seq. Before the passing of the Civil Evidence Act 1968 Pt I (repealed and replaced by the Civil Evidence Act 1995) use was made of the Evidence Act 1938 s 1(2)

(repealed) to facilitate the proof of marriages: see *Markes v Markes* (1955) 106 LJo 75; *Van Wyk v Van Wyk and Holmes* (1965) 109 Sol Jo 154; *Henaff v Henaff* [1966] 1 WLR 598.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/G. REGISTERS IN OTHER JURISDICTIONS/922. Admissibility by statute generally.

922. Admissibility by statute generally.

If Her Majesty in Council is satisfied as respects any country¹ that there exist in that country public registers kept under the authority of the law of that country and recognised by the courts of that country as authentic records, and that the registers are regularly and properly kept, such provision may be made by Order in Council² in respect of that country and all or any of those registers as is specified in the Evidence (Foreign, Dominion and Colonial Documents) Act 1933³.

1 'Country' means a dominion, the Isle of Man, any of the Channel Islands, a British colony or protectorate, a foreign country, a colony or protectorate of a foreign country, or any mandated territory: Evidence (Foreign, Dominion and Colonial Documents) Act 1933 s 1(4). Where, however, part of a country is under both a local and a central legislature, an order under s 1 may be made as well with respect to that part, as with respect to all parts under that central legislature: s 1(4) proviso. After 31 July 1963 s 1(4) applies for the interpretation of the Oaths and Evidence (Overseas Authorities and Countries) Act 1963 s 5(1): see s 5(2); and note 3.

2 For the orders which have been made see PARA 923 note 1.

3 Oaths and Evidence (Overseas Authorities and Countries) Act 1963 s 5(1), which has effect as from 31 July 1963 in substitution for the Evidence (Foreign, Dominion and Colonial Documents) Act 1933 s 1(1) (repealed); but any Order in Council made before that date continues in force until revoked, or as varied, by an Order in Council under the Oaths and Evidence (Overseas Authorities and Countries) Act 1963 s 5(2). The operation of s 5 is not affected by anything in the Civil Evidence Act 1995: see s 14(3)(e). As to the provision that may be made by such an Order in Council see PARA 923.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/G. REGISTERS IN OTHER JURISDICTIONS/923. Orders as to public registers abroad.

923. Orders as to public registers abroad.

Provision may be made by Order in Council¹ that in all parts of the United Kingdom²:

- 116 (1) a specified register of the country to which the order relates is to be deemed to be a public register kept under the authority of the law of that country and recognised by that country's courts as an authentic record, and to be a document of such a public nature as to be admissible as evidence of the matters regularly recorded in it³;
- 117 (2) specified matters, if recorded in such a register, are to be deemed to be regularly recorded in it until the contrary is proved⁴;
- 118 (3) subject to conditions specified in the order and to rules of court, a document purporting to be issued in the country to which the order relates as an official copy of an entry in a register so specified, and purporting to be authenticated in the specified manner, is to be received as evidence that the register contains such entry, without evidence as to the custody of the register or of inability to produce it and without any further or other proof⁵;
- 119 (4) subject as set out above, a certificate purporting to be given in the country to which the order relates as an official certificate of any class specified in the order, and purporting to be signed by the officer and authenticated in the manner specified, is to be received as evidence of the facts stated in the certificate⁶;
- 120 (5) no official document issued in the country to which the order relates as proof of any matters for the proof of which provision is made by the order, if otherwise admissible in evidence, is to be inadmissible by reason only that it is not authenticated by the process known as legalisation⁷.

Official books of record preserved in a central registry and containing entries copied from original registers may, if those entries were copied by officials in the course of their duty, themselves be treated, for the above purposes, as registers⁸.

¹ Evidence (Foreign, Dominion and Colonial Documents) Act 1933 s 1(2) (amended by the Oaths and Evidence (Overseas Authorities and Countries) Act 1963 s 5(1)). Orders were made before 1963 under the Evidence (Foreign, Dominion and Colonial Documents) Act 1933 s 1, and thereafter under the Oaths and Evidence (Overseas Authorities and Countries) Act 1963 s 5: see PARA 922. At the date at which this title states the law the following orders had been made: the Evidence (Aden) Order 1965, SI 1965/1527; the Evidence (Antigua) Order 1965, SI 1965/312; the Evidence (Bahamas) Order 1961, SI 1961/2041; the Evidence (Barbados) Order 1962, SI 1962/641; the Evidence (Basutoland) Order 1965, SI 1965/1719; the Evidence (Bechuanaland Protectorate) Order 1965, SI 1965/1720; the Evidence (Belgium) Order 1933, SR & O 1933/383; the Evidence (Bermuda) Order 1961, SI 1961/2042; the Evidence (British Antarctic Territory) Order 1962, SI 1962/2605; the Evidence (British Guiana) Order 1961, SI 1961/2043; the Evidence (British Honduras) Order 1961, SI 1961/2044; the Evidence (British Indian Ocean Territory) Order 1984, SI 1984/857; the Evidence (Cayman Islands) Order 1965, SI 1965/313; the Evidence (Certain Provinces of Canada) Order 1962, SI 1962/2606; the Evidence (Commonwealth of Australia) Order 1938, SR & O 1938/739; the Evidence (Denmark) Order 1969, SI 1969/144; the Evidence (Dominica) Order 1961, SI 1961/2045; the Evidence (Falkland Islands) Order 1962, SI 1962/2607; the Evidence (Federal Republic of Germany) Order 1970, SI 1970/819; the Evidence (Fiji) Order 1961, SI 1961/2046; the Evidence (France) Order in Council 1937, SR & O 1937/515; the Evidence (Gibraltar) Order 1961, SI 1961/2047; the Evidence (Grenada) Order 1966, SI 1966/82; the Evidence (Hong Kong) Order 1962, SI 1962/642; the Evidence (Jamaica) Order 1962, SI 1962/643; the Evidence (Italy) Order 1969, SI 1969/145; the Evidence (Kenya) Order 1965, SI 1965/1712; the Evidence (Luxembourg) Order 1972, SI 1972/116; the Evidence (Mauritius) Order 1961, SI 1961/2048; the Evidence (Montserrat) Order 1962, SI

1962/644; the Evidence (the Netherlands) Order 1970, SI 1970/284; the Evidence (New Zealand) Order 1959, SI 1959/1306; the Evidence (Republic of Ireland) Order 1969, SI 1969/1059; the Evidence (St Helena) Order 1961, SI 1961/2049; the Evidence (St Lucia) Order 1965, SI 1965/1721; the Evidence (Sarawak) Order 1961, SI 1961/2050; the Evidence (Seychelles) Order 1962, SI 1962/2608; the Evidence (Sierra Leone) Order 1962, SI 1962/2609; the Evidence (Swaziland) Order 1965, SI 1965/1865; the Evidence (Tanganyika) Order 1961, SI 1961/2051; the Evidence (Turks and Caicos Islands) Order 1966, SI 1966/83; the Evidence (Uganda) Order 1961, SI 1961/2052; the Evidence (United States of America) Order 1969, SI 1969/146; and the Evidence (Zanzibar) Order 1961, SI 1961/2053.

2 As to the meaning of 'United Kingdom' see PARA 221 note 2.

3 Evidence (Foreign, Dominion and Colonial Documents) Act 1933 s 1(2)(a). In matrimonial proceedings, one of the effects of these orders is that expert evidence is not normally required to establish the validity of marriages in the countries to which they apply: see *North v North and Ogden* (1936) 105 LJP 56. Expert evidence may still be necessary, however, if the particular certificate is excluded from the terms of the particular order: *Motture v Motture* [1955] 3 All ER 242n, [1955] 1 WLR 1066 (certificate of marriage issued more than 12 months before it was sought to be put in evidence outside the terms of the order, and expert evidence required).

As to the need to adduce expert evidence in proving a foreign marriage see PARA 921.

4 Evidence (Foreign, Dominion and Colonial Documents) Act 1933 s 1(2)(b).

5 Evidence (Foreign, Dominion and Colonial Documents) Act 1933 s 1(2)(c).

6 Evidence (Foreign, Dominion and Colonial Documents) Act 1933 s 1(2)(d).

7 Evidence (Foreign, Dominion and Colonial Documents) Act 1933 s 1(2)(e). 'Legalisation' is a term used to describe the sequence of signatures of certain officials, eg notaries, magistrates or consuls, authenticating each other.

8 Evidence (Foreign, Dominion and Colonial Documents) Act 1933 s 1(3). The operation of s 1 is not affected by anything in the Civil Evidence Act 1995: see s 14(3)(d).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/H. COURT ROLLS/924. Manorial documents.

H. COURT ROLLS

924. Manorial documents.

Court rolls¹ were admissible at common law in proceedings between the lord and tenants of a manor², for example to prove a custom³, or the non-existence of a custom⁴, or as evidence of reputation⁵, or acts of ownership⁶, or other facts concerning the manor⁷. Such court rolls may now be admitted, in civil cases, as hearsay evidence under the Civil Evidence Act 1995⁸, as may other manorial documents⁹ formerly admissible at common law¹⁰.

1 As to court rolls see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 700 et seq.

2 *A-G v Lord Hotham* (1823) Turn & R 209; *Duke of Portland v Hill* (1866) LR 2 Eq 765; *Heath v Deane* [1905] 2 Ch 86; cf *Rowe v Brenton* (1828) 8 B & C 737.

3 *Roe d Beebee v Parker* (1792) 5 Term Rep 26. Cf *Denn v Spray* (1786) 1 Term Rep 466; *Rogers v Allen* (1808) 1 Camp 309; *Doe d Askew v Askew* (1809) 10 East 520.

4 *Duke of Portland v Hill* (1866) LR 2 Eq 765 (customary of manor compiled since the beginning of legal memory is conclusive evidence against existence of custom not mentioned therein).

5 *Chapman v Cowlan* (1810) 13 East 10; *Coote v Ford* (1900) 17 TLR 58. Cf *Johnstone v Earl Spencer* (1885) 30 ChD 581; *Re Walton-cum-Trimley Manor, ex p Tomline* (1873) 21 WR 475. However, an entry is not admissible as evidence of reputation if it was made after the dispute arose: *Richards v Bassett* (1830) 10 B & C 657. Evidence of reputation is in some cases admissible by virtue of the Civil Evidence Act 1995 s 7(3): see PARAS 827-830.

6 *A-G v Emerson* [1891] AC 649, HL; *Woolway v Rowe* (1834) 1 Ad & El 114; *Rogers v Allen* (1808) 1 Camp 309. As to ancient documents as acts of ownership see PARA 875.

7 Eg descriptions of tenants' holdings, and statements of amount of rent paid: see *Foljambe v Smith's Tadcaster Brewery Co* (1904) 73 LJ Ch 722.

8 See the Civil Evidence Act 1995 ss 2-4; and PARA 808 et seq.

9 Eg 'call books' of a manor (*Foljambe v Smith's Tadcaster Brewery Co* (1904) 73 LJ Ch 722); customaries of a manor (*Denn v Spray* (1786) 1 Term Rep 466; *Duke of Portland v Hill* (1866) LR 2 Eq 765); a copy of an admittance (*Dean and Chapter of Ely v Stewart* (1740) 2 Atk 44); parchment writings and draft documents produced from the manor muniments (*Chapman v Cowlan* (1810) 13 East 10; *Doe d Priestley v Calloway* (1827) 6 B & C 484). Certain other documents, not formerly admissible, may now be admitted by virtue of the same provisions, if the requirements of those provisions are satisfied; eg books kept by the steward of a manor (*Dean and Chapter of Ely v Caldecott* (1831) 7 Bing 433); or a private survey of manor land purporting to record the lord's rights (*Talbot v Lewis* (1834) 4 LJ Ex 9).

10 See note 8.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/H. COURT ROLLS/925. Proving court rolls.

925. Proving court rolls.

Court rolls, whether before or after the extinguishment of manorial incidents¹, are deemed for certain purposes of the Evidence Act 1851² to be documents of such a public nature as to be admissible on their mere production from proper custody³. Thus their contents may be proved by an examined or certified copy⁴. Copies of the court rolls under the hand of the steward have been accepted as good secondary evidence of the former copyhold estate⁵, as have sworn copies⁶.

A copy of a court roll of a surrender or grant made out of court, or the entry on the court roll itself of any surrender or grant, whether made in or out of court, is admissible in evidence irrespective of whether or not the principal instrument was stamped⁷.

1 le under the Law of Property Act 1922 s 128 (repealed): see **REAL PROPERTY** vol 39(2) (Reissue) PARA 31 et seq.

2 le for the purposes of the Evidence Act 1851 s 14: see PARA 884.

3 Law of Property Act 1922 s 144. At common law they could be proved by the deputy steward, even if not signed by the steward: *Bridger v Huett* (1860) 2 F & F 35.

4 See PARA 884. As to the care and preservation of manorial documents and the right of certain persons to inspect them see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARAS 701-702.

5 *Snow v Cutler and Stanly* (1663) 1 Keb 567; *Doe d Cawthorn v Mee* (1833) 4 B & Ad 617. Cf *Duke of Somerset v France* (1725) Fortes Rep 41. As to copyhold enfranchisement see **REAL PROPERTY** vol 39(2) (Reissue) PARA 31 et seq.

6 *Breeze v Hawker* (1844) 14 Sim 350. Where secondary evidence of court rolls was given, the court used to require evidence of enjoyment of the estate shown by the copy: see *Pilkington v Bagshaw* (1655) Sty 450. As to secondary evidence of documents generally see PARA 878 et seq.

7 See **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 704.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/I. RECORD BOOKS/926. Excise survey books.

I. RECORD BOOKS

926. Excise survey books.

Survey books in which surveying officers of revenue and customs record particulars of accounts of stock taken by them on visits to traders' premises are documents of a public nature, and as such are admissible in proof of the facts stated in them by virtue of the Civil Evidence Act 1995¹. Documents purporting to be original excise entries produced to the court by an officer of revenue and customs are sufficient evidence of the making of the entries until the contrary is proved², and as regards the Crown are conclusive against the persons making the entries³.

1 See the Civil Evidence Act 1995 s 7(2)(b); and PARA 821; and see *R v Grimwood* (1815) 1 Price 369 (excise books); *Dunbar v Harvie* (1820) 2 Bligh 351 (excise books).

2 See the Customs and Excise Management Act 1979 s 110; and **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 629.

3 *Ellis v Watson* (1819) 2 Stark 478 (customs house books).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/I. RECORD BOOKS/927. Log books of ships and of aircraft.

927. Log books of ships and of aircraft.

The log book of a warship is admissible to prove the facts stated in it¹. Entries made in official log books of merchant vessels in the manner provided by statute² are admissible in evidence; so also is any document purporting to be a copy of any such entry, and to be certified as a true copy by the master of the ship³. The other log books of a merchant vessel may be admissible⁴ as evidence for the owner of the vessel, and they may be used as evidence against him by the opposing party in litigation⁵. A witness, however, is allowed to look at a log book to refresh his memory, even though it was not written by himself, provided he was in the habit of regularly examining it⁶.

Any record made by, or by a person acting under the control of, a designated person or authority and purporting to show the position of an aircraft at any material time or the terms or contents of any message transmitted to or received from the aircraft is, if produced from the custody of the designated person or authority, evidence in any legal proceedings of the matters appearing from the record⁷.

1 *D'Israeli v Jowett* (1795) 1 Esp 427, where the log book of a man-of-war was admitted to prove the time of sailing of a ship convoyed by her. See also *Watson v King* (1815) 4 Camp 272, where, besides the log book, the captain's official letter to the Admiralty at the end of the ship's voyage was admitted. See **SHIPPING AND MARITIME LAW**.

2 For the requirement to keep log books see the Merchant Shipping Act 1995 s 77(1); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 531.

3 See the Merchant Shipping Act 1995 s 287(1)(b); and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1109.

4 *Rundle v Beaumont* (1828) 4 Bing 537; *The Singapore and The Hebe* (1866) LR 1 PC 378; cf *The Sociedade Feliz* (1843) 7 Jur 956.

5 *The Singapore and The Hebe* (1866) LR 1 PC 378; *The Earl of Dumfries* (1885) 10 PD 31; *The Henry Coxon* (1878) 3 PD 156; *The Sandefjord* [1953] 2 Lloyd's Rep 789.

6 *The Sociedade Feliz* (1843) 7 Jur 956; *The Singapore and The Hebe* (1866) LR 1 PC 378. See also **SHIPPING AND MARITIME LAW**.

7 See the Civil Aviation Act 1982 s 96(2); and **AIR LAW** vol 2 (2008) PARA 617.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/I. RECORD BOOKS/928. Vehicle registration documents.

928. Vehicle registration documents.

Although the registration document or log book of a vehicle is not a document of title¹, it is very good evidence of it².

1 *Central Newbury Car Auctions v Unity Finance Ltd* [1957] 1 QB 371, [1956] 3 All ER 905, CA; *Beverley Acceptances Ltd v Oakley* [1982] RTR 417, CA; *Woodard v Woodard* [1995] 3 All ER 980, CA.

2 See *Bentworth Finance Ltd v Lubert* [1968] 1 QB 680, [1967] 2 All ER 810, CA; *Bishopsgate Motor Finance Corp'n Ltd v Transport Brakes Ltd* [1949] 1 KB 322, [1949] 1 All ER 37, CA; see also *Pearson v Rose and Young Ltd* [1951] 1 KB 275, [1950] 2 All ER 1027, CA. However, it is not admissible as a public document to prove the facts stated in it: *R v Sealby* [1965] 1 All ER 701. As to the vehicle registration document see **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 531.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/J. JUDICIAL RECORDS/929. Judgments and convictions; in general.

J. JUDICIAL RECORDS

929. Judgments and convictions; in general.

The conclusiveness of previous judgments, and the proof of convictions and of previous findings of adultery and paternity, are discussed elsewhere in this title¹.

¹ See PARA 1154 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/J. JUDICIAL RECORDS/930. Claim forms and pleadings.

930. Claim forms and pleadings.

The statement on a claim form of the time of issue is conclusive evidence of the time of its issue¹. A claim form is issued on the date entered on the form by the court².

A writ of execution is prima facie evidence of the judgment as between parties and privies³, but not against strangers⁴.

Under the former civil procedure, pleadings recorded in one cause were admissible in evidence in subsequent proceedings to prove the institution and subject matter of that cause⁵, but were generally inadmissible⁶, even as against parties or privies, as proof of the truth of the facts stated in them⁷ and it is apprehended that the same common law principle applies to statements of case⁸ verified by a statement of truth under the Civil Procedure Rules⁹, although they may be admissible as hearsay evidence under the Civil Evidence Act 1995¹⁰. Answers and decrees in Chancery, however, are admitted in peerage cases as evidence of matters of pedigree only incidentally stated in them, and statements made in the course of proceedings by a party upon oath may be admissible in other proceedings as admissions by the party making them¹¹, subject to the statutory safeguards relating to hearsay evidence¹².

1 *Whipple v Manley* (1836) 1 M & W 432.

2 See CPR 7.2(2); and PARA 118.

3 *Doe d Batten v Murless* (1817) 6 M & S 110; but see *Doe d Bland v Smith* (1817) 2 Stark 199. As to privies see eg PARAS 1155 note 5, 1196-1198.

4 *White v Morris* (1852) 11 CB 1015, disapproving *Bessey v Windham* (1844) 6 QB 166; and see *Lake v Billers* (1698) 1 Ld Raym 733; *Martyn v Podger* (1770) 5 Burr 2631; *Ackworth v Kempe* (1778) 1 Doug KB 40. As to writs of execution see PARA 1265 et seq.

5 *Roe d Lord Trimlestown v Kemmis* (1843) 9 Cl & Fin 749, HL; *Boileau v Rutlin* (1848) 2 Exch 665; *Malcomson v O'Dea* (1863) 10 HL Cas 593.

6 Formerly, it would seem, the law was different (Bull NP (7th Edn) 235); see *Medcalfe and Ives v Medcalfe and Johnson* (1737) 1 Atk 63; and *Viscount Lorton v Earl of Kingston* (1838) 5 Cl & Fin 269, HL.

7 *Woollet v Roberts* (1665) 1 Cas in Ch 64; *Eccleston v Petty (alias Speke)* (1689) Carth 79; *Lord Ferres v Shirley* (1731) Fitz-G 195; *Doe d Bowerman v Sybourn* (1796) 7 Term Rep 2; *Miller v Johnson* (1797) 2 Esp 602; *Tomkins v Ashby* (1827) Mood & M 32; *Kilbee v Sneyd* (1828) 2 Mol 186; *R v Walker* (1844) 1 Cox CC 99; *Burkitt v Blanshard* (1848) 3 Exch 89; *Boileau v Rutlin* (1848) 2 Exch 665; *R v Simmonds* (1850) 4 Cox CC 277; *Re Foster, ex p Basan* (1885) 2 Morr 29, CA; *Re Walters, Neison v Walters* (1889) 61 LT 872; *Re Park, Park v Park* [1954] P 89, [1953] 2 All ER 408; affd [1954] P 112, [1953] 2 All ER 1411, CA.

8 As to statements of case see PARA 1065 note 1; and PARA 584 et seq.

9 As to the application of the CPR see PARA 32; and as to statements of truth see PARA 613.

10 See PARA 808 et seq.

11 *Snow v Phillips* (1664) 1 Sid 220; *Mildmay v Mildmay* (1682) 1 Vern 53; *Grant v Jackson* (1793) Peake 203; *Beasley v McGrath* (1804) 2 Sch & Lef 31; *Doe d Digby v Steel* (1811) 3 Camp 115; *Wharton Peerage Case* (1845) 12 Cl & Fin 295, HL; *Marianski v Cairns* (1852) 1 Macq 212, HL; *Shrewsbury Peerage* (1858) 7 HL Cas 1; *Fleet v Perrins* (1868) LR 3 QB 536; and see *Taylor v Cole* (1799) 7 Term Rep 3, note (a); *Lyell v Kennedy* (1889) 14 App Cas 437, HL.

12 The Civil Evidence Act 1968 s 9(2)(a) (repealed) preserved the common law rule whereby adverse admissions (as opposed to formal admissions: see PARAS 776-778) were admissible as an exception to the rule against hearsay; but this exception is not retained by the Civil Evidence Act 1995 so that such admissions are only admissible subject to the safeguards contained in ss 2-4 (see PARAS 811-815).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/J. JUDICIAL RECORDS/931. Affidavits and witness statements.

931. Affidavits and witness statements.

At common law, an affidavit¹ made in one proceeding was admissible in evidence in a subsequent proceeding as proof of the facts stated in it, against the party who made the affidavit², or against the party on whose behalf it was made, on its being shown that he knowingly made use of it³.

A witness statement⁴ may generally be used only for the purpose of the proceedings in which it is served⁵, unless the witness gives consent in writing to some other use of it, the court⁶ gives permission for some other use or the witness statement has been put in evidence at a hearing held in public⁷.

Affidavits and witness statements are, subject to the above restrictions, now admissible as hearsay evidence in other proceedings under the Civil Evidence Act 1995 and subject to the statutory safeguards⁸.

1 As to evidence by affidavit see PARA 989 et seq.

2 *R v Jolliffe* (1791) 4 Term Rep 285; *Brickell v Hulse* (1837) 7 Ad & El 454; *Pritchard v Bagshawe* (1851) 11 CB 459.

3 *Johnson v Ward* (1806) 6 Esp 47; *Gardner v Moul* (1839) 10 Ad & El 464; *White v Dowling* (1845) 8 ILR 128; *Richards v Morgan* (1863) 4 B & S 641; *Campbell v Rothwell* (1877) 38 LT 33; *Simmons v London Joint Stock Bank* (1890) 62 LT 427. The same principle of admissibility did not, however, apply to oral testimony given on behalf of a party in other proceedings: see *British Thomson-Houston Co Ltd v British Insulated and Helsby Cables Ltd* [1924] 1 Ch 203; affd [1924] 2 Ch 160, CA. As to the use of an affidavit in family proceedings see eg *C v C (evidence: privilege)* [2001] EWCA Civ 469, [2002] Fam 42, [2001] 1 FCR 756 (in proceedings relating to a child's welfare, the mother could make use of affidavit evidence by her husband's former solicitors in support of their application to be removed from the record because it showed that he had used grossly indecent, obscene and menacing language to them).

4 As to the meaning of 'witness statement' see PARA 751 note 1

5 CPR 32.12(1). As to the meaning of 'service' see PARA 138 note 2.

6 As to the meaning of 'court' see PARA 22.

7 CPR 32.12(2).

8 See the Civil Evidence Act 1995 ss 1-4; and PARA 808 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/J. JUDICIAL RECORDS/932. Statements of affairs prepared for the purposes of insolvency proceedings.

932. Statements of affairs prepared for the purposes of insolvency proceedings.

In any proceedings, whether or not under the Insolvency Act 1986, a statement of affairs prepared for certain purposes of the 1986 Act¹ and any other statement made in pursuance of certain statutory requirements² may be used in evidence against any person making or concurring in making the statement³. This is subject to safeguards in the case of criminal proceedings⁴.

1 le for the purposes of any provision of the Insolvency Act 1986 which is derived from the Insolvency Act 1985 (repealed): Insolvency Act 1986 s 433(1) (numbered as such by the Youth Justice and Criminal Evidence Act 1999 s 59, Sch 3 para 7(1), (2)). See the Insolvency Act 1986 ss 272, 288, 291(4), 333(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 252, 244, 243, 345 respectively. See also ss 2(3)(b), 22(1), 47(1), 66(1), 95(3), 131(3); and **COMPANY AND PARTNERSHIP INSOLVENCY**.

2 le requirements imposed by or under any such provision as is mentioned in note 1 or by or under rules made under the Insolvency Act 1986: s 433(1) (as renumbered: see note 1). See the Insolvency Rules 1986, SI 1986/1925, rr 6.41, 6.66, 6.72; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 159, 251, 255 respectively. See also **COMPANY AND PARTNERSHIP INSOLVENCY**.

3 Insolvency Act 1986 s 433(1) (as renumbered: see note 1).

4 See the Insolvency Act 1986 s 433(2), (3); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 786; **COMPANY AND PARTNERSHIP INSOLVENCY**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/J. JUDICIAL RECORDS/933. Reports.

933. Reports.

In some cases a report is admissible as evidence of the facts stated in it, when it is a public document¹ made by a public officer on an inquiry of a judicial or quasi-judicial nature². Thus certain early reports of the Charity Commissioners³, reports of the official receiver⁴, and reports of British consular officers, who are not available in the United Kingdom, as to the employment of young persons abroad⁵, are expressly made admissible by statute.

The report of inspectors appointed by the Department of Trade and Industry to investigate the affairs of a company is not the result of an inquiry in the nature of a judicial inquiry, but a copy of the report, certified by the Secretary of State to be a true copy, is admissible in any legal proceedings as evidence of the opinion of the inspectors in relation to any matter contained in the report, and, in proceedings on an application for a disqualification order under the Company Directors Disqualification Act 1986⁶, as evidence of any fact stated in the report⁷.

1 As to public documents and the principles governing admissibility see PARA 821.

2 For examples of inquiries of a judicial or quasi-judicial nature made by public officers see **ADMINISTRATIVE LAW**.

3 See the Charities Act 1993 s 93(2); and **CHARITIES** vol 8 (2010) PARA 595.

4 See the Insolvency Rules 1986, SI 1986/1925, r 7.9(3); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 794.

5 See the Children and Young Persons Act 1933 s 26(4); and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 779.

6 In an application under the Company Directors Disqualification Act 1986 s 8: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 1113, 1299.

7 See the Companies Act 1985 s 441 (amended by the Insolvency Act 1985 ss 109, 235, Sch 6 para 3, Sch 9 Pt II; the Insolvency Act 1986 s 439(1), Sch 13 Pt I; and the Companies Act 1989 s 61); and **COMPANIES** vol 15 (2009) PARA 1555. See also *Re David M Aaron (Personal Financial Planners), Secretary of State for Trade and Industry v Aaron* [2007] All ER (D) 32 (Jun).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/J. JUDICIAL RECORDS/934. Previous proceedings.

934. Previous proceedings.

Evidence given in previous proceedings is admissible in subsequent proceedings as hearsay evidence subject to the statutory safeguards contained in the Civil Evidence Act 1995¹. Affidavits and witness statements in previous proceedings are discussed elsewhere in this title².

A party to whom a document has been disclosed³ may use the document only for the purpose of the proceedings in which it is disclosed, except where (1) the document has been read to or by the court⁴, or referred to, at a hearing which has been held in public⁵; (2) the court gives permission⁶; or (3) the party who disclosed the document and the person to whom the document belongs agree⁷.

1 See the Civil Evidence Act 1995 ss 1-4; and PARA 808 et seq.

2 See PARA 931.

3 As to disclosure see generally PARA 963; and see further PARA 538 et seq.

4 As to the meaning of 'court' see PARA 22.

5 CPR 31.22(1)(a). As to when a hearing may be held in private see generally **COURTS** vol 10 (Reissue) PARA 312; PARA 6.

6 CPR 31.22(1)(b); and see eg *Chase v News Group Newspapers* [2002] EWHC 1101 (QB), [2002] All ER (D) 522 (May).

7 CPR 31.22(1)(c). See further PARA 553.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/J. JUDICIAL RECORDS/935. Depositions.

935. Depositions.

A deposition is evidence obtained from a person who is examined on oath by order of the court before a hearing takes place¹. Various enactments have made depositions admissible in evidence. For example, there are provisions as to the use of depositions taken under legislation relating to matrimonial causes², merchant shipping³ and offences committed on aircraft⁴.

Under the Civil Procedure Rules, a party may apply for an order for a person to be examined before the hearing takes place⁵. The procedure on such an application and the conduct of such examinations is discussed elsewhere in this title⁶. A deposition may be given in evidence at a hearing unless the court⁷ orders otherwise⁸ but there are restrictions on the subsequent use of a deposition taken for the purpose of any hearing except the trial⁹.

1 See CPR 34.8(2); and PARA 992.

2 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.29; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 838.

3 See the Merchant Shipping Act 1995 s 286; and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1108.

4 See the Civil Aviation Act 1982 s 95; and **AIR LAW** vol 2 (2008) PARA 618.

5 CPR 34.8(1). As to the application of the CPR see PARA 32.

6 See PARA 992 et seq.

7 As to the meaning of 'court' see PARA 22.

8 CPR 34.11(1). As to the use of a deposition at a hearing see further PARA 998.

9 See CPR 34.12; and PARA 999.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/J. JUDICIAL RECORDS/936. Proof of proceedings in superior courts.

936. Proof of proceedings in superior courts.

Judgments of the House of Lords are proved by an examined copy of the minutes¹ or by a printed copy of the Lords Journals².

Records and other judicial documents³ of the old Superior Courts of Law and Equity are proved in the same way as records of the Supreme Court⁴. Judicial proceedings in the Supreme Court may be proved by production of the original record⁵ or by office or other copies⁶. To prove that an action was pending and was tried as alleged in an indictment for perjury, a copy of the writ and pleadings properly filed and the original order dismissing the action have been admitted on their production by the officer of the court⁷.

1 *Jones v Randall* (1774) 1 Cowp 17.

2 See PARA 890. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

3 This includes answers in Chancery (*Ewer v Ambrose* (1825) 4 B & C 25; *Highfield v Peake* (1827) Mood & M 109); depositions (*Duncan v Scott* (1807) 1 Camp 100); rules of court (*Selby v Harris* (1698) 1 Ld Raym 745). In some cases ancient judicial proceedings have been admitted without being strictly proved: see *Beverley Corpn v Craven* (1838) 2 Mood & R 140; *Byam v Booth* (1816) 2 Price 231; *Bayley v Wylie* (1806) 6 Esp 85.

4 See the text and notes 5-7. In the case of other old courts, such as the old Court of Admiralty, the ecclesiastical courts, and the Court of Stannaries, judicial documents may, it seems, be proved by exemplifications or by examined copies, but not now by office copies: see *R v Haines* (1695) Comb 337. Such common law categories of appropriately proved judicial records are now admissible under the Civil Evidence Act 1995 s 7(2)(c): see PARA 822. The Lord Chancellor is responsible for public records: see the Public Records Act 1958 s 1(1). As to proof of documents in his custody see PARA 887. Where the record is lost a certified copy of the entry in the judgment book will be admitted: *Re Tollemache, ex p Anderson* (1885) 14 QBD 606, CA. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

5 The permission of the court is required before any document filed, lodged or held in any office of the Supreme Court may be taken out unless the document is to be sent to the office of another court, except in accordance with CPR 39.7 (impounded documents), or after an application in accordance with the prescribed procedure: see *Practice Direction--Court Documents* PD 5A para 5.5; and PARA 85. In the case of a judgment it is necessary to produce the complete record or a copy of it, not merely the minutes: *Godefroy v Jay* (1827) 3 C & P 192. Cf *King v Birch* (1842) 3 QB 425; *R v Smith* (1828) 8 B & C 341. See also *White v Cox* (1876) 2 ChD 387. As to the caution to be used in applying pre-CPR authorities see PARA 33 text and note 2.

6 See PARAS 885-888. It seems that the original must be produced if issue has been joined on an allegation that there is no such record: see 2 *Taylor's Law of Evidence* (12th Edn) 974.

7 *R v Scott* (1877) 2 QBD 415. The fact of a trial on indictment may be proved by certificate: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. As to the proof of convictions and of findings of adultery and paternity see PARAS 1208-1211.

UPDATE

936 Proof of proceedings in superior courts

NOTES 2, 4--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/J. JUDICIAL RECORDS/937. Proof of other proceedings.

937. Proof of other proceedings.

The proceedings of a county court are proved either by the district judge's records or by a certified copy of an entry in them¹. At the hearing of any proceedings in a county court in which there is a right of appeal or from which an appeal may be brought with leave, the judge must, at the request of any party, make a note of any question of law raised at the hearing, of the facts in evidence in relation to any such question and of his decision on any such question and of his determination of the proceedings².

The trial and conviction or acquittal of any person charged with an indictable offence may be proved by various methods which are discussed elsewhere in this work³. There are special provisions relating to the proof of proceedings in magistrates' courts⁴ and a certificate of dismissal of a complaint of assault and battery given by justices is evidence of such dismissal⁵.

The original proceedings of a court-martial purporting to be signed by the president of the court and being in the custody of the Judge Advocate General or of any person having lawful custody of it are admissible in evidence on production from that custody⁶.

In bankruptcy proceedings, where notice of a court order is required⁷ to be gazetted, a copy of the London Gazette containing the notice may in any proceedings be produced as conclusive evidence that the order was made on the date specified in the notice⁸.

Judgments of inferior courts⁹ are proved by the production of the minute book containing an entry of the judgment¹⁰ or by the notes or parol evidence of an officer of the court when no such entry exists¹¹.

The proof of orders of statutory tribunals is generally provided for in the legislation constituting the tribunal. For example, the Copyright, Designs and Patents Act 1988 provides that a document purporting to be a copy of an order of the Copyright Tribunal and to be certified by the chairman to be a true copy is, in any proceedings, to be sufficient evidence of the order unless the contrary is proved¹².

1 See the County Courts Act 1984 s 12(2) (amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 42); PARA 60; and **COURTS** vol 10 (Reissue) PARA 729. The permission of the court is required before any document filed, lodged in or held in any county court office may be taken out unless the document is to be sent to the office of another court, except in accordance with CPR 39.7 (impounded documents), or after an application in accordance with the prescribed procedure: see *Practice Direction--Court Documents* PD 5 para 5.5; and PARA 85.

2 See the County Courts Act 1984 s 80(1); and PARAS 279, 1679. On appeal the judge's note cannot be impeached by affidavit, shorthand note or otherwise, but the court may, it seems, use extraneous evidence to supplement it or to explain any ambiguity: *Huddleston v Furness Rly Co* (1899) 15 TLR 238, CA. If there is no note its absence must be explained (*Lumb v Teal & Co* (1889) 22 QBD 675, DC), and may be a ground for a new trial (*Re Chertsey RDC and Binns* (1905) 49 Sol Jo 223, DC). As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

3 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE; MAGISTRATES; ROAD TRAFFIC; SENTENCING**. As to the proof of the outcome of the trial of a person subject to military or air force law by a civil court see the Army Act 1955 s 199; the Air Force Act 1955 s 199; and **ARMED FORCES**.

4 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE; MAGISTRATES**.

5 See the Offences against the Person Act 1861 s 44 (amended by the Criminal Justice Act 1988 s 170(1), (2), (11), Sch 15 paras 2, 3, Sch 16 note 1; and the Courts Act 2003 s 109(1), (3), Sch 8 paras 41, 43, Sch 10); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE; MAGISTRATES**. Dismissal may be proved otherwise than by certificate: *R v Hutchins* (1880) 5 QBD 353.

6 See the Army Act 1955 s 200; the Air Force Act 1955 s 200; and **ARMED FORCES**. See also PARA 920.

7 See under the Insolvency Act 1986 or the Insolvency Rules 1986, SI 1986/1925: see generally **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**.

8 See the Insolvency Rules 1986, SI 1986/1925, r 12.20(2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 787.

9 Eg a former sheriff's court (*Arundell v White* (1811) 14 East 216); a court baron (*Dyson v Wood* (1824) 3 B & C 449); the former Mayor's Court (*Fisher v Lane* (1772) 2 Wm Bl 834); a manor court (*Dawson v Gregory* (1845) 7 QB 756). As to the abolition of many of the former local courts and the removal of jurisdiction from most of those remaining see **COURTS** vol 10 (Reissue) PARAS 853-854.

10 See the cases cited in note 9.

11 See *Dyson v Wood* (1824) 3 B & C 449; *Manning v Eastern Counties Rly Co* (1843) 12 M & W 237.

12 See the Copyright, Designs and Patents Act 1988 s 151(2); and **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 222.

UPDATE

937 Proof of other proceedings

NOTES 3, 6--Army Act 1955 and Air Force Act 1955 replaced: Armed Forces Act 2006.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iii) Particular Public or Official Documents/J. JUDICIAL RECORDS/938. Proof of arbitrator's award.

938. Proof of arbitrator's award.

An award is proved by the production and proof of execution of the award, which should be signed by all the arbitrators (when there is more than one)¹, and by the production of the arbitration agreement itself²; and, where the award is made by an umpire, of the appointment of the umpire³. Where the award is made in a reference under a court order, production of the award and the order is prima facie evidence of the validity of the award⁴. In the case of an award made under statute by a public officer, the validity of the award is presumed⁵ unless it is proved that subsequent usage has not been in accordance with the award⁶, or that the award was made without jurisdiction. In the latter case, even though the relevant Act provides that the award is to be conclusive evidence that all the relevant statutory directions have been complied with, the award will not be conclusive as to matters which the public officer had no jurisdiction to determine⁷.

In the case of an arbitration award to which the Arbitration Act 1996 applies, and unless otherwise agreed by the parties, where the seat of the arbitration is in England and Wales or Northern Ireland, any award in the proceedings is treated as made there, regardless of where it was signed, despatched or delivered to any of the parties⁸. A New York Convention award must be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland⁹.

1 See the Arbitration Act 1996 s 52(3). It is not apparently essential for the award to be so signed: *Hammond and Grantham's Arbitration* [1964] NZLR 976. See further **ARBITRATION** vol 2 (2008) PARA 1263. If the arbitration agreement empowers less than the full number to make the award, execution by all is unnecessary, provided all were given the opportunity of executing: *White v Sharp* (1844) 12 M & W 712; *Wright v Graham* (1848) 3 Exch 131; *Re Beck and Jackson* (1857) 1 CBNS 695; but cf *Berney v Read* (1845) 7 QB 79 and *Re Beck and Jackson* (1857) 1 CBNS 695.

2 The arbitration agreement need not, it seems, be signed by the parties; it is sufficient if it is acted upon, and thereby adopted: see **ARBITRATION** vol 2 (2008) PARAS 1213, 1263. A claim for enforcement of the award must, where the application is made under the Arbitration Act 1996 s 66 or under the Arbitration Act 1950 s 26 (repealed), be supported by written evidence exhibiting the arbitration agreement and the original award (or copies): see CPR 62.18(6)(a), (c); and **ARBITRATION** vol 2 (2008) PARA 1275.

3 *Still v Halford* (1814) 4 Camp 17. Enlargement of time, if any, must be proved by affidavit, for on an application to enforce an award a statement in the award that the time was enlarged is not sufficient: see *Davis v Vass* (1812) 15 East 97. As to the time for making an award and the mode of enlarging time see **ARBITRATION** vol 2 (2008) PARAS 1220-1221.

4 *Gisborne v Hart* (1839) 5 M & W 50; see *Dresser v Stansfield* (1845) 14 M & W 822.

5 *Doe d Roberts v Mostyn* (1852) 12 CB 268; *Williams v Eyton* (1859) 4 H & N 357; cf *Doe d Nanney v Gore* (1837) 2 M & W 320.

6 *R v Haslingfield Inhabitants* (1814) 2 M & S 558; cf *Manning v Eastern Counties Rly Co* (1843) 12 M & W 237.

7 *Jacomb v Turner* [1892] 1 QB 47.

8 See the Arbitration Act 1996 s 53; and **ARBITRATION** vol 2 (2008) PARA 1264.

9 See the Arbitration Act 1996 s 101(1); and **ARBITRATION** vol 2 (2008) PARA 1290.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iv) Books and Records of Banks, Companies and Corporations/939. Examined copies of entries in bankers' books.

(iv) Books and Records of Banks, Companies and Corporations

939. Examined copies of entries in bankers' books.

As a general rule a bank cannot be compelled to produce its books without an order of the court in any case to which it is not a party, but may instead allow examined copies of entries in those books to be made¹. 'Bankers' books' for these purposes include ledgers, day books, cash books, account books and other records used in the ordinary business of the bank, whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism².

1 See the Bankers' Books Evidence Act 1879; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 907 et seq, where the subject of production, inspection and admissibility of bankers' books is discussed.

2 Bankers' Books Evidence Act 1879 s 9(2) (substituted by the Banking Act 1979 s 51(1), Sch 6 paras 1, 13).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(iv) Books and Records of Banks, Companies and Corporations/940. Books and records of companies and corporations.

940. Books and records of companies and corporations.

The official books of a corporation are admissible to prove the public acts of a corporation, provided that they were kept publicly as the corporation books¹, and that the entries were made by the proper officer².

Particular statutes provide for the admissibility in evidence of the books of companies³, the minutes of meetings of local authorities⁴, extracts from the minutes of meetings of the managers or governors of certain schools, and documents issued by local education authorities⁵. A document which purports to be a copy of a resolution, order or report of a local authority or a precursor of a local authority or the minutes of the proceedings at a meeting of such an authority and which bears a certificate purporting to be signed by the proper officer of the authority and stating that the resolution was passed or the order or report was made by the authority on the date specified in the certificate, or that the minutes were signed in accordance with the statutory requirements⁶, is to be evidence in any proceedings of the matters stated in the certificate and of the terms of the resolution, order, report or minutes in question⁷.

1 *Warden etc of Mercers etc of Shrewsbury v Hart* (1823) 1 C & P 113.

2 *R v Mothersell* (1718) 1 Stra 93; and see **CORPORATIONS**. Such documents, formerly admissible at common law, are now admissible in civil cases by virtue of the Civil Evidence Act 1995 s 7(2)(b): see PARA 821. Statements in such documents relating to private matters may be receivable as hearsay evidence subject to the provisions of ss 1-4: see PARA 808 et seq; and see eg *Hill v Manchester and Salford Water Works Co* (1833) 5 B & Ad 866; *Rennie v Clarke* (1850) 5 Exch 292 (statements admitted under the former common law exception with regard to admissions, not preserved by the 1995 Act).

3 See generally **COMPANIES**.

4 See the text and notes 6-7. A photographic copy of a document in the custody of a local authority is generally admissible in evidence to the like extent as the original: see the Local Government Act 1972 s 229; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 540.

5 See generally **EDUCATION**.

6 Ie in accordance with the requirements of the Local Government Act 1972 s 99, Sch 12 para 41 or the corresponding provision specified in the certificate of the enactments relating to local government which were in force when the minutes were signed: Local Government (Miscellaneous Provisions) Act 1976 s 41(1).

7 Local Government (Miscellaneous Provisions) Act 1976 s 41(1). A document which purports to be a copy of an instrument by which the proper officer of a local authority appointed a person to be an officer of the authority or authorised a person to perform functions specified in the instrument and which bears the appropriate certificate is to be evidence in any proceedings of the fact that the instrument was made by that officer and of the terms of the instrument: see s 41(3). Corresponding provision is made in relation to an authority in England which is operating executive arrangements, as regards a document purporting to be a copy of a record of any decision made by the executive or a member of that executive or by any person acting on behalf of that executive: see s 41(2A) (added, in relation to England, by SI 2001/2237 and, in relation to Wales by SI 2002/808; and amended by the Local Government and Public Involvement in Health Act 2007 s 237(3)). See further **LOCAL GOVERNMENT** vol 69 (2009) PARA 575.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(v) Histories, Scientific Works, Maps and Dictionaries/941. Histories.

(v) Histories, Scientific Works, Maps and Dictionaries

941. Histories.

Accredited public histories are admissible¹ in evidence to prove ancient facts of a public, but not of a private or local, nature²; and standard authors may be referred to as showing the opinions of eminent persons upon particular subjects, but not to prove facts³. Speed's Chronicle has been admitted to prove the date of decease of an English queen⁴, and Collier's Ecclesiastical History, Hooker's Polity, and other authoritative historical and theological works, to prove matters of church doctrine and usage⁵; while the Chronicles of Stowe and Dugdale have been rejected in proof of the creation of a peerage⁶, Camden's Britannia in proof of a local custom to sink salt pits⁷, and a county history in proof of a county boundary⁸.

1 The works mentioned in this paragraph, and in PARAS 942-944, were admissible at common law as an exception to the rule against hearsay; in civil cases they are now admissible by virtue of the Civil Evidence Act 1995 s 7(2)(a): see PARA 820.

2 See *St Katherine's Hospital Case* (1671) 1 Vent 149, where a chronicle was admitted to prove a particular point in the history of Edward III's reign; *Neal v Fry* (1684) cited in 1 Salk 281, where histories were referred to for the date at which Philip of Spain assumed his titles; *Evans v Getting* (1834) 6 C & P 586, where the old authorities are collected; and see *Fowke v Berington*[1914] 2 Ch 308.

3 *Darby v Ouseley* (1856) 1 H & N 1.

4 *Lord Brounker v Atkyns* (1681) Skin 14; and see *Lord Bridgwater's Case* (prior to 1681) cited in Skin 15, HL.

5 *Read v Bishop of Lincoln*[1892] AC 644, PC; *Ridsdale v Clifton* (1877) 2 PD 276, PC; *A-G v Gould* (1860) 28 Beav 485.

6 *Vaux Peerage* (1837) 5 Cl & Fin 526.

7 *Stainer v Burgesses of Droitwich* (1695) 1 Salk 281.

8 See *Evans v Getting* (1834) 6 C & P 586 ('This is a history of Brecknockshire. The writer of that history probably had the same interest in enlarging the boundaries of the county as any other inhabitant of it. It is not like a general history of Wales').

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(v) Histories, Scientific Works, Maps and Dictionaries/942. Scientific works.

942. Scientific works.

Scientific books and records are admissible as evidence of facts of a public nature stated in them¹. Thus, actuarial tables were admitted to show the average duration of life at a particular age, proof having been given that they were generally accepted as authoritative by insurance companies²; the British Pharmacopoeia³ as evidence of the recognised standard for drugs⁴; the Almanac annexed to the Book of Common Prayer as evidence of the matters contained in it⁵; an engineer's reports as to a past state of facts not within living memory, accepted by engineers as accurate, have been admitted on the same principle as historical works⁶; and for some purposes specifications of patents from the records of the Patent Office have been admitted⁷.

1 Eg maps and surveys made by persons of repute in that connection on questions of public rights: *R v Norfolk County Council* (1910) 26 TLR 269. See also PARA 941 note 1.

2 *Rowley v London and North Western Rly Co* (1873) LR 8 Exch 221 (Carlisle Tables). As to the admissibility of the Ogden Tables see PARA 818.

3 As to the British Pharmacopoeia see **MEDICINAL PRODUCTS AND DRUGS** vol 30(2) (Reissue) PARA 149.

4 *Dickins v Randerson* [1901] 1 KB 437, DC.

5 *Tutton v Darke* (1860) 5 H & N 647.

6 *East London Rly Co v Thames Conservators* (1904) 90 LT 347. The reports in question were those of Brunel as to the making of the Thames Tunnel in 1824.

7 *Clark v Adie (No 2)* (1877) 2 App Cas 423, HL.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(v) Histories, Scientific Works, Maps and Dictionaries/943. Maps.

943. Maps.

Public maps, generally offered for public sale, have been admitted to show matters of general geographical notoriety, such as the relative situations of towns or counties¹. Ordnance Survey maps are admissible to show what physical features the persons employed to make the survey did or did not see at the time of the survey², but not as evidence of title or right³.

1 *R v Orton* (1873) and *R v Jameson* (1896) cited in Stephen's Digest of the Law of Evidence (12th Edn) 56; see also *North Staffordshire Rly Co v Hanley Corpn* (1909) 73 JP 477, CA; and see PARAS 902, 942 note 1, 954 (private maps). As to the admissibility of maps and plans as evidence of a highway or footpath see PARA 955.

2 *A-G v Antrobus* [1905] 2 Ch 188; *A-G and Croydon RDC v Moorsom-Roberts* (1907) 72 JP 123; *A-G v Meyrick and Jones* (1915) 79 JP 515. The court may take notice of the practice of the Ordnance Survey as at least prima facie evidence of what a line on a map indicates: see *Davey v Harrow Corpn* [1958] 1 QB 60, [1957] 2 All ER 305, CA.

3 See **BOUNDARIES**; and see *Bidder v Bridges* (1885) 34 WR 514; *Meacher v Blair-Oliphant* 1913 SC 417. For a similar rule in respect of the Irish Survey see *Swift v M'Tiernan* (1848) 11 I Eq R 602; *Tisdall v Parnell* (1863) 14 ICLR 1. See also *Caton v Hamilton* (1889) 53 JP 504, which, however, seems of doubtful authority.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(v) Histories, Scientific Works, Maps and Dictionaries/944. Dictionaries.

944. Dictionaries.

Dictionaries of good reputation¹, whether of a general² or technical³ character, are receivable in order to inform the court's mind in ascertaining the ordinary meaning of words used in Acts of Parliament⁴, wills⁵ and other instruments⁶, but the court is not bound by any definitions or illustrations to be found in dictionaries⁷, nor is a dictionary authority on the meaning of a word peculiar to mercantile usage⁸.

1 *Re Rayner, Rayner v Rayner* [1904] 1 Ch 176, CA. The dictionary must be well known and authoritative: *Marquis of Camden v IRC* [1914] 1 KB 641, CA.

2 Eg Johnson (*Taylor v Smetten* (1883) 11 QBD 207; *Barclay v Pearson* [1893] 2 Ch 154), the Oxford English Dictionary (*Willis v Young and Stembridge* [1907] 1 KB 448; *Yangtze Insurance Association v Indemnity Mutual Marine Assurance Co* [1908] 2 KB 504, CA), Richardson (*Homer v Homer* (1878) 8 ChD 758, CA; *R v Tomlinson* [1895] 1 QB 706, CCR), Webster (*Taylor v Smetten* (1883) 11 QBD 207; *Barclay v Pearson* [1893] 2 Ch 154).

3 Eg Blount's Law Dictionary (*Marchioness of Blandford v Dowager Duchess of Marlborough* (1743) 2 Atk 542); Stroud's Judicial Dictionary (*Lake v Simmons* [1926] 1 KB 366); Wharton's Law Lexicon (*Re Bright-Smith, Bright-Smith v Bright-Smith* (1886) 31 ChD 314).

4 See *Taylor v Smetten* (1883) 11 QBD 207; *R v Peters* (1886) 16 QBD 636; *Midland Rly Co and Kettering, Thrapston and Huntingdon Rly Co v Robinson* (1889) 15 App Cas 19, HL; *R v Tomlinson* [1895] 1 QB 706; *Wills v Young and Stembridge* [1907] 1 KB 448; *Marquis of Camden v IRC* [1914] 1 KB 641, CA; and see generally **STATUTES**.

5 See *Homer v Homer* (1878) 8 ChD 758, CA; *Re Bright-Smith, Bright-Smith v Bright-Smith* (1886) 31 ChD 314; *Re Rayner, Rayner v Rayner* [1904] 1 Ch 176, CA; and see generally **WILLS** vol 50 (2005 Reissue) PARA 488 et seq.

6 See *Matthew v Purchins* (1608) Cro Jac 203 (bond); *Marchioness of Blandford v Dowager Duchess of Marlborough* (1743) 2 Atk 542 (marriage settlement); *Yangtze Insurance Association v Indemnity Mutual Marine Assurance Co* [1908] 2 KB 504, CA, and *Lake v Simmons* [1926] 1 KB 366 (insurance policies).

7 *Grieves v Rawley* (1852) 10 Hare 63; *Re Feeney, Inglis v Birmingham Corpn* (1908) 24 TLR 314. On the question as to the meaning of a word in a statute, the court may consider that the opinions of illustrious judges are a safer guide: *Midland Rly Co and Kettering, Thrapston and Huntingdon Rly Co v Robinson* (1889) 15 App Cas 19, HL; and see PARA 788 note 6.

8 *Houghton v Gilbert* (1836) 7 C & P 701.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vi) Particular Private Documents/A. LETTERS AND ELECTRONIC COMMUNICATIONS/(A) Letters/945. Proof of posting.

(vi) Particular Private Documents

A. LETTERS AND ELECTRONIC COMMUNICATIONS

(A) LETTERS

945. Proof of posting.

The posting of a letter may be proved by the person who posted it, or by showing facts from which posting may be presumed. Thus, evidence of posting may be given by proving that a letter was delivered to an employee who in the ordinary course of business would have posted it¹, or that it was put into a box which was cleared every day by the postman². The fact that a letter has been copied into a letter book is evidence against the person keeping the book that the letter was posted³.

The postmark on an envelope is prima facie evidence of the time and place of posting⁴, and the date which a letter bears is prima facie evidence of the date on which it was written⁵.

1 *Trotter v Maclean*(1879) 13 ChD 574; cf *Pritt v Fairclough* (1812) 3 Camp 305; and see *Hetherington v Kemp* (1815) 4 Camp 193. It is not sufficient to prove delivery to a clerk who might not post it unless instructed to do so: *Toosey v Williams* (1827) Mood & M 129; *Rowlands v De Vecchi* (1882) 9 Cab & El 10; *Copin v Adamson*(1874) LR 9 Exch 345; affd (1875) 1 ExD 17, CA. In a contested case it may be necessary to call the employee concerned, to prove his custom and its reliability: see eg *Holwell Securities Ltd v Hughes*[1973] 2 All ER 476, [1973] 1 WLR 757; on appeal [1974] 1 All ER 161, [1974] 1 WLR 155, CA.

2 *Skilbeck v Garbett*(1845) 7 QB 846. It does not suffice to prove delivery to a postman who has no authority to receive it: *Re London and Northern Bank, ex p Jones*[1900] 1 Ch 220.

3 *Sturge v Buchanan* (1839) 10 Ad & El 598.

4 *Stocken v Collin* (1841) 7 M & W 515; *R v Johnson* (1805) 7 East 65; *R v Plumer* (1814) Russ & Ry 264, CCR; *Re London and Northern Bank, ex p Jones*[1900] 1 Ch 220. In cases of dispute it may be necessary to call the person who made the postmark to prove its authenticity: *Abbey v Lill* (1829) 5 Bing 299; cf *Woodcock v Houldsworth* (1846) 16 M & W 124. As to postmarks see **POST OFFICE** vol 36(2) (Reissue) PARA 103. Payment of compensation under the inland letter and parcel post schemes operated by the Post Office or the successor postal services company is dependent on the sender having obtained a certificate of posting from the appropriate Post Office officer or company employee: see **POST OFFICE** vol 36(2) (Reissue) PARA 96.

5 *Goodtitle d Baker v Milburn* (1837) 2 M & W 853; cf *Malpas v Clements* (1850) 19 LJB 435; *Morgan v Whitmore*(1851) 6 Exch 716. A doubt as to this was expressed in *Butler v Viscount Mountgarret* (1859) 7 HL Cas 633. See also **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 193.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vi) Particular Private Documents/A. LETTERS AND ELECTRONIC COMMUNICATIONS/(A) Letters/946. Proof of delivery.

946. Proof of delivery.

Proof that a letter has been posted¹, and that it was prepaid², properly addressed, and not returned undelivered³, is evidence of its delivery⁴ in the ordinary course of post⁵.

In many cases provision is made by statute⁶ that the posting of a notice is sufficient⁷ or conclusive evidence of service of the notice⁸. In other cases, delivery of a document to a particular person may be inferred from proof that it was delivered to his employee⁹.

Part 6 of the Civil Procedure Rules makes provision regarding the service of documents in civil proceedings¹⁰. A document served by first class post or by document exchange is deemed to be served on the second day after it was posted or left with, delivered to or collected by the relevant service provider, as the case may be, provided that day is a business day or, if not, the next business day after that day¹¹.

¹ See PARA 945. As to the rule that a contract is accepted when the letter of acceptance is posted see **CONTRACT** vol 9(1) (Reissue) PARA 676 et seq.

² Some statutory provisions require service of documents to be by prepaid letter: see *Walthamstow UDC v Henwood* [1897] 1 Ch 41.

³ See eg the Law of Property Act 1925 s 196(4) (amended by SI 2001/1149) which also requires the use of registered post.

⁴ The presumption thus raised may normally be rebutted: see eg *Re Constantinople and Alexandria Hotel Co, Reidpath's Case* (1870) LR 11 Eq 86; *Holwell Securities Ltd v Hughes* [1973] 2 All ER 476, [1973] 1 WLR 757; on appeal [1974] 1 All ER 161, [1974] 1 WLR 155, CA.

⁵ *Kufh v Weston* (1799) 3 Esp 54; *Warren v Warren* (1834) 1 Cr M & R 250; *Dunlop v Higgins* (1848) 1 HL Cas 381; *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) 4 Ex D 216, CA; *Watts v Vickers Ltd* (1916) 86 LJB 177, CA.

'Ordinary course of post' means the general course of post with regard to the delivery of letters to persons resident in the district: *Kemp v Wanklyn* [1894] 1 QB 583, CA. As to the publication of a libel addressed by post see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 65.

⁶ Where an Act passed after the year 1889 authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post: Interpretation Act 1978 s 7, Sch 2 para 3. Section 7 is in two parts, the first part dealing with what has to be done in order for service to be deemed to have been effected, and the second part, which may be rebutted by proof, dealing with the time when service is deemed to be effected: see *R v London County Quarter Sessions Appeal Committee, ex p Rossi* [1956] 1 QB 682 at 700, [1956] 1 All ER 670 at 681, CA; *AS Cathrineholm v Norequipment Trading Ltd* [1972] 2 QB 314, [1972] 2 All ER 538, CA (decided under earlier legislation). Thus, a notice is not deemed to be served at a particular time when the fact is known that it was not delivered at all: *R v London County Quarter Sessions Appeal Committee, ex p Rossi* [1956] 1 QB 682, [1956] 1 All ER 670, CA; *Hewitt v Leicester Corp* [1969] 2 All ER 802, [1969] 1 WLR 855, CA (letter returned marked 'gone away'). Cf *Moody v Godstone RDC* [1966] 2 All ER 696, [1966] 1 WLR 1085, DC (no reason to believe that letter had gone astray); *Saga of Bond Street Ltd v Avalon Promotions Ltd* [1972] 2 QB 325n, [1972] 2 All ER 545n, CA (letter returned marked 'not known' after judgment in default of appearance); *Chiswell v Griffon Land and Estates Ltd* [1975] 2 All ER 665, [1975] 1 WLR 1181, CA (letter lost in the post). See further **STATUTES**.

⁷ As to the effect of sufficient evidence see PARA 767. The Interpretation Act 1978 s 7 (see note 6) will usually apply in such cases.

8 *R v Westminster Unions Assessment Committee, ex p Woodward & Sons* [1917] 1 KB 832; and see the Road Traffic Offenders Act 1988 s 1(1)(c), (2), (3); and **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 1028. As to the effect of conclusive evidence see PARA 767.

9 The inference may be made even though the employee was not specially authorised to accept the document: *MacGregor v Keily* (1849) 3 Exch 794; cf *Tanham v Nicholson* (1872) LR 5 HL 561.

10 See CPR Pt 6; and PARA 138 et seq.

11 See CPR 6.26; and PARA 151. A claim form served in accordance with CPR Pt 6 is deemed to be served on the second business day after completion of the relevant step after it has been issued: CPR 6.14. On the natural and ordinary meaning of the language of what is now CPR 6.26, Saturday and Sunday are not excluded from the calculation of the day of deemed service by first class post: *Anderton v Clwyd County Council* [2002] EWCA Civ 933, [2002] 3 All ER 813, [2002] 1 WLR 3174. The deemed day of service of a claim form is not rebuttable by evidence of actual receipt of the claim form by the defendant: *Anderton v Clwyd County Council* [2002] EWCA Civ 933, [2002] 3 All ER 813, [2002] 1 WLR 3174.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vi) Particular Private Documents/A. LETTERS AND ELECTRONIC COMMUNICATIONS/(B) Other Communications/947. Proof of faxes, emails and other electronic communications.

(B) OTHER COMMUNICATIONS

947. Proof of faxes, emails and other electronic communications.

Faxes and emails may be admitted as evidence in civil proceedings either as hearsay subject to the statutory safeguards¹ or as part of the records of a business or public authority².

Part 6 of the Civil Procedure Rules makes provision regarding the service of documents in civil proceedings³. A document served by facsimile ('fax'), if the transmission of the fax is completed on a business day before 4.30 pm, is deemed to be served on that day or, in any other case, on the next business day after the day on which it was transmitted. A document served by e-mail or any other electronic method, if the e-mail or other electronic transmission is sent on a business day before 4.30 pm, is deemed to be served on that day or, in any other case, on the next business day after the day on which it was sent⁴. Additionally, a practice direction may make provision for documents to be filed⁵ or sent to the court⁶ by fax or other electronic means⁷. Any such practice direction may (1) provide that only particular categories of documents may be filed or sent to the court by such means; (2) provide that particular provisions only apply in specific courts; and (3) specify the requirements that must be fulfilled for any document filed or sent to the court by such means⁸.

In many cases specific statutory provision is made for the service of notices by fax or email⁹.

Subject to the restrictions set out below¹⁰, the appropriate minister¹¹ may by order made by statutory instrument¹² modify the provisions of any enactment¹³ or subordinate legislation¹⁴, or any scheme, licence, authorisation or approval issued, granted or given by or under any enactment or subordinate legislation, in such manner as he may think fit for the purpose of authorising or facilitating the use of electronic communications¹⁵ or electronic storage, instead of other forms of communication or storage, for any of the following purposes¹⁶:

- 121 (a) the doing of anything¹⁷ which under any such provisions is required to be or may be done or evidenced in writing or otherwise using a document, notice or instrument;
- 122 (b) the doing of anything which under any such provisions is required to be or may be done by post or other specified means of delivery;
- 123 (c) the doing of anything which under any such provisions is required to be or may be authorised by a person's signature or seal, or is required to be delivered as a deed or witnessed;
- 124 (d) the making of any statement or declaration which under any such provisions is required to be made under oath or to be contained in a statutory declaration;
- 125 (e) the keeping, maintenance or preservation, for the purposes or in pursuance of any such provisions, of any account, record¹⁸, notice, instrument or other document;
- 126 (f) the provision, production or publication under any such provisions of any information or other matter;
- 127 (g) the making of any payment that is required to be or may be made under any such provisions¹⁹.

The appropriate minister must not, however, make such an order authorising the use of electronic communications or electronic storage for any purpose, unless he considers that the authorisation is such that the extent, if any, to which records of things done for that purpose will be available will be no less satisfactory in cases where use is made of electronic communications or electronic storage than in other cases²⁰. Furthermore, the matters in relation to which provision may be made by such an order do not include any matter under the care and management of the Commissioners for Revenue and Customs²¹.

The provision that may be made by such an order includes provision, in relation to cases in which the use of electronic communications or electronic storage is so authorised, for the determination of any of the following matters or as to the manner in which they may be proved in legal proceedings:

- 128 (i) whether a thing has been done using an electronic communication or electronic storage;
- 129 (ii) the time at which, or date on which, a thing done using any such communication or storage was done;
- 130 (iii) the place where a thing done using such communication or storage was done;
- 131 (iv) the person by whom such a thing was done; and
- 132 (v) the contents, authenticity²² or integrity²³ of any electronic data²⁴.

1 See the Civil Evidence Act 1995 ss 1-4; and PARA 808 et seq.

2 See the Civil Evidence Act 1995 s 9; and PARA 817.

3 See CPR Pt 6; and PARA 138 et seq.

4 See CPR 6.26; and PARA 151 heads (4)-(5) in the text.

5 As to the meaning of 'filing' see PARA 1832 note 2.

6 As to the meaning of 'court' see PARA 22.

7 CPR 5.5(1).

8 CPR 5.5(2). For the provision that has been made see *Practice Direction--Electronic Communication and Filing of Documents* PD 5B; and PARA 84.

9 See eg the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2005, SI 2005/659, reg 40(1)(b); and **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 129; the Civil Aviation Authority Regulations 1991, SI 1991/1672, reg 31A(5)(d); and **AIR LAW** vol 2 (2008) PARA 94.

As to the publication of a libel by fax, e-mail or on the internet see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 65; and as to the offer and acceptance of a contract made by such means see **CONTRACT** vol 9(1) (Reissue) PARA 683.

10 In subject to the Electronic Communications Act 2000 s 8(3): see the text and note 20.

11 For these purposes, 'appropriate minister' means (subject to the Electronic Communications Act 2000 s 9(2), (7), 10(1)): (1) in relation to any matter with which a department of the Secretary of State is concerned, the Secretary of State; (2) in relation to any matter with which the Treasury is concerned, the Treasury; and (3) in relation to any matter with which any government department other than a department of the Secretary of State or the Treasury is concerned, the minister in charge of the other department: s 9(1). Where in the case of any matter, that matter falls within more than one of heads (1)-(3), there is more than one such department as is mentioned in head (3) that is concerned with that matter, or both heads (1) and (2) apply, references, in relation to that matter, to the appropriate minister are references to any one or more of the appropriate ministers acting (in the case of more than one) jointly: s 9(2). In the case of any matter which is not one of the reserved matters within the meaning of the Scotland Act 1998 or in respect of which functions are, by virtue of s 63, exercisable by the Scottish ministers instead of by or concurrently with a minister of the Crown, the Electronic Communications Act 2000 ss 8, 9 apply to Scotland subject to the following modifications: (a) s 9(1), (2) are omitted; (b) any reference to the appropriate minister is to be read as a reference to the Secretary of State; (c) any power of the Secretary of State, by virtue of head (b), to make an order under s 8 may also be

exercised by the Scottish ministers with the consent of the Secretary of State; and (d) where the Scottish ministers make an order under s 8, any reference to the Secretary of State (other than a reference in s 9(7)) is to be construed as a reference to the Scottish ministers and any reference to Parliament or to a House of Parliament is to be construed as a reference to the Scottish Parliament: s 9(7).

For the purposes of the exercise of the powers conferred by s 8 in relation to any matter the functions in respect of which are exercisable by the Welsh Ministers, the appropriate minister is the Secretary of State: s 10(1); Government of Wales Act 2006. Subject to the following provisions, the powers conferred by s 8, so far as they fall within s 10(3), are exercisable by the Welsh Ministers as well as by the appropriate minister: s 10(2). The powers conferred by s 8 fall within s 10(3) to the extent that they are exercisable in relation to (i) the provisions of any subordinate legislation made by the Welsh Ministers; (ii) so much of any other subordinate legislation as makes provision the power to make which is exercisable by those ministers; (iii) any power under any enactment to make provision the power to make which is so exercisable; (iv) the giving, sending or production of any notice, account, record or other document or of any information to or by a body mentioned in s 10(4); or (v) the publication of anything by a body mentioned in s 10(4): s 10(3). Those bodies are (A) the National Assembly for Wales; (B) any body specified in the Government of Wales Act 1998 Sch 4 (Welsh public bodies subject to reform by that Assembly); and (C) any other such body as may be specified for these purposes by an order made by the Secretary of State with the consent of the Welsh Ministers: Electronic Communications Act 2000 s 10(4). The Welsh Ministers may not make an order under s 8 except with the consent of the Secretary of State: s 10(5). Nothing in s 10 confers any power on the Welsh Ministers to modify any provision of the Government of Wales Act 1998: Electronic Communications Act 2000 s 10(7). The power of the Secretary of State to make an order under s 10(4)(c) (see head (c)) includes power to make any such incidental, supplemental, consequential and transitional provision as he may think fit and is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 10(8).

12 Subject to the Electronic Communications Act 2000 s 9(4) and to s 10(6), a statutory instrument containing an order under s 8 is subject to annulment in pursuance of a resolution of either House of Parliament (s 9(3)); but this does not apply in the case of an order a draft of which has been laid before Parliament and approved by a resolution of each House (s 9(4)). Section 9(3) does not apply to any order made under s 8 by the Welsh Ministers: s 10(6). An order under s 8 may (1) provide for any conditions or requirements imposed by such an order to be framed by reference to the directions of such persons as may be specified in or determined in accordance with the order; (2) provide that any such condition or requirement is to be satisfied only where a person so specified or determined is satisfied as to specified matters: s 9(5). The provision made by such an order may include (a) different provision for different cases; (b) such exceptions and exclusions as the person making the order may think fit; and (c) any such incidental, supplemental, consequential and transitional provision as he may think fit; and the provision that may be made by virtue of head (c) includes provision modifying any enactment or subordinate legislation or any scheme, licence, authorisation or approval issued, granted or given by or under any enactment or subordinate legislation: s 9(6).

13 For these purposes, 'enactment' includes an enactment passed after the passing of the Electronic Communications Act 2000 (ie 25 July 2000), an enactment comprised in an Act of the Scottish Parliament and an enactment contained in Northern Ireland legislation but does not include an enactment contained in Pt I (ss 1-6) (provisions relating to encryption not in force at the date at which this title states the law and prospectively repealed, if no order for bringing that Part into force has been made before 25 May 2005, as from that date by virtue of s 16(4)) or Pt II (ss 7-10): s 15(1).

14 For these purposes, 'subordinate legislation' means any subordinate legislation (within the meaning of the Interpretation Act 1978: see **STATUTES** vol 44(1) (Reissue) PARA 1381), any instrument made under an Act of the Scottish Parliament or any statutory rules of Northern Ireland: Electronic Communications Act 2000 s 15(1).

15 'Electronic communication' means a communication transmitted (whether from one person to another, from one device to another or from a person to a device or vice versa) (1) by means of an electronic communications network; or (2) by other means but while in an electronic form; and 'communication' includes a communication comprising sounds or images or both and a communication effecting a payment: Electronic Communications Act 2000 s 15(1) (amended by the Communications Act 2003 s 406(1), Sch 17 para 158).

16 Electronic Communications Act 2000 s 8(1).

17 For these purposes, references to doing anything under the provisions of any enactment include references to doing it under the provisions of any subordinate legislation the power to make which is conferred by that enactment: Electronic Communications Act 2000 s 8(8).

18 For these purposes, 'record' includes an electronic record: Electronic Communications Act 2000 s 15(1).

19 Electronic Communications Act 2000 s 8(2). Without prejudice to the generality of s 8(1), the power to make an order under s 8 includes power to make an order containing any of the following provisions: (1) provision as to the electronic form to be taken by any electronic communications or electronic storage the use of which is authorised by such an order; (2) provision imposing conditions subject to which the use of electronic communications or electronic storage is so authorised; (3) provision, in relation to cases in which any such

conditions are not satisfied, for treating anything for the purposes of which the use of such communications or storage is so authorised as not having been done; (4) provision, in connection with anything so authorised, for a person to be able to refuse to accept receipt of something in electronic form except in such circumstances as may be specified in or determined under the order; (5) provision, in connection with any use of electronic communications so authorised, for intermediaries to be used, or to be capable of being used, for the transmission of any data or for establishing the authenticity or integrity of any data; (6) provision, in connection with any use of electronic storage so authorised, for persons satisfying such conditions as may be specified in or determined under the regulations to carry out functions in relation to the storage; (7) provision, in relation to cases in which the use of electronic communications or electronic storage is so authorised, for the determination of any of the matters mentioned in s 8(5) (see heads (a)-(e) in the text), or as to the manner in which they may be proved in legal proceedings; (8) provision, in relation to cases in which fees or charges are or may be imposed in connection with anything for the purposes of which the use of electronic communications or electronic storage is so authorised, for different fees or charges to apply where use is made of such communications or storage; (9) provision, in relation to any criminal or other liabilities that may arise (in respect of the making of false or misleading statements or otherwise) in connection with anything for the purposes of which the use of electronic communications or electronic storage is so authorised, for corresponding liabilities to arise in corresponding circumstances where use is made of such communications or storage; (10) provision requiring persons to prepare and keep records in connection with any use of electronic communications or electronic storage which is so authorised; (11) provision requiring the production of the contents of any records kept in accordance with such an order; (12) provision for a requirement imposed by virtue of head (10) or head (11) to be enforceable at the suit or instance of such person as may be specified in or determined in accordance with the order; (13) any such provision, in relation to electronic communications or electronic storage the use of which is authorised otherwise than by such an order, as corresponds to any provision falling within any of the preceding heads that may be made where it is such an order that authorises the use of the communications or storage: s 8(4). An order under s 8 must not, subject to the following, require the use of electronic communications or electronic storage for any purpose; but may make provision that a period of notice specified in the order must expire before effect is given to a variation or withdrawal of an election or other decision which has been made for the purposes of such an order and is an election or decision to make use of electronic communications or electronic storage: s 8(6).

20 Electronic Communications Act 2000 s 8(3).

21 Electronic Communications Act 2000 s 8(7) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(1), (7)).

22 For these purposes, references to the authenticity of any communication or data are references to any one or more of the following: (1) whether the communication or data comes from a particular person or other source; (2) whether it is accurately timed and dated; (3) whether it is intended to have legal effect: Electronic Communications Act 2000 s 15(2)(a).

23 For these purposes, references to the integrity of any communication or data are references to whether there has been any tampering with or other modification of the communication or data: Electronic Communications Act 2000 s 15(2)(b). 'Modification' includes any alteration, addition or omission, and cognate expressions are to be construed accordingly: s 15(1).

24 Electronic Communications Act 2000 s 8(5). At the date at which this title states the law, the following orders had been made under s 8: the Local Government and Housing Act 1989 (Electronic Communications) (England) Order 2000, SI 2000/3056; the Companies Act 1985 (Electronic Communications) Order 2000, SI 2000/3373; the Local Government and Housing Act 1989 (Electronic Communications) (Wales) Order 2001, SI 2001/605; the Unsolicited Goods and Services Act 1971 (Electronic Communications) Order 2001, SI 2001/2778; the National Health Service (Charges for Drugs and Appliances) (Electronic Communications) Order 2001, SI 2001/2887; the National Health Service (Pharmaceutical Services) and (Misuse of Drugs) (Electronic Communications) Order 2001, SI 2001/2888; the Prescription Only Medicines (Human Use) (Electronic Communications) Order 2001, SI 2001/2889; the National Health Service (General Medical Services) (Electronic Communications) Order 2001, SI 2001/2890; the Housing (Right to Acquire) (Electronic Communications) (England) Order 2001, SI 2001/3257; and the Public Records Act 1958 (Admissibility of Electronic Copies of Public Records) Order 2001, SI 2001/4058; the Building Societies Act 1986 (Electronic Communications) Order 2003, SI 2003/404; the Patents Act 1977 (Electronic Communications) Order 2003, SI 2003/512; the Town and Country Planning (Electronic Communications) (England) Order 2003, SI 2003/956; the Council Tax and Non-Domestic Rating (Electronic Communications) (England) Order 2003, SI 2003/2604; the Social Security (Electronic Communications) (Carer's Allowance) Order 2003, SI 2003/2800; the Council Tax and Non-Domestic Rating (Electronic Communications) (England) (No 2) Order 2003, SI 2003/3052; the Education Act 1996 (Electronic Communications) Order 2004, SI 2004/2521; the Town and Country Planning (Electronic Communications) (Wales) (No 1) Order 2004, SI 2004/3156; the Town and Country Planning (Electronic Communications) (Wales) (No 2) Order 2004, SI 2004/3157; the Town and Country Planning (Electronic Communications) (Wales) (No 3) Order 2004, SI 2004/3172; the Consumer Credit Act 1974 (Electronic Communications) Order 2004, SI 2004/3236; the Social Security (Electronic Communications) (Miscellaneous Benefits) Order 2005, SI 2005/3321; the Non-Domestic Rating and Council Tax (Electronic Communications)

(England) Order 2006, SI 2006/237; the Registered Designs Act 1949 and Patents Act 1977 (Electronic Communications) Order 2006, SI 2006/1229; the Transport Security (Electronic Communications) Order 2006, SI 2006/2190; the Registration of Births and Deaths (Electronic Communications and Electronic Storage) Order 2006, SI 2006/2809; the Housing Benefit and Council Tax Benefit (Electronic Communications) Order 2006, SI 2006/2968; the Income-related Benefits (Subsidy to Authorities) (Miscellaneous Amendments and Electronic Communications) Order 2007, SI 2007/26; and the Council Tax (Electronic Communications) (England) Order 2008, SI 2008/316.

UPDATE

947 Proof of faxes, emails and other electronic communications

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

NOTE 9--SI 2005/659 now Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009, SI 2009/2268; reg 22(1)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vi) Particular Private Documents/A. LETTERS AND ELECTRONIC COMMUNICATIONS/(B) Other Communications/948. Electronic signatures and related certificates.

948. Electronic signatures and related certificates.

In any legal proceedings (1) an electronic signature incorporated into or logically associated with a particular electronic communication¹ or particular electronic data; and (2) the certification by any person of such a signature, are each admissible in evidence in relation to any question as to the authenticity of the communication or data² or as to the integrity³ of the communication or data⁴. For these purposes, an electronic signature is so much of anything in electronic form as is incorporated into or otherwise logically associated with any electronic communication or electronic data⁵ and purports to be so incorporated or associated for the purpose of being used in establishing the authenticity of the communication or data, the integrity of the communication or data, or both⁶; and an electronic signature incorporated into or associated with a particular electronic communication or particular electronic data is certified by any person if that person, whether before or after the making of the communication has made a statement confirming that:

- 133 (a) the signature;
- 134 (b) a means of producing, communicating or verifying the signature; or
- 135 (c) a procedure applied to the signature,

is (either alone or in combination with other factors) a valid means of establishing the authenticity of the communication or data, the integrity of the communication or data, or both⁷.

It is the duty of the Secretary of State for Trade and Industry to keep under review the carrying on of activities of certification-service-providers⁸ who are established in the United Kingdom⁹ and who issue qualified certificates¹⁰ to the public and the persons by whom they are carried on with a view to her becoming aware of the identity of those persons and the circumstances relating to the carrying on of those activities¹¹. It is also the duty of the Secretary of State to establish and maintain a register of certification-service-providers who are established in the United Kingdom and who issue qualified certificates to the public¹². There is a duty of care between a certification-service-provider who either issues a certificate as a qualified certificate to the public or guarantees a qualified certificate to the public and a person who reasonably relies on that certificate for any of certain specified matters¹³.

1 As to the meaning of 'electronic communication' see PARA 947 note 15.

2 As to the meaning of references to the authenticity of any communication or data see PARA 947 note 22.

3 As to the meaning of references to the integrity of any communication or data see PARA 947 note 23.

4 Electronic Communications Act 2000 s 7(1).

5 Electronic Communications Act 2000 s 7(2)(a).

6 Electronic Communications Act 2000 s 7(2)(b).

7 Electronic Communications Act 2000 s 7(3). The provisions set out in this paragraph implement certain provisions of the European Parliament and EC Council Directive 1999/93 (OJ L13, 19.1.2000, p 12) on a Community framework for electronic signatures.

8 'Certification-service-provider' means a person who issues certificates or provides other services related to electronic signatures; 'certificate' means an electronic attestation which links signature-verification data to a person and confirms the identity of that person; and 'electronic signature' means data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication: Electronic Signatures Regulations 2002, SI 2002/318, reg 2.

9 As to the meaning of 'United Kingdom' see PARA 221 note 2.

10 'Qualified certificate' means a certificate which meets the requirements in the Electronic Signatures Regulations 2002, SI 2002/318, reg 2, Sch 1 and is provided by a certification-service-provider who fulfils the requirements in Sch 2: reg 2. Qualified certificates must contain (1) an indication that the certificate is issued as a qualified certificate; (2) the identification of the certification-service-provider and the State in which it is established; (3) the name of the signatory or a pseudonym, which must be identified as such; (4) provision for a specific attribute of the signatory to be included if relevant, depending on the purpose for which the certificate is intended; (5) signature-verification data which correspond to signature-creation data under the control of the signatory; (6) an indication of the beginning and end of the period of validity of the certificate; (7) the identity code of the certificate; (8) the advanced electronic signature of the certification-service-provider issuing it; (9) limitations on the scope of use of the certificate, if applicable; and (10) limits on the value of transactions for which the certificate can be used, if applicable: Sch 1. 'Signatory' means a person who holds a signature-creation device and acts either on his own behalf or on behalf of the person he represents; 'signature-creation data' means unique data (including, but not limited to, codes or private cryptographic keys) which are used by the signatory to create an electronic signature; 'signature-creation device' means configured software or hardware used to implement the signature-creation data; 'signature-verification data' means data (including, but not limited to, codes or public cryptographic keys) which are used for the purpose of verifying an electronic signature; and 'signature-verification device' means configured software or hardware used to implement the signature-verification data: reg 2. 'Advanced electronic signature' means an electronic signature which is uniquely linked to the signatory, which is capable of identifying the signatory, which is created using means that the signatory can maintain under his sole control and which is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable: reg 2.

Certification-service-providers must (a) demonstrate the reliability necessary for providing certification services; (b) ensure the operation of a prompt and secure directory and a secure and immediate revocation service; (c) ensure that the date and time when a certificate is issued or revoked can be determined precisely; (d) verify, by appropriate means in accordance with national law, the identity and, if applicable, any specific attributes of the person to which a qualified certificate is issued; (e) employ personnel who possess the expert knowledge, experience, and qualifications necessary for the services provided, in particular competence at managerial level, expertise in electronic signature technology and familiarity with proper security procedures; they must also apply administrative and management procedures which are adequate and correspond to recognised standards; (f) use trustworthy systems and products which are protected against modification and ensure the technical and cryptographic security of the process supported by them; (g) take measures against forgery of certificates, and, in cases where the certification-service-provider generates signature-creation data, guarantee confidentiality during the process of generating such data; (h) maintain sufficient financial resources to operate in conformity with the requirements laid down in the Directive cited in note 7, in particular to bear the risk of liability for damages, eg, by obtaining appropriate insurance; (i) record all relevant information concerning a qualified certificate for an appropriate period of time, in particular for the purpose of providing evidence of certification for the purposes of legal proceedings (such recording may be done electronically); (j) not store or copy signature-creation data of the person to whom the certification-service-provider provided key management services; (k) before entering into a contractual relationship with a person seeking a certificate to support his electronic signature inform that person by a durable means of communication of the precise terms and conditions regarding the use of the certificate, including any limitations on its use, the existence of a voluntary accreditation scheme and procedures for complaints and dispute settlement (such information, which may be transmitted electronically, must be in writing and in readily understandable language; relevant parts of this information must also be made available on request to third parties relying on the certificate); (l) use trustworthy systems to store certificates in a verifiable form so that (i) only authorised persons can make entries and changes; (ii) information can be checked for authenticity; (iii) certificates are publicly available for retrieval in only those cases for which the certificate-holder's consent has been obtained; and (iv) any technical changes compromising these security requirements are apparent to the operator: Electronic Signatures Regulations 2002, SI 2002/318, Sch 2. 'Voluntary accreditation' means any permission, setting out rights and obligations specific to the provision of certification services, to be granted upon request by the certification-service-provider concerned by the person charged with the elaboration of, and supervision of compliance with, such rights and obligations, where the certification-service-provider is not entitled to exercise the rights stemming from the permission until he has received the decision of that person: reg 2.

11 Electronic Signatures Regulations 2002, SI 2002/318, reg 3(1).

12 Electronic Signatures Regulations 2002, SI 2002/318, reg 3(2). The Secretary of State must record in the register the names and addresses of those certification-service-providers of whom she is aware who are established in the United Kingdom and who issue qualified certificates to the public: reg 3(3). The Secretary of

State must publish the register in such manner as she considers appropriate: reg 3(4). The Secretary of State must have regard to evidence becoming available to her with respect to any course of conduct of a certification-service-provider who is established in the United Kingdom and who issues qualified certificates to the public and which appears to her to be conduct detrimental to the interests of those persons who use or rely on those certificates with a view to making any of this evidence as she considers expedient available to the public in such manner as she considers appropriate: reg 3(5).

13 See the Electronic Signatures Regulations 2002, SI 2002/318, reg 4(1), (2). The specified matters are (1) the accuracy of any of the information contained in the qualified certificate at the time of issue; (2) the inclusion in the qualified certificate of all the details referred to in Sch 1; (3) the holding by the signatory identified in the qualified certificate at the time of its issue of the signature-creation data corresponding to the signature-verification data given or identified in the certificate; or (4) the ability of the signature-creation data and the signature-verification data to be used in a complementary manner in cases where the certification-service-provider generates them both: reg 4(1)(b). As to the liability of the certification-service-provider where a person relying on a certificate suffers loss see reg 4(1)(c), (d), (3), (4). As to restrictions on the use of personal data see reg 5.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vi) Particular Private Documents/B. DEEDS, WILLS AND FAMILY PAPERS/949. Deeds and wills.

B. DEEDS, WILLS AND FAMILY PAPERS

949. Deeds and wills.

Proof of the attestation of deeds and other documents, the admission of extrinsic evidence to vary or add to documents or to interpret the contents of documents, and presumptions as to the time when alterations have been made to deeds and wills are discussed elsewhere in this work¹.

Although the probate copy of a will is admissible in evidence, the court may require to look at the original will when construing its terms². An unproved will may be admitted as evidence of the appointment of an executor³.

1 As to proof of attestation see PARA 866; as to the admission of extrinsic evidence see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 665 et seq; **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 185 et seq; **WILLS** vol 50 (2005 Reissue) PARA 481 et seq; and as to alterations see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 81 et seq; **WILLS** vol 50 (2005 Reissue) PARA 374 et seq.

2 See *Re Harrison, Turner v Hellard*(1885) 30 ChD 390, CA; and **WILLS** vol 50 (2005 Reissue) PARA 488.

3 See *Whitmore v Lambert*[1955] 2 All ER 147, [1955] 1 WLR 495, CA; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 29.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vi) Particular Private Documents/B. DEEDS, WILLS AND FAMILY PAPERS/950. Family papers.

950. Family papers.

Family papers produced from proper custody¹ are in general admissible in cases of pedigree². It is no objection to their admissibility that they were drawn up, or that entries were made in them, for the purpose of preventing disputes in the family³. Under this rule entries in family Bibles⁴ or other books⁵ are admitted to prove facts concerned with family relationship. In the case of family Bibles, which were the ordinary registers in families⁶, and other writings which are public in the family⁷, no evidence is required that the writer was related to the family⁸, but in all other cases the declaration is only admissible if made by a member of the family⁹.

Other examples of family papers admissible in pedigree cases are family correspondence¹⁰, wills¹¹, deeds¹² executed by a member of the family¹³, pedigrees¹⁴ or genealogical accounts of the family¹⁵, and, generally, any writing by a member of the family¹⁶; while an old will, by which the testator purports to leave all his property to collaterals or friends, is admissible to prove that he died without children¹⁷. Descriptions in a will, or even in the draft of a will¹⁸, relating to the family of the testator are admissible in pedigree cases as statements by deceased persons¹⁹.

1 Such papers, if 20 years old and produced from proper custody, prove themselves, and no proof of execution is necessary: see PARA 869.

2 See PARA 830. In addition, as with any private documents, they may be admitted as hearsay evidence under the Civil Evidence Act 1995 subject to the statutory safeguards: see ss 1-4; and PARA 808 et seq.

3 *Berkeley Peerage Case* (1811) 4 Camp 401, HL. The weight, not the admissibility, of the evidence is affected: *Monkton v A-G* (1831) 2 Russ & M 147; affd sub nom *Robson v A-G* (1843) 10 Cl & Fin 471, HL.

4 *Berkeley Peerage Case* (1811) 4 Camp 401, HL; *Re Goodrich, Payne v Bennett* (1904) 20 TLR 203.

5 Bibles do not stand on any special footing: see the judges' opinion in *Berkeley Peerage Case* (1811) 4 Camp 401, HL. For further instances see *Slane Peerage* (1835) 5 Cl & Fin 23 (missal); *Herbert v Tuckal* (1663) T Raym 84 (almanac); cf *Monkton v A-G* (1831) 2 Russ & M 147; affd sub nom *Robson v A-G* (1843) 10 Cl & Fin 471, HL; *Sussex Peerage Case* (1844) 11 Cl & Fin 85, HL (prayer book); *Tracy Peerage Case* (1843) 10 Cl & Fin 154, HL; *Hood v Beauchamp* (1836) 8 Sim 26 (religious book).

6 *Berkeley Peerage Case* (1811) 4 Camp 401, HL.

7 The family Bible, the public wearing of a ring, the public exposure of an inscription on a tombstone, and the public hanging up of the family pedigree in the mansion are all relied upon because, in all those cases, the publicity supplies the want of connection between the pedigree, the tombstone, the ring or the Bible, with particular individuals, members of the family: *Monkton v A-G* (1831) 2 Russ & M 147 at 163 per Lord Brougham LC.

8 *Berkeley Peerage Case* (1811) 4 Camp 401, HL; *Monkton v A-G* (1831) 2 Russ & M 147; *Hubbard v Lees and Purden* (1866) LR 1 Exch 255. The document must be produced from proper custody before this rule can apply: *Hubbard v Lees and Purden* (1866) LR 1 Exch 255. As to what is proper custody see PARA 871. In *Hood v Beauchamp* (1836) 8 Sim 26 a religious book containing entries of births etc of members of the family was admitted, and one entry was admitted without proof of authorship by a member of the family, the authorship of the others having been proved.

9 As to the necessity for proof of relationship of the declarant see PARA 830.

- 10 *Kidney v Cockburn* (1831) 2 Russ & M 167; cf *Butler v Viscount Mountgarret* (1859) 7 HL Cas 633. In *Shrewsbury Peerage* (1858) 7 HL Cas 1 letters addressed to a lady who had married into a certain family were admitted to prove the character in which she was addressed by members of that family.
- 11 See *Vulliamy v Huskisson* (1838) 3 Y & C Ex 80; *Hungate v Gascoigne* (1846) 2 Ph 25.
- 12 *Neal d Duke of Athol v Wilding* (1741) 2 Stra 1151.
- 13 *Slaney v Wade* (1836) 1 My & Cr 338; *Fort v Clarke* (1826) 1 Russ 601.
- 14 *Monkton v A-G* (1831) 2 Russ & M 147.
- 15 *Robson v A-G* (1843) 10 Cl & Fin 471, HL.
- 16 *Berkeley Peerage Case* (1811) 4 Camp 401, HL.
- 17 *Hungate v Gascoigne* (1846) 2 Ph 25; *Robson v A-G* (1843) 10 Cl & Fin 471, HL; *Tracy Peerage Case* (1843) 10 Cl & Fin 154, HL.
- 18 *Re Lambert* (1886) 56 LT 15.
- 19 See PARA 830.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vi) Particular Private Documents/C. COMMERCIAL DOCUMENTS/951. Entries in account books.

C. COMMERCIAL DOCUMENTS

951. Entries in account books.

Account books are admissible as hearsay evidence under the Civil Evidence Act 1995 subject to the statutory safeguards¹ and require no further proof if they are part of the records of a business, in whatever form they are kept². If an account book was kept by an agent, and it is sought to produce the book against the principal, evidence should be produced of the agent's authority³.

Entries in a bank statement to the credit of a customer, when delivered to him, are prima facie evidence against the bank; and, if not objected to by the customer, entries in it to his debit are prima facie evidence against him⁴.

Accounts 20 years old prove themselves if produced from proper custody⁵. Where the court⁶ orders any account to be taken or any inquiry to be made, it may, by the same or a subsequent order, give directions as to the manner in which the account is to be taken and verified or the inquiry is to be conducted and may, in particular, direct that in taking an account the relevant books of account are to be evidence of their contents but that any party may take such objections to the contents as he may think fit⁷.

1 See the Civil Evidence Act 1995 ss 1-4; and PARA 808 et seq.

2 See the Civil Evidence Act 1995 s 9; and PARA 817.

3 *Baron De Rutzen v Farr* (1835) 4 Ad & El 53.

4 As to the effect of a balance struck in a bank statement see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 873.

5 *Doe d Lord Ashburnham v Michael* (1851) 17 QB 276; and see PARA 869.

6 As to the meaning of 'court' see PARA 22.

7 See *Practice Direction--Accounts, Inquiries etc* PD 40 paras 1.1, 1.2; and PARA 1526. As to the application of the CPR and accompanying practice directions see PARA 32.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vi) Particular Private Documents/C. COMMERCIAL DOCUMENTS/952. Negotiable instruments.

952. Negotiable instruments.

A bill, cheque or promissory note may be evidence of the payment of a debt¹ where it appears to have been received by the creditor², but payment of money by means of such an instrument is not by itself evidence of the existence of a debt³. Where the cheque in question has been lost, the counterfoil is, it seems, admissible to prove the giving of the cheque⁴. An undorsed cheque which appears to have been paid by the banker on whom it is drawn is evidence of the receipt by the payee of the sum payable by the cheque⁵, and a certified copy made by the banker having possession of the cheque after presentment is evidence of the original⁶. A microfilmed record of a customer's cheques (but not the individual cheques) is within the meaning of the phrase 'banker's books'⁷ and so admissible under the statutory provisions applicable to such books⁸.

1 *Boswell v Smith* (1833) 6 C & P 60; *Nash v Gray* (1861) 2 F & F 391; and see **CONTRACT** vol 9(1) (Reissue) PARA 942 et seq.

2 *Mountford v Harper* (1847) 16 LJ Ex 184; *Egg v Barnett* (1800) 3 Esp 196; and see *Gadderer v Dawes* (1847) 10 LTOS 109; *Pfiel v Vanbatenberg* (1810) 2 Camp 439.

3 *Egg v Barnett* (1800) 3 Esp 196; but see *Aubert v Walsh* (1812) 4 Taunt 293; *Pearce v Davis* (1834) 1 Mood & R 365; *Cary v Gerrish* (1801) 4 Esp 9.

4 *R v Wilkinson* (1867) 10 Cox CC 537.

5 Cheques Act 1957 s 3(1) (s 3(1) numbered as such, and s 3(2) added, by SI 1996/2993).

6 See the Cheques Act 1957 s 3(2) (as added: see note 5).

7 *Barker v Wilson* [1980] 2 All ER 81, [1980] 1 WLR 884.

8 See the Bankers' Books Evidence Act 1879; PARA 939; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 907 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vi) Particular Private Documents/C. COMMERCIAL DOCUMENTS/953. Receipts and bills of lading.

953. Receipts and bills of lading.

Receipts are in general only prima facie evidence of payment¹, and can be contradicted by proof that the money was not in fact paid², that the transaction was fraudulent³, that the terms of the receipt do not accurately state the transaction⁴, that the money was in fact paid by another person⁵, or that the receipt was given 'without prejudice'⁶. In some cases, however, a receipt may amount to a contract, the terms of which are embodied in it⁷, and, apart from any question of contract, a receipt will be conclusive in cases where it operates as an estoppel⁸. Receipts 20 years old prove themselves if produced from proper custody⁹.

A bill of lading which represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel and has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading, is conclusive evidence in favour of a person who has become the lawful holder of the bill, against the carrier, of the shipment of the goods or, as the case may be, of their receipt for shipment¹⁰. A sea waybill or straight bill of lading is, however, only prima facie evidence of the receipt of the goods by the carrier¹¹.

1 *Skaife v Jackson* (1824) 3 B & C 421; *Graves v Key* (1832) 3 B & Ad 313; *Farrar v Hutchinson* (1839) 9 Ad & El 641; *Bowes v Foster* (1858) 2 H & N 779; *Huckle v LCC* (1910) 27 TLR 112, CA. See also **CONTRACT** vol 9(1) (Reissue) PARA 947.

2 *Skaife v Jackson* (1824) 3 B & C 421; cf *Straton v Rastall* (1788) 2 Term Rep 366; *Lampon v Corke* (1822) 5 B & Ald 606; *Alner v George* (1808) 1 Camp 392 must now be considered as bad law.

3 *Farrar v Hutchinson* (1839) 9 Ad & El 641; *Wallace v Kelsall* (1840) 7 M & W 264.

4 *Nathan v Ogdens Ltd* (1905) 94 LT 126, CA; and see *Lee v Lancashire and Yorkshire Rly Co* (1871) 6 Ch App 527; distinguish *Stewart v Great Western Rly Co and Saunders* (1865) 2 De GJ & Sm 319 (a case of fraud). Receipts, being as a rule informal documents, may be varied or contradicted by oral evidence: see **CONTRACT** vol 9(1) (Reissue) PARA 947; **DEEDS AND OTHER INSTRUMENTS**.

5 *Graves v Key* (1832) 3 B & Ad 313.

6 *Oliver v Nautilus Steam Shipping Co Ltd* [1903] 2 KB 639. As to 'without prejudice' communications see PARAS 804-805.

7 *Roberts v Eastern Counties Rly Co* (1859) 1 F & F 460; *Rideal v Great Western Rly Co* (1859) 1 F & F 706; and distinguish *Lee v Lancashire and Yorkshire Rly Co* (1871) 6 Ch App 527. The only question arising in these cases is really one of construction of a contract, the documents in question being something more than mere receipts. See *Prosser v Lancashire and Yorkshire Accident Insurance Co Ltd* (1890) 6 TLR 285, CA; *Ellen v Great Northern Rly Co* (1901) 17 TLR 453, CA.

8 See **ESTOPPEL** vol 16(2) (Reissue) PARA 1025. As to receipts in deeds see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 224-225.

9 *Bertie v Beaumont* (1816) 2 Price 303. As to this rule see PARA 869.

10 See the Carriage of Goods by Sea Act 1924 s 4; and **SHIPPING AND NAVIGATION** vol 43(2) (Reissue) PARA 1536. As to the effect of conclusive evidence see PARA 767.

11 See **SHIPPING AND NAVIGATION** vol 43(2) (Reissue) PARA 1536. As to the effect of prima facie evidence see PARA 767. In so far as they are merely receipts for the goods shipped, bills of exchange are governed mutatis mutandis by the same rules as receipts for money: *Cox v Bruce* (1886) 18 QBD 147, CA; *Bennett and Young v*

John Bacon Ltd (1897) 2 Com Cas 102, CA; *Hine Bros v Free, Rodwell & Co Ltd* (1897) 2 Com Cas 149; *Smith & Co v Bedouin Steam Navigation Co* [1896] AC 70, HL; *Parsons v New Zealand Shipping Co* [1901] 1 KB 548, CA; and see **SHIPPING AND NAVIGATION** vol 43(2) (Reissue) PARA 1535.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vi) Particular Private Documents/D. MAPS AND PLANS/954. Private maps and plans.

D. MAPS AND PLANS

954. Private maps and plans.

Private, as distinct from public¹, maps and plans² are admissible in civil proceedings³ as evidence of reputation for the purpose of proving or disproving the existence of any public or general right⁴, or to prove the existence or non-existence of a highway⁵, or otherwise as hearsay evidence under the Civil Evidence Act 1995 subject to the statutory safeguards⁶.

A map annexed to a deed, will or other instrument is to be construed together with it⁷.

Unless the court⁸ orders otherwise, evidence such as a plan, photograph or model which is not (1) contained in a witness statement⁹, affidavit¹⁰ or expert's report¹¹; (2) to be given orally at trial; or (3) evidence of which prior notice must be given under the general rule relating to notice of hearsay evidence¹², is not receivable at a trial unless the party intending to put it in evidence has given notice to the other parties¹³. Where a party has given such notice, he must give every other party an opportunity to inspect the evidence and to agree to its admission without further proof¹⁴.

1 As to the admissibility of public maps see PARA 943.

2 As to the meaning of 'document' see PARA 810 note 15.

3 As to their admissibility in criminal proceedings see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1462.

4 See PARA 828; and **BOUNDARIES**. A plan 'for purposes of identification only' can be used to determine where a boundary lies: *Woolls v Powling* (1999) Times, 9 March, CA.

5 See PARA 955.

6 See the Civil Evidence Act 1995 ss 1-4; and PARA 808 et seq. See also **BOUNDARIES**.

7 *Lyle v Richards* (1866) LR 1 HL 222; cf *Brain v Harris* (1855) 10 Exch 908; *Nicholson v Rose* (1859) 4 De G & J 10; and see **BOUNDARIES; SALE OF LAND; WILLS**.

8 As to the meaning of 'court' see PARA 22.

9 As to the meaning of 'witness statement' see PARA 751 note 1. As to the form of a witness statement see PARA 981.

10 As to the meaning of 'affidavit' see PARA 540 note 5.

11 As to experts' reports see PARA 852 et seq.

12 Ie under CPR 33.2: see PARA 811.

13 CPR 33.6(1), (2). For the procedure to be followed see CPR 33.6(3)-(7); and PARA 817.

14 CPR 33.6(8).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vi) Particular Private Documents/D. MAPS AND PLANS/955. Maps and plans as evidence of highways and footpaths.

955. Maps and plans as evidence of highways and footpaths.

A court or tribunal, before determining whether a way has been dedicated as a highway¹ or the date on which any such dedication took place, must take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and give such weight to it as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purposes for which it was compiled, and the custody in which it has been kept and from which it is produced². Definitive maps and statements made by surveying authorities³ are conclusive evidence of footpaths, bridleways and byways⁴.

1 As to the dedication of highways see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 107 et seq.

2 Highways Act 1980 s 32: see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) para 129.

3 'Surveying authority', in relation to any area, means the county council, county borough council, metropolitan district council or London borough council whose area includes that area: Wildlife and Countryside Act 1981 s 66(1) (definition substituted by the Local Government Act 1985 s 7, Sch 3 para 7; amended by the Local Government (Wales) Act 1994 s 66(6), Sch 16 para 65(8)).

4 See the Wildlife and Countryside Act 1981 s 56; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 592.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vi) Particular Private Documents/E. OTHER DOCUMENTS/956. Inscriptions in pedigree cases.

E. OTHER DOCUMENTS

956. Inscriptions in pedigree cases.

In pedigree cases¹, inscriptions of various kinds are admissible if they have been made by or under the direction of a deceased² member of the family, or have been adopted expressly or tacitly by such member or by the family at large³. This rule includes inscriptions of various kinds, such as inscriptions on rings⁴ and tombstones⁵, mural inscriptions⁶, and those on portraits⁷ and possibly coffin-plates⁸. An inscription on a tombstone has been admitted to prove the death of a person with a life interest⁹. Inscriptions whose removal is impossible or highly inconvenient may be proved by secondary evidence¹⁰. Where inscriptions are removed and destroyed by a burial authority, landowner or religious body under their various statutory powers¹¹, photographic or other records of them must be made¹². Such records, if not otherwise admissible, would be admissible as hearsay evidence under the Civil Evidence Act 1995, subject to the statutory safeguards¹³.

1 See PARA 950 note 7.

2 For the general principles governing the admissibility of statements by deceased persons as to reputation or family tradition see PARA 830.

3 *Davies v Lowndes* (1843) 6 Man & G 471. Statements contained in monumental inscriptions are admissible to prove the ages of the persons to whom they refer and the fact of their relationship to each other: *Kidney v Cockburn* (1831) 2 Russ & M 167. Foreign inscriptions are admissible if they conform to the above rule: *Earldom of Perth* (1848) 2 HL Cas 865; cf *Tracy Peerage Case* (1843) 10 Cl & Fin 154, HL.

4 *Monkton v A-G* (1831) 2 Russ & M 147; *Vowles v Young* (1806) 13 Ves 140.

5 *Haslam v Cron, Olivant's Claim* (1871) 19 WR 968; *Monkton v A-G* (1831) 2 Russ & M 147; cf *Goodright d Stevens v Moss* (1777) 2 Cowp 591; *Vowles v Young* (1806) 13 Ves 140; *Tracy Peerage Case* (1843) 10 Cl & Fin 154, HL; *Shrewsbury Peerage* (1858) 7 HL Cas 1.

6 *Slaney v Wade* (1836) 1 My & Cr 338; *Earldom of Perth* (1848) 2 HL Cas 865; *Berkeley Peerage Case* (1861) 8 HL Cas 21.

7 *Camoy's Peerage* (1839) 6 Cl & Fin 789, HL.

8 Cf *R v Edge* (1842) Wills's Circumstantial Evidence (7th Edn) 319, 353; *R v Hinley* (1843) 1 Cox CC 12.

9 *Whittuck v Waters* (1830) 4 C & P 375.

10 In *Shrewsbury Peerage* (1858) 7 HL Cas 1, an old 'collection of monumental inscriptions' in country churches was held inadmissible to show what had been the inscription on a partly defaced tomb. But copies made or accepted by the family, or a member of the family, are worthy of confidence: *Slaney v Wade* (1836) 1 My & Cr 338; *Davies v Lowndes* (1843) 6 Man & G 471. See also *Tracy Peerage Case* (1843) 10 Cl & Fin 154, HL.

11 Under the powers contained in the Local Authorities' Cemeteries Order 1977, SI 1977/204; the Pastoral Measure 1983; and the Disused Burial Grounds (Amendment) Act 1981: see **CREMATION AND BURIAL** vol 10 (Reissue) PARAS 1049 et seq, 1130 et seq, 1149 et seq.

12 See the Local Authorities' Cemeteries Order 1977, SI 1977/204, art 16; the Pastoral Measure 1983 s 65(1), Sch 6 para 10; the Disused Burial Grounds (Amendment) Act 1981 s 2(1), Schedule para 10; and **CREMATION AND BURIAL** vol 10 (Reissue) PARAS 1053, 1133, 1155.

13 See the Civil Evidence Act 1995 ss 1-4; and PARA 808 et seq. As to photographs see PARA 958.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vi) Particular Private Documents/E. OTHER DOCUMENTS/957. Newspaper reports.

957. Newspaper reports.

A witness may refer to a newspaper report to refresh his memory, if he read the report at the time when he had a recollection of the statements contained in it and knew them to be true¹; but a newspaper report is not generally admissible as evidence of the facts recorded in it² unless admitted as hearsay evidence under the Civil Evidence Act 1995 and subject to the statutory safeguards³.

1 See PARA 1039.

2 *Lord Rossmore v Mowatt* (1850) 15 Jur 238.

3 See the Civil Evidence Act 1995 ss 1-4; and PARA 808 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vi) Particular Private Documents/E. OTHER DOCUMENTS/958. Photographs, films, records, tape recordings and video recordings.

958. Photographs, films, records, tape recordings and video recordings.

At common law, photographs¹ properly verified on oath by a person able to speak to their accuracy² were generally admissible to prove the identity of persons³, or the configuration of land as it existed at a particular moment⁴ (scientific deductions from them being made by a witness both skilled and experienced in such a task)⁵, or radar echoes⁶ or the contents of a lost document⁷.

For the purposes of the Civil Evidence Act 1995, 'document' means anything in which information of any description is recorded⁸ and a similarly wide definition applies for the purposes of disclosure under the Civil Procedure Rules⁹. Thus photographs, films, records, tape recordings and video recordings are all admissible in evidence, subject, if appropriate, to the statutory safeguards with regard to hearsay evidence¹⁰. Prior notice must be given of a party's intention to put photographs and certain other items in evidence¹¹.

The court has power to order the photographing of property which is, or may become, the subject matter of proceedings¹².

A witness's evidence may be given by means of a video link where such facilities are available¹³ and in appropriate cases, court hearings may be conducted by means of such a link¹⁴.

1 A photograph was held to be a document for the purposes of discovery (now known as 'disclosure': see PARA 963) in *Lyell v Kennedy (No 3)* as reported in (1884) 50 LT 730, CA; and a cinematograph film was held to be a 'document' in *Senior v Holdsworth, ex p Independent Television News Ltd* [1976] QB 23, [1975] 2 All ER 1009, CA.

2 See *R v Tolson* (1864) 4 F & F 103; *Hindson v Ashby* [1896] 2 Ch 1, CA. This would also apply to enlargements. X-ray photographs are admissible in evidence to determine the extent of a physical injury or disease, provided it is proved that the photograph is a photograph of the person injured or diseased. The person who took the photograph should be called, unless his evidence is dispensed with by consent.

3 *R v Tolson* (1864) 4 F & F 103. In *C v C and C* [1972] 3 All ER 577, [1972] 1 WLR 1335, Latey J admitted photographs as evidence of facial resemblance on a paternity issue in divorce proceedings, but referred to the perils of attaching too much weight to such evidence. As to proof of identity of persons generally see PARA 1076.

4 *R v United Kingdom Electric Telegraph Co* (1862) 3 F & F 73; *Hindson v Ashby* [1896] 2 Ch 1, CA.

5 *Folkes v Chadd* (1782) 3 Doug KB 157; *R v Silverlock* [1894] 2 QB 766; *United States Shipping Board v The Ship St Albans* [1931] AC 632, PC (land surveyor not qualified to produce an accurate topographical plan from a pictorial delineation of a scene).

6 *The Statue of Liberty* [1968] 2 All ER 195, [1968] 1 WLR 739, where Simon P described the evidence as being in the nature of real evidence, and held it to be irrelevant that, like barograph records or cards from clocking-in machines, it was mechanically produced without human effort. As to real evidence see PARA 965.

7 *M'Cullough v Munn* [1908] 2 IR 194, CA.

8 See the Civil Evidence Act 1995 s 13; and PARA 810 note 15.

9 See CPR 31.4; and PARA 963.

10 See the Civil Evidence Act 1995 ss 1-4; and PARA 808 et seq. As to video evidence by children in child abuse cases see eg *Re R (child abuse: video and expert evidence)* [1995] 2 FCR 573, [1995] 1 FLR 451; *Re N (a minor) (sexual abuse: video evidence)* [1996] 4 All ER 225, [1997] 1 WLR 153, CA; and see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 228. As to the disclosure and use of video evidence in a personal injury

claim see *Rall v Hume* [2001] EWCA Civ 146, [2001] 3 All ER 248. As to whether the prolonged examination of documentary evidence and video footage necessary in a libel claim render the proceedings unfit for jury trial see *Elite Management Corpn v BBC* [2001] All ER (D) 156 (Mar), where the judge held that there were inherent problems in considering matters brought to light by hidden cameras featuring poor quality sound and parties with foreign accents who could be difficult to understand; and that the need for the repeated viewing of video footage could constitute prolonged exposure to documentation for the purposes of the Supreme Court Act 1981 s 69(1). See *Jones v University of Warwick* [2003] EWCA Civ 151, [2003] 3 All ER 760, [2003] 1 WLR 954 (video recording evidence against personal injury claimant collected by inquiry agent posing as market researcher on behalf of insurer admissible). As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

11 See CPR 33.6; and PARAS 817, 954.

12 See the Supreme Court Act 1981 ss 33(1), 34(3); the County Courts Act 1984 ss 52(1), 53(3); and PARAS 114, 317.

13 See PARAS 1032-1035.

14 See eg *Re B (adult: refusal of medical treatment)* [2002] EWHC 429 (Fam), [2002] 2 All ER 449, [2002] All ER (D) 362 (Mar) (Family Division hearing evidence in hospital room with video link to Royal Courts of Justice; legal argument taking place at Royal Courts of Justice with video link to hospital room). As to video conferences in family proceedings see *Practice Direction* [2002] 1 All ER 1024, [2002] 1 WLR 406.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vii) Documents subject to Stamp Duty/959. Exclusion of unstamped documents.

(vii) Documents subject to Stamp Duty

959. Exclusion of unstamped documents.

Except in criminal proceedings, no instrument requiring a stamp which is executed in the United Kingdom¹ or which, wherever executed, relates to property situated in or to any matter or thing done or to be done in the United Kingdom is admissible in evidence or available for any purpose whatever² in legal proceedings unless it is duly stamped in accordance with the law in force at the time when it was executed³. Upon its production as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice must be taken by the judge, arbitrator or referee of any omission or insufficiency of the stamp⁴. The instrument may, however, be received in evidence on payment to the officer of the court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and any interest or penalty payable on stamping it, saving all just exceptions on other grounds⁵.

1 As to the meaning of 'United Kingdom' see PARA 221 note 2.

2 See PARA 960. The rule has been applied to a scheme of arrangement sanctioned by the court whereby shares were transferred: *Sun Alliance Insurance Ltd v IRC* [1972] Ch 133, [1971] 1 All ER 135.

3 Stamp Act 1891 s 14(4) (amended by the Finance Act 1999 s 109(3), Sch 12 para 3(1), (5)). As to stamps on various documents see **STAMP DUTIES AND STAMP DUTY RESERVE TAX**. As to the admissibility of documents inadmissible under foreign law for want of stamping see **CONFLICT OF LAWS**. As to the restamping of deeds which have been altered or cancelled and re-executed see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 84.

4 See the Stamp Act 1891 s 14(1) (amended by the Finance Act 1999 Sch 12 para 3(2)).

5 See note 4. The amendments cited in note 4 have effect in relation to instruments executed on or after 1 October 1999 but do not apply to transfers or other instruments relating to units under a unit trust scheme: see the Finance Act 1999 ss 109(4), 122(1); and for further provision in relation to the exception see s 122(2). Section 122(4), Sch 19 para 1 abolishes stamp duty on transfers or other instruments relating to a unit under a unit trust scheme, in relation to instruments executed on or after 6 February 2000. See further **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vii) Documents subject to Stamp Duty/960. Unstamped document not available for any purpose.

960. Unstamped document not available for any purpose.

An unstamped document which requires a stamp is not available for any purpose¹, to any party², and thus it cannot be used for example in cross-examination³, nor can parol evidence of such a document be received⁴.

However, a document insufficiently stamped has been shown to a witness for the purpose of refreshing his memory⁵.

1 *Fengl v Fengl* [1914] P 274, DC; *Interleaf Publishing Co v Phillips* (1884) Cab & El 315; *Ashling v Boon* [1891] 1 Ch 568; but see *Mason v Motor Traction Co Ltd* [1905] 1 Ch 419, where an injunction was asked for to restrain the defendants from carrying into effect a proposed reconstruction agreement. The agreement was unstamped, and a copy was looked at, not as an agreement, but as a document evidencing the terms upon which the defendants proposed to sell their undertaking unless restrained.

2 The defendant cannot produce an unstamped agreement to meet a case made out by the claimant without reference to it: *Fielder v Ray* (1829) 6 Bing 332; *Magnay v Knight* (1840) 1 Man & G 944.

3 *Interleaf Publishing Co v Phillips* (1884) Cab & El 315; and see *Baker v Dale* (1858) 1 F & F 271.

4 *Buxton v Cornish* (1844) 12 M & W 426; *Hearne v James* (1788) 2 Bro CC 309; *R v St Pauls, Bedford, Inhabitants* (1795) 6 Term Rep 452; *Turner v Power* (1828) 7 B & C 625; *Fenn d Thomas v Griffith* (1830) 6 Bing 533; *Knight v Barber* (1846) 16 M & W 66; *Yorke v Smith* (1851) 21 LJB 53; *Alcock v Delay* (1855) 4 E & B 660; *Venkata Sveta (Rajah of Bobbili) v Inuganti Bhavayyamm Garu* (1899) 15 TLR 475, PC. Secondary evidence of an unstamped document may not be given: *Re Brown and Root McDermott Fabricators Ltd's Application* [1996] STC 483. The Inland Revenue is nevertheless entitled to rely on unstamped documents produced in discharge of the taxpayer's obligations under the Stamp Act 1891 s 5 (see **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARA 1007); *Parinv (Hatfield) Ltd v IRC* [1998] STC 305, CA.

5 *Birchall v Bullough* [1896] 1 QB 325, DC; cf *Fengl v Fengl* [1914] P 274, DC.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vii) Documents subject to Stamp Duty/961. Lost documents and obliterated stamps.

961. Lost documents and obliterated stamps.

Where an instrument has been lost there is a presumption that it was properly stamped¹. The burden of proving that it was in fact unstamped is on the party objecting², and this is discharged by showing that the document was unstamped on or some time after execution³. Where, however, it is shown that a lost instrument was in fact unstamped, secondary evidence of its contents is inadmissible⁴.

Where the stamp on an instrument has been obliterated, the instrument is admissible unless it is shown that the stamp was insufficient⁵.

1 *R v Long Buckby Inhabitants* (1805) 7 East 45; *Pooley v Goodwin* (1835) 4 Ad & El 94; *Hart v Hart* (1841) 1 Hare 1; *Marine Investment Co v Haviside* (1872) LR 5 HL 624; *Henty and Constable (Brewers) Ltd v IRC* [1961] 3 All ER 1146, [1961] 1 WLR 1504, CA.

2 *Hart v Hart* (1841) 1 Hare 1; *Closmadeuc v Carrel* (1856) 18 CB 36; *Marine Investment Co v Haviside* (1872) LR 5 HL 624.

3 *Crowther v Solomons* (1848) 6 CB 758; *Closmadeuc v Carrel* (1856) 18 CB 36; *Marine Investment Co v Haviside* (1872) LR 5 HL 624. Further evidence may make it uncertain whether a document was afterwards stamped or not, and the presumption that it remained in the same state will not apply in such a case: *Closmadeuc v Carrel* (1856) 18 CB 36.

4 This applies even where the instrument was destroyed by the wrongful act of the objecting party: *Rippiner v Wright* (1819) 2 B & Ald 478; *Smith v Henley* (1844) 1 Ph 391. See *R v Castle Morton Inhabitants* (1820) 3 B & Ald 588; *Rose v Clarke* (1842) 1 Y & C Ch Cas 534; *Blair v Ormond* (1847) 1 De G & Sm 428; *Crowther v Solomons* (1848) 6 CB 758; *Rankin v Hamilton* (1850) 15 QB 187; and cf *Andrew v Andrew* (1856) 8 De GM & G 336; *Arbon v Fussell* (1862) 3 F & F 152.

The Stamp Act 1891 s 14(1) (see PARA 959), appears to require the production of the unstamped document before the unpaid duty and the prescribed penalty may be paid. Thus an offer to pay the duty (or an undertaking to pay it) may not make admissible secondary evidence of a missing unstamped document; and see *Re Brown and Root McDermott Fabricators Ltd's Application* [1996] STC 483. However, the Court of Appeal appears to have permitted a stamped copy of an unstamped destroyed document to have been received in evidence in *London and County Banking Co v Ratcliffe* (not reported in that court, but reported in the House of Lords (1881) 6 App Cas 722 at 730 per Lord Blackburn); cf *Venkata Sveta (Rajah of Bobbili) v Inuganti Bhavayyamm Garu* (1899) 15 TLR 475, PC. In *Nally v Nally* [1953] IR 19 the Irish High Court admitted a stamped copy of a deed as evidence of the contents of a lost original deed which was unstamped, following the apparent practice of the Court of Appeal in *London and County Banking Co v Ratcliffe* (1881) 6 App Cas 722, but contrary to an earlier Irish case, not cited, *Connor v Cronin* (1858) 7 ICLR 480.

5 *Doe d Fryer v Coombs* (1842) 3 QB 687.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(vii) Documents subject to Stamp Duty/962. Mode of objection.

962. Mode of objection.

An objection to the admissibility in evidence of an unstamped document should be made when the document is offered in evidence¹, or when it first becomes apparent that it is insufficiently stamped², except where extrinsic evidence is required to show the defect³.

However, on the production of an instrument requiring a stamp, it is the duty of the judge, arbitrator or referee to take notice of any omission or insufficiency of the stamp on it⁴ and unless the duty and penalties are paid⁵, the court must refuse to admit the instrument in evidence⁶, even if the parties do not object to its admission⁷, or the insufficiency or want of stamp is waived⁸; but if the admissibility of the document is doubtful, it should be admitted⁹.

A decision rejecting a document on grounds of stamping may be subject to appeal¹⁰.

1 *Jones v Sandys* (1753) Barnes 463; *Justan v Yates* (1852) 20 LTOS 71; *Robinson v Lord Vernon* (1860) 7 CBNS 231. This rule was applied even though the objecting party had not seen the document before it had been admitted in evidence: *Foss v Wagner* (1834) 7 Ad & El 116n.

2 *Doe d Phillip v Benjamin* (1839) 9 Ad & El 644 (agreement sufficiently stamped and admitted in evidence on trial of an ejectment, subsequently relied on as lease, thereby making stamp insufficient).

3 *Field v Woods* (1837) 7 Ad & El 114; see also *Austin v Bunyard* (1865) 6 B & S 687; *Gatty v Fry* (1877) 2 ExD 265.

4 See the Stamp Act 1891 s 14(1); and PARA 959. The Court of Appeal cannot assume that the court below has made a decision as to the admissibility of an unstamped document merely because it was there admitted in evidence, and must itself pay regard to the provisions of s 14(1): see *Routledge v McKay* [1954] 1 All ER 855 at 856, [1954] 1 WLR 615 at 617, CA, per Evershed MR; cf *Symington & Co v Union Insurance Society of Canton* (1927) 164 LT Jo 390 (unstamped insurance cover note could not be incorporated by arbitrator in special case). See, however, *Prosser v Lancashire and Yorkshire Accident Insurance Co Ltd* (1890) 6 TLR 285, CA, where the Court of Appeal rejected a stamp objection because the document had been admitted in the court below; see also *Bowker v Williamson* (1889) 5 TLR 382, DC, where the court expressed the view that an unstamped document should not have been admitted in the court below, but did not exclude it on appeal.

5 See PARA 959.

6 See the Stamp Act 1891 s 14(1); and PARA 959. The disfavour with which stamp objections are regarded is occasionally shown by depriving the successful party of costs: see *Akt Genforsikrings (Scandinavia Reinsurance Co of Copenhagen) v Da Costa* [1911] 1 KB 137, following *Home Marine Insurance Co v Smith* [1898] 1 QB 829; affd [1898] 2 QB 351, CA.

7 *Bowker v Williamson* (1889) 5 TLR 382, DC; and see *Humphreys v Dudding* (1861) 2 F & F 546, in which Martin B required an unstamped document, the effect of which was admitted, to be put formally in evidence before he would act on it, in order to obtain an undertaking that it would be stamped. Cf *Slatterie v Pooley* (1840) 6 M & W 664.

8 *Nixon v Albion Marine Insurance Co* (1867) LR 2 Exch 338; *Bowker v Williamson* (1889) 5 TLR 382, DC.

9 *Reynolds v Hall* (1858) 1 F & F 18; *Vansittart v James* (1858) 1 F & F 156; *Westlake v Adams* (1858) 1 F & F 183. The court is entitled to go behind the face of the document to determine whether it is duly stamped: see *Maynard v Consolidated Kent Collieries Corp* [1903] 2 KB 121, CA; but judges are not compelled to raise test cases or try doubtful cases, and their duty only extends to intervening to protect the revenue when there is an undoubted case of insufficient stamping or an attempted evasion of the Stamp Act 1891: *Don Francesco v De Meo* 1908 SC 7.

10 *Hutchinson v Ferrier* (1852) 19 LTOS 116, HL; *Alcock v Delay* (1855) 4 E & B 660; *Sharples v Rickard* (1857) 26 LJ Ex 302; *Whitehouse v Hemmant* (1858) 27 LJ Ex 295; *The Belfort* (1884) 9 PD 215, DC. As to appeals generally see PARA 1657 et seq. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(viii) Disclosure of Documents/963. Disclosure; in general.

(viii) Disclosure of Documents

963. Disclosure; in general.

The process formerly known as 'discovery of documents' is now known, for the purposes of proceedings to which the Civil Procedure Rules apply, as 'disclosure'¹. A party discloses a document² by stating that it exists or has existed³; and a party to whom a document has been disclosed normally has a right to inspect that document⁴.

A party's duty to disclose documents is limited to documents which are or have been in his control⁵ and the duty continues until the proceedings are concluded⁶.

There are two types of disclosure, standard disclosure and specific disclosure⁷. Where there is standard disclosure, a search is made for documents in the relevant categories, and then a list of them is compiled and served⁸; although the court may order a higher or lower level of disclosure in appropriate cases. Specific disclosure is specifically ordered by the court and requires disclosure of, or a search for and subsequent disclosure of, particular documents or classes of documents⁹.

The disclosure of certain documents may be withheld on grounds of public interest immunity, which is discussed elsewhere in this title¹⁰. The existence of certain other documents must be disclosed but the documents themselves may be protected from inspection by other parties on the grounds of legal professional privilege¹¹, the privilege against self-incrimination¹², a statutory obligation imposing secrecy¹³ or an express or implied agreement between the parties¹⁴, or on the ground that their production would be disproportionate to the issues in the case¹⁵.

Disclosure of documents is discussed elsewhere in this title¹⁶.

1 See CPR Pt 31; and PARA 538 et seq. As to the application of the CPR see PARA 32. CPR Pt 31 does not apply to a claim on the small claims track: CPR 31.1(2). As to cases allocated to the small claims track see PARAS 267, 274 et seq.

2 As to the meaning of 'document' for these purposes see PARA 538.

3 CPR 31.2.

4 See CPR 31.3; and PARA 539.

5 See CPR 31.8; and PARA 538.

6 See CPR 31.11; and PARA 546.

7 See PARAS 542, 547.

8 See CPR 31.5, 31.6; and PARA 542.

9 See CPR 31.12; and PARA 547.

10 See PARA 574 et seq.

11 As to legal professional privilege see PARA 972; and PARA 558 et seq. As to the situation where a privileged document is made available for inspection by mistake see CPR 31.20; *Al Fayed v Metropolitan Police Comr* [2002] EWCA Civ 780, [2002] All ER (D) 450 (May); and PARA 551.

- 12 As to the privilege against self-incrimination see PARAS 580, 974.
- 13 See PARA 581.
- 14 See PARA 582.
- 15 See PARA 583.
- 16 See PARA 538 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(ix) Estoppel by Deed/964. Estoppel by deed; in general.

(ix) Estoppel by Deed

964. Estoppel by deed; in general.

Estoppel by deed was described in some nineteenth century cases as a rule of evidence but it is doubtful that it is any longer so, or is currently of much significance. Rather, the deed is simply a means of creating legal obligations. Where estoppel is relevant now is as an aspect of the principle of finality of judgments, in the form of estoppel by record¹.

An estoppel by deed is said to arise where there is a statement of fact in a deed² made between parties³. If upon the true construction of the deed the statement is that of both or all the parties, the estoppel is binding on each party; if otherwise, it is binding only on the party making it⁴. It seems that an estoppel also arises upon a deed poll, the mode of its execution being equally solemn with that of a deed made between parties⁵.

Estoppel by deed is based on the principle that, when a person has entered into a solemn engagement by deed as to certain facts, he will not be permitted to deny any matter which he has so asserted⁶. It is a rule of evidence according to which certain evidence is taken to be of so high and conclusive a nature as to admit of no contradictory proof⁷. The averment relied upon to work an estoppel must be 'certain to every intent' without any ambiguity⁸, but may be contained in the recital or in any part of the deed⁹. A mere mistake in a deed, on account of which no one has acted to his detriment, will not give rise to an estoppel but may give grounds for rectification¹⁰.

1 As to cause of action estoppel (or estoppel per rem judicatam) see PARA 1168 et seq.

2 As to the formalities of execution of a deed see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 27 et seq. Any rule of law which required a seal for the valid execution of an instrument as a deed by an individual has, except in relation to a corporation sole, been abolished: Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b), (10). As to proof of execution see PARA 864 et seq.

3 *Rudd v Bowles*[1912] 2 Ch 60.

4 As to parties bound by the estoppel see **ESTOPPEL** vol 16(2) (Reissue) PARA 1020.

5 There is no case of estoppel by deed poll, but see *Right d Jefferys v Bucknell* (1831) 2 B & Ad 278; *Foster v Mentor Life Assurance Co* (1854) 3 E & B 48; *Re Ghost's Trusts* (1883) 49 LT 588; *Cropper v Smith*(1884) 26 ChD 700, CA; and PARA 1188.

6 *Greer v Kettle*[1938] AC 156, [1937] 4 All ER 396, HL; *Bowman v Taylor* (1834) 2 Ad & El 278; *Goodtitle d Edwards v Bailey* (1777) 2 Cowp 597; *Bonner v Wilkinson* (1822) 1 Dow & Ry KB 328; *Roberts v Security Co Ltd*[1897] 1 QB 111, CA.

7 *Simm v Anglo-American Telegraph Co, Anglo-American Telegraph Co v Spurling*(1879) 5 QBD 188, CA, per Brett LJ; *Low v Bouverie*[1891] 3 Ch 82, CA.

8 *Heath v Crealock*(1874) 10 Ch App 22; *Re Holland, Gregg v Holland*[1902] 2 Ch 360, CA.

9 *Shelley v Wright* (1737) Willes 9; *Lainson v Tremere* (1834) 1 Ad & El 792; *Bowman v Taylor* (1834) 2 Ad & El 278; *Crofts v Middleton* (1855) 2 K & J 194; *Re King's Settlement, King v King*[1931] 2 Ch 294 (an estoppel set up by a definite misstatement of fact in the operative part of the deed as to the consideration); but it is not clear whether the words coming after 'in witness whereof' are part of the deed (*Pearse v Morrice* (1834) 2 Ad & El 84). The statement of the date is no estoppel, because a deed operates from date of delivery (*Taylor v McCalmont* (1855) 4 WR 59); but, if the date of a lease is altered after execution, the landlord is estopped from

showing that the date inserted by him in the lease is not the date from which the demise operated so as to prevent anyone claiming under the lease from relying upon the circumstances existing at the date which the lease bears (*Rudd v Bowles*[1912] 2 Ch 60).

10 See **ESTOPPEL** vol 16(2) (Reissue) PARA 1023.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(6) DOCUMENTARY EVIDENCE AND REAL EVIDENCE/(x) Real Evidence/965. What constitutes real evidence.

(x) Real Evidence

965. What constitutes real evidence.

Information as to the facts of a case may be given to the court or jury¹, not only by the spoken words of witnesses or the written words of documents², but also by means of the court's or jury's own observation of persons or things in court³ or of experiments made in the presence of the court⁴. Material objects inspected by the tribunal of fact as a means of proof constitute real, as opposed to documentary or witness, evidence. A person's physical appearance may constitute real evidence⁵ as may the appearance or behaviour of an animal⁶.

Tape-recordings, films and photographs are normally admitted as documentary evidence⁷ but may also constitute real evidence⁸.

Views and inspections both in and out of court are discussed elsewhere in this title⁹.

1 As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

2 As to inspection of documents in general see PARA 538 et seq; and as to the inspection of documents by the court to determine whether they should be withheld on grounds of public interest immunity see PARA 579.

3 See PARA 1107.

4 *Bigsby v Dickinson*(1876) 4 ChD 24, CA; *Twentyman v Barnes* (1848) 2 De G & Sm 225; and see PARA 1107.

5 See *C v C and C*[1972] 3 All ER 577, [1972] 1 WLR 1335; and PARA 1068.

6 See *Line v Taylor* (1862) 3 F & F 731 (claim in respect of a dog bite; dog brought into court to be examined by the jury).

7 See PARA 958.

8 See eg *R v Emmerson*(1990) 92 Cr App Rep 284, CA (tape recording as evidence of tone of voice). See also *The Statue of Liberty*[1968] 2 All ER 195, [1968] 1 WLR 739 (film of radar echoes recorded by shore radar station).

9 See PARAS 794, 1108.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(i) Competence and Compellability/966. Competent and incompetent witnesses.

(7) WITNESSES

(i) Competence and Compellability

966. Competent and incompetent witnesses.

In civil proceedings, every person¹ is now² a competent witness³ unless he is (1) a child of such tender years that he has neither sufficient intelligence to testify nor a proper appreciation of the duty of speaking the truth⁴; (2) a person who at the time of being tendered as a witness is mentally incapable of testifying⁵; (3) deaf and dumb, and unable by writing or signs or otherwise to understand questions put to him, or to communicate his answers to others⁶; (4) a person who, from temporary causes, such as illness or drunkenness, is for the time being incapable of understanding questions and of giving a rational account of events; or (5) a person who does not appreciate the nature and obligation of an oath or affirmation⁷.

In criminal cases the rules as to the competence and incompetence of witnesses are now governed by statute⁸.

1 A limited company is not a competent witness. Evidence which binds the company may be given by a proper officer: *Penn-Texas Corp v Murat Anstalt* [1964] 1 QB 40, [1963] 1 All ER 258, CA.

2 At common law there were various classes of person who were incompetent as witnesses, eg parties to an action or their husbands or wives, persons interested in an action, infamous persons and persons who had no religious belief (see *Starkie's Law of Evidence* (4th Edn) 116) or had conscientious objections to taking an oath. It was doubtful whether a person under sentence of death could give evidence: *R v Webb* (1867) 11 Cox CC 133 per Lush J; cf *R v Fitzgerald* (1884) cited in 2 *Taylor's Law of Evidence* (12th Edn) 849n per Harrison J.

3 Persons interested were made competent witnesses by the Evidence Act 1843; parties to an action (now known as a 'claim': see PARA 18) by the Evidence Act 1851 s 2 and the Evidence Further Amendment Act 1869 (repealed); the husbands and wives of parties by the Evidence Amendment Act 1853 s 1 and the Evidence Further Amendment Act 1869 (repealed); persons previously convicted of a crime or offence by the Evidence Act 1843 (repealed); and persons who had no religious belief or had conscientious objections to taking an oath by provisions re-enacted in the Oaths Act 1978 (see PARA 1023).

4 *R v Brasier* (1779) 1 Leach 199, where a general rule, applicable to both civil and criminal proceedings, was stated. It has been said that it is most undesirable in any circumstances to call a child as young as five years old: *R v Wallwork* (1958) 42 Cr App Rep 153, CCA. As to child witnesses see further PARA 1029.

5 A person suffering from mental disorder may give evidence if the judge at the trial at which he is tendered as a witness is satisfied that he is then of sufficient understanding to give rational evidence; the mere fact that such a person is then suffering from delusions does not make him incompetent if they do not make him incapable of dealing rationally with the matters about which he is to be asked: *R v Hill* (1851) 2 Den 254, CCR; *R v Whitehead* (1866) LR 1 CCR 33; *R v Dunning* [1965] Crim LR 372, CCA. Before a person who is known to be in such a state of mind can be received as a witness there should be a preliminary inquiry as to his fitness to give evidence: *Spittle v Walton* (1871) LR 11 Eq 420. As to such inquiry see PARA 967. As to mental disorder see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 402.

6 *Dickenson v Blisset* (1754) 1 Dick 268; *R v Ruston* (1786) 1 Leach 408; *Morrison v Lennard* (1827) 3 C & P 127; *Bartholomew v George* (1851) cited in *Best's Law of Evidence* (12th Edn) 134 per Lord Campbell CJ; *R v Whitehead* (1868) LR 1 CCR 33; *R v Imrie* (1917) 12 Cr App Rep 282, CCA.

7 An adult may be incompetent from insufficient appreciation of the moral duty of speaking the truth: *R v Wade* (1825) 1 Mood CC 86, CCR; see further the cases cited in notes 5-6. However, no inquiry is normally conducted into an adult witness's appreciation of the duty to tell the truth.

8 See the Youth Justice and Criminal Evidence Act 1999 ss 53-57; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1401-1404; **MAGISTRATES**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(i) Competence and Compellability/967. Judge's duty.

967. Judge's duty.

Questions as to the competence or incompetence of a witness are decided by the court. In civil proceedings the court has a general discretionary power to control evidence¹; in criminal cases the procedure for determining competence is now governed by statute². If the incompetence of a witness is not discovered until after he is sworn and has given evidence, his evidence may nonetheless be objected to and rejected³.

A judicial officer⁴ who is sitting alone on the trial of a case cannot, because of his position, be a witness during that trial⁵.

1 See CPR 32.1; and PARA 791. The preliminary questioning of a witness to determine competence may be referred to as the 'voir dire'.

2 See the Youth Justice and Criminal Evidence Act 1999 s 54; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1401; **MAGISTRATES**.

3 *Jacobs v Layborn* (1843) 11 M & W 685; *R v Whitehead* (1866) LR 1 CCR 33.

4 An arbitrator may be a witness in proceedings on his award: see PARA 971.

5 It has been held that a judge or magistrate who is sitting with others may leave the bench and give evidence, but should not return to the bench or take any further part in the trial in a judicial capacity (*Hurpurshad v Sheo Dyal* (1876) LR 3 Ind App 259, PC; *Mitchell v Croydon Justices* (1914) 111 LT 632, DC; *R v Antrim County Justices* [1901] 2 IR 133, CA; *R v Galway Justices* (1897) 31 ILT 160; *Regicides' Case* (1660) Kel 7); however, it is doubtful if these authorities would now be followed because such a procedure might be in breach of the right to a fair trial under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) art 6, now given more direct effect in domestic law by the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 6: see PARAS 5, 792.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(i) Competence and Compellability/968. Jurors, counsel etc.

968. Jurors, counsel etc.

There seems to be no modern reported instance of a juror giving evidence¹ and such a procedure would appear to be in breach of the right to a fair trial².

A litigant who is conducting his own case may act as his own advocate and also be sworn as a witness³. Counsel or solicitors who are appearing as advocates in a case should not also act in the same case as witnesses⁴, but if they tender evidence their evidence is not inadmissible⁵.

A surveyor appointed to assist the court ought not to be called as a witness⁶ unless he has been appointed as a joint expert witness⁷; nor should a person who acts as an interpreter⁸.

An officer of the Children and Family Court Advisory and Support Service ('CAFCASS')⁹ may, subject to rules of court, be cross-examined¹⁰ in any proceedings to the same extent as any witness¹¹; but he may not be cross-examined merely because he is exercising a right¹² to conduct litigation or a right of audience¹³.

1 For cases suggesting that a juror may give evidence see *Manley v Shaw* (1840) Car & M 361; *R v Rosser* (1836) 7 C & P 648; *R (Giant's Causeway etc Tramway Co) v Antrim County Justices* [1895] 2 IR 603. See also *R v Blick* (1966) 50 Cr App Rep 280, CCA (note handed to judge giving juror's personal knowledge of a matter in evidence); and **JURIES** vol 61 (2010) PARA 801 et seq. Cf *R v Fricker* [1999] 30 LS Gaz R 29, [1999] All ER (D) 673, CA (juror expert on matter in issue; after jury retired, sending note asking if they could take that juror's expert knowledge into account; judge ruling they could do so; held that jury should have been discharged). As to evidence of what took place in the jury room see PARA 971 text and notes 7-8.

2 As to the right to a fair trial under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) art 6, now given direct effect in domestic law by the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 6, see PARAS 5, 792.

3 *Cobbett v Hudson* (1852) 1 E & B 11.

4 *R v Secretary of State for India in Council, ex p Ezekiel* [1941] 2 KB 169, [1941] 2 All ER 546, DC; and see *Stones v Byron* (1846) 4 Dow & L 393.

5 See **LEGAL PROFESSIONS** vol 66 (2009) PARA 1147.

6 *Broder v Saillard* as reported in (1876) 24 WR 456.

7 As to joint experts see PARA 840.

8 See *Singh v Singh* [1971] P 226, [1971] 2 All ER 828, CA. As to interpreters see further PARA 1031.

9 As to CAFCASS see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 230 et seq.

10 As to cross-examination see PARA 1042 et seq.

11 Criminal Justice and Court Services Act 2000 s 16(1); and see *Re M (a child) (children and family reporter: disclosure)* [2002] EWCA Civ 1199, [2003] Fam 26, [2002] 3 FCR 208.

12 Is a right granted in accordance with the Criminal Justice and Court Services Act 2000 s 15: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 243.

13 Criminal Justice and Court Services Act 2000 s 16(2). See further **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 243.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(i) Competence and Compellability/969. Compellability.

969. Compellability.

A competent witness is usually compellable to give evidence¹. Some competent witnesses, however, are not compellable by reason of their special status; thus Her Majesty² and any other head of state³ is not subject to coercive process; so, too, a foreign diplomatic agent (a head of mission or member of diplomatic staff) is not obliged to attend to give evidence⁴; nor are other members of a consular post⁵. Similar diplomatic immunity is conferred on persons in the service of the governments of Commonwealth countries and to persons in the service of the government of the Republic of Ireland⁶.

The staff of various international organisations may be exempted from suit and legal process, which includes process for compelling attendance to give evidence⁷.

Members of Parliament are not compellable during a session⁸. In criminal proceedings, the spouses⁹ and civil partners of accused persons are not always compellable witnesses¹⁰.

1 As to securing the attendance of witnesses see PARA 1003 et seq.

2 As to how far the Sovereign is a competent witness see **CROWN AND ROYAL FAMILY; CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

3 See the State Immunity Act 1978 s 20(1); the Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 31 para 2; and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARAS 265, 274.

4 See the Diplomatic Privileges Act 1964 Sch 1 art 31 para 2; and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 274.

5 See the Consular Relations Act 1968 s 1(1), Sch 1 art 44; and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARAS 296-297.

6 See the Consular Relations Act 1968 s 12 (substituted by the Diplomatic and other Privileges Act 1971 s 4, Schedule); and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 302.

7 See the International Organisations Act 1968 s 1, Sch 1, which also extends immunity to representatives at certain international conferences; and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 307 et seq.

8 See PARA 1003 note 1. As to the Parliamentary Commissioner for Administration see the Parliamentary Commissioner Act 1967 s 11(2); and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 41.

9 For these purposes, 'spouse' does not include a cohabitee: see *R v Pearce* [2001] EWCA Crim 2834, [2002] 1 WLR 1553, [2002] 3 FCR 75.

10 See the Police and Criminal Evidence Act 1984 ss 80, 80A; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1405.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ii) Privilege and Immunity/A. PRIVILEGE/970. Privileges of witnesses.

(ii) Privilege and Immunity

A. PRIVILEGE

970. Privileges of witnesses.

Privilege¹ may in certain cases be claimed as a ground for refusing to give evidence as to matters relevant² to an issue even though the witness who would depose to such matters is generally competent and compellable to give evidence³.

Privilege may be waived by the person entitled to claim it, either expressly or by allowing evidence to be given of matters in respect of which privilege might have been claimed⁴.

The following former grounds of privilege or objection to the production of documents or to answering any question in any civil proceedings⁵ were abrogated by the Civil Evidence Act 1968:

- 136 (1) the old rule that to do so would tend to expose a party to a forfeiture⁶;
- 137 (2) the old rule whereby a person other than a party to the proceedings could not be compelled to produce any deed or other document relating to his title to any land⁷;
- 138 (3) the old rule whereby a party to the proceedings could not be compelled to produce any document relating solely to his own case and in no way tending to impeach that case or support the case of any opposing party⁸;
- 139 (4) the old rule whereby a husband or wife could not be compelled to disclose any communication made to him or her by his or her spouse during the marriage⁹;
- 140 (5) the old rule whereby a husband or wife could not be compelled to give evidence to prove that marital intercourse did or did not take place between them during any period¹⁰;
- 141 (6) the old rule that a witness, including a party, in proceedings instituted in consequence of adultery could not be compelled to answer any question by reason that it tended to show that he or she had been guilty of adultery¹¹.

1 As to privilege in criminal cases see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1474 et seq. As to the protection of witnesses from civil liability in respect of their testimony see PARA 978.

2 As to relevance see PARA 1067 et seq.

3 The privilege is in most cases that of the witness, and not that of a party to the proceedings, unless, as in the case of communications with a legal adviser, the privilege in fact belongs to the party. A party not himself protected by privilege cannot avail himself of it: *R v Kinglake* (1870) 11 Cox CC 499; *Thomas v Newton* (1827) Mood & M 48n; *R v Adey* (1831) 1 Mood & R 94; *Marston v Downes* (1834) 1 Ad & El 31; *Doe d Earl of Egremont v Date* (1842) 3 QB 609; *Doe d Rowcliffe v Earl of Egremont* (1841) 2 Mood & R 386; and see *Procter v Smiles* (1886) 55 LJQB 527, CA. See further PARA 558 et seq.

4 As to the waiver of legal professional privilege see PARA 571. Where evidence is inadmissible on grounds of public policy (see PARA 574 et seq) there is no privilege that can be waived: *Rogers v Secretary of State for the Home Department* [1973] AC 388, [1972] 2 All ER 1057, HL.

5 As to the meaning of 'civil proceedings' for these purposes see PARA 1208 note 1.

6 Civil Evidence Act 1968 s 16(1)(a).

7 Civil Evidence Act 1968 s 16(1)(b).

8 Civil Evidence Act 1968 s 16(2).

9 Civil Evidence Act 1968 s 16(3). The former protection was provided by the Evidence (Amendment) Act 1853 s 3 (now repealed). As to compellability in criminal proceedings see the Police and Criminal Evidence Act 1984 ss 80, 80A; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1405 et seq.

10 See the Civil Evidence Act 1968 s 16(4), which amended the Matrimonial Causes Act 1965 s 43(1) (now repealed). As to compellability in criminal proceedings see note 9.

11 See the Civil Evidence Act 1968 s 16(5) (repealing the Evidence Further Amendment Act 1869 s 3 proviso; and the Matrimonial Causes Act 1965 s 43(2) (in part) (now wholly repealed)); and see *Nast v Nast and Walker*[1972] Fam 142, [1972] 1 All ER 1171, CA; *C v C*[1973] 3 All ER 770, [1973] 1 WLR 568. See also **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 828.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ii) Privilege and Immunity/A. PRIVILEGE/971. Judicial tribunals and jurors.

971. Judicial tribunals and jurors.

A judge is competent but not compellable¹ to give evidence of matters of which he becomes aware relating to and as a result of his performance of his judicial functions, but should be relied upon, in a case where his evidence is vital, not to allow the fact that he is not compellable to stand in the way of his giving evidence². Court officers may be compelled to give such evidence³.

An arbitrator may be called to give evidence of fact in proceedings concerning an award made by him, but his evidence is not admissible to explain, aid or contradict his award⁴. Similarly, a member of a judicial body or a tribunal cannot give evidence as to the reasons which prompted his decisions⁵.

Where a judge is not giving evidence about a case in which he has been concerned, there is no privilege, and no reason for unusual practice⁶.

The evidence of jurors as to what occurred during a trial or in the jury room is not admissible⁷ and for a juror to offer such evidence would constitute a contempt of court⁸.

1 *Florence v Lawson* (1851) 17 LTOS 260; *Duke of Buccleuch v Metropolitan Board of Works* (1872) LR 5 HL 418; *R v Gizard* (1838) 8 C & P 595; *R v Harvey* (1858) 8 Cox CC 99; see also *Ramlochan v R* [1956] AC 475, [1956] 2 All ER 577n, PC (defence on re-trial has no right to see judge's note taken at first trial in a case where there was no shorthand note).

2 *Warren v Warren* [1997] QB 488, [1996] 4 All ER 664, CA.

3 *R v Harvey* (1858) 8 Cox CC 99; *McKinley v McKinley* [1960] 1 All ER 476, [1960] 1 WLR 120 (magistrates' clerk may be compelled to produce a note of evidence in matrimonial proceedings if it is relevant and admissible).

4 See **ARBITRATION**.

5 *Ward v Shell-Mex and BP Ltd* [1952] 1 KB 280, [1951] 2 All ER 904. See eg *Edwards v Cornwall County Council* [2001] EWHC Admin 595, [2001] All ER (D) 395 (Jul) (courts when considering decisions of tribunals, whether by way of judicial review or appeal, should exercise considerable care before relying upon a witness statement of the chair of the tribunal which purports to clarify the basis on which the decision was made, since unlike other decision makers, tribunal members cannot be cross-examined). As to the meaning of 'witness statement' see PARA 751 note 1.

6 See *Dicas v Lord Brougham* (1833) 6 C & P 249. In *Appleby v Errington* (1952) Times, 22 October, Hodson LJ gave evidence from the bench, unrobed and unsworn, and Karminski J gave evidence from the witness box, robed and sworn.

7 *Ellis v Deheer* [1922] 2 KB 113, CA; *Boston v WS Bagshaw & Sons* [1967] 2 All ER 87n, [1966] 1 WLR 1135n, CA. See further **JURIES** vol 61 (2010) PARAS 849, 851. As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

8 See the Contempt of Court Act 1981 s 8; and **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 434. Cf, however, *R v Young (Stephen)* [1995] QB 324, [1995] 2 Cr App Rep 379, CA (Court of Appeal had jurisdiction to inquire into allegations that during an overnight hotel stay four jurors had purported to consult with the deceased victim by means of an ouija board and to have obtained messages prejudicial to the defendant, since a jury's stay in an hotel was a hiatus between sessions in the jury room and was not a period during which the jury as a whole was in the course of its deliberations; however the court had no jurisdiction to inquire into what happened thereafter in the jury room); disapproved in *R v Connor*, *R v Mirza* [2004] UKHL 2, [2004] 1 All ER 925 (juror gave evidence after verdict which, if admitted, would have provided prima facie evidence of jury

partiality; demands of European Convention on Human Rights art 6 did not require the creation of an exception to admissibility rule).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ii) Privilege and Immunity/A. PRIVILEGE/972. Confidential communications.

972. Confidential communications.

Confidential communications passing between a client and his legal adviser and made for the purpose of obtaining or giving legal advice are in general protected by legal professional privilege and privileged from disclosure¹. The privilege is available in respect of the oral testimony of witnesses, and the principles which determine whether a communication is or is not privileged are the same for both oral and written communications². The privilege is that of the client and may be waived by him³. Legal professional privilege is discussed elsewhere in this title⁴.

Confidential communications other than those passing between a client and his legal adviser are not, in general, privileged from disclosure⁵ but may be protected by statute⁶, by public interest immunity⁷ or by the privilege attaching to without prejudice communications⁸.

Privilege may also be protected as a matter of judicial discretion⁹.

1 Secondary evidence of privileged documents may be disclosed (*Goddard v Nationwide Building Society* [1987] QB 670, [1986] 3 All ER 264, CA); although if a copy is obtained improperly, an injunction may be granted restraining the use of that copy and if inspection of a document is given inadvertently, then it may be used only with the court's permission (see PARA 551; and see eg *Derby & Co Ltd v Weldon (No 8)* [1990] 3 All ER 762, [1991] 1 WLR 73, CA).

2 *Nias v Northern and Eastern Rly Co* (1838) 3 My & Cr 355; see PARA 561.

3 See PARA 571.

4 See PARA 558 et seq. See also **LEGAL PROFESSIONS** vol 65 (2008) PARA 140; **LEGAL PROFESSIONS** vol 66 (2009) PARA 1146.

5 See *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1974] AC 405, [1973] 2 All ER 1169, HL; and PARA 556 note 14.

Thus, doctors may be compelled to disclose communications with their patients (*Nuttall v Nuttall and Twyman* (1964) 108 Sol Jo 605; and see *Hunter v Mann* [1974] QB 767 at 775, [1974] 2 All ER 414 at 420, DC, where Widgery CJ said, obiter, that a judge can, if he thinks fit, tell a doctor that he need not answer a question concerning confidential information). The better view is that a priest is not privileged from disclosing the secrets of the confessional (see *Wheeler v Le Marchant* (1881) 17 ChD 675, CA; and see *Normanshaw v Normanshaw and Measham* (1893) 69 LT 468; cf *R v Hay* (1860) 2 F & F 4; *Broad v Pitt* (1828) 3 C & P 518); but in the Republic of Ireland such a privilege has been held to exist (*Cook v Carroll* [1945] IR 515). See also **ECCLESIASTICAL LAW**. In practice, communications passing between spouses and marriage guidance counsellors are privileged because they are to be regarded as communications 'without prejudice': *McTaggart v McTaggart* [1949] P 94, [1948] 2 All ER 754, CA; and see PARA 804. As to the communication to other professionals of information obtained by children and family reporters in the service of the Children and Family Court Advisory and Support Service ('CAFCASS') in the course of their inquiries see *Re M (a child) (children and family reporter: disclosure)* [2002] EWCA Civ 1199, [2002] Fam 26, [2002] 3 FCR 208; and as to welfare reports see further **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 317.

As to the implied contract of a bank not to divulge information see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 791 et seq. As regards absence of legal privilege of a bank see *Lloyd v Freshfield and Kaye* (1826) 2 C & P 325, cited in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 479, CA, per Scrutton LJ.

6 For examples of statutes forbidding the disclosure of information see PARA 581. As to the protection afforded to journalistic sources by the Contempt of Court Act 1981 s 10 see PARA 576.

7 As to public interest immunity see PARA 574 et seq.

- 8 As to without prejudice communications see PARAS 804-805.
- 9 As to judicial discretion see PARA 9.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ii) Privilege and Immunity/A. PRIVILEGE/973. Parliamentary proceedings.

973. Parliamentary proceedings.

A witness may refuse to disclose¹ what has taken place in either House of Parliament, or what was said, or how any person voted, unless the leave of the House is obtained; it is immaterial that the witness is not a member of either House². Leave is granted in appropriate cases³.

¹ In cases other than defamation proceedings, a rule of law prevents evidence being given of proceedings in Parliament unless leave is given, but in relation to defamation proceedings the witness may waive the protection of that rule so far as concerns his conduct in relation to those proceedings: see the Defamation Act 1996 s 13; and **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 102, 104.

² *Plunkett v Cobbett* (1804) 5 Esp 136; *Chubb v Salomons* (1852) 3 Car & Kir 75.

³ See 457 H of C Official Report (5th series) cols 999, 1000 (with reference to *Braddock v Tillotson's Newspapers Ltd* [1950] 1 KB 47, [1949] 2 All ER 306, CA).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ii) Privilege and Immunity/A. PRIVILEGE/974. Incrimination of witnesses.

974. Incrimination of witnesses.

In any legal proceedings¹ other than criminal proceedings² a person may refuse to answer any question³ or produce any document or thing⁴ if to do so would tend to expose him to proceedings for an offence⁵ or for the recovery of a penalty⁶. The privilege applies only as regards criminal offences under the law of any part of the United Kingdom and penalties provided by such law⁷, and includes a similar right to refuse to answer any question or produce any document or thing if to do so would expose the spouse⁸ or civil partner of that person to proceedings for any such criminal offence or for the recovery of any such penalty⁹. The privilege is that of the witness to whom the question is put, and no other person may avail himself of it¹⁰.

The privilege does not apply if there is in fact no possibility of proceedings being taken against the witness¹¹; nor can a witness refuse to answer a question otherwise admissible on the ground that it might tend to degrade him¹² or establish that he owes a debt, or is otherwise subject to a civil suit¹³.

The privilege may be abrogated by statute¹⁴.

Where there are civil proceedings and related criminal proceedings, an application for the stay of the civil proceedings pending the determination of the related criminal proceedings may be made by any party to the civil proceedings or by the prosecutor or any defendant in the criminal proceedings¹⁵.

1 'Legal proceedings' includes an arbitration or reference, whether under an enactment or not: Civil Evidence Act 1968 s 18(2). In relation to a coroner's inquest see also the Coroners Rules 1984, SI 1984/552, r 22, cited in note 6.

2 In criminal proceedings the rule additionally protects a witness from having to answer a question where to do so would expose him to a forfeiture: *Pye v Butterfield* (1864) 5 B & S 829; *Bishop of Cork v Porter* (1877) IR 11 CL 94; and see the Witnesses Act 1806 s 1. The Civil Evidence Act 1968 s 16(1)(a) abrogated the privilege, so far as it relates to forfeiture, in proceedings other than criminal proceedings: see PARA 970. See also **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1476.

3 For the mode of refusal see PARA 975. For judicial statements of the rule that a witness is not bound to answer incriminating questions see *R v Boyes* (1861) 1 B & S 311; *Lamb v Munster* (1882) 10 QBD 110, DC; *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395, [1939] 2 All ER 613, CA; *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253, [1942] 2 All ER 187, CA; *S v E* [1967] 1 QB 367, [1967] 1 All ER 593 (questions as to paternity not incriminating); *Den Norske Bank ASA v Antonatos* [1999] QB 271, [1998] 3 All ER 74, CA; *Memory Corpn plc v Sidhu* [2000] Ch 645, [2000] 1 All ER 434. For a fuller citation of authority see PARA 580. As to the position of an accused person giving evidence for himself or for a co-accused in a criminal trial see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

4 See PARA 580.

5 *Maloney v Bartley* (1812) 3 Camp 210; *R v Pegler* (1833) 5 C & P 521; *Fisher v Ronalds* (1852) 12 CB 762. As to offences to which the privilege has been held to apply see PARA 580 note 3.

6 Civil Evidence Act 1968 s 14(1). As to penalties see *R v Friend* (1696) 13 State Tr 1; *Dandridge v Corden* (1827) 3 C & P 11. See also the Coroners Rules 1984, SI 1984/552, r 22 (no witness at an inquest obliged to answer any question tending to incriminate himself); and **CORONERS** vol 9(2) (2006 Reissue) PARA 1021.

7 Civil Evidence Act 1968 s 14(1)(a). The position in criminal cases may be similar: see *Re Atherton* [1912] 2 KB 251; cf *United States of America v McRae* (1867) 3 Ch App 79; and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1476. A fine which may be imposed by the EU Commission is a

'penalty' provided by English law and consequently privilege applies where such a fine may be incurred: *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547, [1978] 1 All ER 434, HL. See also *Garvin v Domus Publishing Ltd* [1989] Ch 335, [1989] 2 All ER 344; *A-G for Gibraltar v May* [1999] 1 WLR 998, CA (privilege not extended to possible criminal proceedings under foreign law). As to the meaning of 'United Kingdom' see PARA 221 note 2.

8 For these purposes, and in any amendment made by the Civil Evidence Act 1968 to any other enactment, references to a person's husband or wife do not include references to a person who is no longer married to that person: s 18(2). Quære whether the privilege extends to a co-habitee or civil partner; see PARA 969 note 9.

9 Civil Evidence Act 1968 s 14(1)(b) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 30) (as regards legal proceedings other than criminal proceedings); *R v All Saints, Worcester, Inhabitants* (1817) 6 M & S 194; *Stapleton v Crofts* (1852) 18 QB 367.

In so far as any enactment passed before 25 October 1968 (ie the date of commencement of the Civil Evidence Act 1968) conferring (in whatever words) powers of inspection or investigation confers on a person (in whatever words) any right otherwise than in criminal proceedings to refuse to answer any question or give any evidence tending to incriminate him, s 14(1) applies to that right as it applies to the right described in s 14(1), and every such enactment must be construed accordingly: s 14(2). See also s 17(3), Schedule (verbal amendments to bring certain enactments into conformity with the provisions of s 14).

10 *R v Kinglake* (1870) 11 Cox CC 499; *Thomas v Newton* (1827) Mood & M 48n; *R v Adey* (1831) 1 Mood & R 94. A witness may not claim the privilege for the benefit of any other person save his spouse; thus an agent cannot refuse to answer on the ground that to do so would incriminate his principal, if it would not incriminate him personally: *McFadzen v Liverpool Corp* (1868) LR 3 Exch 279.

11 See PARA 580.

12 *Cundell v Pratt* (1827) Mood & M 108; and see *R v Pitcher* (1823) 1 C & P 85; *Millman v Tucker* (1803) Peake Add Cas 222, and the cases cited in the notes at 223. See also PARA 580. The court has a discretion either to permit or exclude a question which tends merely to degrade: *Cooper v Curry* (1846) 8 LTOS 238; and as to the court's general discretionary power to control the evidence see PARA 791.

13 Witnesses Act 1806 s 1; *Doe d Earl of Egremont v Date* (1842) 3 QB 609; *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253, [1942] 2 All ER 187, CA; cf *Venables v Schweitzer* (1873) LR 16 Eq 76; *Re Desportes, ex p Official Receiver* (1893) 68 LT 233.

14 See PARA 976.

15 See PARA 310. As to the meaning of 'stay' see PARA 233 note 11.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ii) Privilege and Immunity/A. PRIVILEGE/975. When a witness can refuse to answer.

975. When a witness can refuse to answer.

A person cannot refuse to be called as a witness on the ground that the only answer he can give will incriminate him or his spouse¹; he can only refuse to answer after he has been sworn, or has affirmed, and must then object to answering a particular question². The mere statement by a witness that he believes the answer will incriminate him does not excuse him from answering; before he may be excused the court must be satisfied that there is a reasonable ground to apprehend danger from his being compelled to answer³. The privilege protects both future and past answers; and where a witness objects to answering a question, but is improperly compelled to answer, the answer cannot usually be admitted in evidence against him in any subsequent proceedings⁴.

1 As to the privilege against incrimination see PARA 974.

2 *Boyle v Wiseman* (1855) 10 Exch 647; and see *National Association of Operative Plasterers v Smithies* [1906] AC 434, HL. See also *R v Lincoln Coroner, ex p Hay* [2000] Lloyd's Rep Med 264, (1999) Times, 30 March (the privilege against self-incrimination contained in the Coroners Rules 1984, SI 1984/552, r 22 (see PARA 974 note 6; and **CORONERS** vol 9(2) (2006 Reissue) PARA 1021) is concerned with the giving of an answer by a witness and the procedure to be adopted when dealing with such a claim of privilege and does not give the witness complete immunity against further questioning).

3 *Re Genese, ex p Gilbert* (1886) 3 Morr 223, CA; *Osborn v London Dock Co* (1855) 10 Exch 698; *R v Boyes* (1861) 1 B & S 311; and see *National Association of Operative Plasterers v Smithies* [1906] AC 434, HL; *Den Norske Bank ASA v Antonatos* [1999] QB 271, [1998] 3 All ER 74, CA; *Memory Corp plc v Sidhu* [2000] Ch 645, [2000] 1 All ER 434; *Great Future International Ltd v Sealand Housing Corp* [2001] CPLR 293; and PARA 580.

4 *R v Garbett* (1847) 1 Den 236; *R v Coote* (1873) LR 4 PC 599. Cf the general rule that wrongfully obtained evidence is admissible: see PARA 765.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ii) Privilege and Immunity/A. PRIVILEGE/976. Statutory exceptions.

976. Statutory exceptions.

In some cases a witness is required by statute to answer a question¹, even though the answer may incriminate him or his spouse or civil partner². It is usual in such cases for a witness so required to answer to be given statutory protection against the use of the answer in subsequent proceedings against himself³ or his spouse or civil partner⁴.

1 There are cases where statute requires a person to provide information otherwise than in the course of proceedings, even though the information given may incriminate him: see eg the Road Traffic Regulation Act 1984 s 112 and the Road Traffic Act 1988 s 172(2) (information about rider or driver of a vehicle); the Road Traffic Act 1988 s 171 (information for verifying requirement about compulsory insurance or security); and **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 1026; and the Companies Act 1985 ss 434(1), 444(1), 447 (assistance with investigation into company's affairs by DTI inspectors); and **COMPANIES** vol 15 (2009) PARAS 1544, 1546, 1558.

2 See eg the Supreme Court Act 1981 s 72 (as to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1); PARA 319; and **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 435; the Representation of the People Act 1983 s 141(1)-(2); and **ELECTIONS AND REFERENDUMS** vol 15(4) (2007 Reissue) PARA 828; the Theft Act 1968 s 31(1)(a) and the Criminal Damage Act 1971 s 9(a); note 3; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1477. A witness cannot object to producing a public document kept in pursuance of a statute on the ground that it might incriminate him: *Bradshaw v Murphy* (1836) 7 C & P 612. For the position of an accused person giving evidence in a criminal trial see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. As to the public examination of company officers and bankrupts see the Insolvency Act 1986 ss 133, 290; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**; and as to the extent to which these provisions abrogate the privilege against self-incrimination see *Bishopsgate Investment Management Ltd (in provisional liquidation) v Maxwell* [1993] Ch 1, [1992] 2 All ER 856, CA.

Where any enactment passed before 25 October 1968 (ie the date of commencement of the Civil Evidence Act 1968) provides, in whatever words, that in any proceedings other than criminal proceedings a person is not to be excused from answering any question or giving any evidence on the ground that to do so may incriminate that person, that enactment must be construed as providing also that in such proceedings a person is not to be excused from answering any question or giving any evidence on the ground that to do so may incriminate that person's husband or wife: s 14(3), (5); see also s 17(3), Schedule (verbal amendments to bring certain enactments into conformity with s 14). No amendment has been made to s 14(3) in respect of civil partners.

3 Eg a person is not excused, by reason that to do so might incriminate that person, or that person's spouse or civil partner, of an offence under the Theft Act 1968, from answering any question put to that person in proceedings for the recovery or administration of any property, for the execution of any trust, or for an account of any property or dealings with property, but no statement or admission made by a person in answering such a question is, in proceedings for an offence under that Act, admissible in evidence against that person, or (unless they married or became civil partners after the making of the statement or admission) against the spouse or civil partner of that person: s 31(1)(a) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 28). The Criminal Damage Act 1971 s 9(a) (amended by the Civil Partnership Act 2004 Sch 27 para 36) makes provision in similar terms to the Theft Act 1968 s 31(1)(a) in relation to answers that might incriminate a person of an offence under the Act of 1971, and provides a similar protection against the admission in evidence in proceedings for an offence under that Act against the person obliged to answer, or his spouse or civil partner, of a statement or admission made in the answer. See further **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

4 Where any enactment, however worded, passed before 25 October 1968 provides as mentioned in the Civil Evidence Act 1968 s 14(3) (see note 2), or confers powers of inspection or investigation, and further provides (in whatever words) that any answer or evidence given by a person is not to be admissible in evidence against that person in any proceedings or class of proceedings (however described, and whether criminal or not), that enactment is to be construed as providing also that any answer or evidence given by that person is not to be admissible in evidence against that person's husband or wife in the proceedings or class of proceedings in question: s 14(4), (5); see also s 17(3), Schedule (verbal amendments to bring certain enactments into conformity with s 14).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ii) Privilege and Immunity/B. IMMUNITY/977. Privilege from civil arrest.

B. IMMUNITY

977. Privilege from civil arrest.

Witnesses, parties and solicitors are privileged from arrest on civil but not criminal¹ process² while going to, attending and returning from, the place of trial³.

The rule applies in all cases where a person is attending a properly constituted tribunal⁴ for the purpose of giving evidence, or where he has some relation to or interest in the proceedings, either as a party or solicitor or agent, or for any other reason⁵. The rule has no application to a person going to obtain a summons, even though he obtains it⁶. It is immaterial that the person has been served with no process by which his presence might be compelled⁷, but he must be acting in good faith in the capacity on which he bases his claim to the privilege⁸.

The time over which the privilege extends is a question of fact and reasonableness in each case⁹; a witness is not, for example, protected as from the moment at which he is served with his witness summons or subpoena¹⁰, but only when, in good faith, he begins his journey to the place of trial¹¹. His journey must be made without unnecessary deviations¹², and any deviation must be clearly connected with the object of the journey¹³.

The time during which the privilege extends while he is actually in attendance at the place of trial will also vary according to the circumstances of each case¹⁴. When he returns he is under no obligation to go home by the shortest route, or the very moment that the trial is over, provided he acts reasonably and does not abuse the privilege for his own purposes¹⁵. The fact that he is compelled to prolong his stay for want of means to return, however, is an immaterial consideration¹⁶.

The privilege exists in the interests of public justice¹⁷, and a delay on the part of the witness in asserting the privilege for the purpose of obtaining his discharge from custody after arrest will not, therefore, prejudice him¹⁸. A witness may obtain his discharge from custody by application to the court from which the process for his arrest has issued, or, if summoned as a witness, to the court to which he has been summoned¹⁹, or by taking habeas corpus proceedings²⁰.

A witness cannot sue the officer who arrests him merely in respect of the arrest, even though the officer knew that the privilege existed²¹, or those who employed the officer²², although in the latter case a knowledge of the privilege may possibly be evidence of malice and may therefore justify a claim²³. The court could itself treat the arrest as a contempt, as being a deliberate interference with the course of justice²⁴.

1 See *Re Freston*(1883) 11 QBD 545, CA, where the distinction is discussed. As to privileges of solicitors generally see **LEGAL PROFESSIONS** vol 65 (2008) PARA 738.

2 *Re Douglas*(1842) 3 QB 825; *Kimpton v London and North Western Rly Co*(1854) 9 Exch 766. There is no privilege from arrest when a person is committed for criminal contempt of court, nor in some cases of civil contempt accompanied by circumstances of misconduct: *Re Freston*(1883) 11 QBD 545, CA; *Re Dudley*(1883) 12 QBD 44, CA; *Re Gent, Gent-Davis v Harris*(1889) 40 ChD 190; *Re Grey*[1892] 2 QB 440, CA; *Re Hunt*[1959] 2 QB 69, [1959] 2 All ER 252, CA; *Stourton v Stourton*[1963] P 302, [1963] 1 All ER 606; and see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 519. For the distinction between criminal and civil contempt see **CONTEMPT OF COURT**.

3 The general principle is stated in *Re Freston*(1883) 11 QBD 545 at 552, CA, per Brett MR; see also *Lightfoot v Cameron* (1776) 2 Wm Bl 1113; *Meekins v Smith* (1791) 1 Hy Bl 636; *Willingham v Matthews* (1815) 6 Taunt 356; *Magnay v Burt*(1843) 5 QB 381, Dav & Mer 652.

4 *Ex p Cobbett* (1857) 7 E & B 955. For cases of the privilege successfully claimed in proceedings before various tribunals see *Arding v Flower* (1800) 3 Esp 117; subsequent proceedings 8 Term Rep 534; *Ex p King* (1802) 7 Ves 312; *Ex p Byne* (1813) 1 Ves & B 316; *Willingham v Matthews* (1815) 6 Taunt 356; *Re Sewercrop, ex p Clarke* (1832) 2 Deac & Ch 99 (bankruptcy); *Moore v Booth* (1797) 3 Ves 350; *Phillips v Pound*(1852) 7 Exch 881; *Re Jewitt* (1864) 33 Beav 559 (judge's chambers); *Sidgier v Birch* (1803) 9 Ves 69; *List's Case* (1813) 2 Ves & B 373; *Franklyn v Colqhoun* (1816) 1 Madd 580 (High Court masters etc); *Newton v Askew* (1848) 6 Hare 319 (Chancery registrar); *Spence v Stuart* (1802) 3 East 89; *Ex p Temple* (1814) 2 Ves & B 391; *Randall v Gurney* (1819) 3 B & Ald 252 (arbitration by court order); *Webb v Taylor* (1843) 13 LJB 24 (the same under a submission agreed to be made a rule of court); *Walters v Rees* (1819) 4 Moore CP 34 (under-sheriff); *Webb v Taylor* (1843) 13 LJB 24; *Mountague v Harrison* (1857) 3 CBNS 292; *Re Freston*(1883) 11 QBD 545, CA (magistrates' courts). The privilege with regard to courts-martial is statutory: see the Army Act 1955 s 100; the Air Force Act 1955 s 100; and **ARMED FORCES**.

5 *Walpole v Alexander* (1782) 3 Doug KB 45; *Meekins v Smith* (1791) 1 Hy Bl 636; *Arding v Flower* (1800) 3 Esp 117 (bankrupt attending, on notice, meeting to declare dividend); *Ex p Byne* (1813) 1 Ves & B 316 (person attending, without summons, commissioners in a bankruptcy, and filing uncontradicted affidavit that he is a material witness); cf *Phillips v Pound*(1852) 7 Exch 881 (solicitors' clerk at judge's chambers not privileged).

6 *Ex p Cobbett* (1857) 7 E & B 955.

7 *Walpole v Alexander* (1782) 3 Doug KB 45 (witness coming from abroad to give evidence); *Meekins v Smith* (1791) 1 Hy Bl 636; *Spence v Stuart* (1802) 3 East 89; *Rishton v Nisbett* (1834) 1 Mood & R 347 (witness attending at request of party to arbitration proceedings). There was at one time a difference of opinion as to the necessity of a witness summons, subpoena or other like process: see *Ex p Byne* (1813) 1 Ves & B 316, and the cases there cited, as well as cases cited in *Magnay v Burt*(1843) 5 QB 381, Dav & Mer 652.

8 *Meekins v Smith* (1791) 1 Hy Bl 636; *Gibbs v Phillipson* (1829) 1 Russ & M 19.

9 *Walpole v Alexander* (1782) 3 Doug KB 45; *Strong v Dickenson* (1836) 1 M & W 488.

10 *Gibbs v Phillipson* (1829) 1 Russ & M 19.

11 *Gibbs v Phillipson* (1829) 1 Russ & M 19; *Ricketts v Gurney* (1819) 7 Price 699; *Strong v Dickenson* (1836) 1 M & W 488; *Persse v Persse* (1856) 5 HL Cas 671.

12 *Ricketts v Gurney* (1819) 7 Price 699; *Strong v Dickenson* (1836) 1 M & W 488.

13 *Ricketts v Gurney* (1819) 7 Price 699 (deviation on way to place of trial to collect and arrange necessary papers). Contrast *Gibbs v Phillipson* (1829) 1 Russ & M 19, where the witness was held to have no privilege on going to his solicitors' office three days before his examination, for the purpose of looking at the interrogatories which he would have to answer.

14 *Walpole v Alexander* (1782) 3 Doug KB 45 (witness coming from abroad, and finding case postponed to following sittings, privileged from arrest while staying in London for case to be heard); *Childerston v Barrett* (1809) 11 East 439 (arrest of witness on day when case was not in list unjustifiable); *Ex p Temple* (1814) 2 Ves & B 391 (privilege during adjournment); *Spencer v Newton* (1837) 6 Ad & El 623 (but not where case is adjourned indefinitely, and the witness stays on in the expectation that some step will be taken by the other side).

15 *Willingham v Matthews* (1815) 6 Taunt 356; *Strong v Dickenson* (1836) 1 M & W 488; see also *Lightfoot v Cameron* (1776) 2 Wm Bl 1113 (arrest unjustified where a party after being present at case in the morning was dining in the afternoon with his solicitor and witnesses; sed quaere); *Holiday v Pitt* (1734) 2 Stra 985; *Selby v Hills* (1832) 1 Dowl 257 (arrest unjustified where witness was arrested a mile from the court, and two hours after leaving it, but on his direct road home); *Pitt v Coomes* (1834) 5 B & Ad 1078 (the same, where witness was in his tailor's shop, which he had visited on his way home). The privilege covers a witness while returning home after imprisonment for contempt of court committed during the trial: *R v Wigley* (1835) 7 C & P 4.

16 *Spencer v Newton* (1837) 6 Ad & El 623.

17 *Newton v Constable*(1841) 2 QB 157; *Magnay v Burt*(1843) 5 QB 381, Dav & Mer 652; *Ex p Cobbett* (1857) 7 E & B 955.

18 *Webb v Taylor* (1843) 1 Dow & L 676; *Andrews v Martin* (1862) 12 CBNS 371.

19 *Walker v Webb* (1797) 3 Anst 941; *Randall v Gurney* (1819) 3 B & Ald 252; *Selby v Hills* (1832) 8 Bing 166; *Re Sewercrop, ex p Clarke* (1832) 2 Deac & Ch 99; *A-G v Skinners' Co* (1837) Coop Pr Cas 1; *Kimpton v London and North Western Rly Co* (1854) 9 Exch 766.

20 *Ex p Tillotson* (1816) 1 Stark 470; *Towers v Newton* (1841) 1 QB 319; *Astbury v Belbin* (1850) 3 Car & Kir 20. As to habeas corpus proceedings see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 207 et seq.

21 *Tarlton v Fisher* (1781) 2 Doug KB 671; *Magnay v Burt* (1843) 5 QB 381, Dav & Mer 652.

22 *Stokes v White* (1834) 1 Cr M & R 223; *Yearsley v Heane* (1845) 14 M & W 322; *Ewart v Jones* (1845) 14 M & W 774.

23 *Whalley v Pepper* (1836) 7 C & P 506; but in view of the later decisions, such as *Magnay v Burt* (1843) 5 QB 381, Dav & Mer 652, this seems open to question.

24 *Magnay v Burt* (1843) 5 QB 381, Dav & Mer 652.

UPDATE

977 Privilege from civil arrest

NOTE 4--Army Act 1955 and Air Force Act 1955 replaced: Armed Forces Act 2006.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ii) Privilege and Immunity/B. IMMUNITY/978. Protection from proceedings in respect of the evidence given.

978. Protection from proceedings in respect of the evidence given.

A witness is protected from civil proceedings¹ in respect of the evidence which he gives² in judicial proceedings³, and in respect of things said or done in the course of preparing evidence for such proceedings⁴ although not in respect of advice given as to the merits of a claim before proceedings are commenced⁵. The protection is against civil proceedings of any sort, and is not limited to claims for libel and slander⁶. The underlying rationale of the immunity is to ensure that persons who may be witnesses in future cases will not be deterred from giving evidence by fear of being sued for what they say in court⁷.

Where, however, an arrest has been secured as a result of some malicious proceeding for which there was no reasonable cause, the protection given to the witness will not necessarily exclude a claim for malicious arrest. A person giving evidence in support of a bench warrant has no privilege⁸.

The immunity of witnesses from civil proceedings does not extend to immunity in respect of the deliberate fabrication of evidence which is to be referred to in a statement of evidence⁹.

An expert is not immune from professional disciplinary procedures in relation to evidence given at trial¹⁰.

1 As to the crime of perjury and similar offences see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 712 et seq.

2 *Floyd v Barker* (1607) 12 Co Rep 23; *Revis v Smith* (1856) 18 CB 126; *Astley v Younge* (1759) 2 Burr 807; *Henderson v Broomhead* (1859) 4 H & N 569; *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, Ex Ch; affd (1875) LR 7 HL 744; *Seaman v Netherclift* (1876) 2 CPD 53, CA; *Bynoe v Bank of England* [1902] 1 KB 467, CA; *Barratt v Kearns* [1905] 1 KB 504, CA; *Watson v M'Ewan*, *Watson v Jones* [1905] AC 480, HL; *Marrinan v Vibart* [1963] 1 QB 528, [1962] 3 All ER 380, CA; *Lincoln v Daniels* [1962] 1 QB 237, [1961] 3 All ER 740, CA; and see *Roy v Prior* [1970] 1 QB 283, [1969] 3 All ER 1153, CA; revsd [1971] AC 470, [1970] 2 All ER 729, HL.

It has been said that the rule applies even if the witness knows that the evidence is false (*Henderson v Broomhead* (1859) 4 H & N 569; and see *Roy v Prior* [1971] AC 470, [1970] 2 All ER 729, HL (where the House of Lords, reversing the Court of Appeal's decision, held that the plaintiff's action was not brought on or in respect of any evidence given but in respect of malicious abuse of process)) on the basis that the remedy against a witness who has given evidence which is false and injurious to another is to indict him for perjury (*Watson v M'Ewan*, *Watson v Jones* [1905] AC 480 at 486, HL, per Lord Halsbury LC). See, however, the text and note 9.

3 The court need not be a court of record, provided it is duly and legally constituted: *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, Ex Ch (military court of inquiry); affd (1875) LR 7 HL 744; *Barratt v Kearns* [1905] 1 KB 504, CA (ecclesiastical commission); *Lincoln v Daniels* [1962] 1 QB 237, [1961] 3 All ER 740, CA (disciplinary proceedings against a barrister by the benchers of an Inn of Court). Matters to be considered in determining whether proceedings before a tribunal are judicial proceedings were discussed in *Trapp v Mackie* [1979] 1 All ER 489, [1979] 1 WLR 377, HL (proceedings before Scottish local inquiry held to be judicial proceedings).

4 *Watson v M'Ewan*, *Watson v Jones* [1905] AC 480, HL; *Marrinan v Vibart* [1963] 1 QB 528, [1962] 3 All ER 380, CA; *Roy v Prior* [1970] 1 QB 283, [1969] 3 All ER 1153, CA; revsd [1971] AC 470, [1970] 2 All ER 729, HL.

5 *Palmer v Durnford Ford (a firm)* [1992] QB 483, [1992] 2 All ER 122. See also *Evans v London Hospital Medical College* [1981] 1 All ER 715, [1981] 1 WLR 184.

6 *Marrinan v Vibart* [1963] 1 QB 528, [1962] 3 All ER 380, CA; *Revis v Smith* (1856) 18 CB 126; *Henderson v Broomhead* (1859) 4 H & N 569, Ex Ch; *Hargreaves v Bretherton* [1959] 1 QB 45, [1958] 3 All ER 122. As to the protection of witnesses from intimidation and victimisation see **CONTEMPT OF COURT**; and as to special measures

directions for the protection of vulnerable witnesses in criminal proceedings see the Youth Justice and Criminal Evidence Act 1999 ss 16-33; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1417 et seq; **MAGISTRATES**.

7 See *Darker (suing as personal representative of Docker) v Chief Constable of the West Midlands Police* [2001] 1 AC 435, [2000] 4 All ER 193, HL.

8 *Roy v Prior* [1971] AC 470, [1970] 2 All ER 729, HL.

9 See *Darker (suing as personal representative of Docker) v Chief Constable of the West Midlands Police* [2001] 1 AC 435, [2000] 4 All ER 193, HL (there is a distinction in principle between what a witness says in court (or what, in a proof of evidence, a prospective witness states he will say in court) and the fabrication of evidence, such as the forging of a suspect's signature to a confession, the writing down by a police officer in his notebook of words which the suspect had not in fact said or the planting of drugs on a suspect. That distinction is real, even though it may in practice appear to be a fine one; eg the immunity would apply to a police officer who, though not claiming to have made a note, falsely stated in the witness box that the suspect had made a verbal confession to him. In contrast, it would not apply to a police officer who, in order to support the evidence he would give in court, fabricated a note containing an admission which the suspect had not made).

10 *Meadow v General Medical Council* [2006] EWCA Civ 1390, [2007] QB 462, [2007] 1 All ER 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iii) Witness Statements, Witness Summaries and Affidavits/A. INTRODUCTION/979. Evidence of witnesses; in general.

(iii) Witness Statements, Witness Summaries and Affidavits

A. INTRODUCTION

979. Evidence of witnesses; in general.

The general rule in civil proceedings to which the Civil Procedure Rules ('CPR') apply is that any fact which needs to be proved by the evidence of witnesses is to be proved, at trial, by their oral evidence given in public¹ and at any other hearing, by their evidence in writing². This is subject to any provision to the contrary contained in the CPR or elsewhere³ or to any order of the court⁴.

The general rule is that evidence at hearings other than the trial is to be by witness statement⁵ unless the court, a practice direction or any other enactment requires otherwise⁶. At such hearings a party may, however, rely on the matters set out in his statement of case⁷ or his application notice⁸, if the statement of case or application notice is verified by a statement of truth⁹.

The requirements with regard to expert evidence are discussed elsewhere in this title¹⁰.

1 CPR 32.2(1)(a). As to when hearings may be held in private see **COURTS** vol 10 (Reissue) PARA 312; PARA 6. As to the application of the CPR see PARA 32.

2 CPR 32.2(1)(b). As to the ways in which evidence may be given in writing see PARA 981 et seq.

3 CPR 32.2(2)(a).

4 CPR 32.2(2)(b). As to the meaning of 'court' see PARA 22. As a specific example of the court's case management power to make use of technology, a witness may be allowed to give evidence through a video link or by other means: see PARAS 1032-1035.

5 As to the meaning of 'witness statement' see PARA 751 note 1.

6 CPR 32.6(1).

7 As to statements of case see PARA 1065 note 1.

8 As to application notices see PARA 306.

9 CPR 32.6(2). As to statements of truth see PARA 613. To verify a statement of case the statement of truth should be set out as follows: '[I believe][the (*party on whose behalf the statement of case is being signed*) believes] that the facts stated in the statement of case are true': *Practice Direction--Written Evidence* PD 32 para 26.2. As to parties who may sign a statement of truth see PARA 613.

10 See PARA 835 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iii) Witness Statements, Witness Summaries and Affidavits/A. INTRODUCTION/980. No notice of intention to rely on hearsay evidence required.

980. No notice of intention to rely on hearsay evidence required.

The requirement under the Civil Evidence Act 1995 to give notice of an intention to rely on hearsay evidence¹ does not apply to evidence at hearings other than trials². Accordingly, in such cases no notice of such intention³ is required and a party may rely on such evidence at such hearings, but the witness who swears the relevant affidavit or makes the affirmation or statement is required to indicate such parts of his evidence as are based upon information or belief⁴ and identify the source of such information or belief⁵.

1 Ie the Civil Evidence Act 1995 s 2(1): see PARA 811. For the purposes of CPR Pt 33 (see the text and notes 2-3; and PARA 808 et seq) 'hearsay' means a statement made, otherwise than by a person while giving oral evidence in proceedings, which is tendered as evidence of the matters stated; and references to hearsay include hearsay of whatever degree: CPR 33.1.

2 CPR 33.3(a).

3 Ie under CPR 33.2: see PARA 811.

4 As to affidavits and affirmations see *Practice Direction--Evidence* PD 32 para 4.2(1); and PARA 990. As to witness statements see para 18.2(1); and PARA 981.

5 As to affidavits and affirmations see *Practice Direction--Evidence* PD 32 para 4.2(2); and PARA 990. As to witness statements see para 18.2(2); and PARA 981.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iii) Witness Statements, Witness Summaries and Affidavits/B. WITNESS STATEMENTS AND WITNESS SUMMARIES/981. Form of witness statement.

B. WITNESS STATEMENTS AND WITNESS SUMMARIES

981. Form of witness statement.

A witness statement¹ must comply with the requirements set out in the relevant practice direction². It must be headed in the prescribed manner with the title of the proceedings³ and must, if practicable, be in the intended witness's own words⁴. It must indicate which of the statements in it are made from the witness's own knowledge and which are matters of information or belief and the source for any matters of information or belief⁵. It is usually convenient for a witness statement to follow the chronological sequence of the events or matters dealt with and each paragraph of a witness statement should as far as possible be confined to a distinct portion of the subject⁶.

A witness statement must be in the prescribed format⁷ and must be verified by a statement of truth⁸.

Any alteration to a witness statement must be initialled by the person making the statement or by the authorised person where appropriate⁹. A witness statement which contains an alteration that has not been initialled may be used in evidence only with the permission of the court¹⁰.

An exhibit used in conjunction with a witness statement must be verified and identified by the witness and remain separate from the witness statement¹¹. Where a witness makes more than one witness statement to which there are exhibits, in the same proceedings, the numbering of the exhibits must run consecutively throughout and not start again with each witness statement¹². The rules relating to exhibits to affidavits¹³ apply similarly to witness statements as they do to affidavits¹⁴.

Where a witness statement, or an exhibit to a witness statement, does not comply with the relevant rules or practice direction¹⁵ in relation to its form, the court may refuse to admit it as evidence and may refuse to allow the costs arising from its preparation¹⁶. Permission to file a defective witness statement or to use a defective exhibit may be obtained from a judge¹⁷ in the court where the case is proceeding¹⁸.

1 As to the meaning of 'witness statement' see PARA 751 note 1.

2 CPR 32.8.

3 See *Practice Direction--Evidence* PD 32 para 17.1. At the top right hand corner of the first page there must be clearly written: (1) the party on whose behalf it is made; (2) the initials and surname of the witness; (3) the number of the statement in relation to that witness; (4) the identifying initials and number of each exhibit referred to; and (5) the date the statement was made: para 17.2. As to exhibits see the text and notes 11-14.

4 *Practice Direction--Evidence* PD 32 para 18.1. The witness statement should be expressed in the first person and should also state (1) the full name of the witness; (2) his place of residence or, if he is making the statement in his professional, business or other occupational capacity, the address at which he works, the position he holds and the name of his firm or employer; (3) his occupation, or if he has none, his description; and (4) the fact that he is a party to the proceedings or is the employee of such a party if it be the case: para 18.1(1)-(4).

5 *Practice Direction--Evidence* PD 32 para 18.2. The naming of the source of hearsay evidence in a witness statement requires the source of hearsay evidence to be identified, but this is not required to be based on admissible evidence: *Clarke v Marlborough Fine Art (London) Ltd* [2002] 1 WLR 1731.

6 *Practice Direction--Evidence* PD 32 para 19.2.

7 A witness statement should (1) be produced on durable quality A4 paper with a 3.5 cm margin; (2) be fully legible and should normally be typed on one side of the paper only; (3) where possible, be bound securely in a manner which would not hamper filing, or otherwise each page should be indorsed with the case number and should bear the initials of the witness; (4) have the pages numbered consecutively as a separate statement (or as one of several statements contained in a file); (5) be divided into numbered paragraphs; (6) have all numbers, including dates, expressed in figures; and (7) give the reference to any document or documents mentioned either in the margin or in bold text in the body of the statement: *Practice Direction--Evidence* PD 32 para 19.1.

8 See *Practice Direction--Evidence* PD 32 para 20; and PARA 751 note 1.

9 *Practice Direction--Evidence* PD 32 para 22.1.

10 *Practice Direction--Evidence* PD 32 para 22.2.

11 *Practice Direction--Evidence* PD 32 para 18.3. Where a witness refers to an exhibit or exhibits, he should state 'I refer to the (*description of exhibit*) marked '. . .': para 18.4.

12 *Practice Direction--Evidence* PD 32 para 18.6.

13 *le Practice Direction--Evidence* PD 32 paras 11.3-15.4: see PARA 990.

14 *Practice Direction--Evidence* PD 32 para 18.5.

15 *le does not comply with CPR Pt 32 or Practice Direction--Evidence* PD 32: see PARA 791 et seq, PARA 984 et seq.

16 *Practice Direction--Evidence* PD 32 para 25.1.

17 As to the meaning of 'judge' see PARA 49.

18 *Practice Direction--Evidence* PD 32 para 25.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iii) Witness Statements, Witness Summaries and Affidavits/B. WITNESS STATEMENTS AND WITNESS SUMMARIES/982. Requirement to serve witness statements for use at trial.

982. Requirement to serve witness statements for use at trial.

The court¹ will order a party to serve² on the other parties any witness statement³ of the oral evidence⁴ which the party serving the statement intends to rely on in relation to any issues of fact to be decided at the trial⁵. The court may give directions as to the order in which witness statements are to be served and whether or not the witness statements are to be filed⁶.

If the court directs that a witness statement is to be filed, it must be filed in the court or Division, or office or registry of the court or Division, where the case in which it was or is to be used is proceeding or will proceed⁷. Where the court has directed that a witness statement in a foreign language is to be filed the party wishing to rely on it must have it translated and file the foreign language witness statement with the court⁸. The translator must make and file with the court an affidavit verifying the translation and exhibiting both the translation and a copy of the foreign language witness statement⁹.

Subject to certain exceptions, a witness statement may be used only for the purpose of the proceedings in which it is served¹⁰.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'witness statement' see PARA 751 note 1, and as to the format of witness statements, see PARA 981.

4 As to oral evidence see PARA 1036 et seq.

5 CPR 32.4(2). Such an order will be made as part of the case management directions given by the court, either when it gives directions at allocation to a track (see CPR Pt 26; and PARA 260 et seq), or at a case management conference (in the multi-track: see PARA 295) or at the hearing of an application (eg for summary judgment which is dismissed: see PARA 527). As to the consequence of failure to serve a witness statement see CPR 32.10; and PARA 987.

6 CPR 32.4(3). As to the meaning of 'filing' see PARA 1832 note 8.

7 *Practice Direction--Written Evidence* PD 32 para 23.1.

8 *Practice Direction--Written Evidence* PD 32 para 23.2(1).

9 *Practice Direction--Written Evidence* PD 32 para 23.2(2). Similar provisions apply if the court orders an affidavit to be filed: see paras 10.1, 10.2; and PARA 991. As to exhibits to witness statements see PARA 981 text and notes 11-14.

10 See CPR 32.12; and PARA 984.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iii) Witness Statements, Witness Summaries and Affidavits/B. WITNESS STATEMENTS AND WITNESS SUMMARIES/983. Use at trial of witness statements which have been served.

983. Use at trial of witness statements which have been served.

If a party has served¹ a witness statement² and he wishes to rely at trial on the evidence of the witness who made the statement, he must call the witness to give oral evidence, unless the court³ orders otherwise or he puts the statement in as hearsay evidence⁴. Where a witness is called to give oral evidence under this provision, his witness statement will stand as his evidence in chief⁵ unless the court orders otherwise⁶.

A witness giving oral evidence at trial may, with the permission of the court, amplify his witness statement⁷ and give evidence in relation to new matters which have arisen since the witness statement was served on the other parties⁸. The court will give such permission only if it considers that there is good reason not to confine the evidence of the witness to the contents of his witness statement⁹.

If a party who has served a witness statement does not call the witness to give evidence at trial or put the witness statement in as hearsay evidence, any other party may put the witness statement in as hearsay evidence¹⁰.

Where a witness is called to give evidence at trial, he may be cross-examined¹¹ on his witness statement whether or not the statement or any part of it was referred to during the witness's evidence in chief¹².

1 As to service of witness statements see PARA 982; and as to the meaning of 'service' see PARA 138 note 2.

2 As to the meaning of 'witness statement' see PARA 751 note 1.

3 As to the meaning of 'court' see PARA 22.

4 CPR 32.5(1). As to the meaning of 'hearsay' see PARA 808. As to hearsay evidence see the Civil Evidence Act 1995; CPR Pt 33; and PARA 808 et seq.

5 Evidence in chief is the evidence given by a witness for the party who called him: see CPR 2.2, Glossary. As to the effect of a description in the Glossary see PARA 31.

6 CPR 32.5(2). As to the circumstances in which the court may consider ordering otherwise see eg *Mercer v Chief Constable of the Lancashire Constabulary* [1991] 2 All ER 504, [1991] 1 WLR 367, CA (decided under the old rules); and as to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2. As to striking out certain portions of a witness statement see eg *Akhtar v Muhammad* [2002] EWHC 673 (Ch), [2002] All ER (D) 254 (Feb).

7 CPR 32.5(3)(a).

8 CPR 32.5(3)(b).

9 CPR 32.5(4).

10 CPR 32.5(5). As to hearsay evidence see PARA 806 et seq.

11 As to the meaning of 'cross-examination' see PARA 50 note 4; and as to cross-examination see PARAS 1042-1044.

12 CPR 32.11.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iii) Witness Statements, Witness Summaries and Affidavits/B. WITNESS STATEMENTS AND WITNESS SUMMARIES/984. Use of witness statements for other purposes.

984. Use of witness statements for other purposes.

A witness statement¹ may be used only for the purpose of the proceedings in which it is served², except that this does not apply if and to the extent that the witness gives consent in writing to some other use of it³, the court⁴ gives permission for some other use⁵ or the witness statement has been put in evidence at a hearing held in public⁶.

1 As to the meaning of 'witness statement' see PARA 751 note 1.

2 CPR 32.12(1). As to the meaning of 'service' see PARA 138 note 2.

3 CPR 32.12(2)(a).

4 As to the meaning of 'court' see PARA 22.

5 CPR 32.12(2)(b).

6 CPR 32.12(2)(c). As to hearings held in public and the criteria for holding a hearing in private see CPR 39.2; and PARA 6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iii) Witness Statements, Witness Summaries and Affidavits/B. WITNESS STATEMENTS AND WITNESS SUMMARIES/985. Availability of witness statements for inspection.

985. Availability of witness statements for inspection.

A witness statement¹ which stands as evidence in chief² is open to inspection during the course of the trial unless the court³ otherwise directs⁴.

Any person may ask for a direction that a witness statement is not open to inspection⁵. The court will not, however, make such a direction unless it is satisfied that a witness statement should not be open to inspection because of:

- 142 (1) the interests of justice⁶;
- 143 (2) the public interest⁷;
- 144 (3) the nature of any expert medical evidence in the statement⁸;
- 145 (4) the nature of any confidential information (including information relating to personal financial matters) in the statement⁹; or
- 146 (5) the need to protect the interests of any child¹⁰ or protected party¹¹.

The court may exclude from inspection words or passages in the statement¹².

Where the court has ordered that a witness statement is not to be open to inspection by the public or that words or passages in the statement are not to be open to inspection, the court officer¹³ will so certify on the statement and make any deletions directed¹⁴ by the court¹⁵.

1 As to the meaning of 'witness statement' see PARA 751 note 1.

2 As to the meaning of 'evidence in chief' see PARA 983 note 5.

3 As to the meaning of 'court' see PARA 22.

4 CPR 32.13(1). As to the application of the CPR see PARA 32. As to the procedure by which persons not party to proceedings may apply for permission to inspect witness statements and other documents filed at court see PARA 82.

5 CPR 32.13(2).

6 CPR 32.13(3)(a).

7 CPR 32.13(3)(b).

8 CPR 32.13(3)(c).

9 CPR 32.13(3)(d).

10 As to the meaning of 'child' see PARA 222 note 3.

11 CPR 32.13(3)(e). As to the meaning of 'protected party' see PARA 222 note 1.

12 CPR 32.13(4).

13 As to the meaning of 'court officer' see PARA 49 note 3.

14 Ie any deletions directed under CPR 32.13(4): see the text to note 12.

15 *Practice Direction--Written Evidence* PD 32 para 24.1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iii) Witness Statements, Witness Summaries and Affidavits/B. WITNESS STATEMENTS AND WITNESS SUMMARIES/986. Witness summaries.

986. Witness summaries.

A party who is required to serve¹ a witness statement² for use at trial, but is unable to obtain one³, may apply, without notice, for permission to serve a witness summary instead⁴. A witness summary is a summary of the evidence, if known, which would otherwise be included in a witness statement⁵ or, if the evidence is not known, the matters about which the party serving the witness summary proposes to question the witness⁶.

Unless the court⁷ orders otherwise, a witness summary must include the name and address of the intended witness⁸ and must be served within the period in which a witness statement would have had to be served⁹.

1 As to the meaning of 'service' see PARA 138 note 2.

2 As to the meaning of 'witness statement' see PARA 751 note 1.

3 In these circumstances it is likely that the party will have to issue a witness summons to secure the attendance of the witness. As to such summonses see PARA 1004 et seq.

4 CPR 32.9(1). As to the consequence of failure to serve a witness summary see CPR 32.10; and PARA 987.

5 CPR 32.9(2)(a).

6 CPR 32.9(2)(b).

7 As to the meaning of 'court' see PARA 22.

8 CPR 32.9(3).

9 CPR 32.9(4). Where a party serves a witness summary, so far as practicable CPR 32.4 (requirement to serve witness statements for use at trial: see PARA 982), CPR 32.5(3) (amplifying witness statements: see PARA 983), and CPR 32.8 (form of witness statement: see PARA 981) apply to the summary: CPR 32.9(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iii) Witness Statements, Witness Summaries and Affidavits/B. WITNESS STATEMENTS AND WITNESS SUMMARIES/987. Consequence of failure to serve witness statement or summary.

987. Consequence of failure to serve witness statement or summary.

If a witness statement¹ or a witness summary² for use at trial is not served³ in respect of an intended witness within the time specified by the court⁴, then the witness may not be called to give oral evidence unless the court gives permission⁵.

- 1 As to the meaning of 'witness statement' see PARA 751 note 1.
- 2 As to the meaning of 'witness summary' see PARA 986 text to notes 5-6.
- 3 As to the meaning of 'service' see PARA 138 note 2.
- 4 As to the meaning of 'court' see PARA 22. As to time limits generally see PARA 88 et seq.
- 5 CPR 32.10.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iii) Witness Statements, Witness Summaries and Affidavits/B. WITNESS STATEMENTS AND WITNESS SUMMARIES/988. False statements.

988. False statements.

Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth¹ without an honest belief in its truth². Such proceedings may be brought only by the Attorney General³ or with the permission of the court⁴.

Where a party alleges that a statement of truth or a disclosure statement⁵ is false, the party must refer that allegation to the court dealing with the claim in which the statement of truth or disclosure statement has been made⁶. The court may:

- 147 (1) exercise any of its powers under the Civil Procedure Rules⁷;
- 148 (2) initiate steps to consider if there is a contempt of court and, where there is, to punish it⁸;
- 149 (3) direct the party making the allegation to refer the matter to the Attorney General with a request to him to consider whether he wishes to bring proceedings for contempt of court⁹.

The practice of the Attorney General is to prefer an application that comes from the court, and so has received preliminary consideration by a judge, to one made direct to him by a party to the claim in which the alleged contempt occurred without prior consideration by the court. An application to the Attorney General is not a way of appealing against, or reviewing, the decision of the judge¹⁰.

A person applying to commence such proceedings must consider whether the incident complained of does amount to contempt of court and whether such proceedings would further the overriding objective¹¹.

1 As to statements of truth see PARA 613. Witness statements and, where practicable, witness summaries, must be verified by a statement of truth: see PARAS 981, 986.

2 CPR 32.14(1). As to the application of the CPR see PARA 32.

3 CPR 32.14(2)(a).

4 CPR 32.14(2)(b). As to the meaning of 'court' see PARA 22. Where a party makes an application to the court for permission for that party to commence proceedings for contempt of court, it must be supported by written evidence containing the information specified in *Practice Direction--Written Evidence* PD 32 para 28.2(1) (see note 9) and the result of the application to the Attorney General made by the applicant: para 28.3. As to the circumstances when permission will be granted see *Coca Cola Co v Aytacli (No 2)* [2002] All ER (D) 04 (Sep).

5 As to disclosure statements see PARA 538.

6 *Practice Direction--Written Evidence* PD 32 para 28.1(1).

7 As to the court's general discretionary powers to impose sanctions see PARA 247.

8 As to committal to prison if contempt is proved see CPR Sch 1 RSC Ord 52; CPR Sch 2 CCR Ord 29; and **CONTEMPT OF COURT**.

9 *Practice Direction--Written Evidence* PD 32 para 28.1(2). An application to the Attorney General must be made to his chambers at 9 Buckingham Gate, London SW1E 6JP in writing. The Attorney General will initially require a copy of the order recording the direction of the judge referring the matter to him and information which (1) identifies the statement said to be false; and (2) explains why it is false and why the maker knew it to be false at the time he made it; and (3) explains why contempt proceedings would be appropriate in the light of the overriding objective in CPR Pt 1: *Practice Direction--Written Evidence* PD 32 para 28.2(1). As to the overriding objective see PARA 791.

10 *Practice Direction--Written Evidence* PD 32 para 28.2(2).

11 *Practice Direction--Written Evidence* PD 32 para 28.4. The CPR do not change the law of contempt or introduce new categories of contempt: *Practice Direction--Written Evidence* PD 32 para 28.4. See also *Malgar Ltd v RE Leach (Engineering) Ltd* [2000] FSR 393; *MBNA America Bank NA v Freeman* [2000] IP & T 1102. Where a settlement is reached between parties, but subsequent evidence reveals that false statements were made, consideration has to be given to whether the public interest requires committal proceedings to be brought, and whether such proceedings are proportionate and in accordance with the overriding objective: *Kirk v Walton* [2008] EWHC 1780 (QB), [2009] 1 All ER 257.

UPDATE

988 False statements

NOTE 11--See also *Walton v Kirk* [2009] EWHC 703 (QB), [2009] All ER (D) 70 (Apr).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iii) Witness Statements, Witness Summaries and Affidavits/C. AFFIDAVITS/989. Affidavit evidence; in general.

C. AFFIDAVITS

989. Affidavit evidence; in general.

Under the Civil Procedure Rules ('CPR'), evidence must be given by affidavit¹ instead of or in addition to a witness statement² if this is required by the court³, a provision contained in any other rule⁴, a practice direction or any other enactment⁵. For example, affidavits must be used as evidence in any application for a search order, a freezing injunction, or an order requiring an occupier to permit another to enter his land⁶ and in any application for an order against anyone for alleged contempt of court⁷.

Nothing in the CPR prevents a witness from giving evidence by affidavit at a hearing other than the trial if he chooses to do so in a case where the above provision does not apply, but the party putting forward the affidavit may not recover the additional cost of making it from any other party unless the court orders otherwise⁸. The court may give a direction under this provision that evidence must be given by affidavit instead of or in addition to a witness statement or statement of case⁹ either on its own initiative or after any party has applied to the court for such a direction¹⁰. Further, if a party believes that sworn evidence is required by a court in another jurisdiction for any purpose connected with the proceedings, he may apply to the court for a direction that evidence must be given only by affidavit on any pre-trial applications¹¹.

On any application made in any family proceedings, evidence may be given by affidavit unless the Family Proceedings Rules 1991 otherwise provide or the court otherwise directs, but the court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit; and where, after such an order has been made, that person does not attend, his affidavit must not be used as evidence without the leave of the court¹². The procedure for taking such affidavits is discussed elsewhere in this work¹³.

1 As to the meaning of 'affidavit' see PARA 540 note 5. An affidavit, where referred to in the Civil Procedure Rules or in a practice direction, also means an affirmation unless the context requires otherwise: *Practice Direction--Written Evidence* PD 32 para 1.7. As to the application of provisions in that or any practice direction relating to affidavits to affirmations, and the necessary exceptions and modifications, see para 16. See also the Commissioners for Oaths Act 1889 s 11 ('affidavit' includes affirmation, statutory or other declaration, acknowledgment, examination, and attestation or protestation of honour). As to affidavits generally see the Commissioners for Oaths Acts 1889 and 1891; the Courts and Legal Services Act 1990 s 113 (administration of oaths and taking of affidavits); and PARA 1026. As to the entitlement of a person who objects to taking an oath to make a solemn affirmation, and the power to require him to so do, see the Oaths Act 1978 s 5(1), (4); and PARA 1023. Where it is not reasonably practicable without inconvenience or delay to administer an oath in the manner appropriate to a person's religious belief, he may be permitted or required to make a solemn affirmation: see s 5(2), (3); and PARA 1023.

2 As to the meaning of 'witness statement' see PARA 751 note 1.

3 As to the meaning of 'court' see PARA 22.

4 See eg CPR 71.5 (judgment creditor's affidavit); and PARA 1255.

5 CPR 32.15(1); and see *Practice Direction--Written Evidence* PD 32 para 1.4(1). For an example of an enactment requiring an affidavit see the Protection from Harassment Act 1997 s 3(5)(a) (application for the issue of a warrant for the arrest of the defendant); and **TORT** vol 45(2) (Reissue) PARA 457.

6 *Practice Direction--Written Evidence* PD 32 para 1.4(2). As to search orders see PARAS 315 head (8) in the text, 319, 402 et seq; and as to freezing injunctions see PARAS 315 head (6) in the text, 318, 396 et seq.

7 *Practice Direction--Written Evidence* PD 32 para 1.4(3). See further **CONTEMPT OF COURT** vol 9(1) (Reissue) PARAS 496-497.

8 CPR 32.15(2); and see *Practice Direction--Written Evidence* PD 32 para 1.2.

9 As to statements of case see PARA 1065 note 1.

10 *Practice Direction--Written Evidence* PD 32 para 1.6.

11 *Practice Direction--Written Evidence* PD 32 para 1.5.

12 Family Proceedings Rules 1991, SI 1991/1247, r 10.12.

13 See **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 837.

UPDATE

989 Affidavit evidence; in general

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iii) Witness Statements, Witness Summaries and Affidavits/C. AFFIDAVITS/990. Form of affidavit; in general.

990. Form of affidavit; in general.

An affidavit¹ must comply with the requirements set out in the relevant practice direction². It must be headed in the prescribed manner with the title of the proceedings³ and must, if practicable, be in the deponent's⁴ own words⁵. It must indicate which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief and the source for any matters of information or belief⁶. It is usually convenient for an affidavit to follow the chronological sequence of the events or matters dealt with and each paragraph of an affidavit should as far as possible be confined to a distinct portion of the subject⁷.

An affidavit must be in the prescribed format⁸ and must be sworn before a person independent of the parties or their representatives⁹. Where an affidavit is sworn by a person who is unable to read or sign it, the person before whom the affidavit is sworn must certify in the jurat that he read the affidavit to the deponent, that the deponent appeared to understand it and that the deponent signed or made his mark in his presence¹⁰. If that certificate is not included in the jurat, the affidavit may not be used in evidence unless the court¹¹ is satisfied that it was read to the deponent and that he appeared to understand it¹².

Any alteration to an affidavit must be initialled by both the deponent and the person before whom the affidavit was sworn¹³. An affidavit which contains an alteration that has not been initialled may be filed¹⁴ or used in evidence only with the permission of the court¹⁵.

A document used in conjunction with an affidavit should be produced to and verified by the deponent, and remain separate from the affidavit, and should be identified by a declaration of the person before whom the affidavit was sworn¹⁶.

Where an affidavit does not comply with the relevant rules or practice direction¹⁷ in relation to its form, the court may refuse to admit it as evidence and may refuse to allow the costs arising from its preparation¹⁸. Permission to file a defective affidavit may be obtained from a judge¹⁹ in the court where the case is proceeding²⁰.

A person may make an affidavit outside the jurisdiction²¹ in accordance with Part 32 of the Civil Procedure Rules²² or the law of the place where he makes the affidavit²³.

Additional requirements with regard to affidavits are contained in the guides to proceedings in particular civil courts²⁴.

1 As to the meaning of 'affidavit' see PARA 540 note 5. See also PARA 989 note 1.

2 CPR 32.16.

3 *Practice Direction--Evidence* PD 32 para 3.1. At the top right hand corner of the first page (and on the backsheet) there should be clearly written: (1) the party on whose behalf it is made; (2) the initials and surname of the deponent; (3) the number of the affidavit in relation to that deponent; (4) the identifying initials and number of each exhibit referred to; and (5) the date sworn: para 3.2.

4 A deponent is a person who gives evidence by affidavit or affirmation: *Practice Direction--Written Evidence* PD 32 para 2.

5 *Practice Direction--Evidence* PD 32 para 4.1. The affidavit should be expressed in the first person and the deponent should (1) commence 'I (*full name*) of (*address*) state on oath'; (2) if giving evidence in his professional, business or other occupational capacity, give the address at which he works in head (1), the

position he holds and the name of his firm or employer; (3) give his occupation or, if he has none, his description; and (4) state if he is a party to the proceedings or employed by a party to the proceedings, if it be the case: para 4.1(1)-(4).

6 *Practice Direction--Written Evidence* PD 32 para 4.2(1), (2). As to opinion evidence see generally PARA 826 et seq.

7 *Practice Direction--Written Evidence* PD 32 para 6.2.

8 An affidavit should (1) be produced on durable quality A4 paper with a 3.5 cm margin; (2) be fully legible and must normally be typed on one side of the paper only; (3) where possible, be bound securely in a manner which would not hamper filing, or otherwise each page must be indorsed with the case number and must bear the initials of the deponent and of the person before whom it was sworn; (4) have the pages numbered consecutively as a separate document (or as one of several documents contained in a file); (5) be divided into numbered paragraphs; (6) have all numbers, including dates, expressed in figures; and (7) give the reference to any document or documents mentioned either in the margin or in bold text in the body of the affidavit: *Practice Direction--Evidence* PD 32 para 6.1. The jurat must (a) be signed by all deponents; (b) be completed and signed by the person before whom the affidavit was sworn, whose name and qualification must be printed beneath his signature; (c) contain the full address of the person before whom the affidavit was sworn; and (d) follow immediately on from the text and not be put on a separate page: para 5.2. The jurat of an affidavit is a statement set out at the end of the document which authenticates the affidavit: para 5.1.

9 *Practice Direction--Written Evidence* PD 32 para 9.2. As to the persons who may administer oaths and take affidavits see PARA 1026.

10 *Practice Direction--Written Evidence* PD 32 para 7.1.

11 As to the meaning of 'court' see PARA 22.

12 *Practice Direction--Written Evidence* PD 32 para 7.2. Two versions of the form of jurat with the certificate are set out at para 7.2, Annex 1.

13 *Practice Direction--Written Evidence* PD 32 para 8.1.

14 As to the meaning of 'filing' see PARA 1832 note 8.

15 *Practice Direction--Written Evidence* PD 32 para 8.2.

16 *Practice Direction--Evidence* PD 32 para 11.1. The declaration must be headed with the name of the proceedings in the same way as the affidavit and the first page of each exhibit must be marked as in para 3.2 (see note 3) and with the exhibit mark referred to in the affidavit: paras 11.2, 11.3. Where a deponent refers to an exhibit or exhibits, he must state 'there is now shown to me marked '. . .' the (*description of exhibit*)'; and where he makes more than one affidavit (to which there are exhibits) in the same proceedings, the numbering of the exhibits must run consecutively throughout and not start again with each affidavit: para 4.3. Copies of individual letters should be collected together and exhibited in a bundle or bundles and should be arranged in chronological order with the earliest at the top, and firmly secured: para 12.1. When a bundle of correspondence is exhibited, the exhibit should have a front page attached stating that the bundle consists of original letters and copies. They should be arranged and secured as above and numbered consecutively: para 12.2. Photocopies instead of original documents may be exhibited provided the originals are made available for inspection by the other parties before the hearing and by the judge at the hearing: para 13.1. Court documents must not be exhibited (official copies of such documents prove themselves): para 13.2. Where an exhibit contains more than one document, a front page must be attached setting out a list of the documents contained in the exhibit; the list must contain the dates of the documents: para 13.3. Items other than documents should be clearly marked with an exhibit number or letter in such a manner that the mark cannot become detached from the exhibit: para 14.1. Small items may be placed in a container and the container appropriately marked: para 14.2.

Where an exhibit contains more than one document, the bundle should not be stapled but should be securely fastened in a way that does not hinder the reading of the documents, and the pages should be numbered consecutively at bottom centre: para 15.1. Every page of an exhibit should be clearly legible; typed copies of illegible documents should be included, paginated with 'a' numbers: para 15.2. Where affidavits and exhibits have become numerous, they should be put into separate bundles and the pages numbered consecutively throughout: para 15.3. Finally, where on account of their bulk the service of exhibits or copies of exhibits on the other parties would be difficult or impracticable, the directions of the court should be sought as to arrangements for bringing the exhibits to the attention of the other parties and as to their custody pending trial: para 15.4. As to the meaning of 'service' see PARA 138 note 2.

17 It does not comply with CPR Pt 32 or *Practice Direction--Written Evidence* PD 32: para 25.1.

- 18 *Practice Direction--Written Evidence* PD 32 para 25.1.
- 19 As to the meaning of 'judge' see PARA 49.
- 20 *Practice Direction--Written Evidence* PD 32 para 25.2.
- 21 As to the meaning of 'jurisdiction' see PARA 117 note 6.
- 22 le CPR Pt 32: see PARA 749 et seq.
- 23 CPR 32.17.
- 24 As to such court guides and their status see PARAS 16, 757.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iii) Witness Statements, Witness Summaries and Affidavits/C. AFFIDAVITS/991. Filing of affidavits.

991. Filing of affidavits.

If the court¹ directs that an affidavit² is to be filed³, it must be filed in the court or Division, or office or registry of the court or Division, where the case in which it was or is to be used is proceeding or will proceed⁴.

Where an affidavit is in a foreign language the party wishing to rely on it must have it translated and must file the foreign language affidavit with the court⁵. The translator must make and file with the court an affidavit verifying the translation and exhibiting both the translation and a copy of the foreign language affidavit⁶.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'affidavit' see PARA 540 note 5. See also PARA 989 note 1.

3 As to the meaning of 'filing' see PARA 1832 note 8.

4 *Practice Direction--Written Evidence* PD 32 para 10.1.

5 *Practice Direction--Written Evidence* PD 32 para 10.2(1).

6 *Practice Direction--Written Evidence* PD 32 para 10.2(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iv) Examination out of Court and Depositions/992. Evidence by deposition.

(iv) Examination out of Court and Depositions

992. Evidence by deposition.

The Civil Procedure Rules¹ provide for a party to obtain evidence before a hearing to be used at the hearing²; and 'hearing' for these purposes includes a reference to the trial³. A party may apply for an order for a person to be examined before the hearing takes place⁴. A person from whom evidence is to be obtained following such an order is referred to as a 'deponent' and the evidence is referred to as a 'deposition'⁵. Such an order will be for a deponent to be examined on oath⁶ before a judge⁷, an examiner of the court⁸ or such other person as the court appoints⁹. The order may require the production of any document which the court considers is necessary for the purposes of the examination¹⁰ and must state the date, time and place of the examination¹¹. At the time of service¹² of the order the deponent must be offered or paid a sum reasonably sufficient to cover his expenses in travelling to and from the place of examination¹³ and such sum by way of compensation for loss of time as may be specified in the relevant practice direction¹⁴.

Where the court makes an order for a deposition to be taken, it may also order the party who obtained the order to serve a witness statement¹⁵ or witness summary¹⁶ in relation to the evidence to be given by the person to be examined¹⁷.

The Family Proceedings Rules 1991 provide that evidence may be taken by deposition in matrimonial causes¹⁸. The procedure in such cases is discussed elsewhere in this work¹⁹.

1 le CPR Pt 34 s 1 (CPR 34.1-34.15): see the text and notes 2-19; and PARA 993 et seq.

2 CPR 34.1(1)(b). Part 34 applies to claims allocated to the small claims track, except to the extent that a rule limits such application: see CPR 27.2(2). As to the application of the CPR see PARA 32. As to cases allocated to the small claims track see PARAS 267, 274 et seq.

3 CPR 34.1(2).

4 CPR 34.8(1). For the form of order see *Practice Direction--Forms* PD 4 para 3, Table 1, Form N21; and see *The Civil Court Practice*. As to the use of the forms listed in Table 1 see PARA 14.

5 CPR 34.8(2).

6 As to persons who may administer oaths see PARA 1026.

7 CPR 34.8(3)(a). As to the meaning of 'judge' see PARA 49.

8 CPR 34.8(3)(b). As to the appointment of examiners of the court see CPR 34.15; and PARA 993.

9 CPR 34.8(3)(c).

10 CPR 34.8(4). Documents and exhibits must have an identifying number or letter marked on them by the examiner and must be preserved by the party or his legal representative who obtained the order for the examination, or as the court or the examiner may direct: *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.6. As to the meaning of 'legal representative' see PARA 1833 note 13.

11 CPR 34.8(5).

12 As to the meaning of 'service' see PARA 138 note 2.

- 13 CPR 34.8(6)(a).
- 14 CPR 34.8(6)(b); *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.2(3).
As to the sum to be paid see PARA 1013.
- 15 As to the meaning of 'witness statement' see PARA 751 note 1.
- 16 As to witness summaries see PARA 986.
- 17 CPR 34.8(7).
- 18 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.29 (amended by SI 1997/1893).
- 19 See **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 838.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iv) Examination out of Court and Depositions/993. Examiners of the court.

993. Examiners of the court.

The Lord Chancellor¹ appoints persons to be examiners of the court² who must be barristers or solicitor-advocates who have been practising for a period of not less than three years³. The Lord Chancellor may revoke an appointment at any time⁴.

A person who obtains an order for the examination of a deponent⁵ before an examiner of the court must apply to the appropriate department at the Royal Courts of Justice⁶ for the allocation of an examiner⁷. When the examiner is allocated, he must be provided with copies of all documents in the proceedings necessary to inform him of the issues⁸.

1 As to the Lord Chancellor see **COURTS** vol 10 (Reissue) PARA 501; **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 477 et seq.

2 CPR 34.15(1). As to the meaning of 'court' see PARA 22. As to the application of the CPR see PARA 32.

3 CPR 34.15(2).

4 CPR 34.15(3).

5 As to the meaning of 'deponent' see PARA 992 the text to note 5.

6 As to the Foreign Process Section of the Masters' Secretary's Department: see *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.2(1).

7 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.2(1). Such a person is usually unconnected with the case; but it has been held under the old rules that the mere fact that the witnesses are known to the proposed examiner may not prevent his appointment (*Ongley v Hill* (1874) 22 WR 817), but that a shorthand writer ought not to be appointed as examiner (*Bicknell v Bicknell* [1908] WN 97, CA), nor should a solicitor in the case (see *Fricker v Moore* (1730) Bunb 289; *Selwyn's Case* (1779) 2 Dick 563). See also *Sayer v Wagstaff* (1842) 12 LJ Ch 35 (new commission issued owing to misconduct of commissioner). As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2. For examples of cases where the examiner has been provided with an interpreter see *Marquess of Bute v James* (1886) 33 ChD 157; *Baddeley v Bailey* [1893] WN 56.

8 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.2(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iv) Examination out of Court and Depositions/994. Examiners' fees and expenses.

994. Examiners' fees and expenses.

An examiner of the court¹ may charge a fee for the examination². He need not send the deposition³ to the court⁴ unless the fee is paid⁵.

An examiner may charge an hourly rate for each hour, or part of an hour, that he is engaged in examining the witness⁶. He is also entitled to charge a single fee of twice the hourly rate as the appointment fee when the appointment for the examination is made⁷ and is entitled to retain the appointment fee where the witness fails to attend on the date and time arranged⁸. Where the examiner fails to attend on the date and time arranged he may not charge a further appointment fee for arranging a subsequent appointment⁹.

The examiner of court is also entitled to recover the following expenses:

- 150 (1) all reasonable travelling expenses;
- 151 (2) any other expenses reasonably incurred; and
- 152 (3) any reasonable charge for the room where the examination takes place¹⁰,

but no expenses may be recovered under head (3) above if the examination takes place at the examiner's usual business address¹¹.

The examiner's fees and expenses must be paid by the party who obtained the order for examination¹². If the fees and expenses due to an examiner are not paid within a reasonable time, he may report that fact to the court¹³. The court may order the party who obtained the order for examination to deposit in the court office a specified sum in respect of the examiner's fees and, where it does so, the examiner will not be asked to act until the sum has been deposited¹⁴. Such an order does not, however, affect any decision as to the party who is ultimately to bear the costs of the examination¹⁵.

1 As to the appointment of examiners of the court and their allocation see PARA 993.

2 CPR 34.14(1). As to the application of the CPR see PARA 32.

3 As to the meaning of 'deposition' see PARA 992 the text to note 5.

4 As to the meaning of 'court' see PARA 22.

5 CPR 34.14(2).

6 *Practice Direction--Fees for Examiners of the Court* PD 34B para 2.1. The hourly rate is calculated by reference to the formula set out in para 3.1, and the examination fee is the hourly rate multiplied by the number of hours the examination has taken: paras 2.2, 2.3. The formula for calculating the hourly rate is as follows: divide the amount of the minimum annual salary of a post within Group 7 of the judicial salary structure as designated by the Review Body on Senior Salaries (published annually by the Stationery Office) by 220 to give 'x'; and then divide 'x' by 6 to give the hourly rate: *Practice Direction--Fees for Examiners of the Court* PD 34B para 3.1.

7 *Practice Direction--Fees for Examiners of the Court* PD 34B para 4.1.

8 *Practice Direction--Fees for Examiners of the Court* PD 34B para 4.2.

9 *Practice Direction--Fees for Examiners of the Court* PD 34B para 4.3.

- 10 *Practice Direction--Fees for Examiners of the Court* PD 34B para 5.1.
- 11 *Practice Direction--Fees for Examiners of the Court* PD 34B para 5.2.
- 12 CPR 34.14(3).
- 13 CPR 34.14(4).
- 14 CPR 34.14(5).
- 15 CPR 34.14(6). As to costs generally see PARA 1729 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iv) Examination out of Court and Depositions/995. Conduct of examination.

995. Conduct of examination.

Subject to any directions contained in the order for examination¹, the examination must be conducted in the same way as if the witness were giving evidence at a trial². If all the parties are present, the examiner³ may conduct the examination of a person not named in the order for examination if all the parties and the person to be examined consent⁴. The examiner may conduct the examination in private if he considers it appropriate to do so⁵ and may put any question to the deponent⁶ as to the meaning of any of his answers or any matter arising in the course of the examination⁷.

The examiner must ensure that the evidence given by the witness is recorded in full⁸. In ensuring that the deponent's evidence is recorded in full, the court⁹ or the examiner may permit it to be recorded on audiotape or videotape, but the deposition¹⁰ must always be recorded in writing by him or by a competent shorthand writer or stenographer¹¹. If the deposition is not recorded word for word, it must contain, as nearly as may be, the statement of the deponent; the examiner may record word for word any particular questions and answers which appear to him to have special importance¹². If a deponent objects to answering any question or where any objection is taken to any question, the examiner must (1) record in the deposition or a document attached to it the question, the nature of and grounds for the objection and any answer given; and (2) give his opinion as to the validity of the objection; and must record it in the deposition or a document attached to it¹³. The court will decide as to the validity of the objection and any question of costs arising from it¹⁴.

1 As to obtaining an order for examination out of court see PARA 992.

2 CPR 34.9(1). As to oral evidence at trial see PARA 1036 et seq.

3 As to examiners of the court see PARA 993.

4 CPR 34.9(2).

5 CPR 34.9(3). For the general rule that hearings are to be in public see **COURTS** vol 10 (Reissue) PARA 312; PARA 6.

6 As to the meaning of 'deponent' see PARA 992 the text to note 5.

7 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.7.

8 CPR 34.9(4).

9 As to the meaning of 'court' see PARA 22.

10 As to the meaning of 'deposition' see PARA 992 the text to note 5.

11 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.3.

12 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.4.

13 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.5(1), (2).

14 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.5.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iv) Examination out of Court and Depositions/996. Enforcing attendance of witness.

996. Enforcing attendance of witness.

If a person served¹ with an order to attend before an examiner² fails to attend or refuses to be sworn³ for the purpose of the examination or to answer any lawful question⁴ or to produce any document at the examination, a certificate of his failure or refusal, signed by the examiner, must be filed⁵ by the party requiring the deposition⁶. On the certificate being filed, the party requiring the deposition may apply to the court⁷ for an order requiring that person to attend or to be sworn or to answer any question or produce any document, as the case may be⁸. An application for such an order may be made without notice⁹.

The court may order the person against whom such an order is made to pay any costs resulting from his failure or refusal¹⁰ and will make such order on the application as it thinks fit¹¹. A deponent who wilfully refuses to obey an order made against him under Part 34 of the Civil Procedure Rules¹² may be proceeded against for contempt of court¹³.

1 As to the meaning of 'service' see PARA 138 note 2.

2 As to orders for examination out of court see PARA 992; and as to examiners of the court see PARA 993.

3 As to persons who may administer oaths see PARA 1026.

4 As to the making and recording of objections to answering questions at the examination see *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.5; and PARA 995.

5 As to the meaning of 'filing' see PARA 1832 note 8.

6 CPR 34.10(1). The examiner may include in his certificate any comment as to the conduct of the deponent or of any person attending the examination: *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.8. As to the meaning of 'deposition' and 'deponent' see PARA 992 text to note 5.

7 As to the meaning of 'court' see PARA 22.

8 CPR 34.10(2); and see *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.9.

9 CPR 34.10(3).

10 CPR 34.10(4). As to costs generally see PARA 1729 et seq.

11 See *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.10.

12 Ie CPR Pt 34: see PARAS 992-995, 997 et seq.

13 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.11. See further **CONTEMPT OF COURT**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iv) Examination out of Court and Depositions/997. Procedure after conclusion of examination.

997. Procedure after conclusion of examination.

A deposition¹ must be signed by the examiner² and have any amendments to it initialled by the examiner and the deponent³. It must be indorsed by the examiner with a statement of the time occupied by the examination⁴ and a record of any refusal by the deponent to sign the deposition and of his reasons for not doing so⁵.

The examiner must send a copy of the deposition to the person who obtained the order for the examination of the witness⁶ and to the court⁷ where the case is proceeding⁸ for filing⁹ on the court file¹⁰. The party who obtained the order must send each of the other parties a copy of the deposition which he receives from the examiner¹¹.

1 As to the meaning of 'deposition' see PARA 992 text to note 5.

2 As to examiners of the court see PARA 993.

3 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.12(1), (2). As to the meaning of 'deponent' see PARA 992 the text to note 5.

4 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.12(3)(a). As to the examiner's hourly fee see PARA 994.

5 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.12(3)(b). As to the consequences of such refusal see PARA 996. It has been held under the old rules that it is improper for the examiner to give his opinion as to the credibility of a witness: *Re Wipperman, Wissler v Wipperman* [1955] P 59, [1953] 1 All ER 764. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

6 As to orders for examination out of court see PARA 992.

7 As to the meaning of 'court' see PARA 22.

8 CPR 34.9(5).

9 As to the meaning of 'filing' see PARA 1832 note 8.

10 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 4.12(4).

11 CPR 34.9(6).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iv) Examination out of Court and Depositions/998. Use of deposition at hearing or trial.

998. Use of deposition at hearing or trial.

A deposition¹ may be given in evidence at a hearing, including a trial², unless the court³ orders otherwise⁴. A party intending to put in evidence a deposition at a hearing must serve⁵ notice of his intention to do so on every other party⁶ at least 21 days before the day fixed for the hearing⁷.

The court may require a deponent⁸ to attend the hearing and give evidence orally⁹.

Where a deposition is given in evidence at trial, it is to be treated as if it were a witness statement¹⁰ for the purposes of making it available¹¹ for inspection¹².

There are restrictions on the subsequent use of a deposition for other hearings¹³.

1 le a deposition ordered under CPR 34.8: see PARA 992. As to the meaning of 'deposition' see PARA 992 the text to note 5.

2 See CPR 34.1(2) cited in PARA 992.

3 As to the meaning of 'court' see PARA 22.

4 CPR 34.11(1). The court will presume, in favour of the admissibility of depositions, that examiners have discharged their duties correctly; thus where it had been ordered that witnesses should be examined separately it was presumed that this had been done even though the return was silent on the point: *Simms v Henderson* (1848) 11 QB 1015. See also *Atkins v Palmer* (1821) 4 B & Ald 377; *Greville v Stulz* (1847) 11 QB 997; *Hitchins v Hitchins* (1866) LR 1 P & D 153; *Grill v General Iron Screw Colliery Co* (1866) LR 1 CP 600 (affd (1868) LR 3 CP 476, Ex Ch); *Hodges v Cobb* (1867) LR 2 QB 652; *Richards, Tweedy & Co v Hough* (1882) 51 LJQB 361, DC. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

5 As to the meaning of 'service' see PARA 138 note 2.

6 CPR 34.11(2).

7 CPR 34.11(3). As to the calculation of time and the court's general discretion to extend time limits see PARA 88 et seq.

8 As to the meaning of 'deponent' see PARA 992 the text to note 5.

9 CPR 34.11(4). As to oral evidence see PARA 1036 et seq.

10 As to the meaning of 'witness statement' see PARA 751 note 1.

11 le for the purposes of CPR 32.13 (availability of witness statements for inspection): see PARA 985.

12 CPR 34.11(5).

13 See CPR 34.12; and PARA 999.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iv) Examination out of Court and Depositions/999. Restrictions on subsequent use of deposition taken for the purpose of any hearing except the trial.

999. Restrictions on subsequent use of deposition taken for the purpose of any hearing except the trial.

Where the court¹ orders a party to be examined about his or any other assets for the purpose of any hearing² except the trial, the deposition³ may generally be used only for the purpose of the proceedings in which the order was made⁴. It may, however, be used for some other purpose by the party who was examined⁵ or if that party agrees⁶ or if the court gives permission⁷.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'hearing' for these purposes see PARA 1004 text to note 6.

3 As to the meaning of 'deposition' see PARA 992 text to note 5.

4 See CPR 34.12(1).

5 CPR 34.12(2)(a).

6 CPR 34.12(2)(b).

7 CPR 34.12(2)(c).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iv) Examination out of Court and Depositions/1000. Examination before an examiner outside the jurisdiction.

1000. Examination before an examiner outside the jurisdiction.

If the government of a country allows a person appointed by the High Court to examine a person in that country, the High Court may make an order appointing a special examiner for that purpose¹. A special examiner so appointed may be the British Consul or the Consul-General or his deputy in the country where the evidence is to be taken if (1) there is in respect of that country a Civil Procedure Convention providing for the taking of evidence in that country for the assistance of proceedings in the High Court or other court in this country; or (2) with the consent of the Secretary of State². A person may be examined under these provisions on oath or affirmation³ or in accordance with any procedure permitted in the country in which the examination is to take place⁴.

The provisions set out in the relevant practice direction with regard to depositions taken in this jurisdiction⁵ also apply to depositions taken abroad⁶.

1 CPR 34.13(4).

2 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 5.8. In some countries the local courts will compel the attendance of a person for the purposes of the examination; in others there is no means of compelling the attendance of an unwilling witness. In some countries the issue of a letter of request (see PARA 1001) is the only available method. Where it is desired to obtain the examination of a person outside the jurisdiction inquiry should be made of the Masters' Secretary's Department, Room E214, Royal Courts of Justice, Strand, London WC2A 2LL, as to what is the appropriate procedure in the case of the country concerned.

3 As to persons who may administer oaths and affirmations outside the jurisdiction see PARA 1027.

4 CPR 34.13(5).

5 *le Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A paras 4.1-4.12: see PARAS 992-997.

6 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 5.9.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iv) Examination out of Court and Depositions/1001. Letter of request where a person to be examined is out of the jurisdiction.

1001. Letter of request where a person to be examined is out of the jurisdiction.

Where a party wishes to take a deposition¹ from a person out of the jurisdiction² and not in a regulation state³, the High Court may order the issue of a letter of request⁴ to the judicial authorities of the country in which the proposed deponent is⁵. A letter of request is a request to a judicial authority to take the evidence of that person, or arrange for it to be taken⁶.

The High Court may make an order under these provisions in relation to county court proceedings⁷. The High Court has jurisdiction to order the issue of a letter of request even if all that is sought is the production of documents⁸.

If the High Court makes an order for the issue of a letter of request, the party who sought the order must file⁹ the following documents and, unless English is one of the official languages of the country where the examination is to take place, or a practice direction has specified that country as one where no translation is necessary, a translation of them¹⁰:

- 153 (1) a draft letter of request¹¹;
- 154 (2) a statement of the issues relevant to the proceedings;
- 155 (3) a list of questions or the subject matter of questions to be put to the person to be examined¹².

That party must also file an undertaking to be responsible for the Secretary of State's expenses¹³ and a draft order¹⁴.

The application will be dealt with by the Senior Master of the Queen's Bench Division of the High Court¹⁵ who will, if appropriate, sign the letter of request¹⁶.

The provisions set out in the relevant practice direction with regard to depositions taken in this jurisdiction¹⁷ also apply to depositions taken abroad¹⁸.

Where a party to existing or contemplated proceedings in the High Court or a magistrates' court under the Proceeds of Crime Act 2002¹⁹ wishes to take a deposition from a person who is out of the jurisdiction, the High Court may, on the application of the party, order the issue of a letter of request to the judicial authorities of the country in which the proposed deponent is²⁰.

Requests with regard to evidence to be used in criminal proceedings are dealt with elsewhere in this work²¹.

1 As to the meaning of 'deposition' see PARA 992 the text to note 5.

2 As to the meaning of 'jurisdiction' see PARA 117 note 6.

3 ie within the meaning of CPR Pt 34 Section III: see PARA 1002 note 1. For the procedure for taking evidence in another regulation state for use in England and Wales, see PARA 1002.

4 For a draft of such a letter see *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 5.3(1), Annex A; and see *The Civil Court Practice*. As to the restrictions on the use in other proceedings of a deposition obtained from a person outside the jurisdiction see *Dendron GmbH v Regents of the University of California (Boston Scientific Ltd, Pt 20 claimant)* [2004] EWHC 589 (Pat), [2005] 1 WLR 200.

5 CPR 34.13(1), (1A); and see *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 5.1. As to the meaning of 'deponent' see PARA 992 text to note 5. An application for such an order must be made by application notice in accordance with CPR Pt 23 (see PARA 303 et seq): *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 5.2.

For a case where the court refused to authorise the issue of letters of request directed to the courts of a friendly foreign state in the interests of the comity of nations where the party seeking the letters of request wished to obtain evidence to show that the motives of the government of the foreign state in promulgating a law of that state were such that the law was unenforceable in the United Kingdom as being contrary to public policy see *Settebello Ltd v Banco Totta and Acores* [1985] 2 All ER 1025, [1985] 1 WLR 1050, CA.

6 CPR 34.13(2); and see note 4.

7 CPR 34.13(3); and see the County Courts Act 1984 s 56 (the High Court has the same power to issue a commission, request or order to examine witnesses abroad for the purpose of proceedings in a county court as it has for the purpose of proceedings in the High Court).

8 *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] Ch 142, [1994] 1 All ER 755.

9 The documents must be filed with the Masters' Secretary in Room E214, Royal Courts of Justice, Strand, London WC2A 2LL: *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 5.4. As to the meaning of 'filing' see PARA 1832 note 8.

10 See CPR 34.13(7). If parties are in doubt as to whether a translation is required, they should seek guidance from the Foreign Process Section of the Masters' Secretary's Department: *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 5.7.

11 As to the draft see note 4.

12 CPR 34.13(6)(a)(i)-(iii); and see *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 5.3(1)-(4).

13 CPR 34.13(6)(b); *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 5.3(5). The Secretary of State here concerned is the Secretary of State for Foreign and Commonwealth Affairs.

14 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 5.3.

15 As to the Senior Master see PARA 176 note 17; and **COURTS** vol 10 (Reissue) PARA 654.

16 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 5.5.

17 Ie *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A paras 4.1-4.12: see PARAS 992-997.

18 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 5.9.

19 Ie under the Proceeds of Crime Act 2002 Pt 5 (ss 240-316) (civil recovery of the proceeds etc of unlawful conduct: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2147 et seq).

20 CPR 34.13A(1), (2). CPR 34.13(4)-(7) applies irrespective of where the proposed deponent is, and CPR 34.23 does not apply in cases where the proposed deponent is in a regulation state: CPR 34.13A(3).

21 See the Criminal Justice (International Co-operation) Act 2003 s 7; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 903.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(iv) Examination out of Court and Depositions/1002. Request for evidence to be taken in another regulation state for use in England and Wales.

1002. Request for evidence to be taken in another regulation state for use in England and Wales.

Where a party wishes to take a deposition from a person who is in another regulation state (that is, a member state other than Denmark)¹, the court where the proceedings are taking place may order the issue of a request to a designated court (the requested court)² in the regulation state in which the proposed deponent is³. If the court makes an order for the issue of a request, the party who sought the order must file:

- 156 (1) a draft form of request⁴;
- 157 (2) a translation of the form of request, unless English is one of the official languages of the regulation state where the examination is to take place, or the regulation state has indicated in accordance with the prescribed procedure that English is a language which it will accept⁵;
- 158 (3) an undertaking to be responsible for costs sought by the requested court in relation to fees paid to experts and interpreters, and where requested by that party, the use of special procedures or communications technology⁶; and
- 159 (4) an undertaking to be responsible for the court's expenses⁷.

If the court grants an order under the above provisions, it will send the form of request directly to the designated court⁸.

The court where proceedings are taking place may take evidence directly from a deponent in another regulation state if the evidence is to be given voluntarily, without the need for coercive measures⁹. Where evidence may be taken directly in another regulation state⁹, the court may make an order for the submission of a request¹⁰. The party who sought the order must file:

- 160 (a) a draft form of request¹¹;
- 161 (b) a translation of the form of request, unless English is one of the official languages of the regulation state where the examination is to take place, or the regulation state has indicated in accordance with the prescribed procedure that English is a language which it will accept¹²; and
- 162 (c) an undertaking to be responsible for the court's expenses¹³.

1 'Regulation state' has the same meaning as 'member state' in EC Council Regulation 1206/2001 on co-operation between the courts of the member states in the taking of evidence in civil and commercial matters (OJ L174, 27.6.2001, p 1) (ie the 'Taking of Evidence Regulation'): CPR 34.22(b), (c). The regulation states are all member states except Denmark: see CPR 34.22(b). This regulation is reproduced in *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A Annex B. In relation to Denmark, CPR 34.13 (see PARA 1001) continues to apply: *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 7.3. Note that EC Council Regulation 1206/2001 prevails over other provisions contained in bilateral or multilateral agreements or arrangements concluded by the member states and, in particular, the Hague Convention of 1 March 1954 on Civil Procedure and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters: EC Council Regulation 1206/2001 (OJ L174, 27.6.2001, p 1) art 21(1).

2 In accordance with EC Council Regulation 1206/2001 (OJ L174, 27.6.2001, p 1), each regulation state has prepared a list of courts competent to take evidence in accordance with the Council Regulation indicating the territorial and, where appropriate, special jurisdiction of those courts: *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 8.1. Where CPR 34.22-34.24 refer to a 'designated court' in relation to

another regulation state, the reference is to the court, referred to in the list of competent courts of that state, which is appropriate to the application in hand: *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 8.2. Where the reference is to the 'designated court' in England and Wales, the reference is to the appropriate competent court in the jurisdiction: para 8.3. The designated courts for England and Wales are (1) for the London and South Eastern Circuit, the Royal Courts of Justice (Queen's Bench Division); (2) for the Midland Circuit, Birmingham Civil Justice Centre; (3) for the Western Circuit, Bristol County Court; (4) for the Wales Circuit, Cardiff Civil Justice Centre; (5) for the Northern Circuit, Manchester County Court; and (6) for the North Eastern Circuit, Leeds County Court: *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 8.3, Annex C.

3 CPR 34.23(1), (2); *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 10.1. This is subject to CPR 34.13A (see PARA 1001 text and notes 19-20): CPR 34.23(1).

An application to the court for an order under CPR 34.23(2) should be made by application notice in accordance with CPR Pt 23: *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 10.2. The application may be made without notice: see para 10.7. A deposition cannot be used as evidence in a separate non-judicial hearing; nor can it be used in other judicial proceedings without the permission of the court: *Dendron GmbH v Regents of the University of California (Boston Scientific Ltd, Pt 20 claimant)* [2004] EWHC 589 (Pat), [2005] 1 WLR 200 (use as evidence in hearing before European Patent Office prohibited).

4 CPR 34.23(3)(a); and see *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 10.3. As to the draft, see EC Council Regulation 1206/2001 (OJ L174, 27.6.2001, p 1) Annex Form A, which is reproduced in *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A Annex B.

5 CPR 34.23(3)(b), (4). See also EC Council Regulation 1206/2001 (OJ L174, 27.6.2001, p 1) art 5.

6 CPR 34.23(3)(c). Where the taking of evidence requires the use of an expert, the designated court may require a deposit in advance towards the costs of that expert. The party who obtained the order is responsible for the payment of any such deposit which should be deposited with the court for onward transmission. Under the provisions of EC Council Regulation 1206/2001 (OJ L174, 27.6.2001, p 1), the designated court is not required to execute the request until such payment is received: *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 10.5.

7 CPR 34.23(3)(d).

8 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 10.4.

9 EC Council Regulation 1206/2001 (OJ L174, 27.6.2001, p 1) art 17; *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 10.6.

10 CPR 34.23(5). See also *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A paras 10.6, 10.7.

11 CPR 34.23(6)(a). As to the draft, see EC Council Regulation 1206/2001 (OJ L174, 27.6.2001, p 1) Annex Form I, which is reproduced in *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A Annex B.

12 CPR 34.23(6)(b), (4).

13 CPR 34.23(6)(c).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/A. ENFORCING ATTENDANCE/1003. Obligation to attend.

(v) Attendance at Court

A. ENFORCING ATTENDANCE

1003. Obligation to attend.

Subject to the exceptional cases previously considered¹, all competent witnesses who are amenable to the jurisdiction of the Supreme Court of England and Wales and other courts² are compellable to attend³ for the purpose of giving evidence.

In appropriate cases and where the technology is available, evidence may be given by means of a video link⁴.

1 See PARAS 966-969. By the law and custom of Parliament members of both Houses of Parliament are exempted from attendance as witnesses during the session of Parliament, but the privilege may be waived and leave of absence granted. If permission has not been previously granted for the attendance of a member as a witness, the process may be set aside: see 521 H of C Official Report (5th series) cols 957-959, 961, 1287 (with reference to *Lewis v Mullally* (1953) Times, 2-4 December).

2 As to witnesses in criminal cases see **ARMED FORCES; CRIMINAL LAW, EVIDENCE AND PROCEDURE; MAGISTRATES**. As to the attendance of witnesses who are out of the jurisdiction see PARA 1008. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

3 As to examination of witnesses out of court see PARA 992 et seq.

4 See PARA 1032.

UPDATE

1003 Obligation to attend

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/A. ENFORCING ATTENDANCE/1004. Witness summonses.

1004. Witness summonses.

Part 34 of the Civil Procedure Rules¹ provides for the circumstances in which a person may be required to attend court² to give evidence or to produce a document³.

A witness summons is a document issued by the court requiring a witness to attend court to give evidence or to produce documents to the court⁴, or both⁵, either on the date fixed for a hearing, which includes a trial⁶, or on such date as the court may direct⁷. The only documents that such a summons can require a person to produce before a hearing are documents which that person could be required to produce at the hearing⁸.

A witness summons must be in the relevant practice form⁹ and there must be a separate witness summons for each witness¹⁰.

The Family Proceedings Rules 1991 provide for the issue of witness summonses or writs of subpoena to enforce the attendance of witnesses in matrimonial causes¹¹; and particular provision to enforce the attendance of witnesses is made by other enactments¹². The attendance of witnesses in criminal cases is dealt with elsewhere in this work¹³.

1 Ie CPR Pt 34 Section I (CPR 34.1-34.15): see PARAS 992 et seq, 1005 et seq. Part 34 applies to claims allocated to the small claims track, except to the extent that a rule limits such application: see CPR 27.2(2). As to the application of the CPR see PARA 32. As to cases allocated to the small claims track see PARAS 267, 274 et seq.

2 As to the duty to attend see PARA 1003.

3 CPR 34.1(1)(a). 'Document' is not defined for these purposes; but see CPR 31.4 ('document' means anything in which information of any description is recorded); and PARA 538.

4 CPR 34.2(1)(a), (b); *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 1.1(1), (2). The documents must either be individually identified or identified by reference to a class of documents or things by which criterion the person to whom the summons is addressed can know what obligation the court imposes on him: *Tajik Aluminium Plant v Hydro Aluminium AS* [2005] EWCA Civ 1218, [2005] 4 All ER 1232, [2006] 1 WLR 767. As to the court's power to order a person not a party to the proceedings to give disclosure of documents see CPR 31.17; and PARA 550.

5 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 1.1(3).

6 See CPR 34.1(2), cited in PARA 992.

7 CPR 34.2(4)(a), (b).

8 CPR 34.2(5).

9 CPR 34.2(2). See *Practice Direction--Forms* PD 4 para 3, Table 1 Form N20; and see *The Civil Court Practice*. As to the use of the forms listed in Table 1 see PARA 14.

10 CPR 34.2(3).

11 See the Family Proceedings Rules 1991, SI 1991/1247, r 2.30 (amended by SI 2005/2922); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 826.

12 See eg the Magistrates' Courts Act 1980 s 97; and **MAGISTRATES**.

13 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE; MAGISTRATES**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/A. ENFORCING ATTENDANCE/1005. Issue of a witness summons.

1005. Issue of a witness summons.

A witness summons¹ must be issued by the court² where the case is proceeding³ or the court where the hearing or trial⁴ in question will be held⁵. Two copies of the witness summons must be filed⁶ with the court for sealing⁷, one of which will be retained on the court file⁸. A mistake in the name or address of a person named in a witness summons may be corrected if the summons has not been served⁹.

A witness summons is issued on the date entered on the summons by the court¹⁰. A party must obtain permission from the court where he wishes to:

- 163 (1) have a summons issued less than seven days before the date of the trial¹¹;
- 164 (2) have a summons issued for a witness to attend court to give evidence or to produce documents on any date except the date fixed for the trial¹²; or
- 165 (3) have a summons issued for a witness to attend court to give evidence or to produce documents at any hearing except the trial¹³.

The court may set aside¹⁴ or vary a witness summons issued under these provisions¹⁵.

1 As to the meaning of 'witness summons' see PARA 1004.

2 As to the meaning of 'court' see PARA 22.

3 CPR 34.3(3)(a). As to the application of the CPR see PARA 32.

4 See CPR 34.1(2), cited in PARA 992.

5 CPR 34.3(3)(b).

6 As to the meaning of 'filing' see PARA 1832 note 8.

7 As to the meaning of 'seal' see PARA 81 note 2.

8 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 1.2.

9 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 1.3. The corrected summons must be re-sealed by the court and marked 'Amended and Re-Sealed': para 1.4. As to service of a witness summons see PARA 1007.

10 CPR 34.3(1).

11 CPR 34.3(2)(a).

12 CPR 34.3(2)(b).

13 CPR 34.3(2)(c).

14 As to the meaning of 'set aside' see PARA 197 note 6.

15 CPR 34.3(4). The witness must make an application for such an order under CPR Pt 23: see PARA 303 et seq.

UPDATE

1005 Issue of a witness summons

NOTE 11--See *Desmond v Bower* [2009] EWCA Civ 667, [2010] EMLR 109, [2009] All ER (D) 276 (Jul) (permission granted in libel proceedings where evidence of similar incident emerged).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/A. ENFORCING ATTENDANCE/1006. Issue of witness summons in aid of inferior court or tribunal.

1006. Issue of witness summons in aid of inferior court or tribunal.

The court¹ may issue a witness summons² in aid of an inferior court or of a tribunal³ which does not have the power to issue a summons in relation to the proceedings before it⁴. The court which issued the witness summons may also set it aside⁵.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'witness summons' see PARA 1004.

3 CPR 34.4(1). For these purposes, 'inferior court or tribunal' means any court or tribunal that does not have power to issue a witness summons in relation to proceedings before it: CPR 34.4(3).

4 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 2.1; and see note 3.

5 CPR 34.4(2); *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 2.2. Unless the court directs otherwise, the applicant witness must give at least two days' notice to the person who issued the summons of the application, which will normally be dealt with at a hearing: para 2.4. Such application will be heard in the High Court by a master at the Royal Courts of Justice or by a district judge in a district registry and in a county court by a district judge: para 2.3. As to the meaning of 'set aside' see PARA 197 note 6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/A. ENFORCING ATTENDANCE/1007. Serving a witness summons.

1007. Serving a witness summons.

The general rule is that a witness summons¹ is binding if it is served² at least seven days³ before the date on which the witness is required to attend before the court⁴ or tribunal⁵. The court may, however, direct that a witness summons is to be binding although it will be served less than seven days before such date⁶.

A witness summons which is served in accordance with these provisions and requires the witness to attend court to give evidence is binding until the conclusion of the hearing or trial⁷ at which the attendance of the witness is required⁸.

A witness summons must be served by the court unless the party on whose behalf it is issued indicates in writing, when he asks the court to issue the summons, that he wishes to serve it himself⁹. Where the court is to serve the witness summons, the party on whose behalf it is issued must deposit, in the court office, the money to be paid or offered to the witness¹⁰ for travelling expenses and in compensation for loss of time¹¹.

1 As to the meaning of 'witness summons' see PARA 1004.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to the calculation of time and the court's general discretion to extend time limits see PARA 88 et seq.

4 As to the meaning of 'court' see PARA 22.

5 CPR 34.5(1). As to the issue of a witness summons on behalf of a tribunal see PARA 1006.

6 CPR 34.5(2).

7 See CPR 34.1(2), cited in PARA 992.

8 CPR 34.5(3).

9 CPR 34.6(1).

10 Ie under CPR 34.7: see PARA 1013.

11 CPR 34.6(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/A. ENFORCING ATTENDANCE/1008. Compelling attendance of witness who is out of the jurisdiction, but within the United Kingdom.

1008. Compelling attendance of witness who is out of the jurisdiction, but within the United Kingdom.

If it appears to the High Court proper to compel the personal attendance at any trial¹ of a witness who may not be within the jurisdiction of the court, the High Court has power² to order the issue of a writ of subpoena ad testificandum³ or of subpoena duces tecum⁴ in special form⁵ commanding the witness to attend the trial wherever he is within the United Kingdom⁶.

Nothing in these provisions affects the High Court's power to issue a commission for the examination of witnesses out of the jurisdiction of the court in any case in which, notwithstanding these provisions, it thinks fit to issue such a commission, or the admissibility at any trial of any evidence which would, had these provisions not been enacted, have been admissible on the ground of a witness being outside the jurisdiction of the court⁷.

1 For these purposes, references to attendance at a trial include references to attendance before an examiner or commissioner appointed by the High Court in any cause or matter in that court, including an examiner or commissioner appointed to take evidence outside the jurisdiction of the court: Supreme Court Act 1981 s 36(6). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to examiners of the court see PARA 993.

2 Ie if in its discretion it sees fit to do so: see the Supreme Court Act 1981 s 36(1).

3 Ie the equivalent of a witness summons to attend court to give evidence under CPR 34.2(1)(a): see PARA 1004. See also note 6.

4 Ie the equivalent of a witness summons to produce documents to the court under CPR 34.2(1)(b): see PARA 1004. See also note 6.

5 The writ will not be issued unless it has a statement that it has been issued by the special order of the High Court: see the Supreme Court Act 1981 s 36(2).

6 See the Supreme Court Act 1981 s 36(1). The service of any such writ in any part of the United Kingdom is as valid and effectual for all purposes as if it had been served within the jurisdiction of the High Court: s 36(1). As to the consequences of non-appearance see s 36(3), (4); and PARA 1016. As to the meaning of 'United Kingdom' see PARA 221 note 2. These provisions have not been modified following the replacement of writs of subpoena by witness summonses under the CPR.

7 Supreme Court Act 1981 s 36(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/A. ENFORCING ATTENDANCE/1009. Attendance of prisoners.

1009. Attendance of prisoners.

Subject as follows, in any proceedings pending before a county court, the judge may, if he thinks fit, upon application on affidavit by any party, issue an order under his hand for bringing up before the court any person (a 'prisoner') confined in any place under any sentence or under committal for trial or otherwise, to be examined as a witness in the proceedings¹. No such order may, however, be made with respect to a person confined under process in any civil action or matter².

The prisoner mentioned in any such order must be brought before the court under the same custody, and must be dealt with in the same manner in all respects, as a prisoner required by a writ of habeas corpus³ to be brought before the High Court and examined there as a witness⁴. The person having the custody of the prisoner is not, however, bound to obey the order unless there is tendered to him a reasonable sum for the conveyance and maintenance of a proper officer or officers and of the prisoner in going to, remaining at, and returning from, the court⁵.

The alternative methods of bringing up a prisoner to give evidence before the court (including the High Court) are considered elsewhere in this work⁶.

1 County Courts Act 1984 s 57(1).

2 County Courts Act 1984 s 57(2).

3 As to the writ of habeas corpus ad testificandum see PARA 1531 note 1; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 250.

4 County Courts Act 1984 s 57(3).

5 County Courts Act 1984 s 57(4).

6 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 250.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/B. PRODUCTION OF DOCUMENTS/1010. Enforcing production of documents at trial.

B. PRODUCTION OF DOCUMENTS

1010. Enforcing production of documents at trial.

The production at the trial of a material document which is in the possession of any person other than the party who desires its production, which that person¹ is not willing to produce voluntarily, is enforced by a witness summons². Witness summonses are discussed elsewhere in this title³.

A special procedure exists for obtaining the production of documents filed, lodged or held in a court office⁴. Notwithstanding that procedure, which is discussed elsewhere in this title⁵, a court officer⁶ may be directed to attend the court, tribunal or arbitrator requesting such a document for the purpose of producing it⁷.

1 A separate witness summons is required for each person who is required to produce documents: see CPR 34.2(3); and PARA 1004.

2 See CPR 34.2(1)(b); and PARA 1004.

3 See PARA 1004 et seq.

4 See *Practice Direction--Court Documents* PD 5A para 5.6. See also the Supreme Court Act 1981 s 136, which provides that rules may be made in accordance with the Constitutional Reform Act 2005 Sch 1 Pt 1 for providing that, in any case where a document filed in, or in the custody of, any office of the Supreme Court is required to be produced to any court or tribunal (including an umpire or arbitrator) sitting elsewhere than at the Royal Courts of Justice, (1) it shall not be necessary for any officer, whether served with a subpoena in that behalf or not, to attend for the purpose of producing the document; but (2) the document may be produced to the court or tribunal by sending it to the court or tribunal, in the manner prescribed in the rules, together with a certificate, in the form so prescribed, to the effect that the document has been filed in, or is in the custody of, the office; and any such certificate is to be prima facie evidence of the facts stated in it: s 136(1) (amended by the Constitutional Reform Act 2005 s 12(2), Sch 1 Pt 2 paras 11, 13(1), (2)). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. Rules under the Supreme Court Act 1981 s 136 may contain provisions for securing the safe custody and return to the proper office of the Supreme Court of any document sent to a court or tribunal in pursuance of the rules and such incidental and supplementary provisions as appear to the person making the rules to be necessary or expedient: s 136(2) (amended by the Constitutional Reform Act 2005 Sch 1 Pt 2 para 13(3)). The Supreme Court Act 1981 s 136 is amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 4 para 26(1), (2), to substitute references to the Senior Courts for the references to the Supreme Court. At the date at which this title states the law, no such day had been appointed. As to rules see the Supreme Court Documents (Production) Rules 1926, SR & O 1926/461, which have effect as if made under these provisions by virtue of the Interpretation Act 1978 s 17(2)(b) and which mirror the procedure set out in relation to the Supreme Court and county courts by *Practice Direction--Court Documents* PD 5.

5 See PARA 85.

6 As to the meaning of 'court officer' see PARA 49 note 3.

7 *Practice Direction--Court Documents* PD 5A para 5.6(7).

UPDATE

1010 Enforcing production of documents at trial

NOTE 4--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/B. PRODUCTION OF DOCUMENTS/1011. Objection to production.

1011. Objection to production.

When a witness objects to the production of a document it is for the judge who tries the case to decide on the validity of the objection¹. A witness may object to producing a document on the ground of privilege² or public interest immunity³. A witness cannot object to producing a document on the ground that he has a lien on it⁴ except, it seems, when the party who asks for its production is the person against whom the lien is claimed⁵.

1 *Amey v Long* (1808) 9 East 473; *R v Greenaway* (1845) 7 QB 126. A person who has possession of documents only as an employee cannot be compelled to produce them if his employer refuses to allow him to bring them (*Austin v Evans* (1841) 2 Man & G 430; *Crowther v Appleby* (1873) LR 9 CP 23; *Re Higgs, ex p Leicester* (1892) 66 LT 296), or if production would amount to a violation of his duty to his employer (*Eccles & Co v Louisville and Nashville Railroad Co* [1912] 1 KB 135, CA).

2 A document is privileged from production on the same grounds as those on which a witness is privileged from giving evidence: see PARA 970 et seq; and PARA 555 et seq.

3 See PARA 574 et seq.

4 *Re Toleman and England, ex p Bramble* (1880) 13 ChD 885; *Re South Essex Estuary and Reclamation Co, ex p Paine and Layton* (1869) 4 Ch App 215; *Pratt v Pratt* (1882) 51 LJ Ch 838; *Lockett v Cary* (1864) 3 New Rep 405; *Hope v Liddell* (1855) 7 De GM & G 331, where *Griffith v Ricketts* (1849) 7 Hare 299 was disapproved; *Re Cameron's Coalbrook etc Rly Co* (1857) 25 Beav 1; *Ley v Barlow* (1848) 1 Exch 800; *Thompson v Mosely* (1833) 5 C & P 501; *Hunter v Leathley* (1830) 10 B & C 858; *Brassington v Brassington* (1823) 1 Sim & St 455; *Furlong v Howard* (1804) 2 Sch & Lef 115; *Re Rapid Road Transit Co* [1909] 1 Ch 96. As to solicitor's lien see *Re Hawkes, Ackerman v Lockhart* [1898] 2 Ch 1, CA; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 996 et seq.

5 *Kemp v King* (1842) 2 Mood & R 437. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/B. PRODUCTION OF DOCUMENTS/1012. Production of documents before a hearing.

1012. Production of documents before a hearing.

A witness summons¹ may require a witness to produce documents to the court before a hearing, but only if they are documents which that person could be required to produce at the hearing².

The disclosure of documents is discussed elsewhere in this title³.

1 As to the meaning of 'witness summons' see PARA 1004.

2 See CPR 34.2(4)(b), (5); and PARA 1004.

3 See PARA 538 et seq. See also PARA 963.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/C. EXPENSES/1013. Witness's right to travelling expenses and compensation for loss of time.

C. EXPENSES

1013. Witness's right to travelling expenses and compensation for loss of time.

At the time of service¹ of a witness summons² the witness must be offered or paid a sum reasonably sufficient to cover his expenses in travelling to and from the court³ and such sum by way of compensation for loss of time as may be specified in the relevant practice direction⁴. The latter sum is to be based on the sums payable to witnesses attending the Crown Court⁵ and must be a sum in respect of the period during which earnings or benefit are lost, or such lesser sum as it may be proved that the witness will lose as a result of his attendance at court in answer to the witness summons⁶.

If the witness summons is to be served by the court, the party issuing the summons must deposit the sums mentioned above with the court⁷. Where the party issuing the witness summons wishes to serve it himself⁸, he must notify the court in writing that he wishes to do so and at the time of service offer the above-mentioned sums to the witness⁹.

A party requiring a prisoner to give evidence must tender reasonable expenses for him and his escort¹⁰.

Provision is made by a number of enactments for the payment of expenses and compensation to witnesses attending particular courts or tribunals¹¹. Such payments to witnesses in criminal proceedings are discussed elsewhere in this work¹².

1 As to the meaning of 'service' see PARA 138 note 2.

2 As to the meaning of 'witness summons' see PARA 1004; and as to service of a witness summons see PARA 1007.

3 I.e. travelling to the court and in returning to his home or place of work: *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 3.2(1). As to the meaning of 'court' see PARA 22.

4 CPR 34.7(a), (b); *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 3.1. As to the application of the CPR see PARA 32.

5 I.e. fixed pursuant to the Prosecution of Offences Act 1985 and the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335: *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 3.3. As to the sums so payable see the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, regs 15-25; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2076 et seq.

6 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 3.2(2).

7 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 3.2(1), (2).

8 See CPR 34.6(1); and PARA 1007.

9 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 3.4.

10 See PARA 1009.

11 See eg the Mental Health Act 1983 s 78(7) (payment of travelling expenses to witnesses before Mental Health Review Tribunals); and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 589; the Representation of the People Act 1983 s 143 (reasonable expenses incurred by any person in appearing to give evidence at the trial of an

election petition); and **ELECTIONS AND REFERENDUMS** vol 15(4) (2007 Reissue) PARA 877; the General Teaching Council for England (Disciplinary Functions) Regulations 2001, SI 2001/1268, reg 28 (reasonable travelling, subsistence and such other allowances as the Council sees fit in respect of witnesses appearing before a committee); and **EDUCATION** vol 15(2) (2006 Reissue) PARAS 1198, 1237; the Pathogens Access Appeal Commission (Procedure) Rules 2002, SI 2002/1845, r 20(2) (no witness required to travel more than 16 km from his place of residence unless the necessary expenses of his attendance are paid or tendered to him); the Standing Civilian Courts Order 1997, SI 1997/172, art 26; the Courts-Martial (Royal Air Force) Rules 1997, SI 1997/171, r 23 (witnesses' expenses); and **ARMED FORCES**.

12 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/C. EXPENSES/1014. Waiver of expenses.

1014. Waiver of expenses.

A witness may waive payment¹ of the whole or part of the expenses to which he is entitled, such as the expenses of going to the place of trial; but in the latter case he is still entitled to demand money for his return². A witness who makes no complaint that the sum tendered is insufficient, but offers to bear his own expenses, has no answer to punishment for contempt of court if he refuses to attend the trial³ on the ground that he has not been paid expenses due to him for attendance on an earlier occasion⁴.

1 It would seem that the situations described in the text may still arise where a witness summons is served under the Civil Procedure Rules, since CPR 34.7 refers to the sums to be 'offered or paid' to the witness: see PARA 1013.

2 *Newton v Harland* (1840) 1 Man & G 956. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

3 *Goff v Mills* (1844) 13 LJQB 227. For the punishment see PARA 1016.

4 *Gaunt v Johnson* (1848) 6 Hare 551.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/C. EXPENSES/1015. Liability for expenses.

1015. Liability for expenses.

A solicitor who causes a witness summons to be served is not personally liable to the witness for his expenses, in the absence of a contract, express or implied¹. The fact that a witness attends and gives evidence without demanding his expenses² is evidence from which a promise may be inferred by the party for whom he appears to pay the expenses subsequently³.

When the attendance of a witness has become unnecessary, and no expenses have been incurred by him under the witness summons, and he has done no act under it, the expenses paid to him may be recovered from him as money had and received⁴.

1 *Robins v Bridge* (1837) 3 M & W 114. The rule with regard to expert witnesses is the same: *Lee v Everest* (1857) 2 H & N 285. It seems that where a solicitor is conducting a speculative claim a contract to make himself personally liable to the witnesses might be implied: see *Miller v Appleton* (1906) 50 Sol Jo 192. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

2 It would seem that the situations described in the text may still arise where a witness summons is served under the Civil Procedure Rules, since CPR 34.7 refers to the sums to be 'offered or paid' to the witness: see PARA 1013.

3 *Hallet v Mears* (1810) 13 East 15; *Pell v Daubeny* (1850) 5 Exch 955.

4 *Martin v Andrews* (1856) 7 E & B 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/D. PENALTIES FOR NON-ATTENDANCE/1016. Penalty for neglecting or refusing to give evidence.

D. PENALTIES FOR NON-ATTENDANCE

1016. Penalty for neglecting or refusing to give evidence.

Subject as follows, any person who, having been summoned in pursuance of rules of court as a witness in a county court, refuses or neglects, without sufficient cause, to appear or to produce any documents required by the summons to be produced, or who, having been so summoned or being present in court and being required to give evidence, refuses to be sworn or give evidence, is to forfeit such fine as the judge¹ may direct². No person summoned in pursuance of rules of court as a witness in a county court is, however, to forfeit a fine under these provisions unless there has been paid or tendered to him at the time of the service of the summons such sum in respect of his expenses³ as may be prescribed for these purposes⁴.

The judge may at his discretion direct that the whole or any part of any such fine, after deducting the costs, is to be applicable towards indemnifying the party injured by the refusal or neglect⁵.

If a person served with a subpoena by the High Court under the provisions for compelling the attendance of a witness who is outside the jurisdiction but within the United Kingdom⁶ does not appear as required by the writ, the High Court, on proof to the satisfaction of the court of the service of the writ and of the default, may transmit a certificate of the default under its seal or under the hand of a judge to the appropriate court⁷ and the court to which it is sent must thereupon proceed against and punish the person in default in the like manner as if that person had neglected or refused to appear in obedience to process issued out of that court⁸. No court may proceed against or punish any person for such default, however, unless it is shown to the court that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence and of returning from giving evidence, and any other reasonable expenses which he has asked to be defrayed in connection with his evidence, was tendered to him at the time when the writ was served⁹.

Failure to attend the court may also constitute contempt of court¹⁰; but for the court to interfere a clear case of contempt must be made out¹¹. Thus, there may be reasonable excuse for absence¹²; it may be sufficient that the witness was ill¹³ or unable to travel¹⁴, that his employers (who were not parties to the case) refused to allow him to take to court a large number of books and papers belonging to them¹⁵, that he had genuine and reasonable grounds for thinking that his attendance would not be required¹⁶ or that a proper sum was not tendered to him for his expenses¹⁷.

The most stringent order of an employer not to leave business, however, is no excuse¹⁸; neither is the fact that the witness has not actually been called¹⁹, nor that the case was not called on²⁰, nor that the witness would have been in time if the case had not unexpectedly been called on²¹, nor, it seems, that his evidence was not material²².

It is a contempt of court for a witness not to attend on a witness summons issued in aid of an inferior court or tribunal²³. Such courts and tribunals may have their own powers of punishment for witnesses who fail to attend²⁴.

1 A district judge, assistant district judge or deputy district judge has the same powers under these provisions as a judge: County Courts Act 1984 s 55(4A) (added by the Courts and Legal Services Act 1990 s 74(5)).

2 County Courts Act 1984 s 55(1) (s 55(1), (3) amended by the Civil Procedure Act 1997, s 10, Sch 2 para 2). A judge does not have power under the County Courts Act 1984 s 55(1) to direct that a person is to forfeit a fine of an amount exceeding £1,000: s 55(2) (amended by the Criminal Justice Act 1991 s 17(3)(a), Sch 4 Pt I).

3 le including, in such cases as may be prescribed, compensation for loss of time: County Courts Act 1984 s 55(3) (as amended: see note 2). As to compensation for loss of time see PARA 1013.

4 County Courts Act 1984 s 55(3) (as amended: see note 2). As to the sum so prescribed see *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 3.3; and PARA 1013 note 5.

5 County Courts Act 1984 s 55(4). Section 55 does not apply to a debtor summoned to attend by a judgment summons: s 55(5). As to judgment summonses see PARA 1516 et seq.

6 le under the Supreme Court Act 1981 s 36(1): see PARA 1008. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

7 le (1) if the service was in Scotland, to the Court of Session at Edinburgh; and (2) if the service was in Northern Ireland, to the High Court of Justice in Northern Ireland at Belfast: Supreme Court Act 1981 s 36(3).

8 Supreme Court Act 1981 s 36(3). These provisions have not been modified following the replacement of writs of subpoena by witness summonses under the CPR. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

9 Supreme Court Act 1981 s 36(4) (amended by the Courts and Legal Services Act 1990 s 125(2), Sch 17 para 13).

10 See **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 476. As to the failure of a witness who does attend to give evidence see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 407 head (6) in the text.

11 *Horne v Smith* (1815) 6 Taunt 9; *Garden v Creswell* (1837) 2 M & W 319; *R v Lord Russell, R v Fox Maule* (1839) 7 Dowl 693; *Chapman v Davis* (1841) 3 Man & G 609; *Netherwood v Wilkinson* (1855) 17 CB 226 (wife's failure to hand husband notice requiring attendance); *Glendinning v Thomas* (1862) 6 LT 251 (failure to hear call); but see *R v Daye*[1908] 2 KB 333, DC.

12 *Malcolm v Day* (1819) 3 Moore CP 579; *Whiteland v Grant* (1840) 4 Jur 1061.

13 *Re Jacobs* (1835) 1 Har & W 123; *Scholes v Hilton* (1842) 10 M & W 15; *Dick v Piller*[1943] KB 497, [1943] 1 All ER 627, CA (whether court under duty to adjourn if essential witness unable to attend owing to illness).

14 *More v Woreham* (1580) Cary 99; cf *Humble v Malbe* (1559) Cary 41 (witness impressed as a soldier).

15 *Crowther v Appleby*(1873) LR 9 CP 23. In ordinary circumstances a witness must bring the documents specified, even though not bound to produce them: *R v Carey*(1845) 7 QB 126, 2 New Sess Cas 103; but see *Eccles & Co v Louisville and Nashville Railroad Co*[1912] 1 KB 135, CA.

16 *R v Sloman* (1832) 1 Dowl 618; cf *Farrah v Keat* (1838) 6 Dowl 470 (case called on while witness absent with attorney's consent); and see *Blandford v De Tastet* (1813) 5 Taunt 260 (witness subpoenaed without notice of when case would come on, leaving on third day of his attendance on urgent business); *Vaughton v Brine* (1840) 9 Dowl 179 (defendant's attorney subpoenaed for a particular day, and case postponed at defendant's request).

17 As to expenses see PARAS 1013-1015.

18 *Goff v Mills* (1844) 13 LJQB 227 (even though there is no possibility of communicating with employer). However, this case is not consistent with *Crowther v Appleby*(1873) LR 9 CP 23. See also *Jackson v Seager* (1844) 2 Dow & L 13.

19 *Dixon v Lee* (1834) 3 Dowl 259; *R v Fenn* (1835) 3 Dowl 546; *Lamont v Crook* (1840) 6 M & W 615; *Goff v Mills* (1844) 13 LJQB 227. Cf *Malcolm v Ray* (1819) 3 Moore CP 222; *R v Stretch* (1835) 3 Ad & El 503.

20 *Barrow v Humphreys* (1820) 3 B & Ald 598.

21 *R v Fenn* (1835) 3 Dowl 546.

22 See *Chapman v Davis* (1841) 3 Man & G 609; cf *Dicas v Lawson* (1835) 1 Cr M & R 934; *Taylor v Williams* (1830) 4 Moo & P 59; *Tinley v Porter* (1837) 5 Dowl 744.

23 As to witness summonses issued in aid of an inferior court or tribunal see PARA 1006; and see *Ex p Customs and Excise Comrs* [1956] Crim LR 130, DC. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

24 See eg the Magistrates' Courts Act 1980 s 97; and **MAGISTRATES**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/D. PENALTIES FOR NON-ATTENDANCE/1017. Claim for damages.

1017. Claim for damages.

The party who has obtained and served a witness summons or subpoena may bring a claim for damages against an absent witness, in which proof of actual damage caused by the witness's non-attendance must be given¹. In decided cases the damages awarded have invariably been limited to costs thrown away through the witness's non-attendance². Although it must be alleged that the defendant was a material witness in the case³, and that he could and might have appeared⁴, it is unnecessary to aver that the plaintiff had a good cause of action⁵, or that the witness's absence was the sole cause of the loss of the suit⁶. The claim will lie even though the claimant himself withdrew the record at the trial, if he did so because of the absence of the defendant as a witness⁷. In some circumstances there may be a cause of action in contract⁸.

1 *Couling v Coxe* (1848) 6 Dow & L 399; *Crewe v Field* (1896) 12 TLR 405; *Roberts v J and F Stone Lighting and Radio Ltd* (1945) 172 LT 240; and see *Chapman v Honig* [1963] 2 QB 502, [1963] 2 All ER 513, CA.

2 *Roberts v J and F Stone Lighting and Radio Ltd* (1945) 172 LT 240.

3 *Masterman v Judson* (1832) 8 Bing 224. Materiality on a single issue is sufficient (*Couling v Coxe* (1848) 6 Dow & L 399), for the plaintiff (now known as the 'claimant': see PARA 18) may have lost his costs of that issue.

4 *Maunsell v Ainsworth* (1840) 8 Dowl 869. It is not necessary to aver that the original subpoena was shown to the witness (*Mullett v Hunt* (1833) 1 Cr & M 752), or that he was called on his subpoena at the trial, if he was not in fact present (*Lamont v Crook* (1840) 6 M & W 615).

5 *Masterman v Judson* (1832) 8 Bing 224.

6 *Davis v Lovell* (1839) 4 M & W 678.

7 *Mullett v Hunt* (1833) 1 Cr & M 752; and see *Needham v Fraser* (1845) 14 LJCP 256.

8 If a witness promises to attend at a trial, a claim will lie against him for breach of the promise: *Yeatman v Dempsey* (1860) 7 CBNS 628; affd (1861) 9 CBNS 881. As to the recovery of expenses from a witness see PARA 1015. A witness who has not been paid his expenses has a claim for them against the party who sues out the subpoena: *Collins v Godefroy* (1831) 1 B & Ad 950; *Robins v Bridge* (1837) 3 M & W 114; *Hale v Bates* (1858) EB & E 575.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/E. ORDERING WITNESSES OUT OF COURT/1018. Power to order witnesses out of court.

E. ORDERING WITNESSES OUT OF COURT

1018. Power to order witnesses out of court.

At any time during the course of a trial the judge may order witnesses in the case to leave the court until called¹. Application for such an order may be made by either party². Refusal to leave the court when ordered is contempt of court and punishable accordingly³, but the witness is not thereby rendered incompetent, and his evidence is not inadmissible⁴.

1 *Moore v Lambeth County Court Registrar*[1969] 1 All ER 782, [1969] 1 WLR 141, CA. Whether or not a witness is ordered to leave the court is purely a matter within the judge's discretion: see PARA 1019. An examiner has a similar power: *Re Western of Canada Oil, Lands and Works Co*(1877) 6 ChD 109. For the practice in criminal cases see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

2 *Southey v Nash* (1837) 7 C & P 632.

3 *Skelton v Castle*(1837) 6 JP 154n; *Chandler v Horne* (1842) 2 Mood & R 423; *Cobbett v Hudson* (1852) 1 E & B 11; and see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 407 head (6) in the text.

4 *Moore v Lambeth County Court Registrar*[1969] 1 All ER 782, [1969] 1 WLR 141, CA; *R v Briggs*(1930) 22 Cr App Rep 68, CCA; and see *R v Carefoot* [1948] 2 DLR 22 (Ont). The jury may be directed that the weight to be attached to the evidence of such a witness is diminished: *Cook v Nethercote* (1835) 6 C & P 741; *Chandler v Horne* (1842) 2 Mood & R 423; and see *Moore v Lambeth County Court Registrar*[1969] 1 All ER 782, [1969] 1 WLR 141, CA. As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132. As to the court's general discretionary power to control the evidence see PARA 791.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/E. ORDERING WITNESSES OUT OF COURT/1019. When discretion is exercised.

1019. When discretion is exercised.

The power of the judge to exclude witnesses from the court is discretionary¹, and is not a matter of right so far as the parties are concerned², although in a civil case³ the parties themselves may not be ordered to leave the court⁴.

A solicitor in the case, even if a witness, is usually permitted to remain if his presence is necessary for the purpose of instructing counsel or the like⁵; and it is the usual practice for witnesses who are called to give expert evidence or to produce documents, and not to speak to facts, to be allowed to remain, even though other witnesses are excluded⁶.

1 *Moore v Lambeth County Court Registrar* [1969] 1 All ER 782, [1969] 1 WLR 141, CA; and see *Practice Note, Re Nightingale, Green v Nightingale* [1975] 1 WLR 80.

2 *R v Murphy and Douglas* (1837) 8 C & P 297; *Selfe v Isaacson* (1858) 1 F & F 194; *Penniman v Hill* (1876) 24 WR 245 (witness not ordered out of court during reading of affidavit already seen by him). As to arbitrators see **ARBITRATION** vol 2 (2008) PARA 1226.

3 For the practice in criminal cases see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

4 *Charnock v Dewings* (1853) 3 Car & Kir 378; *Selfe v Isaacson* (1858) 1 F & F 194; and see *Russell v Pilson* (1893) 28 LJo 810n; cf *Outram v Outram* [1877] WN 75.

5 *Pomeroy v Baddeley* (1826) Ry & M 430; *Everett v Lowdham* (1831) 5 C & P 91. This is so even if the solicitor has a personal interest in the case: *Re Aughtie, ex p Dugard* (1835) 4 Deac & Ch 524 (petitioner in bankruptcy, also an assignee, allowed to remain as being in position of solicitor in the case).

6 As to expert witnesses see PARA 835 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(v) Attendance at Court/E. ORDERING WITNESSES OUT OF COURT/1020. Hearing in private.

1020. Hearing in private.

The general rule is that both civil and criminal cases must be heard in open court¹; but there are a number of statutory and other exceptions whereby the court may sit in private². In practice there are three categories of case: those heard in open court, those heard in private and those heard in secret where the information disclosed to the court and the proceedings remain confidential³.

Even where a hearing is in public, the court may order that the identity of any party or witness must not be disclosed⁴.

1 *Scott v Scott* [1913] AC 417, HL; CPR 39.2(1), (3); and see **COURTS** vol 10 (Reissue) PARA 312; **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1408; **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 848. See also the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) art 6, now given direct effect in domestic law by the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 6 (right to a fair and public hearing); and PARAS 5, 791.

2 See **COURTS** vol 10 (Reissue) PARA 312; PARA 6; and see **CHILDREN AND YOUNG PERSONS; CRIMINAL LAW, EVIDENCE AND PROCEDURE; MATRIMONIAL AND CIVIL PARTNERSHIP LAW; SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 545.

3 See *Clibbery v Allan* [2002] EWCA Civ 45 at [20], [2002] 1 All ER 865 at [20], [2002] 1 FCR 385 at [20] per Dame Elizabeth Butler-Sloss P.

4 See CPR 39.2(4); PARA 1030; and **COURTS** vol 10 (Reissue) PARA 312; PARA 6. As to reporting restrictions see **COURTS** vol 10 (Reissue) PARA 313; **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 428 et seq; **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARAS 1271-1272; **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 1015; **PRESS, PRINTING AND PUBLISHING** vol 36(2) (Reissue) PARA 434 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(vi) Oaths and Affirmations/1021. Evidence on oath.

(vi) Oaths and Affirmations

1021. Evidence on oath.

With certain exceptions¹ no evidence is admissible in any court² unless it is given upon oath or affirmation³. By statute, any oath may be administered and taken in the following form and manner: the person taking the oath must hold the New Testament or, in the case of a Jew, the Old Testament, in his uplifted hand, and say or repeat after the officer⁴ administering the oath the words 'I swear by Almighty God . . .' followed by the words of the oath prescribed by law⁵. The officer must administer the oath in that form and manner without question unless the person about to take the oath objects to, or is physically incapable of, so taking it⁶; but in the case of a person who is neither a Christian nor a Jew the oath must be administered in any lawful manner⁷. Whether the oath is administered in a lawful manner to a witness who is neither a Christian nor a Jew depends not on the intricacies of his particular religion but on whether the oath appears to the court to be binding on the conscience of the witness and whether the witness himself considers the oath to be binding on his conscience⁸.

If a witness desires to take the oath in the Scottish manner⁹ with uplifted hand he must be permitted to do so without further question¹⁰.

If a witness takes the oath, in whatever form, without objection, or has declared it to be binding on him, or has affirmed¹¹, then if he gives false evidence he may be convicted of perjury¹².

1 See PARA 1025.

2 As to what constitutes a court see **COURTS** vol 10 (Reissue) PARA 301 et seq.

3 At common law the form of oath was immaterial, providing it was binding on the witness's conscience: *Omychund v Barker* (1745) 1 Atk 21; *R v Morgan* (1764) 1 Leach 54; *Atcheson v Everitt* (1776) 1 Cowp 382; *R v Gilham* (1795) 1 Esp 284; *Edmonds v Rowe* (1824) Ry & M 77; *R v Entrehman* (1842) Car & M 248; *Maden v Catanach* (1861) 7 H & N 360; *A-G v Bradlaugh* (1885) 14 QBD 667, CA.

4 'Officer' includes any person duly authorised to administer oaths: Oaths Act 1978 s 1(4). As to such persons see PARAS 1026-1027.

5 Oaths Act 1978 s 1(1). The following form of oath was approved by the King's Bench Judges in January 1927 for use in the civil and criminal courts over which they preside: 'that the evidence I shall give shall be the truth, the whole truth, and nothing but the truth'. This oath is also used in the Chancery Division and in the Family Division.

The Lord Chancellor may, after consulting the Lord Chief Justice of England and Wales, make rules prescribing a translation in the Welsh language of any form for the time being prescribed by law as the form of any oath or affirmation to be administered and taken or made by any person in any court, and an oath or affirmation administered and taken or made in any court in Wales in the translation prescribed by such rules is, without interpretation, to be of the like effect as if it had been administered and taken or made in the English language: Welsh Language Act 1993 s 23(1) (numbered as such and amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 para 232(1)-(3)). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the Welsh Language Act 1993 s 23: s 23(2) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 232(4)). When each witness is called, the court officer administering the oath or affirmation will inform the witness that he or she may be sworn or may affirm in Welsh or English as he or she wishes: *Practice Direction relating to the use of the Welsh Language in cases in the civil courts in Wales* CPR PD 39 Wel para 6.1. For the form of words in Welsh which may be used as an alternative to the form of affirmation set out in the Oaths Act 1978 s 6(1) (see PARA 1023 note 2) see the Citizenship Oath and Pledge (Welsh Language) Order 2007, SI 2007/1484, art 4.

The form of oath to be administered to and taken by any person before a youth court, or any child or young person before any other court, is 'I promise before Almighty God . . .' instead of 'I swear by Almighty God': Children and Young Persons Act 1963 s 28(1) (amended by the Criminal Justice Act 1991 s 100, Sch 11 para 40; and the Oaths Act 1978 s 2). Whether the oath is administered in this form, or in the form prescribed by the Oaths Act 1978 s 1(1), it is deemed to have been duly administered and taken: see the Children and Young Persons Act 1963 s 28(2). For these purposes, 'child' means a person under the age of 14 years; and 'young person' means a person who has attained the age of 14 years and is under the age of 18 years: Children and Young Persons Act 1933 s 107 (definition of 'young person' substituted for certain purposes by the Criminal Justice Act 1991 s 68, Sch 8 para 1). See further **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 1-3.

6 Oaths Act 1978 s 1(2).

7 Oaths Act 1978 s 1(3). See also the text and note 8. Persons of other religions usually take the oath upon their own holy book. For the forms of oath customarily used by persons of other religions see Boland and Sayers *Oaths and Affirmations* (2nd Edn) p 107 et seq. Where it is not reasonably practicable without inconvenience or delay to administer an oath to such a person he may be required to make a solemn affirmation instead of being sworn: see the Oaths Act 1978 s 5(2), (3); and PARA 1023.

8 *R v Kemble*[1990] 3 All ER 116, [1990] 1 WLR 1111, CA.

9 One form of Scottish oath is as follows: 'I swear by Almighty God as I shall answer to God at the Great Day of Judgment . . .': see Home Office circular dated 31 May 1893. The words 'as I shall answer to God at the Great Day of Judgment' are often omitted in practice. No book is used, but the witness raises his ungloved right hand.

10 Oaths Act 1978 s 3; *R v Palm*(1910) 4 Cr App Rep 201, CCA; and see *Rabey v Birch*(1908) 72 JP 106. The Oaths Act 1978 obviates the necessity for a corporal oath, ie an oath ratified by corporally touching (eg by kissing) a sacred object.

11 As to affirmation see PARA 1023.

12 See the Perjury Act 1911 ss 1, 1A, 15; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 712 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(vi) Oaths and Affirmations/1022. Validity of oaths.

1022. Validity of oaths.

In any case in which an oath may lawfully be and has been administered to any person¹, if it has been administered in a form and manner other than that prescribed by law², he is bound by it if it has been administered in such form and with such ceremonies as he may have declared to be binding³.

Where an oath has been duly administered and taken, the fact that the person to whom it was administered had, at the time of taking it, no religious belief, does not for any purpose affect the validity of the oath⁴.

1 As to the administration of oaths see PARA 1021.

2 See PARA 1021 the text and notes 7-8.

3 Oaths Act 1978 s 4(1).

4 Oaths Act 1978 s 4(2). As to the consequences of giving false evidence on oath see PARA 1021 text and notes 11-12.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(vi) Oaths and Affirmations/1023. Affirmations.

1023. Affirmations.

Any person who objects to being sworn¹ must be permitted to make his solemn affirmation² instead of taking an oath³, and a solemn affirmation is of the same force and effect as an oath⁴. A person may also affirm, and he may be required to do so⁵, where it is not reasonably practicable without inconvenience or delay to administer an oath to him in the manner appropriate to his religious belief⁶.

Except in the case of a child or other person who may give unsworn evidence⁷, it is contempt of court for a witness to refuse to affirm or to be sworn⁸.

1 A special form of affirmation was long permitted to members of the religious bodies of Quakers and Moravians, and to persons who had ceased to belong to those bodies but who retained their religious objection to the taking of oaths: see the Quakers and Moravians Act 1833 s 1; the Quakers and Moravians Act 1838 s 1 (both repealed); and *R v Doran* (1838) 2 Mood CC 37, CCR.

2 Every affirmation must be as follows: 'I, (*name*) do solemnly, sincerely and truly declare and affirm', and then proceed with the words of the oath prescribed by law omitting any words of imprecation or calling to witness: Oaths Act 1978 s 6(1). As to affirmations in Welsh see PARA 1021 note 5. Every affirmation in writing must commence: 'I, (*name*), of (*address*), do solemnly and sincerely affirm', and the form in lieu of jurat must be 'Affirmed at . . . this . . . day of . . . [20] . . ., before me': s 6(2). As to the meaning of 'jurat' see PARA 990 note 8.

3 Oaths Act 1978 s 5(1). See also the Interpretation Act 1978 s 5, Sch 1 ('oath' and 'affidavit' include affirmation and declaration, and 'swear' includes affirm and declare). Before the Oaths Act 1888 (repealed) it was a rule of the common law that persons of no religious belief were incompetent as witnesses, being incapable of acknowledging the obligation of an oath: see *Maden v Catanach* (1861) 7 H & N 360; *A-G v Bradlaugh* (1885) 14 QBD 667, CA; *Nash v Ali Khan* (1892) 8 TLR 444, CA.

4 Oaths Act 1978 s 5(4).

5 Oaths Act 1978 s 5(3). See also the Army Act 1955 s 102; the Air Force Act 1955 s 102; the Naval Discipline Act 1957 s 60, where the like provision is made with regard to courts-martial; and **ARMED FORCES**.

6 Oaths Act 1978 s 5(2); and see *R v Pritam Singh* [1958] 1 All ER 199, [1958] 1 WLR 143. See also note 5.

7 See PARA 1025.

8 See **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 407 at head (6) in the text.

UPDATE

1023 Affirmations

NOTE 5--Army Act 1955, Air Force Act 1955 and Naval Discipline Act 1957 replaced: Armed Forces Act 2006.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(vi) Oaths and Affirmations/1024. Statutory declarations.

1024. Statutory declarations.

With regard to certain oaths required to be taken out of court and such voluntary declarations as may be required in confirmation of written instruments, proofs of debts or other matters, any person may make a solemn declaration¹ in place of an oath².

1 The form is: 'I, AB, of . . . do solemnly and sincerely declare that . . . and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act 1835': s 20, Schedule. The form of jurat is 'Declared at . . . this . . . day of . . . before me': see Forms and Precedents.

2 See the Statutory Declarations Act 1835 ss 4, 7, 18, 20 (amended by the Statute Law Revision (No 2) Act 1888; the Statute Law Revision Act 1890; the Statute Law Revision (No 2) Act 1890; and the Perjury Act 1911 ss 17, 18, Schedule).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(vi) Oaths and Affirmations/1025. Unsworn statements.

1025. Unsworn statements.

There are some exceptions to the general rule that evidence must be given on oath or affirmation¹. In civil claims which have been allocated to the small claims track, the court need not take evidence on oath or affirmation². In other proceedings, although a judge³ or jurymen⁴, if competent to give evidence in a trial in which he acts in that capacity⁵, must be sworn before he gives evidence in relation to any matter which is within his own particular knowledge, a judge explaining an incident occurring at a former trial may, it seems, be heard unsworn⁶. A barrister is permitted to make a statement from the bar without being sworn on any matter within his knowledge in connection with the case, for example when a question of his authority to enter into a compromise has arisen⁷; but he may be sworn, in which case the modern practice is for him to give his evidence, unrobed, from the witness box⁸.

In criminal proceedings, an accused person is not permitted to make an unsworn statement unless he is without legal representation and he wishes to address the court or jury otherwise than on oath on any matter on which, if he were represented, counsel or a solicitor could address the court or jury on his behalf⁹.

The unsworn statements of young children are considered subsequently, and elsewhere in this work¹⁰.

1 The rule is said to extend to the Sovereign herself: see *Abignye v Clifton* (1611) Hob 213, where a certificate of the Sovereign was received in place of an affidavit. It may be doubted whether this would be followed today. See also PARA 969.

2 See CPR 27.8(4); and PARA 279. As to cases allocated to the small claims track see PARAS 267, 274 et seq.

3 *R v Anderson* (1680) 7 State Tr 811; *Hurpershad v Sheo Dyal* (1876) LR 3 Ind App 259, PC.

4 *R v Rosser* (1836) 7 C & P 648; *Manley v Shaw* (1840) Car & M 361.

5 See PARA 971.

6 See (1905) 40 LJo 415; and PARA 971 note 6. See also *R v Earl of Thanet* (1799) 27 State Tr 821 (evidence against accused).

7 See eg *Hickman v Berens* [1895] 2 Ch 638, CA; and see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1147.

8 See **LEGAL PROFESSIONS** vol 66 (2009) PARA 1147.

9 See the Criminal Justice Act 1982 s 72 (amended by the Youth Justice and Criminal Evidence Act 1999 s 67(1), Sch 4 para 10; and the Statute Law (Repeals) Act 2008); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1408.

10 See PARA 1029; and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1277.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(vi) Oaths and Affirmations/1026. Persons empowered to administer oaths and take affidavits, etc.

1026. Persons empowered to administer oaths and take affidavits, etc.

Only the following may administer oaths¹ and take affidavits²:

- 166 (1) commissioners for oaths³;
- 167 (2) practising solicitors⁴;
- 168 (3) other persons specified by statute⁵;
- 169 (4) certain officials of the Supreme Court⁶;
- 170 (5) a circuit judge or district judge⁷;
- 171 (6) any justice of the peace⁸; and
- 172 (7) certain officials of any county court appointed by the judge of that court for the purpose⁹.

1 As to the administration of oaths and affirmations see PARAS 1021, 1023. 'Oath' includes affirmation: see PARA 1023 note 3.

2 *Practice Direction--Written Evidence* PD 32 para 9.1. As to affidavits see PARA 989 et seq. As to oaths etc taken out of the jurisdiction see PARA 1027; and as to persons who may take evidence for the purposes of proceedings abroad see PARA 1059.

As from a day to be appointed, the administering of oaths is a reserved legal activity under the Legal Services Act 2007: see s 12(1)(f), Sch 2 paras 7, 8. Only persons who are authorised or exempt under that Act will be entitled to carry on reserved legal activities: see s 13. At the date at which this title states the law, no day had been appointed bringing the relevant provisions into force. See **LEGAL PROFESSIONS** vol 65 (2008) PARA 509.

3 A commissioner for oaths may, in England and Wales or elsewhere, administer any oath or take any affidavit for the purposes of any court or matter in England and Wales, including any of the ecclesiastical courts or jurisdictions, matters ecclesiastical, matters relating to applications for notarial faculties, and matters relating to the registration of any instrument, whether under an Act of Parliament or otherwise, and take any bail or recognisance in or for the purpose of any civil proceeding in the Supreme Court: Commissioners for Oaths Act 1889 s 1(2) (amended by the Courts Act 1971 s 56(4), Sch 11 Pt IV; by the Courts and Legal Services Act 1990 s 125(7), Sch 20; and, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 4 para 15, to substitute a reference to the Senior Courts for the reference to the Supreme Court). A commissioner for oaths must not, however, exercise any of the powers so given in any proceeding in which he is solicitor to any of the parties to the proceeding, or clerk to any such solicitor, or in which he is interested: Commissioners for Oaths Act 1889 s 1(3) (amended, as from a day to be appointed, by the Legal Services Act 2007 ss 208(1), 210, Sch 21 paras 11, 12, Sch 23 to delete the words 'in which he is solicitor to any of the parties to the proceeding, or clerk to any such solicitor, or'): see note 2. For these purposes, 'oath' includes affirmation and declaration; and 'affidavit' includes affirmation, statutory or other declaration, acknowledgment, examination, and attestation or protestation of honour: Commissioners for Oaths Act 1889 s 11. Every commissioner before whom any oath or affidavit is taken or made must state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made: s 5.

4 Every solicitor who holds a practising certificate which is in force has the powers conferred on a commissioner for oaths by the Commissioners for Oaths Acts 1889 and 1891 and the Stamp Duties Management Act 1891 s 24 (statutory declarations relating to stamp duties); and any reference to such a commissioner in an enactment or instrument includes a reference to such a solicitor unless the context otherwise requires: Solicitors Act 1974 s 81(1). A solicitor must not exercise the powers so conferred in a proceeding in which he is solicitor to any of the parties, or in which he is interested: s 81(2). A solicitor before whom any oath or affidavit is taken or made must state in the jurat or attestation at which place and on what date the oath or affidavit is taken or made: s 81(3). A document containing such a statement and purporting to be sealed or signed by a solicitor must be admitted in evidence without proof of the seal or signature, and without proof that he is a solicitor or that he holds a practising certificate which is in force: s 81(4). Every practising solicitor has the right to use the title 'Commissioner for Oaths': Courts and Legal Services Act 1990 s 113(10)(a). The Solicitors Act 1974 s 81 and the Courts and Legal Services Act 1990 s 113 are repealed, as from a day to be appointed, by the Legal Services Act 2007 ss 177, 210, Sch 16 Pt 1 paras 1, 73, Sch 23 and ss

208(1), 210, Sch 21 paras 83, 96, Sch 23 respectively. At the date at which this title states the law, no such day had been appointed. See note 2.

5 Subject as follows, every authorised person has the powers conferred on a commissioner for oaths by the Commissioners for Oaths Acts 1889 and 1891 and the Stamp Duties Management Act 1891 s 24; and any reference to such a commissioner in an enactment or instrument includes a reference to an authorised person unless the context otherwise requires: Courts and Legal Services Act 1990 s 113(3). For these purposes, 'authorised person' means (1) any authorised advocate or authorised litigator, other than one who is a solicitor (in relation to whom provision similar to that made by these provisions is made by the Solicitors Act 1974 s 81 (see note 4)); or (2) any person who is a member of a professional or other body prescribed by the Secretary of State for these purposes: Courts and Legal Services Act 1990 s 113(1) (amended by SI 2003/1887). As to the prospective repeal of the Courts and Legal Services Act 1990 s 113 see note 4. The Council for Licensed Conveyancers and the Institute of Legal Executives are prescribed bodies for these purposes and licensed conveyancers and legal executives are authorised to administer oaths and take affidavits etc: see the Commissioners for Oaths (Prescribed Bodies) Regulations 1994, SI 1994/1380, reg 3; the Commissioners for Oaths (Prescribed Bodies) Regulations 1995, SI 1995/1676, reg 2; and **LEGAL PROFESSIONS** vol 66 (2009) PARAS 1410, 1463.

Subject as follows, every general notary has the powers conferred on a commissioner for oaths by the Commissioners for Oaths Acts 1889 and 1891; and any reference to such a commissioner in an enactment or instrument includes a reference to a general notary unless the context otherwise requires: Courts and Legal Services Act 1990 s 113(4). 'General notary' means any public notary other than an ecclesiastical notary: s 113(1) (amended by the Access to Justice Act 1999 s 106, Sch 15 Pt II).

No person must exercise the powers conferred by the Courts and Legal Services Act 1990 s 113 in any proceedings in which he is interested: s 113(5). A person exercising such powers and before whom any oath or affidavit is taken or made must state in the jurat or attestation at which place and on what date the oath or affidavit is taken or made: s 113(6). A document containing such a statement and purporting to be sealed or signed by an authorised person or general notary is to be admitted in evidence without proof of the seal or signature, and without proof that he is an authorised person or general notary: s 113(7). The Secretary of State may, with the concurrence of the Lord Chief Justice and the Master of the Rolls, by order prescribe the fees to be charged by authorised persons exercising the powers of commissioners for oaths by virtue of s 113 in respect of the administration of an oath or the taking of an affidavit: s 113(8) (amended by SI 2003/1887). As to the meaning of 'affidavit' see note 3 (definition applied by the Courts and Legal Services Act 1990 s 113(9)). Every authorised person and general notary has the right to use the title 'Commissioner for Oaths': s 113(10) (b), (c). For the prescribed fees see the Commissioners for Oaths (Authorised Persons) (Fees) Order 1993, SI 1993/2298.

6 Every person who, being an officer of or performing duties in relation to any court, is for the time being so authorised by a judge of the court, or by or in pursuance of any rules or orders regulating the procedure of the court, and every person directed to take an examination in any cause or matter in the Supreme Court, has authority to administer any oath or take any affidavit required for any purpose connected with his duties: Commissioners for Oaths Act 1889 s 2 (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 Sch 11 Pt 4 para 15, to substitute a reference to the Senior Courts for the reference to the Supreme Court).

7 County Courts Act 1984 s 58(1)(a) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3)).

8 County Courts Act 1984 s 58(1)(b).

9 County Courts Act 1984 s 58(1)(c). An affidavit sworn before a judge or district judge or before any such officer may be sworn without the payment of any fee: s 58(2) (as amended: see note 7).

UPDATE

1026 Persons empowered to administer oaths and take affidavits, etc

NOTES 3, 6--Constitutional Reform Act 2005 Sch 11 in force 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(vi) Oaths and Affirmations/1027. Taking oaths etc out of the jurisdiction.

1027. Taking oaths etc out of the jurisdiction.

Any oath¹ or affidavit² required for the purpose of any court or matter in England and Wales, or for the purpose of the registration of any instrument in any part of the United Kingdom³, may be taken or made in any place out of England and Wales before any person having authority to administer an oath in that place⁴. In the case of a person having such authority otherwise than by the law of a foreign country, judicial and official notice must be taken of his seal or signature affixed, impressed, or subscribed to or on any such oath or affidavit⁵.

The Lord Chancellor may, whenever it appears to him necessary to do so, authorise any person to administer oaths and take affidavits for any purpose relating to prize proceedings in the Supreme Court, whilst that person is on the high seas or out of Her Majesty's dominions, and it is not necessary to affix any stamp to the document by which he is so authorised⁶.

Every commissioner⁷ before whom any oath or affidavit is taken or made⁸ must state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made⁹.

Every British ambassador, envoy, minister, chargé d'affaires, and secretary of embassy or legation exercising his functions in any foreign country, and every British consul-general, acting consul general, consul, acting consul, vice-consul, acting vice-consul, pro-consul, and consular agent or acting consular agent exercising his functions in any foreign place may, in that country or place, administer any oath and take any affidavit, and also do any notarial act which any notary public can do within the United Kingdom; and every oath, affidavit, and notarial act administered, sworn, or done by or before any such person is as effectual as if duly administered, sworn, or done by or before any lawful authority in any part of the United Kingdom¹⁰. Any document purporting to have affixed, impressed, or subscribed thereon or thereto the seal and signature of any person authorised by these provisions to administer an oath in testimony of any oath, affidavit, or act being administered, taken, or done by or before him, is to be admitted in evidence without proof of the seal or signature being the seal or signature of that person, or of the official character of that person¹¹.

Where in any country or area Her Majesty has for the time being no diplomatic or consular representatives appointed on the advice of Her Government in the United Kingdom, and arrangements made on such advice are in force for the representation of interests of Her Majesty in the country or area through diplomatic or consular representatives of any other country, Her Majesty may by Order in Council provide for empowering such representatives to administer oaths and do notarial acts¹².

1 As to the meaning of 'oath' for these purposes see PARA 1026 note 3.

2 As to the meaning of 'affidavit' for these purposes see PARA 1026 note 3.

3 As to the meaning of 'United Kingdom' see PARA 221 note 2.

4 Commissioners for Oaths Act 1889 s 3(1).

5 Commissioners for Oaths Act 1889 s 3(2). As to judicial notice see PARA 779 et seq.

6 Commissioners for Oaths Act 1889 s 4 (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 4 para 15, to substitute a reference to the Senior Courts for the reference to the Supreme Court; at the date at which this title states the law, no such day had been appointed). See further **PRIZE**.

7 As to the persons who may use the title 'Commissioner for Oaths' see PARA 1026.

8 le under the Commissioners for Oaths Act 1889: s 5.

9 Commissioners for Oaths Act 1889 s 5. Where by or under the Merchant Shipping Act 1995, or the Customs Consolidation Act 1876 (mostly repealed: see now the Customs and Excise Management Act 1979; and **CUSTOMS AND EXCISE**), or Acts amending the same respectively, any oath or affidavit is required to be taken or made before any particular person or officer, whether having special authority or otherwise, and whether at any particular place, or within any specified limits or otherwise, such oath or affidavit may be taken or made before a commissioner for oaths, at any place, and is to be as effectual to all intents and purposes as if taken or made before such person or officer, and at any particular place or within specified limits: Commissioners for Oaths Act 1891 s 1 (amended by the Consumer Credit Consumer Credit Act 1974 s 192(3)(b), Sch 5 Pt I; the Trade Marks Act 1994 s 106(2), Sch 5; and the Merchant Shipping Act 1995 s 314(2), Sch 13 para 10).

10 Commissioners for Oaths Act 1889 s 6(1) (amended by the Commissioners for Oaths Act 1891 s 2). As from a day to be appointed, 'notary public' in the Commissioners for Oaths Act 1891 s 6(1) includes a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to any activity which constitutes a notarial activity (within the meaning of that Act): Commissioners for Oaths Act 1889 s 6(1A) (prospectively added by the Legal Services Act 2007 s 208(1), Sch 21 paras 11, 13). At the date at which this title states the law, no such day had been appointed.

11 Commissioners for Oaths Act 1889 s 6(2).

12 Oaths and Evidence (Overseas Authorities and Countries) Act 1963 s 2(1). An order under s 2 may prescribe the facts to be stated in the jurat by any person by whom an oath is administered by virtue of the order; and any document purporting to have subscribed thereto the signature of any person in testimony of any oath being administered before him, and containing in the jurat a statement of the facts required to be stated therein by the order, is to be received in evidence without proof of the signature being the signature of that person or of the facts so stated: s 2(2). At the date at which this title states the law, no such order had been made.

UPDATE

1027 Taking oaths etc out of the jurisdiction

NOTE 6--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(vii) Special Categories of Witness/1028. Expert witnesses.

(vii) Special Categories of Witness

1028. Expert witnesses.

Provision may be made by rules of court as to the conditions subject to which oral expert evidence may be given in civil proceedings¹. Expert witnesses, and the restrictions on expert evidence, are discussed elsewhere in this title².

1 See the Civil Evidence Act 1972 s 2(4); and PARA 838.

2 See PARA 835 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(vii) Special Categories of Witness/1029. Children.

1029. Children.

Where a child¹ who is called as a witness in any civil proceedings² does not, in the opinion of the court, understand the nature of an oath³, the child's evidence may be heard by the court if, in its opinion, he understands that it is his duty to speak the truth and he has sufficient understanding to justify his evidence being heard⁴.

The court has a general discretionary power to control the evidence⁵ and may, for example, allow a child to give evidence by means of a live video link⁶. Evidence in family proceedings is discussed in detail elsewhere in this work⁷.

Where a child may be called as a witness before a statutory tribunal, statutory provision may be made as to the circumstances in which this is done and as to the manner in which such evidence is given⁸.

In criminal proceedings, a witness may not be sworn unless he has attained the age of 14 years and he has a sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath⁹. A person of any age who is competent to give evidence in criminal proceedings, but who is not permitted to be sworn for the purpose of giving evidence on oath in such proceedings, must give his evidence unsworn¹⁰. Provision is made by statute for a number of special measures to be taken by the court when a child is giving evidence in criminal proceedings¹¹. Additionally, there are statutory protections for child complainants in proceedings for sexual offences¹². These provisions are discussed elsewhere in this work¹³.

1 For these purposes, 'child' means a person under the age of 18 years: Children Act 1989 s 105(1). As to the competence of child witnesses see PARA 966.

2 For these purposes, 'civil proceedings' means civil proceedings, before any tribunal, in relation to which the strict rules of evidence apply, whether as a matter of law or by agreement of the parties, and references to the 'court' are to be construed accordingly: Children Act 1989 s 96(7) (definition substituted by the Civil Evidence Act 1995 s 15(1), Sch 1 para 16).

3 ie including a solemn affirmation: see PARA 1023 note 2.

4 Children Act 1989 s 96(1), (2).

5 See PARA 791.

6 As to video conferencing see generally PARA 1032.

7 See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 228-229; **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**. As to video conferencing in the Family Division of the High Court see *Practice Direction (Family Division: Video Conferencing)* [2002] 1 All ER 1024, [2002] 1 WLR 406.

8 See eg the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 17, which provides as follows: (1) a child may only give evidence in person where (a) the president or the nominated chairman of the tribunal has given the parties an opportunity to make written representations before the hearing or representations at the hearing; and (b) having regard to all the available evidence, and the representations of the parties, the president or the nominated chairman considers that the welfare of the child will not be prejudiced by so doing (reg 17(1)); (2) if he directs that a child is to give evidence in person, the president or the nominated chairman must secure that any arrangements he considers appropriate (such as the use of a video link) are made to safeguard the welfare of the child and appoint for the purpose of the hearing a person with appropriate skills or experience in facilitating the giving of evidence by children (reg 17(2)); (3) the president or the nominated chairman must pay such fees as he may determine to

any person appointed under reg 17 (reg 17(6)). See also the Protection of Children and Vulnerable Adults and Care Standards Tribunal (Review of Disqualification Orders) Regulations 2006, SI 2006/1929, reg 13(1), (2), (6). See further **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 731.

9 See the Youth Justice and Criminal Evidence Act 1999 s 55(2); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1403.

10 Youth Justice and Criminal Evidence Act 1999 s 56(1), (2). The fact that it appears to the Court of Appeal that the person should in fact have given his evidence on oath does not, of itself, render the conviction in question unsafe: see s 56(5).

11 See the Youth Justice and Criminal Evidence Act 1999 Pt II Chs I, IA (ss 16-33C). As to children see in particular s 21. See also the Criminal Procedure Rules 2005, SI 2005/384, Pt 29.

12 See the Youth Justice and Criminal Evidence Act 1999 Pt II Chs II, III (ss 34-43). As to children see in particular s 35.

13 See **CHILDREN AND YOUNG PERSONS; CRIMINAL LAW, EVIDENCE AND PROCEDURE; MAGISTRATES**.

UPDATE

1029 Children

NOTE 8--SI 2002/816 revoked: SI 2008/2683.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(vii) Special Categories of Witness/1030. Vulnerable or intimidated adult witnesses.

1030. Vulnerable or intimidated adult witnesses.

Under the Civil Procedure Rules, the court has a general discretionary power to control the evidence¹ and may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness². The court's power to hold a hearing in private is discussed elsewhere in this title³.

Where a vulnerable adult may be called as a witness before a statutory tribunal, statutory provision may be made as to the circumstances in which this is done and as to the manner in which such evidence is given⁴.

In criminal proceedings, a person of any age who is competent to give evidence but who is not permitted to be sworn for the purpose of giving evidence on oath in such proceedings⁵ must give his evidence unsworn⁶. Provision is made by statute for a number of special measures to be taken by the court when a vulnerable adult witness or an intimidated witness is giving evidence in criminal proceedings⁷. Additionally, there are statutory protections for complainants in proceedings for sexual offences⁸. These provisions are discussed elsewhere in this work⁹.

It has been held that in public law proceedings involving children a social worker giving evidence as a witness should only be afforded the protection of anonymity in an exceptional case¹⁰.

1 See PARA 791.

2 CPR 39.2(4). As to the application of the CPR see PARA 32.

3 See PARA 1020.

4 See eg the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002, SI 2002/816, reg 17, which provides as follows: (1) where the president or the nominated chairman of the tribunal believes that it might not be in the best interests of a vulnerable adult for the vulnerable adult to give oral evidence to the tribunal, the president or the nominated chairman must (a) give the parties the opportunity to make written representations before the hearing or representations at the hearing; and (b) having regard to all the available evidence, including any written representations made by the parties, consider whether it would prejudice the vulnerable adult's welfare to give oral evidence to the tribunal either in any circumstances or otherwise than in accordance with reg 17(5) (reg 17(3)); (2) if the president or the nominated chairman considers that (a) it would prejudice the vulnerable adult's welfare to give oral evidence to the tribunal in any circumstances, he must direct that the vulnerable adult must not do so; or (b) it would prejudice the vulnerable adult's welfare to give oral evidence to the tribunal otherwise than in accordance with reg 17(5) he must direct that reg 17(5) is to apply in relation to the vulnerable adult (reg 17(4)); (3) if he directs that reg 17(5) is to apply in relation to the vulnerable adult, the president or the nominated chairman must (a) secure that any arrangements he considers appropriate (such as the use of a video link) are made to safeguard the welfare of the vulnerable adult; and (b) appoint for the purpose of the hearing a person with appropriate skills or experience in facilitating the giving of evidence by vulnerable adults (reg 17(5)). As to the payment of fees to persons so appointed see PARA 1029 note 8. See also the Protection of Children and Vulnerable Adults and Care Standards Tribunal (Review of Disqualification Orders) Regulations 2006, SI 2006/1929, reg 13(3)-(5).

5 Ie by virtue of the Youth Justice and Criminal Evidence Act 1999 s 55(2): see PARA 1029.

6 See Youth Justice and Criminal Evidence Act 1999 s 56(1), (2).

7 See the Youth Justice and Criminal Evidence Act 1999 Pt II Chs I, IA (ss 16-33C). See also the Criminal Procedure Rules 2005, SI 2005/384, Pt 29.

8 See the Youth Justice and Criminal Evidence Act 1999 Pt II Chs II, III (ss 34-43).

9 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE; MAGISTRATES**. Provision has been made as to reporting directions in relation to witnesses in criminal proceedings who have attained the age of 18: see the Youth Justice and Criminal Evidence Act 1999 s 46; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1430.

10 See *Re W (children) (family proceedings: evidence)* [2002] EWCA Civ 1626, [2003] 1 FLR 329, [2002] All ER (D) 81 (Oct).

UPDATE

1030 Vulnerable or intimidated adult witnesses

NOTE 4--SI 2002/816 revoked: SI 2008/2683.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(vii) Special Categories of Witness/1031. Witnesses unable to communicate in spoken English.

1031. Witnesses unable to communicate in spoken English.

In civil proceedings in courts in England the use of interpreters by parties or witnesses is entirely a matter of discretion for the judge¹ but the authorities to that effect must be read in the light of the right to a fair trial under the Convention for the Protection of Human Rights and Fundamental Freedoms, now given direct effect in domestic law by the Human Rights Act 1998². In any legal proceedings in Wales the Welsh language may be spoken by any party, witness or other person who desires to use it, subject in the case of proceedings in a court other than a magistrates' court to such prior notice as may be required by rules of court; and any necessary provision for interpretation must be made accordingly³. The Lord Chancellor may make rules as to the provision and employment of interpreters of the Welsh and English languages for the purposes of proceedings before courts in Wales⁴. The diary manager, in consultation with the designated civil judge, will ensure that a case in which the Welsh language is to be used is listed wherever practicable before a Welsh speaking judge and, where translation facilities are needed, at a court with simultaneous translation facilities⁵. Whenever an interpreter is needed to translate evidence from English to Welsh or from Welsh to English, the court manager in whose court the case is to be heard will take steps to secure the attendance of an interpreter whose name is included in the list of approved court interpreters⁶.

Additionally, the guides to proceedings in particular civil courts contain information about the use of interpreters⁷.

Where, by reason of any defect of speech or hearing from which he is suffering, a person called as a witness in any legal proceedings gives his evidence in writing or by signs, that evidence must be treated for the purposes of the Civil Evidence Act 1968 as being given orally⁸.

1 *Re Fuld, Hartley v Fuld (Fuld intervening)* [1965] 2 All ER 653, [1965] 1 WLR 1336. The judge must accord litigants natural justice in exercising his discretion, so that a litigant has a right to go into the witness box and give evidence through an interpreter: *Re Fuld, Hartley v Fuld (Fuld intervening)* [1965] 2 All ER 653, [1965] 1 WLR 1336. In the ordinary course of litigation it is undesirable that the judge should be addressed from the well of the court through an interpreter, although the court may allow it: *Re Trepca Mines Ltd* [1959] 3 All ER 798n, [1960] 1 WLR 24 (revsd on another point [1960] 3 All ER 304n, [1960] 1 WLR 1273, CA); *Re Fuld, Hartley v Fuld (Fuld intervening)* [1965] 2 All ER 653, [1965] 1 WLR 1336. The court may in its discretion allow evidence to be translated, as it is given: *Re Fuld, Hartley v Fuld (Fuld intervening)* [1965] 2 All ER 653, [1965] 1 WLR 1336. Where an interpreter translates counsel's questions into the language of the witness, it often happens that the rules of evidence are broken, and unless counsel or the judge knows the language they are powerless to prevent it: *Re Trepca Mines Ltd* [1959] 3 All ER 798n, [1960] 1 WLR 24.

An interpreter who can have no bias is necessary: *R v Mitchell* (1969) 114 Sol Jo 86, CA; *Singh v Singh* [1971] P 226, [1971] 2 All ER 828, CA (interpreter ought not to be called as expert witness).

2 See the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) art 6, now given direct effect in domestic law by the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 6; and PARAS 5, 792.

3 Welsh Language Act 1993 s 22(1). Any power to make rules of court includes power to make provision as to the use, in proceedings in or having a connection with Wales, of documents in the Welsh language: s 22(2). As to taking the oath or making an affirmation in Welsh see PARA 1021 note 5.

4 Welsh Language Act 1993 s 24(1). The interpreters must be paid, out of the same fund as the expenses of the court are payable, such remuneration in respect of their services as the Lord Chancellor may determine: s 24(2). The Lord Chancellor's powers under s 24 must be exercised with the consent of the Treasury: s 24(3).

5 *Practice Direction relating to the use of the Welsh Language in Cases in the Civil Courts in Wales* CPR PD 39 Wel para 4.1.

6 *Practice Direction relating to the use of the Welsh Language in Cases in the Civil Courts in Wales* CPR PD 39 Wel para 5.1.

7 As to such guides and their status see PARA 757; and PARA 16.

8 Civil Evidence Act 1968 s 18(6).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(viii) Evidence by Video Link, Telephone etc/1032. Court's power to allow use of video link etc.

(viii) Evidence by Video Link, Telephone etc

1032. Court's power to allow use of video link etc.

As a specific example of the court's¹ case management power under the Civil Procedure Rules to make use of technology², a witness may be allowed to give evidence through a video link or by other means³. Guidance has been issued with regard to video conferencing in the civil courts generally⁴ and specifically with regard to the Family Division of the High Court⁵. Additionally, the guides to proceedings in particular civil courts contain information about the use of video links⁶.

In criminal proceedings, a special measures direction may provide for the witness to give evidence by means of a live link⁷.

1 As to the meaning of 'court' see PARA 22.

2 See CPR 1.4(2)(k); and PARA 246.

3 CPR 32.3. As to the application of the CPR see PARA 32. The hearing of an application or part of an application may be by telephone: see PARA 309.

No defined limit or set of circumstances must be placed upon the discretion to permit video link evidence, which is to be exercised with the objective of enabling the court to do justice. Although a refusal to attend which can be characterised as an abuse or contemptuous, or which seeks to obtain a collateral advantage, may put an application beyond a favourable exercise of the discretion, considerations of cost, time, inconvenience etc are relevant considerations. Regard must also be had to the need that parties should be on an equal footing as far as possible. Full access to the court for justice in a civil matter should not, save in exceptional circumstances, be at the price of a litigant losing his liberty and facing criminal proceedings: *Rowland v Bock*[2002] EWHC 692 (QB), [2002] 4 All ER 370 (appeal against master's refusal to allow witness to give evidence by video link on ground that he faced arrest if he entered the United Kingdom). See also *Polanski v Condé Nast Publications Ltd*[2005] UKHL 10, [2005] 1 All ER 945, [2005] 1 WLR 637; *McGlinn v Waltham Contractors Ltd (No 2)*[2006] EWHC 2322 (TCC), (2006) 108 Con LR 43.

4 See PARAS 1033-1035.

5 See *Practice Direction (Family Division: Video Conferencing)* [2002] 1 All ER 1024, [2002] 1 WLR 406; and **CHILDREN AND YOUNG PERSONS; MATRIMONIAL AND CIVIL PARTNERSHIP LAW.**

6 As to such guides and their status see PARA 757; and PARA 16.

7 See the Youth Justice and Criminal Evidence Act 1999 s 24; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1422; **MAGISTRATES.** Video recorded interviews may also be admitted as evidence in chief: see s 27.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(viii) Evidence by Video Link, Telephone etc/1033. Video conferencing; general guidance.

1033. Video conferencing; general guidance.

Guidance for the use of video conferencing ('VCF') is annexed to the practice direction relating to written evidence¹. The guidance covers the use of VCF equipment both in a courtroom, whether via equipment which is permanently placed there or via a mobile unit, and in a separate studio or conference room. In either case, the location at which the judge sits is referred to as the 'local site'. The other site or sites to and from which transmission is made are referred to as the 'remote site' and in any particular case any such site may be another courtroom. The guidance applies to cases where VCF is used for the taking of evidence and also to its use for other parts of any legal proceedings².

VCF may be a convenient way of dealing with any part of proceedings: it can involve considerable savings in time and cost. Its use for the taking of evidence from overseas witnesses will, in particular, be likely to achieve a material saving of costs, and such savings may also be achieved by its use for taking domestic evidence. It is, however, inevitably not as ideal as having the witness physically present in court. Its convenience should not therefore be allowed to dictate its use. A judgment must be made in every case in which the use of VCF is being considered not only as to whether it will achieve an overall cost saving but as to whether its use will be likely to be beneficial to the efficient, fair and economic disposal of the litigation. In particular, it needs to be recognised that the degree of control a court can exercise over a witness at the remote site is or may be more limited than it can exercise over a witness physically before it³.

When used for the taking of evidence, the objective should be to make the VCF session as close as possible to the usual practice in a trial court where evidence is taken in open court⁴.

It should not be presumed that all foreign governments are willing to allow their nationals or others within their jurisdiction to be examined before a court in England or Wales by means of VCF⁵. Further, time zone differences need to be considered when a witness abroad is to be examined in England or Wales by VCF⁶.

Those involved with VCF need to be aware that, even with the most advanced systems currently available, there are the briefest of delays between the receipt of the picture and that of the accompanying sound⁷. With current technology, picture quality is good, but not as good as a television picture. The quality of the picture is enhanced if those appearing on VCF monitors keep their movements to a minimum⁸.

1 See *Practice Direction--Written Evidence* PD 32 para 29.1, Annex 3. The guidance is in part based, with permission, on the protocol of the Federal Court of Australia. It is intended to provide a guide to all persons involved in the use of VCF although it does not attempt to cover all the practical questions which might arise: Annex 3 introduction.

2 *Practice Direction--Written Evidence* PD 32 Annex 3 para 1. Examples of other parts of legal proceedings where VCF may be used are interim applications, case management conferences and pre-trial reviews: Annex 3 para 1. When presenting short applications before the Civil Division of the Court of Appeal, counsel should consider using video link where it would be more appropriate and less costly: *Babbings v Kiklees Metropolitan Council* [2004] EWCA Civ 1431, (2004) Times, 4 November. Those advising parties appearing before Civil Division of the Court of Appeal must take all steps possible to reduce the cost of proceedings, including using video conferencing facilities where available and appropriate: *Pastouna v Black* [2005] EWCA Civ 1389, (2005) Independent, 2 December.

3 *Practice Direction--Written Evidence* PD 32 Annex 3 para 2.

4 *Practice Direction--Written Evidence* PD 32 Annex 3 para 3. As to the giving of oral evidence generally see PARA 1036 et seq. To gain the maximum benefit, several differences have to be taken into account. Some matters, which are taken for granted when evidence is taken in the conventional way, take on a different dimension when it is taken by VCF: eg, the administration of the oath, ensuring that the witness understands who is at the local site and what their various roles are, the raising of any objections to the evidence and the use of documents: Annex 3 para 3. As to the administration of oaths etc see generally PARA 1021 et seq.

5 *Practice Direction--Written Evidence* PD 32 Annex 3 para 4. If there is any doubt about this, inquiries should be directed to the Foreign and Commonwealth Office (International Legal Matters Unit, Consular Division) with a view to ensuring that the country from which the evidence is to be taken raises no objection to it at diplomatic level. The party who is directed to be responsible for arranging the VCF (see PARA 1034) will be required to make all necessary inquiries about this well in advance of the VCF and must be able to inform the court what those inquiries were and of their outcome: Annex 3 para 4.

6 *Practice Direction--Written Evidence* PD 32 Annex 3 para 5. The convenience of the witness, the parties, their representatives and the court must all be taken into account. The cost of the use of a commercial studio is usually greater outside normal business hours: Annex 3 para 5.

7 *Practice Direction--Written Evidence* PD 32 Annex 3 para 6. If due allowance is not made for this, there will be a tendency to 'speak over' the witness, whose voice will continue to be heard for a millisecond or so after he or she appears on the screen to have finished speaking: Annex 3 para 6.

8 *Practice Direction--Written Evidence* PD 32 Annex 3 para 7.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(viii) Evidence by Video Link, Telephone etc/1034. Preliminary arrangements for video conferencing.

1034. Preliminary arrangements for video conferencing.

The court's permission is required for any part of any proceedings to be dealt with by means of video conferencing ('VCF')¹. Before seeking a direction, the applicant must notify the listing officer, diary manager or other appropriate court officer of the intention to seek it, and must inquire as to the availability of court VCF equipment for the day or days of the proposed VCF². If a witness at a remote site³ is to give evidence by an interpreter, consideration must be given at this stage as to whether the interpreter should be at the local site⁴ or the remote site. If a VCF direction is given, arrangements for the transmission will then need to be made. The court will ordinarily direct that the party seeking permission to use VCF is to be responsible for this⁵.

The local site will, if practicable, be a courtroom but it may instead be an appropriate studio or conference room⁶. It is recommended that the judge, practitioners and witness should arrive at their respective VCF sites about 20 minutes prior to the scheduled commencement of the transmission⁷. If the local site is not a courtroom, but a conference room or studio, the judge will need to determine who is to sit where⁸.

In cases in which the VCF is to be used for the taking of evidence, the VCF arranging party must arrange for recording equipment to be provided by the court which made the VCF direction so that the evidence can be recorded. An associate will normally be present to operate the recording equipment when the local site is a courtroom. The VCF arranging party must take steps to ensure that an associate is present to do likewise when it is a studio or conference room. The equipment must be set up and tested before the VCF transmission⁹.

Some countries may require that any oath or affirmation¹⁰ to be taken by a witness accord with local custom rather than the usual form of oath or affirmation used in England and Wales. The VCF arranging party must make all appropriate prior inquiries and put in place all arrangements necessary to enable the oath or affirmation to be taken in accordance with any local custom. That party must be in a position to inform the court what those inquiries were, what their outcome was and what arrangements have been made. If the oath or affirmation can be administered in the manner normal in England and Wales, the VCF arranging party must arrange in advance to have the appropriate holy book at the remote site. The associate will normally administer the oath¹¹.

Consideration will need to be given in advance to the documents to which the witness is likely to be referred. The parties should endeavour to agree on this. It will usually be most convenient for a bundle of the copy documents to be prepared in advance, which the VCF arranging party should then send to the remote site¹². Additional documents are sometimes quite properly introduced during the course of a witness's evidence. To cater for this, the VCF arranging party must ensure that equipment is available to enable documents to be transmitted between sites during the course of the VCF transmission¹³.

¹ *Practice Direction--Written Evidence* PD 32 para 29.1, Annex 3 para 8; and see CPR 32.3, cited in PARA 1032.

² *Practice Direction--Written Evidence* PD 32 Annex 3 para 8. The application for a direction must be made to the master, district judge or judge, as may be appropriate. If all parties consent to a direction, permission can be sought by letter, fax or email, although the court may still require an oral hearing. All parties are entitled to be heard on whether or not such a direction should be given and as to its terms: Annex 3 para 8.

³ As to the meaning of 'remote site' see PARA 1033.

4 As to the meaning of 'local site' see PARA 1033.

5 *Practice Direction--Written Evidence* PD 32 Annex 3 para 8. That party is referred to as the 'VCF arranging party': Annex 3 para 8. Subject to any order to the contrary, all costs of the transmission, including the costs of hiring equipment and technical personnel to operate it, will initially be the responsibility of, and must be met by, the VCF arranging party. All reasonable efforts must be made to keep the transmission to a minimum and so keep the costs down. All such costs will be considered to be part of the costs of the proceedings and the court will determine at such subsequent time as is convenient or appropriate who, as between the parties, should be responsible for them and (if appropriate) in what proportions: Annex 3 para 9. As to costs see PARA 1729 et seq.

6 *Practice Direction--Written Evidence* PD 32 Annex 3 para 10. The VCF arranging party must contact the listing officer, diary manager or other appropriate officer of the court which made the VCF direction and make arrangements for the VCF transmission. Details of the remote site, and of the equipment to be used both at the local site (if not being supplied by the court) and the remote site (including the number of ISDN lines and connection speed), together with all necessary contact names and telephone numbers, will have to be provided to the listing officer, diary manager or other court officer. The court will need to be satisfied that any equipment provided by the parties for use at the local site and also that at the remote site is of sufficient quality for a satisfactory transmission. The VCF arranging party must ensure that an appropriate person will be present at the local site to supervise the operation of the VCF throughout the transmission in order to deal with any technical problems. That party must also arrange for a technical assistant to be similarly present at the remote site for like purposes: Annex 3 para 10.

7 *Practice Direction--Written Evidence* PD 32 Annex 3 para 11.

8 *Practice Direction--Written Evidence* PD 32 Annex 3 para 12. The VCF arranging party must take care to ensure that the number of microphones is adequate for the speakers and that the panning of the camera for the practitioners' table encompasses all legal representatives so that the viewer can see everyone seated there: Annex 3 para 12. The proceedings, wherever they may take place, form part of a trial to which the public is entitled to have access (unless the court has determined that they should be heard in private). If the local site is to be a studio or conference room, the VCF arranging party must ensure that it provides sufficient accommodation to enable a reasonable number of members of the public to attend: Annex 3 para 13. In cases where the local site is a studio or conference room, the VCF arranging party must make arrangements, if practicable, for the royal coat of arms to be placed above the judge's seat: Annex 3 para 14.

9 *Practice Direction--Written Evidence* PD 32 Annex 3 para 15. It will often be a valuable safeguard for the VCF arranging party also to arrange for the provision of recording equipment at the remote site. This will provide a useful back-up if there is any reduction in sound quality during the transmission. A direction from the court for the making of such a back-up recording must, however, be obtained first. This is because the proceedings are court proceedings and, save as directed by the court, no other recording of them must be made. The court will direct what is to happen to the back-up recording: Annex 3 para 15.

10 As to oaths and affirmations see PARA 1021 et seq.

11 *Practice Direction--Written Evidence* PD 32 Annex 3 para 16.

12 *Practice Direction--Written Evidence* PD 32 Annex 3 para 17.

13 *Practice Direction--Written Evidence* PD 32 Annex 3 para 17. Consideration should be given to whether to use a document camera. If it is decided to use one, arrangements for its use will need to be established in advance. The panel operator will need to know the number and size of documents or objects if their images are to be sent by document camera. In many cases, a simpler and sufficient alternative will be to ensure that there are fax transmission and reception facilities at the participating sites: Annex 3 para 17.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(viii) Evidence by Video Link, Telephone etc/1035. Examination of witnesses by video conferencing.

1035. Examination of witnesses by video conferencing.

The procedure for conducting the transmission will be determined by the judge and he will determine who is to control the cameras¹. The following guidance applies primarily to cases where the video conferencing ('VCF') is being used for the taking of the evidence of a witness at a remote site². At the beginning of the transmission, the judge will probably wish to introduce himself and the advocates to the witness. He will probably want to know who is at the remote site and will invite the witness to introduce himself and anyone else who is with him. He may wish to give directions as to the seating arrangements at the remote site so that those present are visible at the local site during the taking of the evidence. He will probably wish to explain to the witness the method of taking the oath or of affirming³, the manner in which the evidence will be taken, and who will be conducting the examination and cross-examination⁴.

The examination of the witness at the remote site should follow as closely as possible the practice adopted when a witness is in the courtroom. During examination, cross-examination and re-examination, the witness must be able to see the legal representative⁵ asking the question and also any other person, whether another legal representative or the judge, making any statements in regard to the witness's evidence. It will in practice be most convenient if everyone remains seated throughout the transmission⁶.

1 *Practice Direction--Written Evidence* PD 32 para 29.1, Annex 3 para 19. In cases where the VCF is being used for an application in the course of the proceedings, the judge will ordinarily not enter the local site until both sites are on line. Similarly, at the conclusion of the hearing, he will ordinarily leave the local site while both sites are still on line: Annex 3 para 19. As to the meaning of 'local site' see PARA 1033.

2 *Practice Direction--Written Evidence* PD 32 Annex 3 para 19. As to the meaning of 'remote site' see PARA 1033. In all cases, the judge will need to decide whether court dress is appropriate when using VCF facilities. It might be appropriate when transmitting from courtroom to courtroom. It might not be when a commercial facility is being used: Annex 3 para 19.

3 As to oaths and affirmations see PARA 1021 et seq. See also PARA 1034 the text and notes 10-11.

4 *Practice Direction--Written Evidence* PD 32 Annex 3 para 20. He will probably also wish to inform the witness of the matters referred to in Annex 3 paras 6 and 7 (co-ordination of picture with sound, and picture quality: see PARA 1033): Annex 3 para 20. As to the meaning of 'cross-examination' see PARA 50 note 4.

5 As to the meaning of 'legal representative' see PARA 1833 note 13.

6 *Practice Direction--Written Evidence* PD 32 Annex 3 para 21.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/A. INTRODUCTION/1036. Oral evidence of witnesses; in general.

(ix) Oral Examination of Witnesses at or prior to Trial

A. INTRODUCTION

1036. Oral evidence of witnesses; in general.

Under the Civil Procedure Rules, the court has a general discretionary power to control the evidence by giving directions as to the issues on which it requires evidence, the nature of the evidence it requires to decide those issues and the way in which the evidence is to be placed before the court¹. The following paragraphs describing the examination of witnesses² must be read in the light of this general discretionary power.

The general rule in civil proceedings is that the evidence of witnesses is given orally at trial and by means of written evidence at any other hearing, but this is subject to exceptions³. There are also restrictions on expert evidence⁴ and on calling witnesses at trial in respect of whom a witness statement or witness summary has not been served within the specified time⁵.

The discretion to allow evidence to be given by a live video link is discussed elsewhere in this title⁶.

The rules regarding the examination of witnesses in criminal proceedings are dealt with elsewhere in this work⁷.

¹ See CPR 32.1(1); and PARA 791. In the context of the right to a fair trial under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) art 6 (now given direct effect in domestic law: see PARAS 5, 792), as a general rule the assessment of facts is within the province of the national courts; and where the domestic courts have examined the applicant's requests to have witnesses called and given detailed reasons for their refusals which are not tainted by arbitrariness, there is no violation of art 6(1): see Application 24541/94 *Wierzbicki v Poland* (2004) 38 EHRR 38, [2002] ECHR 24541/94, ECtHR.

The administrative court has power, in an appropriate case, to direct oral evidence and cross-examination in judicial review proceedings; and there is nothing in CPR Pt 54 (judicial review: see **JUDICIAL REVIEW**) which excludes recourse to the exercise of the general and unfettered powers in CPR 32.1: see CPR 54.16(1), which has been amended with effect from 2 December 2002 to confirm this position in the light of *R (on the application of PG) v Ealing London Borough Council* [2002] EWHC 250 (Admin), [2002] All ER (D) 61 (Mar).

² See PARA 1037 et seq.

³ See CPR 32.2; and PARA 979.

⁴ See PARA 835 et seq.

⁵ See CPR 32.10; and PARAS 982, 986-987.

⁶ See PARAS 1032-1035.

⁷ See **CRIMINAL LAW, EVIDENCE AND PROCEDURE; MAGISTRATES**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/B. EXAMINATION IN CHIEF/1037. Examination in chief; in general.

B. EXAMINATION IN CHIEF

1037. Examination in chief; in general.

A witness is examined in chief by or on behalf of the party for whom he is called to give evidence¹. Where a witness in respect of whom a witness statement has been served² is called to give oral evidence, his witness statement stands as his evidence in chief³ unless the court orders otherwise⁴. He may amplify his witness statement or give evidence in relation to new matters which have arisen, but only with the permission of the court⁵. These restrictions also apply, so far as practicable, to oral evidence given by a witness in respect of whom a witness summary has been served⁶. Oral expert evidence requires the court's permission⁷.

Leading questions, that is to say questions which by their form suggest the answer which it is desired the witness shall give⁸, are not generally permitted in examination in chief⁹. This rule is relaxed where evidence is being given about facts not in dispute, or which are formal¹⁰, or introductory, or where the other parties consent. A witness may be directed to a particular topic upon which it is desired to examine him by a preliminary leading question¹¹, the limit of this indulgence being a matter of discretion for the judge¹². Even if a question is one which contravenes the rules of evidence, the witness is bound to answer, unless objection is taken to its admissibility¹³.

A witness may generally give evidence only of fact, and not of inference from facts, or of his opinion or belief, unless such opinion or belief is relevant to an issue, is a way of conveying facts personally perceived by him or falls within one of the other established exceptions to this general principle¹⁴.

This paragraph must be read in the light of the court's general discretionary power to control the evidence¹⁵.

1 For circumstances in which it is permitted to contradict or cross-examine one's own witness see PARAS 1047-1048. As to evidence given on affidavit see PARA 989 et seq; and as to examination of witnesses out of court see PARA 992 et seq.

2 As to the requirement to serve witness statements see PARA 982; as to the meaning of 'witness statement' see PARA 751 note 1; and as to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'evidence in chief' see PARA 983 note 5.

4 See CPR 32.5(2); and PARA 983. As to the meaning of 'court' see PARA 22. As to the application of the CPR see PARA 32.

5 See CPR 32.5(3); and PARA 983.

6 See CPR 32.9(5); and PARA 986.

7 See CPR 35.5; and PARA 839.

8 *Nicholls v Dowding and Kemp* (1815) 1 Stark 81. Questions which assume the existence of facts in issue may not be asked. A question couched in an alternative form may be, but is not necessarily, a leading question: *Rowe v Brenton* (1828) 3 Man & Ry KB 133.

9 *R v Rosewell* (1684), as reported in 10 State Tr 147 per Jeffreys CJ; *Nicholls v Dowding and Kemp* (1815) 1 Stark 81; *Gregory v Marychurch* (1850) 19 LJ Ch 289; *Moor v Moor*[1954] 2 All ER 458, [1954] 1 WLR 927, CA (leading questions in hearing of undefended divorce disapproved). The judge has a discretion to allow leading questions if they are necessary or desirable: *Ex p Bottomley*[1909] 2 KB 14, DC. Answers given to leading questions often carry no weight and are of no value: *Moor v Moor*[1954] 2 All ER 458, [1954] 1 WLR 927, CA.

10 Eg the witness's name, address and calling: *Nicholls v Dowding and Kemp* (1815) 1 Stark 81.

11 *Courteen v Touse* (1807) 1 Camp 43; *Acerro v Petroni* (1815) 1 Stark 100; *Edmonds v Walter* (1820) 3 Stark 7. So, also, a witness's attention may be directed to an individual in court for the purpose of identifying him (*R v Watson* (1817) 2 Stark 116), although such evidence is clearly less satisfactory than that given spontaneously by the witness (see eg *R v Chapman*(1911) 7 Cr App Rep 53, CCA). As to identification evidence in criminal cases see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 1010.

A witness called to contradict another as to what the other has said may have the words in issue put to him, otherwise it would be impossible to come to a direct contradiction: *Courteen v Touse* (1807) 1 Camp 43; *Edmonds v Walter* (1820) 3 Stark 7. A witness called to explain ancient records may be asked to state the result of his examination of them, and may be examined on them in detail: *Rowe v Brenton* (1828) 3 Man & Ry KB 133. Proof of a custom must be given before a question is asked about some detail of the custom: *Curtis v Peek* (1864) 13 WR 230, Ex Ch.

12 See *Bastin v Carew* (1824) Ry & M 127.

13 Unless a witness is protected by privilege from the obligation to answer a question (or the party calling him is so protected) he must answer all questions that are put to him, on pain of punishment for contempt of court: *Ex p Fernandez* (1861) 10 CBNS 3. As to privilege see PARA 970 et seq; and as to contempt of court in the case of a witness see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 407 at head (6) in the text. As to the making of objections see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1210.

14 As to evidence of opinion see PARA 826 et seq; and as to expert evidence see PARA 835 et seq.

15 See PARAS 791, 1036.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/B. EXAMINATION IN CHIEF/1038. Previous consistent statements.

1038. Previous consistent statements.

The general rule¹ is that a witness may not state, nor may evidence be given to prove, that he has previously made a statement consistent with his evidence². This rule does not apply to witness statements served for use at the trial since they stand as the witness's evidence in chief³. Subject to certain exceptions, a witness statement may be used only for the purpose of the proceedings in which it is served⁴.

In civil proceedings⁵, however, evidence of such a previous statement may be adduced with the leave of the court⁶ or for the purpose of rebutting a suggestion that the witness's evidence has been fabricated⁷. There are additional exceptions to the rule in criminal proceedings: (1) in sexual cases, where the victim made a complaint shortly after the incident complained of⁸; (2) where it constitutes a previous identification of the accused⁹; and (3) where the statement forms part of the *res gestae* of the matter in issue¹⁰. These are discussed elsewhere in this work¹¹.

This paragraph must be read in the light of the court's general discretionary power to control the evidence¹².

1 The rule has been largely superseded by statute in civil cases: see the text and notes 5-7.

2 *R v Parker* (1783) 3 Doug KB 242; *R v Coll* (1889) 24 LR 1r 522, CCR; *Jones v South Eastern and Chatham Rly Co's Managing Committee* (1917) 87 LJKB 775, CA; *Gillie v Posho Ltd* [1939] 2 All ER 196, PC; *Corke v Corke and Cook* [1958] P 93, [1958] 1 All ER 224, CA; *Fox v General Medical Council* [1960] 3 All ER 225, [1960] 1 WLR 1017, PC; and see *Spittle v Spittle* [1965] 3 All ER 451, [1965] 1 WLR 1156.

3 See CPR 32.5(1); and PARAS 983, 1037. See also the Civil Evidence Act 1995 s 2; and PARA 810. As to the meaning of 'service' see PARA 138 note 2; as to the meaning of 'witness statement' see PARA 751 note 1; and as to the meaning of 'evidence in chief' see PARA 983 note 5. As to the application of the CPR see PARA 32. It has been stated in the context of proceedings for ancillary relief, to which CPR Pt 32 does not apply (see PARA 32), that the openness and candour of parties should be judged more reliably on the oral evidence given in the witness box rather than on the statements prepared for them by their lawyers during the course of the adversarial exchanges: see *Shaw v Shaw* [2002] EWCA Civ 1298, [2002] 3 FCR 298.

4 See CPR 32.12; and PARA 984.

5 As to the meaning of 'civil proceedings' for these purposes see PARA 808 note 1.

6 See the Civil Evidence Act 1995 s 6(2)(a); and PARA 810.

7 See the Civil Evidence Act 1995 s 6(2)(b); and PARA 810.

8 See *R v Valentine* [1996] 2 Cr App Rep 213, CA; *R v Jarvis and Jarvis* [1991] Crim LR 374, CA; *R v Lillyman* [1896] 2 QB 167, CCR; *R v Osborne* [1905] 1 KB 551, CCR; and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1529.

9 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1456.

10 As one of the circumstances of the events that are being described: see *Milne v Leisler* (1862) 7 H & N 786; *Ratten v R* [1972] AC 378, [1971] 3 All ER 801, PC. In civil cases *res gestae* statements are admissible with the leave of the court under the Civil Evidence Act 1995 s 6(2)(a). For the operation of this exception in criminal cases see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1530.

11 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

12 See PARAS 791, 1036.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/B. EXAMINATION IN CHIEF/1039. Reference to documents to refresh memory.

1039. Reference to documents to refresh memory.

A witness is permitted to refresh his memory¹ in the course of his evidence by reference to documents or memoranda². The document or memorandum must have been made either at the time of the events described in it or so shortly afterwards that the facts were fresh in the witness's memory³.

It need not have been made by the witness personally, but if it was not made by him it must have been checked by him while the facts were fresh in his memory⁴. Documents may be used by a witness to refresh his memory even if they would not be admissible in evidence if tendered as such⁵. Documents may be read over to a witness who has become blind to refresh his memory⁶.

A copy of a document may not be used by a witness to refresh his memory⁷ if the original is in existence or its absence is not accounted for⁸. Even where the original is not in existence, a copy cannot be used unless it is proved to be correct⁹.

It is not necessary that the witness should have any independent recollection of the facts to which he testified and of which he seeks to refresh his memory, apart from the document to which he refers¹⁰.

This paragraph must be read in the light of the court's general discretionary power to control the evidence¹¹.

1 Experts may refresh their memories by reference to accredited works (see PARA 835 note 5), and when giving evidence as to foreign law a witness may refer to authorities, laws and treatises (see PARA 1088).

2 From early times, witnesses were not permitted to give the whole of their evidence in writing: *Anon* (1753) 3 Term Rep 752n. As to the circumstances in which witness evidence is now given in writing see PARA 1036. Witnesses may see statements they made previously up to the time when they go into the witness box, provided they were made at some time reasonably close to the time of the event which is the subject of the trial: *R v Richardson* [1971] 2 QB 484, [1971] 2 All ER 773, CA; and see *Lawes v Reed* (1835) 2 Lew CC 152.

3 *Duchess of Kingston's Case* (1776) 20 State Tr 355; *Kensington v Inglis* (1807) 8 East 273; *Jones v Stroud* (1825) 2 C & P 196; *Hill v Barry* (1842) 7 Jur 10; *R v Mills* [1962] 3 All ER 298, [1962] 1 WLR 1152, CCA; *R v Simmonds* [1969] 1 QB 685, [1967] 2 All ER 399n, CA; *R v Richardson* [1971] 2 QB 484, [1971] 2 All ER 773, CA; cf *Whitfield v Aland* (1849) 2 Car & Kir 1015; and see *R v Graham* [1973] Crim LR 628, CA (27 days too long a period before document made). Where a witness has taken notes of a conversation it is not necessary that they should be a verbatim report, provided they substantially reproduce what was said: *R v O'Connell* (1844) Armstrong & Trevor 163. The requirement of contemporaneity is merely an evidential rule of practice and need not be followed in extradition proceedings: *R v Gloucester Prison Governor, ex p Miller* [1979] 2 All ER 1103, [1979] 1 WLR 537, DC.

4 *Rambert v Cohen* (1802) 4 Esp 213 (receipt which witness saw given when money was paid); *Burrough v Martin* (1809) 2 Camp 112 (log book examined by witness from time to time shortly after events in it were recorded). See also *Anderson v Whalley* (1852) 3 Car & Kir 54; *Burton v Plummer* (1834) 2 Ad & El 341 (entries copied daily from waste book to ledger and checked by the witness); *Lord Bolton v Tomlin* (1836) 5 Ad & El 856 (document assented to in witness's presence); *Smith v Morgan* (1839) 2 Mood & R 257 (deposition signed by witness after examination by bankruptcy commissioner), following *Vaughan v Martin* (1796) 1 Esp 440. See also *Wood v Cooper* (1845) 1 Car & Kir 645; *R v Mullins* (1848) 3 Cox CC 526 (reports dictated by witness and afterwards read over and signed by him); *Dyer v Best* (1866) LR 1 Exch 152 (witness who had read in newspaper shortly afterwards of event at which he had been present allowed to refresh his memory from newspaper as to date of event); *Hiscox v Batchelor* (1867) 15 LT 543; *R v Langton* (1876) 2 QBD 296 (time sheet used every week by witness in paying wages); *R v Dexter, Laidler and Coates* (1899) 19 Cox CC 360

(transcript of shorthand note made by clerk and afterwards read over to witness); *R v Bass* [1953] 1 QB 680, [1953] 1 All ER 1064, CCA (police notes of interview made after interview); *R v Mills* [1962] 3 All ER 298, [1962] 1 WLR 1152, CCA (notes made by police officer from tape recording of conversation which the officer heard); and *B v B* (1962) Times, 29 May. See also *R v Kelsey* (1981) 74 Cr App Rep 213, CA (contemporaneous note made by police officer at direction of witness; witness seeing note made and verifying accuracy when read out to him).

For cases in which the delay in making the document was held to be too long see *Anon* (1753) 3 Term Rep 752n; *Doe d Church and Phillips v Perkins* (1790) 3 Term Rep 749; *Jones v Stroud* (1825) 2 C & P 196 (six months too long); *Steinkeller v Newton* (1838) 9 C & P 313.

5 *Jacob v Lindsay* (1801) 1 East 460 (unstamped receipt); *Catt v Howard* (1820) 3 Stark 3; *Maugham v Hubbard* (1828) 8 B & C 14; *Lord Bolton v Tomlin* (1836) 5 Ad & El 856 (invalid lease); *Birchall v Bullough* [1896] 1 QB 325 (unstamped document).

6 *Catt v Howard* (1820) 3 Stark 3. It is uncertain whether this would be so if the document is not proved to have been made or checked by the witness while the facts were fresh in his memory.

7 It may be used if it was itself made while the facts were fresh in the witness's memory, and it is then used as an original: see eg *Burton v Plummer* (1834) 2 Ad & El 341.

8 *Tanner v Taylor* (1756) cited in 3 Term Rep 754; *Doe d Church and Phillips v Perkins* (1790) 3 Term Rep 749; *R v St Martins, Leicester, Inhabitants* (1834) 2 Ad & El 210; *Beech v Jones* (1848) 5 CB 696; *Alcock v Royal Exchange Assurance Co* (1849) 13 QB 292; *Lord Talbot De Malahide v Cusack* (1864) 12 LT 678; *R v Harvey* (1869) 11 Cox CC 546.

9 *Topham v M'Gregor* (1844) 1 Car & Kir 320 (witness allowed to refresh memory from newspaper, where editor gives evidence that the manuscript is lost, and that the printed paper is a true copy); cf *Alcock v Royal Exchange Assurance Co* (1849) 13 QB 292; *Doe d Church and Phillips v Perkins* (1790) 3 Term Rep 749 (copy shown to be imperfect); and see *R v St Martins, Leicester, Inhabitants* (1834) 2 Ad & El 210.

10 *R v Bryant, R v Dickson* (1946) 31 Cr App Rep 146, CCA; *Maugham v Hubbard* (1828) 8 B & C 14; *R v St Martins, Leicester, Inhabitants* (1834) 2 Ad & El 210; *Topham v M'Gregor* (1844) 1 Car & Kir 320.

11 See PARAS 791, 1036.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/B. EXAMINATION IN CHIEF/1040. Production of the document at the trial.

1040. Production of the document at the trial.

Where a witness uses a document in the witness box to refresh his memory, the document may be seen by the opposing party¹. Where a witness has used a document to refresh his memory before going into the witness box, it should be produced if he has no independent recollection of the facts, and it is customary, though not necessary, to produce it in all cases in order to make it available to the other party².

The other party may not see the document at all where the witness is unable to refresh his memory even with its assistance, or where it is used only for the purpose of enabling a witness to identify handwriting³, except for the purposes of examination as to the handwriting⁴.

This paragraph must be read in the light of the court's general discretionary power to control the evidence⁵.

1 See *Senat v Senat* [1965] P 172, [1965] 2 All ER 505. If only part of the document is used, then all of the document which is relevant to the facts in issue must be made available to the other party: *Loyd v Freshfield and Kaye* (1826) 2 C & P 325. Thus, documents should not be fastened in such a way that other parts, besides those referred to by the witness, cannot be read: *Betts v Betts and Brodrick* (1917) 33 TLR 200. See also *R v Sekhon* (1986) 85 Cr App Rep 19, CA.

For the circumstances in which a document used to refresh a witness's memory becomes evidence in the case see PARA 1041.

2 *Sinclair v Stevenson* (1824) 1 C & P 582; *Howard v Canfield* (1836) 5 Dowl 417; *Dupuy v Truman* (1843) 2 Y & C Ch Cas 341; *Beech v Jones* (1848) 5 CB 696. However, it is not customary to produce a proof of evidence which a witness has made on a previous occasion and from which he refreshes his memory before going into the witness box. Where a witness refreshes his memory from a notebook outside court, the opposing party may examine the notebook and cross-examine upon the relevant matters contained in it: *Owen v Edwards* (1983) 77 Cr App Rep 191, DC.

3 *Sinclair v Stevenson* (1824) 1 C & P 582; *Russell v Rider* (1834) 6 C & P 416.

4 *Holland v Reeves* (1835) 7 C & P 36; *R v Duncombe* (1838) 8 C & P 369; *Peck v Peck* (1870) 21 LT 670.

5 See PARAS 791, 1036.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/B. EXAMINATION IN CHIEF/1041. When the document becomes evidence.

1041. When the document becomes evidence.

When a document is used by a witness to refresh his memory, the other party may inspect that document in order to check it without making it evidence, and his counsel may use it for cross-examination without making it evidence, providing his cross-examination does not go further than the parts which the witness has used to refresh his memory¹. But if the other party goes further than those parts, or if he calls for and inspects a document in the possession of the other party which has not been used to refresh the memory of a witness, he is bound to put the document in evidence if required to do so².

When, in civil proceedings³, a document becomes evidence as a result of cross-examination going further than the part used for refreshing the memory of a witness, any statement⁴ made in that document or part by the person using the document to refresh his memory is admissible as hearsay evidence of any fact stated in it if it would otherwise be so admissible under the Civil Evidence Act 1995⁵.

1 *Senat v Senat* [1965] P 172, [1965] 2 All ER 505; *R v Ramsden* (1827) 2 C & P 603; *Gregory v Tavernor* (1833) 6 C & P 280; *Payne v Ibbotson* (1858) 27 LJ Ex 341. See also *R v Britton* [1987] 2 All ER 412, [1987] 1 WLR 539, CA.

2 *Senat v Senat* [1965] P 172, [1965] 2 All ER 505; *Wharam v Routledge* (1805) 5 Esp 235; *Wilson v Bowie* (1823) 1 C & P 8; *Palmer v Maclear and M'Grath* (1858) 1 Sw & Tr 149; *Stroud v Stroud* [1963] 3 All ER 539, [1963] 1 WLR 1080. It is not permissible to put only part of a document in evidence: *Loyd v Freshfield and Kaye* (1826) 2 C & P 325.

3 As to the meaning of 'civil proceedings' for these purposes see PARA 808 note 1.

4 As to the meaning of 'statement' for these purposes see PARA 808 note 3.

5 See the Civil Evidence Act 1995 s 6(4), (5); and PARA 810. The rule at common law is probably the same. Nothing in the Civil Evidence Act 1995 affects the rule of law, explained in this paragraph, concerning when a document used to refresh a witness's memory may be made evidence: see s 6(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/C. CROSS-EXAMINATION/1042. Time and scope of cross-examination.

C. CROSS-EXAMINATION

1042. Time and scope of cross-examination.

Under the Civil Procedure Rules the court¹ has a general discretionary power to limit cross-examination².

Where, at a hearing other than the trial, evidence is given in writing, any party may apply to the court for permission to cross-examine the person giving the evidence³. If the court gives such permission but the person in question does not attend as required by the order, his evidence may not be used unless the court gives permission⁴.

Where a witness is called to give evidence at trial, he may be cross-examined on his witness statement⁵ whether or not the statement or any party of it was referred to during the witness's evidence in chief⁶.

Any party may cross-examine any other party who gives evidence and his witnesses, and no evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination⁷. Cross-examination of a witness, unless postponed by leave or direction of the judge, follows immediately upon his examination in chief⁸. However, where a single joint expert has been appointed⁹, there is generally no need for that expert's evidence to be amplified by oral evidence or tested in cross-examination. The court may permit amplification or cross-examination where the need arises but any such cross-examination must be carried out with restraint¹⁰.

A witness, once sworn¹¹, is liable to be cross-examined, even though he has not given evidence or been asked any questions in chief¹², unless he has been called by mistake and not examined in consequence of the mistake being discovered¹³. Where, however, a witness is called and examined by the judge¹⁴, and not by either of the parties, he cannot be cross-examined save at the judge's discretion¹⁵. A defendant may cross-examine his co-defendant who gives evidence¹⁶ and any of his co-defendant's witnesses, provided the cross-examination is relevant to an issue in the case¹⁷.

This paragraph must be read in the light of the court's general discretionary power to control the evidence, including the power to limit cross-examination set out above¹⁸.

In criminal proceedings there are statutory restrictions on (1) cross-examination of the accused person as to his character¹⁹; (2) the right of an accused person to cross-examine a witness in person²⁰; and (3) the questions which may be asked in cross-examination of a complainant in the trial of a person accused of a sexual offence²¹. These matters are discussed elsewhere in this work²².

1 As to the meaning of 'court' see PARA 22.

2 See CPR 32.1(3); and PARA 791. As to the exercise of this discretion see eg *Watson v Chief Constable of Cleveland Police*[2001] EWCA Civ 1547, [2001] All ER (D) 193 (Oct). This power applies to claims allocated to the small claims track: CPR 27.2(1)(c). As to cases allocated to the small claims track see PARAS 267, 274 et seq. As to the application of the CPR see generally PARA 32. As to the meaning of 'cross-examination' see PARA 50 note 4.

It was held that under the former rules, there is no automatic right to cross-examine declarants in the Trade Marks Registry: see the Trade Marks Rules 2000, SI 2000/136, r 55(2) (revoked); and *Lombard Bank Ltd v Alliance & Leicester plc* [2001] All ER (D) 417 (Oct). Cf now the Trade Marks Rules 2008, SI 2008/1797, r 64(3).

3 CPR 32.7(1).

4 CPR 32.7(2).

5 As to the meaning of 'witness statement' see PARA 751 note 1.

6 See CPR 32.11; and PARA 983. As to the meaning of 'evidence in chief' see PARA 983 note 5.

7 *Allen v Allen*[1894] P 248, CA; *Lonnkvist v Lonnkvist* [1952] WN 88, DC; *Blaise v Blaise*[1969] P 54, [1969] 2 All ER 1032, CA; and see *Lord v Colvin* (1855) 3 Drew 222. As to the rules approved by the Bar Council in regard to cross-examination see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1213.

As to the duty of a magistrates' court to assist an unrepresented party in examination or cross-examination in family proceedings see the Magistrates' Courts Act 1980 s 73; *Fox v Fox*[1954] 3 All ER 526, [1954] 1 WLR 1472, DC; *Marjoram v Marjoram*[1955] 2 All ER 1, [1955] 1 WLR 520, DC; *Brewster v Brewster*[1971] 2 All ER 993, [1971] 1 WLR 1102, DC; and **MAGISTRATES**.

8 *Beaugh v Beaugh* (1830) 1 Hog 98.

9 As to single joint experts see PARA 847.

10 See *Austen v Oxfordshire County Council* [2002] All ER (D) 97 (Apr).

11 *Summers v Moseley* (1834) 3 LJ Ex 128 (witness only called to produce a document); *Perry v Gibson* (1834) 1 Ad & El 48; *Griffith v Lunell*, *Griffith v Ricketts* (1849) 19 LJ Ch 399. In proceedings for civil contempt the judge may in his discretion disallow cross-examination of the defendant: *Comet Products UK Ltd v Hawkey Plastics Ltd*[1971] 2 QB 67, [1971] 1 All ER 1141, CA; and see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 501. As to oaths and affirmations see PARA 1021 et seq.

12 *Phillips v Eamer* (1795) 1 Esp 355; *R v Brooke* (1819) 2 Stark 472; *Wood v Mackinson* (1840) 2 Mood & R 273.

13 *Clifford v Hunter* (1827) 3 C & P 16 (wrong witness called owing to a mistake in name); *Rush v Smith* (1834) 3 LJ Ex 355; *Wood v Mackinson* (1840) 2 Mood & R 273 (witness called by counsel's mistake); and see *Reed v James* (1815) 1 Stark 132.

14 See PARA 1046. As to the powers of the judge in a criminal trial see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

15 *Coulson v Disborough*[1894] 2 QB 316, CA. Where, however, a witness is recalled and asked a question by the judge the other party should be allowed to cross-examine on the point and to call rebutting evidence: *R v Howarth*(1918) 13 Cr App Rep 99, CCA. For the judge's power to recall a witness see PARA 1046.

16 *Lord v Colvin* (1855) 3 Drew 222; *Allen v Allen*[1894] P 248, CA; and see *Dryden v Surrey County Council and Stewart*[1936] 2 All ER 535.

17 The right to cross-examine exists even where the witness has not given evidence which the cross-examiner seeks to challenge (*Re Baden's Deed Trusts*, *Baden v Smith*[1967] 3 All ER 159, [1967] 1 WLR 1457; on final appeal sub nom *McPhail v Doulton*[1971] AC 424, [1970] 2 All ER 228, HL), but not in relation to cross-examination (cf *Re Dunhill*, ex p *Dunhill* (1894) 29 LJo 368). The principle in criminal cases is similar: *R v Hilton*[1972] 1 QB 421, [1971] 3 All ER 541, CA. See also *Re Wagstaff*, *Wagstaff v Jalland*[1907] 2 Ch 35 (on appeal [1908] 1 Ch 162, CA) (no cross-examination which is not relevant to an issue in which the cross-examiner has an interest); *Tedeschi v Singh*[1948] Ch 319 (a party cannot be cross-examined by his own counsel, even if he has given evidence for another party). As to the cross-examination of attesting witnesses see PARA 867 note 5.

18 See PARAS 791, 1036; and see the text and note 2.

19 See the Criminal Evidence Act 1898 s 1; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1502 et seq.

20 See the Youth Justice and Criminal Evidence Act 1999 ss 34-37; and see *H v L* [2006] EWHC 3099 (Fam), [2007] 1 FCR 430, [2007] 2 FLR 162 (equivalent statutory provision urgently needed in civil context).

21 See the Youth Justice and Criminal Evidence Act 1999 ss 41-43.

22 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE; MAGISTRATES.**

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/C. CROSS-EXAMINATION/1043. Purpose of cross-examination.

1043. Purpose of cross-examination.

Cross-examination is directed to (1) the credibility of the witness¹; (2) the facts to which he has deposed in chief, including the cross-examiner's version of them; and (3) the facts to which the witness has not deposed but to which the cross-examiner thinks he is able to depose². Where the court is to be asked to disbelieve a witness, the witness should be cross-examined³; and failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence⁴.

This paragraph must be read in the light of the court's general discretionary power to control the evidence, including its power to limit cross-examination⁵.

1 As to impeaching the credit of a witness see PARA 1047 et seq; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1433 et seq.

2 However, a party may be prevented from cross-examining as to facts which his own witnesses have not dealt with in their evidence: *R v Rice* [1963] 1 QB 857, [1963] 1 All ER 832, CCA. As to the duty of counsel in relation to the cross-examination of witnesses see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1213.

3 *Browne v Dunn* (1893) 6 R 67, HL. Defence counsel is under a duty to cross-examine a co-defendant if the veracity of his evidence is challenged: *R v Fenlon* (1980) 71 Cr App Rep 307, CA.

4 *Browne v Dunn* (1893) 6 R 67, HL; *R v Hart* (1932) 23 Cr App Rep 202, CCA. This rule is not strictly applied in magistrates' courts, where the parties or their representatives do not always appreciate the need to cross-examine: *O'Connell v Adams* [1973] RTR 150, DC.

5 See PARAS 791, 1036, 1042.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/C. CROSS-EXAMINATION/1044. Leading questions in cross-examination.

1044. Leading questions in cross-examination.

Leading questions¹ may be asked in cross-examination, and must be answered², although it is not permissible to mislead the witness by false assumptions or actual mis-statements³. Provided the questions are relevant to matters in issue⁴ they need not be confined to the subject matter of the evidence already given by the witness in chief⁵; and where one party has examined a witness in chief, who is afterwards called by another party as his own witness, he is nevertheless liable to be cross-examined by the party who first called him⁶.

This paragraph must be read in the light of the court's general discretionary power to control the evidence, including its power to limit cross-examination⁷.

1 As to leading questions generally see PARA 1037 text and note 8.

2 *Parkin v Moon* (1836) 7 C & P 408. It has been suggested that it is not permissible to put the actual words into the witness's mouth for him to repeat: *R v Hardy* (1794) 24 State Tr 199 at 755 per Buller J.

3 The court has a power to stop cross-examination which is vexatious or oppressive: see *Re Mundell, Fenton v Cumberlege* (1883) 48 LT 776; *Mechanical and General Inventions Co Ltd and Lehwess v Austin and Austin Motor Co Ltd* [1935] AC 346, HL; *Jones v National Coal Board* [1957] 2 QB 55, [1957] 2 All ER 155, CA; and see further **LEGAL PROFESSIONS** vol 66 (2009) PARA 1213.

4 *Haigh v Belcher* (1836) 7 C & P 389; *Tennant v Hamilton* (1839) 7 Cl & Fin 122, HL; *Lever & Co v Goodwin Bros* [1887] WN 107, CA. However, counsel may undertake to show by subsequent evidence that questions apparently irrelevant are not so in fact: *Haigh v Belcher* (1836) 7 C & P 389.

5 *Morgan v Brydges* (1818) 2 Stark 314; *Berwick upon Tweed Corp'n v Murray* (1850) 19 LJ Ch 281. But see *Re Woodfine, Thompson v Woodfine* (1878) 47 LJ Ch 832, where the defendant, who was counterclaiming, recalled the plaintiff as his own witness, and was directed not to cross-examine him on matters raised by the counterclaim.

6 *Lord v Colvin* (1855) 3 Drew 222. This is not so if the result would be that a party was able to be cross-examined by his own counsel: see *Tedeschi v Singh* [1948] Ch 319; and PARA 1042 note 15.

7 See PARAS 791, 1036, 1042.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/D. RE-EXAMINATION/1045. Scope of re-examination.

D. RE-EXAMINATION

1045. Scope of re-examination.

On the conclusion of his cross-examination a witness may be re-examined on behalf of the party for whom he has given evidence in chief, for the purpose of explaining any part of his evidence given during cross-examination which is capable of being construed unfavourably to his own side¹; but no questions may be asked in re-examination which introduce wholly new matters², except by leave of the court, which is given subject to cross-examination on the new matter. Where, however, questions asked in cross-examination let in evidence which would not have been admissible in chief, the witness may be re-examined upon it³. Leading questions are not permissible in re-examination⁴.

This paragraph must be read in the light of the court's general discretionary power to control the evidence⁵.

1 See *The Queen's Case* (1820) 2 Brod & Bing 284; *Dicas v Lord Brougham* (1833) 6 C & P 249; *R v St George* (1840) 9 C & P 483; *Dunn v Aslett* (1838) 2 Mood & R 122. As to re-establishing the credit of a witness in re-examination see PARA 1052.

2 *The Queen's Case* (1820) 2 Brod & Bing 284 (witness, cross-examined as to whether he had not stated that he was to be one of the witnesses for the prosecution, can only be asked what induced him to make the statement); *Dicas v Lord Brougham* (1833) 6 C & P 249 (witness, admitting in cross-examination a conversation with defendant, may be re-examined as to the whole of the conversation, but not if he denies that he had any such conversation at all); *Prince v Samo* (1838) 7 Ad & El 627 (if cross-examined as to a particular statement only, witness may not be re-examined on other statements in some conversation unconnected with the one spoken to). See also *Cartwright v W Richardson & Co Ltd* [1955] 1 All ER 742n, [1955] 1 WLR 340; *Harvey v Smith-Wood* [1964] 2 QB 171, [1963] 2 All ER 127.

3 *Blewett v Tregonning* (1835) 5 Nev & MKB 308; *Greville v Chapman* (1844) 5 QB 731. See also *Davies v DPP* [1954] AC 378, [1954] 1 All ER 507, HL.

4 *Ireland v Taylor* as reported in [1949] 1 KB 300, CA.

5 See PARAS 791, 1036.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/D. RE-EXAMINATION/1046. Judge's power to question or call witnesses.

1046. Judge's power to question or call witnesses.

The judge may ask a witness any question which he considers necessary¹. He may at any time recall a witness who has already given evidence to ask him further questions². Questions may be put by the jury to a witness³, but the usual practice is for questions suggested by the jury to be put by the judge. The parties themselves, except where they call evidence in rebuttal, may only recall a witness at the judge's discretion⁴.

Leave will be given to a party, even after his own case is closed, to call fresh evidence when he has been taken by surprise in the course of his opponent's conduct of his case⁵.

This paragraph must be read in the light of the court's general discretionary power to control the evidence⁶.

1 As to the limits of permissible judicial intervention see *R v Cain* (1936) 25 Cr App Rep 204, CCA; *Yuill v Yuill* [1945] P 15, [1945] 1 All ER 183, CA; *R v Bateman* (1946) 31 Cr App Rep 106, CCA; *Harris v Harris* (1952) Times, 9 April, CA; *Jones v National Coal Board* [1957] 2 QB 55, [1957] 2 All ER 155, CA; *Vernon v Bosley* [1994] PIQR P337, CA. As to the caution to be exercised in applying pre-CPR authorities with regard to civil proceedings see PARA 33 text and note 2.

2 *R v Remnant* (1807) Russ & Ry 136; *R v Watson* (1834) 6 C & P 653; *Middleton v Bamed* (1849) 4 Exch 241; *R v Sullivan* [1923] 1 KB 47, CCA; *Fallon v Calvert* [1960] 2 QB 201, [1960] 1 All ER 281, CA; *South Eastern Gas Board v Cooper* (1968) 112 Sol Jo 803, CA. As to cross-examination by the parties of a witness recalled by the judge see PARA 1042 note 15.

3 *R v Lillyman* [1896] 2 QB 167, CCR; and see **JURIES** vol 61 (2010) PARA 801 et seq. As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

4 *Cattlin v Barker* (1847) 5 CB 201; *Adams v Bankart* (1835) 1 Cr M & R 681; *R v Morrison* (1911) 75 JP 272, CCA (for the defence during the final speech for the prosecution); *Bristol Corp v Great Western Rly Co and Midland Rly Co* [1916] WN 47 (on appeal sub nom *Great Western Rly and Midland Rly v Bristol Corp* (1918) 87 LJ Ch 414, HL) (not after judgment on a question of costs); *Burgess v Burgess* [1958] 2 All ER 63n, [1958] 1 WLR 608. See further PARA 774.

5 *Bigsby v Dickinson* (1876) 4 ChD 24, CA. The claimant will not usually be allowed to call the defendant as a witness after the defence case is closed, unless there has been a representation that the defendant would be called to support his own case: *Barker v Furlong* [1891] 2 Ch 172. See also *Nellins v Chief Constable of the Royal Ulster Constabulary* [1998] NI 1.

6 See PARAS 791, 1036.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/E. IMPEACHING THE CREDIT OF WITNESSES/1047. Contradicting own unfavourable witness.

E. IMPEACHING THE CREDIT OF WITNESSES

1047. Contradicting own unfavourable witness.

In certain circumstances a party is permitted to contradict a witness whom he himself has called¹, but he is not allowed to impeach the credit of such a witness by general evidence of bad character².

Where a witness gives unfavourable evidence the party calling him may adduce other evidence of the facts in question, not consistent with the unfavourable evidence³, including, in civil cases (subject to certain conditions), the evidence of a statement made by that witness on another occasion⁴. Where a party contradicts his witness by other evidence he does not thereby destroy that witness's evidence; it is a matter for the judge or jury⁵ to decide where the truth lies⁶.

The course to be taken in the case of a witness who is declared hostile is discussed below⁷.

This paragraph must be read in the light of the court's general discretionary power to control the evidence⁸.

1 A witness called in pursuance of law, such as an attesting witness to a will, may be cross-examined by the party calling him: see PARA 867 note 5. As to a debtor in bankruptcy proceedings see *Re A Debtor, Jacobs v Lloyd* [1944] Ch 344, [1944] 1 All ER 597; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 299.

2 Criminal Procedure Act 1865 s 3, which applies both to criminal and civil proceedings: see PARA 1048 note 2.

3 The wording of the Criminal Procedure Act 1865 s 3 might suggest that leave of the judge is first necessary, but it is not: see *Greenough v Eccles* (1859) 5 CBNS 786, decided on the similar wording of the Common Law Procedure Act 1854 s 22 (repealed). See, however, the text and note 8.

4 Civil Evidence Act 1995 ss 1, 6(3). For the conditions see ss 2-4; and PARAS 811-815.

5 As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

6 See *Ewer v Ambrose* (1825) 3 B & C 746; *Bradley v Ricardo* (1831) 8 Bing 57. For a different view of the effect of contradictory evidence see *Sumner and Leivesley v John Brown & Co* (1909) 25 TLR 745 (disapproved in *Cariboo Observer Ltd v Carson Truck Lines and Tyrell* (1961) 32 DLR (2d) 36 (BC CA); and *R v Brent* [1973] Crim LR 295, CA (prosecution in a criminal case has duty to present all evidence fairly, even if inconsistent).

7 See PARA 1048.

8 See PARAS 791, 1036.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/E. IMPEACHING THE CREDIT OF WITNESSES/1048. Contradicting own hostile witness.

1048. Contradicting own hostile witness.

If a witness whom a party has called proves hostile¹ the witness may be contradicted by other evidence, and the party calling him may, with the leave of the judge, prove that he has, at some other time, made a statement inconsistent with his present testimony². Before proof is given of an inconsistent statement the circumstances of the alleged statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must then be asked whether or not he made the statement³.

An adverse witness is one who shows a mind hostile to the party calling him⁴ and, by his manner of giving evidence, shows that he is not desirous of telling the truth⁵. Whether he shows himself to be so hostile as to justify his cross-examination⁶ by the party calling him is a matter for the discretion of the judge⁷, the exercise of which will rarely be interfered with by a higher court⁸. This is so even where a party calls a witness who must of necessity wish to be unfavourable to him, for example, his opponent in the case⁹.

In a criminal case where a previous inconsistent statement by a hostile witness is proved, that statement does not become evidence of the facts stated in it¹⁰, but in a civil case it may¹¹.

1 The word used in the Criminal Procedure Act 1865 s 3 is 'adverse', but see *Greenough v Eccles* (1859) 5 CBNS 786. As to the meaning that has been ascribed to 'adverse' see the text and note 4.

2 Criminal Procedure Act 1865 s 3. This applies both to criminal and to civil proceedings: see s 1 (amended by the Statute Law Revision Act 1893; the Criminal Law Act 1967 s 10(2), Sch 3 Pt III; and the Criminal Law Act (Northern Ireland) 1967 s 15(2), Sch 2).

3 Criminal Procedure Act 1865 s 3.

4 *Greenough v Eccles* (1859) 5 CBNS 786 (he is not 'adverse' when his evidence is merely unfavourable to the party calling him); and see *R v Williams* (1913) 29 TLR 188, CCA.

5 *Coles v Coles and Brown* (1866) LR 1 P & D 70. See also *Parkin v Moon* (1836) 7 C & P 408; *R v Ball* (1839) 8 C & P 745; *R v Murphy and Douglas* (1837) 8 C & P 297; *Dear v Knight* (1859) 1 F & F 433. A witness who is genuinely forgetful cannot be treated as hostile: *R v Manning* (1968) 112 Sol Jo 745, CA.

6 As to cross-examination of attesting witnesses see PARA 867; and as to that of opposing witnesses see PARA 1042.

7 *Greenough v Eccles* (1859) 5 CBNS 786; *Ohlsen v Terrero* (1874) 10 Ch App 127; *Rice v Howard* (1886) 16 QBD 681, DC; *Price v Manning* (1889) 42 ChD 372, CA; *R v Williams* (1913) 29 TLR 188, CCA.

8 *R v Manning* (1968) 112 Sol Jo 745, CA.

9 *Price v Manning* (1889) 42 ChD 372, CA; cf *Tedeschi v Singh* [1948] Ch 319. Where a witness gave evidence contradicting his proof he was treated as hostile: *Amstell v Alexander* (1867) 16 LT 830; cf *Reed v King* (1858) 30 LTOS 290; and see *Pound (Assignee of Dod) v Wilson* (1865) 4 F & F 301; *Jackson v Thomason* (1861) 31 LJQB 11, differently reported in 1 B & S 745. Cf the court's general discretionary power to control the evidence: see PARAS 791, 1036.

10 The statement is admissible only to destroy the evidence given by the witness at the trial: *R v White* (1922) 17 Cr App Rep 60, CCA; *R v Birch* (1924) 18 Cr App Rep 26; *R v Harris* (1927) 20 Cr App Rep 144; *R v Golder* [1960] 3 All ER 457, [1960] 1 WLR 1169, CCA.

11 See the Civil Evidence Act 1995 s 6(5); and PARA 810.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/E. IMPEACHING THE CREDIT OF WITNESSES/1049. Previous convictions and inconsistent statements of opponent's witness.

1049. Previous convictions and inconsistent statements of opponent's witness.

A witness may be asked whether he has been convicted¹. If he denies or does not admit the fact, the conviction may be proved, and in civil proceedings a certificate signed by the proper officer² of the court where the conviction took place is sufficient evidence of the conviction, provided evidence of identity is also given³.

A witness may be asked in cross-examination whether he has previously made a statement inconsistent with his present evidence, and if he does not distinctly admit that he made such a statement, proof may be given that he did in fact make it; but the circumstances of the alleged statement, sufficient to designate the particular occasion, must first be put to the witness⁴.

A witness may also be cross-examined as to a previous statement made by him in writing, without the writing being shown to him⁵; but if it is intended to contradict him by such writing, his attention must first be called to those parts of the writing which are to be used for that purpose⁶, and the judge may at any time during the trial require production of the writing for his own inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit⁷. According to early authorities, if the writing is not in the possession of the party cross-examining, he may interpose evidence out of turn, either to prove it or to give secondary evidence of it⁸; these must now be read in the light of the court's general discretionary power to control the evidence⁹.

In criminal cases a previous inconsistent statement when proved is not evidence of the facts stated in it. It may be used only for the purpose of discrediting the witness¹⁰. The rule is different in civil cases¹¹.

The admissibility of evidence affecting the credibility of a person not called as a witness, but whose statement is admitted as hearsay evidence subject to the statutory safeguards¹² is discussed elsewhere in this title¹³.

1 Criminal Procedure Act 1865 s 6(1) (numbered as such and amended, and s 6(2) added, by the Access to Justice Act 1999 s 90(1), Sch 13 para 3(1)-(3); the Criminal Procedure Act 1865 s 6(1) further amended by the Criminal Justice Act 2003 ss 331, 332, Sch 36 Pt 5 para 79, Sch 37 Pt 5), which applies in civil proceedings: see PARA 1048 note 2. An accused person in criminal proceedings is normally protected from such a question: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1502 et seq. Further restrictions on questions about and evidence to prove certain previous convictions are imposed by the Rehabilitation of Offenders Act 1974: see PARA 1210; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 660.

It is not clear how far one party has a duty to disclose his witness's previous convictions to his opponent, but if the effect of not making such a disclosure might be misleading it should be made: see *Tombling v Universal Bulb Co Ltd* [1951] 2 TLR 289, CA; *Meek v Fleming* [1961] 2 QB 366, [1961] 3 All ER 148, CA.

2 For these purposes, 'proper officer' means (1) in relation to a magistrates' court in England and Wales, the justices' chief executive of the court; and (2) in relation to any other court, the clerk of the court or other officer having the custody of the records of the court, or the deputy of such clerk or other officer: Criminal Procedure Act 1865 s 6(2) (as added: see note 1).

3 Criminal Procedure Act 1865 s 6(1) (as so numbered and as amended (see note 1); repealed in relation to criminal proceedings by the Police and Criminal Evidence Act 1984 s 119(2), (3), Sch 7 Pt IV). As to proof of convictions for the purposes of criminal proceeding see **CRIMINAL LAW, EVIDENCE AND PROCEDURE; MAGISTRATES**.

4 Criminal Procedure Act 1865 s 4, which applies to criminal and to civil proceedings: see PARA 1048 note 2. See also *R v Funderburk* [1990] 2 All ER 482, [1990] 1 WLR 587, CA; *R v O'Boyle* (1991) 92 Cr App Rep 202, [1991] Crim LR 67, CA.

5 He cannot demand to see it first: *North Australian Territory Co Ltd v Goldsborough, Mort & Co Ltd* [1893] 2 Ch 381, CA. Where, on cross-examination by defending counsel, a witness for the plaintiff (now known as the 'claimant' see PARA 18) admitted having given a signed statement to the defendants and was asked questions concerning parts of it, it was held that the plaintiff's counsel had the right to call for the whole of the statement to be put in evidence, privilege having been thereby waived in respect of the whole of the statement: *Burnell v British Transport Commission* [1956] 1 QB 187, [1955] 3 All ER 822, CA; cf PARA 1041 the text and note 2. As to waiver of privilege in general see PARA 970 the text and note 4; and PARA 571.

6 Criminal Procedure Act 1865 s 5, which applies to criminal and to civil proceedings: see PARA 1048 note 2. See *R v Younsy* (1914) 11 Cr App Rep 13.

7 Criminal Procedure Act 1865 s 5 proviso; and see *Farrow v Blomfield* (1859) 1 F & F 653. There is authority to the effect that the Criminal Procedure Act 1865 ss 4, 5 do not distinguish between oral and written statements. Although s 5 clearly refers only to written statements, s 4 covers both oral and written statements. Section 4 allows proof that a previous inconsistent statement was made if that is not distinctly admitted; s 5 additionally permits (1) cross-examination of a witness as to a previous inconsistent written statement without showing him the statement; and (2) contradiction of the witness's testimony by putting the previous statement to him. If he denies making it, the statement can be proved under s 4. Even if he admits making the statement but adheres to evidence inconsistent with it, the statement, or such part of it as the judge thinks proper, may be put before the jury under s 5: see *R v Derby Magistrates' Court, ex p B* [1996] AC 487, [1995] 4 All ER 526, HL.

8 *Calvert v Flower* (1836) 7 C & P 386; *A-G v Bond* (1839) 9 C & P 189; *Davies v Davies* (1840) 9 C & P 252; *R v Shellard* (1840) 9 C & P 277.

9 See PARAS 791, 1036.

10 *North Australian Territory Co Ltd v Goldsborough, Mort & Co Ltd* [1893] 2 Ch 381, CA; *R v Golder* [1960] 3 All ER 457, [1960] 1 WLR 1169, CCA; *R v Oliva* [1965] 3 All ER 116, [1965] 1 WLR 1028, CCA; *R v O'Neill* [1969] Crim LR 260, CA; and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

11 Such a statement may be admitted as hearsay evidence of the facts contained in it, subject to the statutory safeguards: see the Civil Evidence Act 1995 s 6(1), (3); and PARA 810.

12 It is admitted in evidence subject to the Civil Evidence Act 1995 ss 1-4: see PARA 808 et seq.

13 See the Civil Evidence Act 1995 s 5(2); and PARA 809.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/E. IMPEACHING THE CREDIT OF WITNESSES/1050. Finality of answers of opponent's witness.

1050. Finality of answers of opponent's witness.

In the course of cross-examination¹ a witness may be asked any question tending to impeach his character or credit, but unless such questions are also relevant to the matters in issue the witness's answers are conclusive and cannot be contradicted by other evidence². The exceptions to this general rule are discussed below³. It is often a matter of some difficulty to decide whether a question relating to a witness's character is also relevant to an issue⁴.

There are other limits, which must be determined by the judge's discretion, to the questions which may be asked affecting the witness's credit. Thus a question as to a witness's religious belief has been held not to be admissible to impeach credit, although asked with that object⁵.

This paragraph must be read in the light of the court's general discretionary power to control the evidence⁶.

¹ As to cross-examination generally see PARA 1042. As to evidence of character and credibility of witnesses in criminal cases see **CRIMINAL LAW, EVIDENCE AND PROCEDURE; MAGISTRATES**.

² *Spenceley v De Willott* (1806) 7 East 108; *Harris v Tippett* (1811) 2 Camp 637; *R v Yewin* (1811) 2 Camp 638n; *R v Watson* (1817) 2 Stark 116; *Tennant v Hamilton* (1839) 7 Cl & Fin 122, HL; *A-G v Hitchcock* (1847) 1 Exch 91; *Alcock v Royal Exchange Assurance Co* (1849) 13 QB 292; *Palmer v Trower* (1852) 22 LJ Ex 32; *Goddard v Parr* (1855) 24 LJ Ch 783; *R v Burke* (1858) 8 Cox CC 44; *Tolman v Johnstone* (1860) 2 F & F 66; *Baker v Baker* (1863) 32 LJPM & A 145; *Re Haggelmacher's Patents* [1898] 2 Ch 280; *R v Cargill* [1913] 2 KB 271, CCA; *Hobbs v CT Tinling & Co Ltd* [1929] 2 KB 1, CA.

³ See PARA 1051. See also **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

⁴ Thus, on a charge of rape, it has been held that the complainant may be contradicted if she denies previous connection with the defendant, for that may be material to consent (*R v Martin* (1834) 6 C & P 562; *R v Holmes* (1871) LR 1 CCR 334; and see *R v Riley* (1887) 18 QBD 481); but that her answer is conclusive if she denies connection with other men, for then the question only goes to her character and credit (*R v Hodgson* (1812) Russ & Ry 211; *R v Holmes* (1871) LR 1 CCR 334). However, the complainant in a case of rape or other sexual offence may not now be questioned at all about her sexual behaviour except with leave of the court and subject to certain statutory conditions: see the Youth Justice and Criminal Evidence Act 1999 ss 41-43; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1446-1447.

⁵ *Darby v Ouseley* (1856) 1 H & N 1; and see *R v Bernard* (1858) 1 F & F 240; *Seaman v Netherclift* (1876) 2 CPD 53, CA.

⁶ See PARAS 791, 1036. As to the exercise of this discretion see eg *Great Future International Ltd v Sealand Housing Corpn* [2002] EWCA Civ 1183, [2002] All ER (D) 391 (Jul) (where the defendants' case was in part based on allegations of bad faith on the part of the claimants, the judge was wrong not to permit the examination and cross-examination of witnesses by the defendants relating to an allegation that a claimant had authorised an individual to approach one of the defendants' witnesses in an improper manner).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/E. IMPEACHING THE CREDIT OF WITNESSES/1051. Calling evidence to discredit opponent's witness.

1051. Calling evidence to discredit opponent's witness.

In addition to the right to prove the convictions and previous inconsistent statements of an opponent's witness¹, there are the following exceptions to the general rule that a witness's answers in cross-examination as to credit are final:

- 173 (1) evidence may be given to contradict a witness who denies the truth of questions tending to show that he is not impartial, or that for some other reason he has a bias in favour of, or against, one of the parties²;
- 174 (2) evidence may be given of a witness's general reputation³ for untruthfulness, and the person giving such evidence may be asked whether in his opinion the witness is to be believed on oath⁴, although he is not permitted to give evidence of particular facts and circumstances upon which his opinion, or the general reputation of the witness, has been formed⁵; however, evidence intended to impeach the credit of a witness should be given by somebody acquainted with him, and not by a stranger sent to make inquiries about him⁶;
- 175 (3) medical evidence is admissible to show that a witness suffers from some disease or defect or abnormality of mind which affects the reliability of his evidence⁷.

This paragraph must be read in the light of the court's general discretionary power to control the evidence⁸.

1 See PARA 1049.

2 *R v Yewin* (1811) 2 Camp 638n; *The Queen's Case* (1820) 2 Brod & Bing 284 (witness suborned); *Thomas v David* (1836) 7 C & P 350 (witness the mistress of party calling her); *R v Shaw* (1888) 16 Cox CC 503 (hostility between witness and other party); *R v Phillips* (1936) 26 Cr App Rep 17, CCA (witness 'schooled'); *R v Denley* [1970] Crim LR 583 (offer by witness to make false allegations); and see *A-G v Hitchcock* (1847) 1 Exch 91.

3 As to the admissibility in civil proceedings of evidence of reputation see PARA 827 et seq.

4 *R v Richardson, R v Longman* [1969] 1 QB 299, [1968] 2 All ER 761, CA; *R v Brown and Hedley* (1867) LR 1 CCR 70; *Stebbins v London and North Western Rly Co* (1899) 63 JP Jo 138; *R v Gunewardene* [1951] 2 KB 600, [1951] 2 All ER 290, CCA; and see *Toohey v Metropolitan Police Comr* [1965] AC 595, [1965] 1 All ER 506, HL (overruling in part *R v Gunewardene* [1951] 2 KB 600, [1951] 2 All ER 290, CCA); cf *R v Rowton* (1865) Le & Ca 520.

5 He may, however, be asked about particular incidents in cross-examination: *R v Gunewardene* [1951] 2 KB 600, [1951] 2 All ER 290, CCA; *R v Richardson, R v Longman* [1969] 1 QB 299, [1968] 2 All ER 761, CA. The character of a witness who is called to impeach that of another might be impeached, but the process might not be carried further: *Five Popish Lords' Case* (1680) 7 State Tr 1217; *R v Murphy* (1753) 19 State Tr 693; *R v Whelan* (1881) 14 Cox CC 595; *R v Richardson, R v Longman* [1969] 1 QB 299, [1968] 2 All ER 761, CA.

6 *Mawson v Hartsink* (1803) 4 Esp 102; *R v Richardson, R v Longman* [1969] 1 QB 299, [1968] 2 All ER 761, CA.

7 *Toohey v Metropolitan Police Comr* [1965] AC 595, [1965] 1 All ER 506, HL; overruling in part *R v Gunewardene* [1951] 2 KB 600, [1951] 2 All ER 290, CCA. Such evidence is not confined to a general opinion of the unreliability of the witness, but may include all the matters necessary to show not only the reason for and foundation of the diagnosis, but also the extent to which the credibility of the witness is affected: *Toohey v Metropolitan Police Comr* [1965] AC 595, [1965] 1 All ER 506, HL; and see *R v Eades* [1972] Crim LR 99; *Lowery*

v R [1974] AC 85, [1973] 3 All ER 662, PC; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1445. However, in the absence of mental illness, there is no general rule that psychiatric evidence is admissible to show that a witness is likely to be telling the truth: see *R v Turner* [1975] QB 834, [1975] 1 All ER 70, CA.

8 See PARAS 791, 1036.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/E. IMPEACHING THE CREDIT OF WITNESSES/1052. Re-establishing credit of witness.

1052. Re-establishing credit of witness.

General evidence of good character and reputation is admissible subsequent to the cross-examination of a witness where his character or credit has been impugned¹, but does not become admissible if the cross-examination goes no further than to show that the witnesses contradict each other². Where, however, it has been suggested in cross-examination that the witness's evidence is a recent invention³, he may be asked, and evidence may be given to prove⁴, when he first made the impugned statement⁵.

This paragraph must be read in the light of the court's general discretionary power to control the evidence⁶.

1 *Annesley v Earl of Anglesea* (1743) 17 State Tr 1139; *Doe d Walker v Stephenson* (1801) 3 Esp 284; *Bishop of Durham v Beaumont* (1808) 1 Camp 207; *R v Clarke* (1817) 2 Stark 241. As to the admissibility of evidence of reputation in civil cases see PARA 827 et seq.

2 *Bishop of Durham v Beaumont* (1808) 1 Camp 207. Evidence of good general reputation may not be led to rebut an allegation of a particular instance of bad behaviour: *R v Wood* [1951] 2 All ER 112n.

3 It is not sufficient that the whole of the witness's evidence has merely been attacked in cross-examination: *Fox v General Medical Council* [1960] 3 All ER 225, [1960] 1 WLR 1017, PC; *Flanagan v Fahy* [1918] 2 IR 361.

4 Such statements when proved may be admissible as hearsay evidence of the matters contained in them, subject to the statutory safeguards: see the Civil Evidence Act 1995 ss 1-4, 6(1); and PARA 808 et seq.

5 *R v Coll* (1889) 24 LR Ir 522, CCR; *R v Benjamin* (1913) 8 Cr App Rep 146, CCA; *O'Gorman v O'Gorman* (1912) 56 Sol Jo 634; *Flanagan v Fahy* [1918] 2 IR 361; *R v Roberts* [1942] 1 All ER 187; *Ahmed v Brumfitt* (1967) 112 Sol Jo 32, CA; and see *Fox v General Medical Council* [1960] 3 All ER 225, [1960] 1 WLR 1017, PC. As to previous consistent statements generally see PARA 1038.

6 See PARAS 791, 1036.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/F. PARTICULAR CARE REQUIRED IN CASE OF CERTAIN WITNESSES/1053. No requirement for corroboration in civil cases.

F. PARTICULAR CARE REQUIRED IN CASE OF CERTAIN WITNESSES

1053. No requirement for corroboration in civil cases.

In general, a court may act on the evidence of a single witness, or a single document properly proved¹, both in civil and criminal proceedings². There are no circumstances in which such evidence requires corroboration in civil proceedings. The limited circumstances in which a criminal court cannot convict an accused person of speeding³, perjury⁴ or an attempt to commit such an offence⁵ without corroboration are discussed elsewhere in this work⁶. The corroborating evidence must be independent; thus the previous statement of a witness cannot corroborate his sworn evidence⁷.

1 As to proof of documents and their contents see PARA 864 et seq.

2 *DPP v Kilbourne*[1973] AC 729, [1973] 1 All ER 440, HL; and see *Wright v Tatham* (1838) 5 Cl & Fin 670; *Davis v Hardy* (1827) 6 B & C 225; *Morrow v Morrow*[1914] 2 IR 183.

3 See the Road Traffic Regulation Act 1984 s 89(2); and **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 856.

4 See the Perjury Act 1911 s 13; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 723.

5 See the Criminal Attempts Act 1981 s 2(2)(g); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 79.

6 See notes 3-5.

7 *R v Christie*[1914] AC 545, HL; *R v Evans*(1924) 18 Cr App Rep 123, CCA; *R v Whitehead*[1929] 1 KB 99, CCA; cf *Milne v Leisler* (1862) 7 H & N 786; *R v Fowkes*(1856) Times, 8 March (statements part of res gestae); *O'Gorman v O'Gorman* (1912) 56 Sol Jo 634; *Stephenson v River Tyne Improvement Comrs* (1869) 17 WR 590. 'Corroboration' has no technical legal meaning; however, 'corroborative evidence' is that which strengthens or supports other evidence: *DPP v Hester*[1973] AC 296, [1972] 3 All ER 1056, HL; *DPP v Kilbourne*[1973] AC 729, [1973] 1 All ER 440, HL; *R v O'Reilly*[1967] 2 QB 722, [1967] 2 All ER 766, CA; and see *R v Baskerville*[1916] 2 KB 658, CCA; *Thomas v Jones*[1921] 1 KB 22, CA; *Fromhold v Fromhold* [1952] 1 TLR 1522, CA (corroboration in matrimonial cases).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(7) WITNESSES/(ix) Oral Examination of Witnesses at or prior to Trial/F. PARTICULAR CARE REQUIRED IN CASE OF CERTAIN WITNESSES/1054. Corroboration of the evidence of certain witnesses desirable in practice.

1054. Corroboration of the evidence of certain witnesses desirable in practice.

Although there is no requirement of corroboration in civil cases, evidence will always carry more weight if it is corroborated¹. This may be particularly true in cases of claims against a deceased person's estate² and in certain matrimonial cases, particularly where sexual misconduct is alleged³. A high standard of proof is required in cases where serious allegations, such as allegations of child abuse, are made⁴.

In criminal cases, the previous requirements that the jury should be warned about the dangers of convicting the accused on the uncorroborated evidence of (1) an alleged accomplice of the accused; or (2) the complainant, where the offence charged was a sexual offence, were abrogated by the Criminal Justice and Public Order Act 1994⁵.

It has been held that the principles concerning the need for caution in relying solely on identification evidence in the criminal justice system⁶ apply equally to public law proceedings involving children⁷.

¹ As to the weight of evidence generally see PARAS 766-768. As to what constitutes corroboration see PARA 1053 note 7.

² See *Rawlinson v Scholes* (1898) 79 LT 350, DC; and **EXECUTORS AND ADMINISTRATORS**; cf *Re Cummins, Cummins v Thompson* [1972] Ch 62, [1971] 3 All ER 782, CA (claim under the Married Women's Property Act 1882). See also *Re Farrow's Estate* (1856) 22 Beav 400; cf *Gill v Gill* 1907 SC 532; and *Forrest v Forrest* (1865) 5 New Rep 299 (uncorroborated evidence of alleged admission by testator); *Kinleside v Harrison* (1818) 2 Phillim 449 (sanity of testator impeached); and see **WILLS** vol 50 (2005 Reissue) PARA 481 et seq.

³ See *Alli v Alli* [1965] 3 All ER 480, DC; and see generally **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 213.

⁴ See *Re H and R (minors) (sexual abuse: standard of proof)* [1996] AC 563, [1996] 1 All ER 1, HL; and see generally PARA 775.

⁵ See the Criminal Justice and Public Order Act 1994 s 32(1). Any corresponding requirement applicable to the summary trial of a person for an offence was likewise abrogated: see s 32(3).

⁶ See *R v Turnbull* [1977] QB 224, [1976] 3 All ER 549, CA; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1458.

⁷ See *Re W (children) (family proceedings: evidence)* [2002] EWCA Civ 1626, [2003] 1 FLR 329, [2002] All ER (D) 81 (Oct).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(8) EVIDENCE FOR USE IN FOREIGN PROCEEDINGS/1055. Cases in which assistance may be given.

(8) EVIDENCE FOR USE IN FOREIGN PROCEEDINGS

1055. Cases in which assistance may be given.

Facilities are afforded by the Evidence (Proceedings in Other Jurisdictions) Act 1975¹ enabling the High Court, the Court of Session or the High Court of Justice in Northern Ireland to order evidence to be obtained² in the part of the United Kingdom³ in which it exercises jurisdiction where it is satisfied, on application made to it, (1) that the application is made in pursuance of a request⁴ issued by or on behalf of a court or tribunal (the 'requesting court'), exercising jurisdiction in any other part of the United Kingdom, in any country or territory outside the United Kingdom⁵, or in any court exercising jurisdiction in any international proceedings to which the statutory provisions are applied⁶; and (2) that the evidence concerned is to be obtained for the purposes of civil proceedings⁷ which either have been instituted before the requesting court⁸ or whose institution before that court is contemplated⁹.

The provisions may be extended by Order in Council to any of the Channel Islands, the Isle of Man, any colony other than one for whose external relations a country other than the United Kingdom is responsible, or any country or territory outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of her United Kingdom government¹⁰.

The statutory provision which has been made for the obtaining of evidence to be used for criminal proceedings in other jurisdictions is dealt with elsewhere in this work¹¹, as is the provision made for the obtaining of evidence pursuant to a request from a court in a reciprocating country under the Maintenance Orders (Reciprocal Enforcement) Act 1972¹².

¹ See the Evidence (Proceedings in Other Jurisdictions) Act 1975, which came into force on 4 May 1976: Evidence (Proceedings in Other Jurisdictions) Act 1975 (Commencement) Order 1976, SI 1976/429.

² See PARA 1058.

³ As to the meaning of 'United Kingdom' see PARA 221 note 2.

⁴ 'Request' includes any commission, order or other process issued by or on behalf of the requesting court: Evidence (Proceedings in Other Jurisdictions) Act 1975 s 9(1).

⁵ Evidence (Proceedings in Other Jurisdictions) Act 1975 s 1(a). For these purposes, 'tribunal' does not include a private tribunal: *Commerce and Industry Insurance Co of Canada v Certain Underwriters at Lloyd's of London* [2002] 2 All ER (Comm) 204, [2002] 1 WLR 1323.

⁶ Her Majesty may by Order in Council direct that, subject to such exceptions, adaptations or modifications as may be specified in the order, the Evidence (Proceedings in Other Jurisdictions) Act 1975 ss 1-3 are to have effect in relation to international proceedings of any description specified in the order (s 6(1)); and such an order may direct that the Perjury Act 1911 s 1(4) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 714) or the Perjury (Northern Ireland) Order 1979, SI 1979/1714, art 3(4) is to have effect in relation to the relevant international proceedings as it has effect in relation to a judicial proceeding in a tribunal of a foreign state (Evidence (Proceedings in Other Jurisdictions) Act 1975 s 6(2) (amended by SI 1979/1714). 'International proceedings' means proceedings before the International Court of Justice or any other court, tribunal, commission, body or authority (whether consisting of one or more persons) which, in pursuance of any international agreement or any resolution of the United Nations General Assembly, exercises any jurisdiction or performs any functions of a judicial nature or by way of arbitration, conciliation or inquiry, or is appointed, temporarily or permanently, for the purpose of exercising any jurisdiction or performing any such functions: Evidence (Proceedings in Other Jurisdictions) Act 1975 s 6(3). The power to make such an Order in Council includes power to revoke or vary it by a subsequent such Order: s 9(3).

The Evidence (European Court) Order 1976, SI 1976/428, made under this power, applies the Evidence (Proceedings in Other Jurisdictions) Act 1975 ss 1-3 to the Court of Justice of the European Communities ('ECJ') (Evidence (European Court) Order 1976, SI 1976/428, art 2) and provides that the Perjury Act 1911 s 1(4) has appropriate effect in relation to the court's proceedings (Evidence (European Court) Order 1976, SI 1976/428, art 3). As to the ECJ see further PARA 1087.

The Evidence (Proceedings in Other Jurisdictions) (Guernsey) Order 1980, SI 1980/1956, art 4, Sch 2 and the Evidence (Proceedings in Other Jurisdictions) (Isle of Man) Order 1979, SI 1979/1711, art 3, Sch 1 apply the Evidence (European Court) Order 1976, SI 1976/428, to the Bailiwick of Guernsey and to the Isle of Man respectively, subject to specified exceptions, modifications and adaptations.

7 'Civil proceedings', in relation to the requesting court, means proceedings in any civil or commercial matter: Evidence (Proceedings in Other Jurisdictions) Act 1975 s 9(1). The question whether proceedings are a 'civil or commercial matter' depends on the classification of those proceedings according to the law of the requesting court and the law of the court to which the request is made (ie English law), since the classification cannot be made by reference to any internationally acceptable classification: see *Re State of Norway's Applications (Nos 1 and 2)* [1990] 1 AC 723, [1989] 1 All ER 745, HL. See also *Re Gross, ex p Treasury Solicitor* [1968] 3 All ER 804, sub nom *Re Extradition Act 1870, ex p Treasury Solicitor* [1969] 1 WLR 12 at 15 ('civil or commercial matter' is a wide general term covering all kinds of suits, petitions, summonses, applications for orders and so forth, of which courts are competent to take cognisance). The words 'civil proceedings' in the phrase 'evidence . . . to be obtained for the purposes of civil proceedings' include all the procedural steps taken in the course of the proceedings from their institution up to and including their completion and if the procedural system of the requesting court provides for the examination of witnesses or the production of documents for the purposes of enabling a party to ascertain whether there exists admissible evidence to support his own case or contradict that of his opponent the High Court has jurisdiction to make an order under the 1975 Act: *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547 at 633, [1978] 1 All ER 434 at 461-462, HL, per Lord Diplock.

8 In relation to any application made in pursuance of a request issued by the High Court under the County Courts Act 1984 s 56 (see PARA 1001) or the High Court of Justice in Northern Ireland under the County Courts (Northern Ireland) Order 1980, SI 1980/397, art 43, this reference to proceedings instituted before the requesting court is to be construed as a reference to the relevant county court proceedings: Evidence (Proceedings in Other Jurisdictions) Act 1975 s 9(2) (amended by the County Courts Act 1984 s 148(1), Sch 2 para 53; and by SI 1980/397).

9 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 1(b).

10 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 10(3); and see s 9(3), cited in note 6. At the date at which this title states the law, the following orders had been made: (1) the Bermuda (Evidence) Order 1987, SI 1987/662; (2) the Evidence (Proceedings in Other Jurisdictions) (Anguilla) Order 1986, SI 1986/218; (3) the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978, SI 1978/1890; (4) the Evidence (Proceedings in Other Jurisdictions) (Falkland Islands and Dependencies) Order 1978, SI 1978/1891; (5) the Evidence (Proceedings in Other Jurisdictions) (Gibraltar) Order 1978, SI 1978/1892; (6) the Evidence (Proceedings in Other Jurisdictions) (Guernsey) Order 1980, SI 1980/1956; (7) the Evidence (Proceedings in Other Jurisdictions) (Isle of Man) Order 1980, SI 1980/1956; (8) the Evidence (Proceedings in Other Jurisdictions) (Jersey) Order 1983, SI 1983/1700; (9) the Evidence (Proceedings in Other Jurisdictions) (Sovereign Base Areas of Akrotiri and Dhekelia) Order 1978, SI 1978/1920; and (10) the Evidence (Proceedings in Other Jurisdictions) (Turks and Caicos Islands) Order 1987, SI 1987/1266.

11 See the Criminal Justice (International Co-operation) Act 2003 s 15; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 906.

12 See the Family Proceedings Rules 1991, SI 1991/1247, r 7.34; and **CONFLICT OF LAWS**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(8) EVIDENCE FOR USE IN FOREIGN PROCEEDINGS/1056. Application for order.

1056. Application for order.

An application for an order under the Evidence (Proceedings in Other Jurisdictions) Act 1975¹ for evidence to be obtained, other than an application made as a result of a request by a court in another regulation state² must be made to the High Court³. It must be supported by written evidence⁴ and accompanied by the request⁵ as a result of which the application is made and, where appropriate, a translation of the request into English⁶. The application may be made without notice⁷.

1 As to the cases in which assistance may be given under the Evidence (Proceedings in Other Jurisdictions) Act 1975 see PARA 1055; and as to the orders that may be made see PARA 1058.

2 CPR 34.16(1). As to the meaning of 'regulation state' see CPR 34.16(2); and PARA 1002 note 1; and as to requests made by a court in another regulation state see PARA 1064.

3 CPR 34.16(1), 34.17(a)(i).

4 CPR 34.17(a)(ii). The written evidence supporting the application (which should be made by application notice: see CPR Pt 23; and PARA 303 et seq) must include or exhibit (1) a statement of the issues relevant to the proceedings; (2) a list of questions or the subject matter of questions to be put to the proposed deponent; (3) a draft order; and (4) a translation of the documents in heads (1) and (2) into English, if necessary: *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 6.3.

5 As to the meaning of 'request' see PARA 1055 note 4.

6 CPR 34.17(a)(iii).

7 CPR 34.17(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(8) EVIDENCE FOR USE IN FOREIGN PROCEEDINGS/1057. Application by Treasury Solicitor in certain cases.

1057. Application by Treasury Solicitor in certain cases.

The Senior Master of the Queen's Bench Division of the High Court¹ will send to the Treasury Solicitor any request² (1) forwarded by the Secretary of State³ with a recommendation that effect should be given to the request without requiring an application to be made; or (2) received by him in pursuance of a Civil Procedure Convention⁴ providing for the taking of evidence of any person in England and Wales to assist a court or tribunal in a foreign country where no person is named in the document as the applicant⁵. In relation to such a request, the Treasury Solicitor may, with the consent of the Treasury, apply for an order under the Evidence (Proceedings in Other Jurisdictions) Act 1975⁶ and take such other steps as are necessary to give effect to the request⁷.

1 As to the Senior Master see **COURTS** vol 10 (Reissue) PARA 654.

2 As to the meaning of 'request' see PARA 1055 note 4.

3 The Secretary of State here concerned is the Secretary of State for Foreign and Commonwealth Affairs.

4 There are many bilateral conventions; they generally provide that requests made under them are to be made by the consular authority in England and Wales of the foreign country concerned. See further PARA 1000.

5 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 6.4(1).

6 As to the orders that may be made see PARA 1058.

7 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 6.4(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(8) EVIDENCE FOR USE IN FOREIGN PROCEEDINGS/1058. Order for evidence to be obtained.

1058. Order for evidence to be obtained.

The High Court has power, on application¹, by order to make such provision for obtaining evidence in England and Wales as appears to it appropriate for the purpose of giving effect to the request in pursuance of which the application is made². The order may require a person specified in it to take such steps as the court considers appropriate for the purpose³, but no steps may be required to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings⁴ in the High Court, whether or not proceedings of the same description as those to which the application relates⁵. This does not, however, preclude the making of an order requiring a person to give testimony, either orally or in writing, otherwise than on oath⁶ where this is asked for by the requesting court⁷.

Subject to the provisions set out above, the order may, in particular, make provision for the examination of witnesses, either orally or in writing⁸, for the production of documents⁹, for the inspection, photographing, preservation, custody or detention of any property¹⁰, for the taking of samples of any property and the carrying out of any experiments on or with any property¹¹, for the medical examination of any person¹², and for the taking and testing of blood samples from any person¹³. A person required by the order to attend at any place is entitled to the same conduct money and payment for expenses and loss of time as on attendance as a witness in High Court civil proceedings¹⁴.

The order may not, however, require a person to state what documents relevant to the proceedings to which the application relates are or have been in his possession, custody or power¹⁵, or to produce any documents other than particular documents specified in the order or being documents appearing to the High Court to be, or to be likely to be, in his possession, custody or power¹⁶. Further, effect will not be given to a request for evidence, including oral evidence, which is oppressive, or which is merely 'fishing'¹⁷.

Nothing in the Evidence (Proceedings in Other Jurisdictions) Act 1975 is to be construed as enabling the court to make an order which binds the Crown or any person in his capacity as an officer or servant of the Crown¹⁸. Nor may a court in the United Kingdom¹⁹ make an order under the above provisions for giving effect to a request issued by or on behalf of a court or tribunal of an overseas country²⁰ if it is shown that the request infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom²¹. A certificate signed by or on behalf of the Secretary of State to the effect that it infringes that jurisdiction or is so prejudicial is conclusive evidence of that fact²².

1 As to making the application see PARA 1056.

2 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 2(1). As to the meaning of 'request' see PARA 1055 note 4. For the form of order see *Practice Direction--Forms* PD 4, para 4, Table 2 Form 93; and see *The Civil Court Practice*. As to the use of the forms listed in Table 2 see PARA 14.

The Court of Session in Scotland and the High Court of Justice in Northern Ireland have the like power in relation to Scotland and Northern Ireland: Evidence (Proceedings in Other Jurisdictions) Act 1975 s 2(1).

3 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 2(1).

4 As to the meaning of 'civil proceedings' in relation to the requesting court see PARA 1055 note 7.

5 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 2(3). As to taking the evidence of witnesses see generally PARA 979 et seq. As to whether the request is oppressive see *First American Corp v Sheikh Zayed Al-Nahyan* [1998] 4 All ER 439, sub nom *First American Corp v Zayed* [1999] 1 WLR 1154, CA; and note 17.

6 As to oaths and affirmations see generally PARA 1021 et seq; and as to who may administer oaths etc when taking evidence for the purposes of foreign proceedings see PARA 1059.

7 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 2(3).

8 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 2(2)(a). See further PARA 1059. For the offence committed by a person making a false statement in testimony otherwise than on oath pursuant to an order under the Evidence (Proceedings in Other Jurisdictions) Act 1975 see the Perjury Act 1911 s 1A (added by the Evidence (Proceedings in Other Jurisdictions) Act 1975 s 8(1), Sch 1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 717.

9 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 2(2)(b). See, however, the text and notes 15-16. Under earlier legislation it was held that the court would only order the production of documents by a witness if this was ancillary to oral testimony: *Penn-Texas Corp v Murat Anstalt (No 2)* [1964] 2 QB 647, [1964] 2 All ER 594, CA; *Panthalu v Ramnord Research Laboratories Ltd* [1966] 2 QB 173, [1965] 2 All ER 921, CA; *American Express Warehousing Ltd v Doe* [1967] 1 Lloyd's Rep 222, CA. However, production need not be by a witness who is orally examined: *Penn-Texas Corp v Murat Anstalt* [1964] 1 QB 40, [1963] 1 All ER 258, CA. A company may be ordered to produce by its proper officer documents specified in the order: *Penn-Texas Corp v Murat Anstalt* [1964] 1 QB 40, [1963] 1 All ER 258, CA.

10 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 2(2)(c). 'Property' includes any land, chattel or other corporeal property of any description: s 9(1).

11 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 2(2)(d).

12 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 2(2)(e).

13 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 2(2)(f).

14 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 2(5). As to witnesses' expenses see PARAS 1013-1015.

15 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 2(4)(a).

16 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 2(4)(b). The requirements of s 2(4)(b) are not satisfied by the specification of classes of documents; what is called for is the specification of 'particular documents' which means individual documents separately described: *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547 at 625, [1978] 1 All ER 434 at 455, HL per Viscount Dilhorne and at 635 and 463 per Lord Diplock; *Re Asbestos Insurance Coverage Cases* [1985] 1 All ER 716, [1985] 1 WLR 331, HL.

Under earlier legislation it was held that an order for production would not be made for the purpose of giving discovery (now known as 'disclosure': see PARA 963) against a person who was not a party to the action (now known in England and Wales as a 'claim': see PARA 18): *Burchard v McFarlane, ex p Tindall* [1891] 2 QB 241, CA; *Radio Corp of America v Rauland Corp* [1956] 1 QB 618, [1956] 1 All ER 549, DC; *Penn-Texas Corp v Murat Anstalt (No 2)* [1964] 2 QB 647, [1964] 2 All ER 594, CA; *American Express Warehousing Ltd v Doe* [1967] 1 Lloyd's Rep 222, CA; *Seyfang v GD Searle & Co* [1973] QB 148, [1973] 1 All ER 290.

17 *State of Minnesota v Philip Morris Inc* [1998] ILPr 170, CA; *First American Corp v Sheikh Zayed Al-Nahyan* [1998] 4 All ER 439, sub nom *First American Corp v Zayed* [1999] 1 WLR 1154, CA.

18 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 9(4); and see *Re Pan American World Airways Inc's Application* [1992] QB 854, [1992] 3 All ER 197, CA.

19 As to the meaning of 'United Kingdom' see PARA 221 note 2.

20 For these purposes, 'overseas country' means any country or territory outside the United Kingdom other than one for whose international relations Her Majesty's Government in the United Kingdom is responsible: Protection of Trading Interests Act 1980 s 8(2). References to the law or a court, tribunal or authority of an overseas country include, in the case of a federal state, references to the law or a court, tribunal or authority of any constituent part of that country: s 8(3).

21 Protection of Trading Interests Act 1980 s 4. Her Majesty may by Order in Council direct that the Protection of Trading Interests Act 1980 is to extend with such exceptions, adaptations and modifications, if any, as may be specified in the Order to any territory outside the United Kingdom, being a territory for the international relations of which Her Majesty's Government in the United Kingdom is responsible: s 8(8). At the

date at which this title states the law, the following Orders had been made: the Protection of Trading Interests Act 1980 (Guernsey) Order 1983, SI 1983/1703; the Protection of Trading Interests Act 1980 (Isle of Man) Order 1983, SI 1983/1704; and the Protection of Trading Interests Act 1980 (Jersey) Order 1983, SI 1983/607 (amended by SI 1983/1700). The Protection of Trading Interests Act 1980 extends to Northern Ireland: s 8(7).

If it appears to the Secretary of State (1) that a requirement has been or may be imposed on a person or persons in the United Kingdom to produce to any court, tribunal or authority of an overseas country any commercial document which is not within the territorial jurisdiction of that country or to furnish any commercial information to any such court, tribunal or authority; or (2) that any such authority has imposed or may impose a requirement on a person or persons in the United Kingdom to publish any such document or information, the Secretary of State may, if it appears to him that the requirement is inadmissible by virtue of s 2(2) or (3), give directions for prohibiting compliance with the requirement: s 2(1). Such a requirement is inadmissible (a) if it infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; or (b) if compliance with the requirement would be prejudicial to the security of the United Kingdom or to the relations of the government of the United Kingdom with the government of any other country: s 2(2). Such a requirement is also inadmissible (i) if it is made otherwise than for the purposes of civil or criminal proceedings which have been instituted in the overseas country; or (ii) if it requires a person to state what documents relevant to any such proceedings are or have been in his possession, custody or power or to produce for the purposes of any such proceedings any documents other than particular documents specified in the requirement: s 2(3). Directions under s 2(1) may be either general or special and may prohibit compliance with any requirement either absolutely or in such cases or subject to such conditions as to consent or otherwise as may be specified in the directions; and general directions under s 2(1) must be published in such manner as appears to the Secretary of State to be appropriate: s 2(4). For these purposes, the making of a request or demand is to be treated as the imposition of a requirement if it is made in circumstances in which a requirement to the same effect could be or could have been imposed; and (A) any request or demand for the supply of a document or information which, pursuant to the requirement of any court, tribunal or authority of an overseas country, is addressed to a person in the United Kingdom; or (B) any requirement imposed by such a court, tribunal or authority to produce or furnish any document or information to a person specified in the requirement, is to be treated as a requirement to produce or furnish that document or information to that court, tribunal or authority: s 2(5). For these purposes, 'commercial document' and 'commercial information' mean respectively a document or information relating to a business of any description and 'document' includes any record or device by means of which material is recorded or stored: s 2(6). For the penalty for contravening a direction under s 2 see s 3; and see further **CONFLICT OF LAWS**.

22 Protection of Trading Interests Act 1980 s 4. As to the effect of conclusive evidence see PARA 767.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(8) EVIDENCE FOR USE IN FOREIGN PROCEEDINGS/1059. Procedure for examination of witness.

1059. Procedure for examination of witness.

Where an order is made under the Evidence (Proceedings in Other Jurisdictions) Act 1975 for the examination of a witness¹, the court² may order the examination to be taken before any fit and proper person nominated by the person applying for the order³ or before an examiner of the court⁴ or before any other person whom the court considers suitable⁵. Unless the court orders otherwise, the examination must be conducted in the same way as if the witness were giving evidence at a trial⁶. If all the parties are present, the examiner may conduct the examination of a person not named in the order for examination if all the parties and the person to be examined consent⁷. The examiner may conduct the examination in private if he considers it appropriate to do so⁸. He must ensure that the evidence given by the witness is recorded in full⁹.

The court may make an order¹⁰ for payment of the fees and expenses of the examination¹¹.

Any person appointed by a court or other judicial authority of any foreign country has power in the United Kingdom¹² to administer oaths¹³ for the purpose of taking evidence for use in proceedings, not being criminal proceedings, carried on under the law of that country¹⁴.

Where an order is made for the examination of witnesses under the 1975 Act in certain cases relating to patents¹⁵, the court may permit an officer of the European Patent Office to attend the examination and examine the witnesses or request the court or the examiner before whom the examination takes place to put specified questions to them¹⁶.

1 As to the power to make such orders see PARA 1058.

2 I.e. the High Court: see CPR 34.17(a)(i); and PARA 1056 (application for the order must be made to the High Court).

3 CPR 34.18(1)(a). As to application for the order see PARA 1056.

4 CPR 34.18(1)(b). As to examiners of the court see PARA 993.

5 CPR 34.18(1)(c). A company cannot be ordered to attend for the purpose of being examined on oath: *Penn-Texas Corp v Murat Anstalt* [1964] 1 QB 40, [1963] 1 All ER 258, CA. An order will not readily be made requiring an expert to give evidence against his wishes in a case where he has no connection with the facts or history of the matter in issue, particularly where giving such evidence would involve breach of confidence and the expenditure of time and study: *Seyfang v GD Searle & Co* [1973] QB 148, [1973] 1 All ER 290. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

6 CPR 34.9(1), applied by CPR 34.18(2)(a). Examinations in England and Wales for the purpose of obtaining evidence for foreign courts should follow the procedural norms for proceedings in England and Wales. However, where a request is made by a foreign court as to the manner for taking depositions, the English court should, subject to the exercise of judicial discretion whether to make an order in any particular case, normally employ that method unless what is proposed is so contrary to established English procedures that it ought not to be permitted: *J Barber & Sons (a firm) v Lloyd's Underwriters* [1987] QB 103, [1986] 2 All ER 845. It has been held that questions of admissibility of evidence are governed by the procedural laws of the requesting court: *R v Rathbone, ex p Dikko, Noga OGA Commodities (Overseas) Inc v Rijn Maas- en Zeescheepvaartknaoor NV* [1985] QB 630, [1985] 2 WLR 375. See also *Desilla v Fells & Co* (1879) 40 LT 423, DC, approved in *Eccles & Co v Louisville and Nashville Railroad Co* [1912] 1 KB 135, CA. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

7 CPR 34.9(2), applied by CPR 34.18(2)(a). See also *R v Rathbone, ex p Dikko Noga OGA Commodities (Overseas) Inc v Rijn Maas- en Zeescheepvaartknaoor NV* [1985] QB 630, [1985] 2 WLR 375 (conduct of proceedings where the witness is attended by a legal representative in order to receive advice).

- 8 CPR 34.9(3), applied by CPR 34.18(2)(a).
- 9 CPR 34.9(4), applied by CPR 34.18(2)(a). See further PARA 995.
- 10 le under CPR 34.14: see PARA 994.
- 11 CPR 34.18(3). As to calculation of the examiner's fee see PARA 994.
- 12 As to the meaning of 'United Kingdom' see PARA 221 note 2.
- 13 For this purpose, references to the administration of an oath includes references to the taking of an affidavit: Oaths and Evidence (Overseas Authorities and Countries) Act 1963 s 6(2).
- 14 Oaths and Evidence (Overseas Authorities and Countries) Act 1963 s 1.
- 15 le under the Evidence (Proceedings in Other Jurisdictions) Act 1975 s 1 as applied by the Patents Act 1977 s 92: see **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 541.
- 16 CPR 34.21.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(8) EVIDENCE FOR USE IN FOREIGN PROCEEDINGS/1060. Enforcing attendance of witness.

1060. Enforcing attendance of witness.

Unless the court¹ orders otherwise when making an order for the examination of a witness under the Evidence (Proceedings in Other Jurisdictions) Act 1975², the following provisions apply³. If a person served⁴ with an order to attend before an examiner⁵ fails to attend or refuses to be sworn⁶ for the purpose of the examination or to answer any lawful question or produce any document at the examination, a certificate of his failure or refusal, signed by the examiner, must be filed⁷ by the party requiring the deposition⁸. On the certificate being filed, the party requiring the deposition may apply to the court for an order requiring that person to attend or to be sworn or to answer any question or produce any document, as the case may be⁹. An application for such an order may be made without notice¹⁰.

The court may order the person against whom an order is made under these provisions to pay any costs resulting from his failure or refusal¹¹.

¹ In the High Court: see CPR 34.17(a)(i); and PARA 1056 (application for the order must be made to the High Court).

² As to the power to make such orders see PARA 1058.

³ CPR 34.18(2)(b).

⁴ As to the meaning of 'service' see PARA 138 note 2.

⁵ As to persons who may conduct the examination see PARA 1059.

⁶ As to oaths etc see generally PARA 1021 et seq; and as to persons who may administer oaths and take affidavits for these purposes see PARA 1059. As to the power to make an order requiring the witness to give unsworn testimony see PARA 1058.

⁷ As to the meaning of 'filing' see PARA 1832 note 8.

⁸ CPR 34.10(1), applied by CPR 34.18(2)(b).

⁹ CPR 34.10(2), applied by CPR 34.18(2)(b).

¹⁰ CPR 34.10(3), applied by CPR 34.18(2)(b).

¹¹ CPR 34.10(4), applied by CPR 34.18(2)(b). See further PARA 996. As to costs see PARA 1729 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(8) EVIDENCE FOR USE IN FOREIGN PROCEEDINGS/1061. Privilege of witnesses.

1061. Privilege of witnesses.

A person is not to be compelled by virtue of an order for obtaining evidence for use in foreign proceedings¹ to give any evidence² which he could not be compelled to give (1) in civil proceedings in England and Wales³; or (2) in civil proceedings⁴ in the country or territory in which the requesting court exercises jurisdiction⁵, although this latter restriction does not apply unless the claim of the person in question to be exempt from giving the evidence is either supported by a statement contained in the request (whether it is so supported unconditionally or subject to conditions that are fulfilled)⁶, or conceded by the applicant for the order⁷. Where such a claim made by any person is not so supported or conceded he may be required to give the evidence to which the claim relates, but it is not to be transmitted⁸ to the requesting court if that court, on the matter being referred to it, upholds the claim⁹.

Further, a person is not to be compelled by virtue of such an order to give any evidence if his so doing would be prejudicial to the security of the United Kingdom¹⁰.

1 le an order under the Evidence (Proceedings in Other Jurisdictions) Act 1975 s 2: see PARA 1058.

2 In the Evidence (Proceedings in Other Jurisdictions) Act 1975 s 3, references to giving evidence include references to answering any question and to producing any document: s 3(4).

3 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 3(1)(a).

4 As to the meaning of 'civil proceedings' in relation to the requesting court see PARA 1055 note 7; and as to the meaning of 'requesting court' see PARA 1055.

5 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 3(1)(b); and see *R v Rathbone, ex p Dikko, Noga OGA Commodities (Overseas) Inc v Rijn Maas- en Zeescheepvaartknaator NV* [1985] QB 630, [1985] 2 WLR 375.

6 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 3(2)(a).

7 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 3(2)(b).

8 References to transmitting evidence are to be construed in the light of what is said in note 2: Evidence (Proceedings in Other Jurisdictions) Act 1975 s 3(4).

9 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 3(2). For the procedure to be followed in such circumstances see PARA 1062.

10 Evidence (Proceedings in Other Jurisdictions) Act 1975 s 3(3). A certificate signed by or on behalf of the Secretary of State to the effect that it would be so prejudicial to do so is conclusive evidence of that fact: s 3(3). As to the meaning of 'United Kingdom' see PARA 221 note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(8) EVIDENCE FOR USE IN FOREIGN PROCEEDINGS/1062. Procedure where privilege not supported or conceded.

1062. Procedure where privilege not supported or conceded.

Where a witness claims to be exempt from giving evidence, on the ground that he would be exempt from giving it under the law of the country of the court making the request¹, and the witness's claim is not supported² or conceded³, the examiner⁴ may require the witness to give the evidence which he claims to be exempt from giving⁵. Where the examiner does not require the witness to give that evidence, the court⁶ may order the witness to do so⁷ and an application for such an order may be made by the person who obtained the order for examination of the witness⁸.

Where such evidence is taken, it must be contained in a document separate from the remainder of the deposition⁹. The examiner will send the deposition, and a signed statement setting out the claim to be exempt and the ground on which it was made, to the Senior Master of the Queen's Bench Division of the High Court¹⁰. On receipt of the statement the Senior Master will retain the document containing the part of the witness's evidence to which the claim relates¹¹ and send the statement and a request to determine that claim to the foreign court or tribunal, together with the other documents relating to the examination¹². If the claim is rejected by the foreign court or tribunal, the Senior Master will send to that court or tribunal the document containing that part of the witness's evidence to which the claim relates¹³, but if the claim is upheld he must send the document to the witness¹⁴. In either case he must notify the witness and the person who obtained the order for examination of the foreign court or tribunal's determination¹⁵.

1 le on the ground specified in the Evidence (Proceedings in Other Jurisdictions) Act 1975 s 3(1)(b): see PARA 1061.

2 le supported by a conditional or unconditional statement contained in the request: see the Evidence (Proceedings in Other Jurisdictions) Act 1975 s 3(2)(a); and PARA 1061. As to the meaning of 'request' see PARA 1055 note 4.

3 le conceded by the party who applied for the order: see the Evidence (Proceedings in Other Jurisdictions) Act 1975 s 3(2)(b); and PARA 1061. As to applications for an order for the examination of a witness see PARAS 1056-1058.

4 As to persons who may conduct the examination see PARA 1059.

5 CPR 34.20(1), (2).

6 le the High Court: see CPR 34.17(a)(i) (application for the order for examination must be made to the High Court); and PARA 1056.

7 CPR 34.20(3).

8 CPR 34.20(4).

9 CPR 34.20(5)(a).

10 CPR 34.20(5)(b)(i), (ii). As to the Senior Master see **COURTS** vol 10 (Reissue) PARA 654.

11 CPR 34.20(6)(a).

12 CPR 34.20(6)(b). The other documents referred to in the text are the documents referred to in CPR 34.17 (see PARA 1056): see CPR 34.20(6)(b).

- 13 CPR 34.20(7)(a).
- 14 CPR 34.20(7)(b).
- 15 CPR 34.20(7)(c).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(8) EVIDENCE FOR USE IN FOREIGN PROCEEDINGS/1063. Dealing with deposition.

1063. Dealing with deposition.

Unless the court¹ orders otherwise, the examiner² must send the deposition of the witness to the Senior Master of the Queen's Bench Division of the High Court³. The Senior Master will give a certificate sealed⁴ with the seal of the Supreme Court for use out of the jurisdiction⁵ identifying the following documents:

- 176 (1) the request⁶;
- 177 (2) the order of the court for the examination⁷; and
- 178 (3) the deposition⁸.

He will send the certificate, with the documents referred to above, to the Secretary of State⁹, or, where the request was sent to the Senior Master by another person in accordance with a Civil Procedure Convention¹⁰, to that other person, for transmission to the court or tribunal requesting the examination¹¹.

1 The High Court: see CPR 34.17(a)(i) (application for the order for examination must be made to the High Court); and PARA 1056.

2 As to persons who may conduct the examination for the purposes of the Evidence (Proceedings in Other Jurisdictions) Act 1975 see PARA 1059.

3 CPR 34.19(1). As to the Senior Master see **COURTS** vol 10 (Reissue) PARA 654.

4 As to the meaning of 'seal' see PARA 81 note 2.

5 As to the meaning of 'jurisdiction' see PARA 117 note 6. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

6 As to the meaning of 'request' see PARA 1055 note 4.

7 As to the orders which may be made see PARA 1058.

8 CPR 34.19(2)(a). As to the procedure where a witness has made a claim to privilege see PARA 1062.

9 The Secretary of State here concerned is the Secretary of State for Foreign and Commonwealth Affairs.

10 As to the treatment of a request sent to the Senior Master in accordance with a Civil Procedure Convention see PARA 1062.

11 CPR 34.19(2)(b).

UPDATE

1063 Dealing with deposition

TEXT AND NOTES 4-8--CPR 34.19(2)(a) amended: SI 2009/2092.

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(8) EVIDENCE FOR USE IN FOREIGN PROCEEDINGS/1064. Request for evidence to be taken in England and Wales for use in regulation state.

1064. Request for evidence to be taken in England and Wales for use in regulation state.

Where a court in another regulation state¹ (the 'requesting court') issues a request for evidence to be taken from a person who is in England and Wales, an application for an order for evidence to be taken:

- 179 (1) must be made to a designated court²;
- 180 (2) must be accompanied by the form of request for the taking of evidence as a result of which the application is made and, where appropriate, a translation of the form of request³; and
- 181 (3) may be made without notice⁴.

When the designated court in England and Wales receives the request it will send the request to the Treasury Solicitor⁵ who may, with the consent of the Treasury, apply for the order⁶. The application must be accompanied by the form of request to take evidence and any accompanying evidence⁷, which may be written either in English or French⁸.

The order for the deponent to attend and be examined together with the evidence on which the order was made must be served on the deponent⁹. Arrangements for the examination to take place at a specified time and place must be made by the Treasury Solicitor and approved by the court¹⁰. The court must send details of the arrangements for the examination to such of the parties and, if any, their representatives, or the representatives of the foreign court, who have indicated¹¹, that they wish to be present at the examination¹².

The procedure for the examination is similar to that for an order for the examination of a witness made under the Evidence (Proceedings in Other Jurisdictions) Act 1975¹³. The examiner must send the deposition to the court for transmission to the requesting court and a copy of the deposition to the person who obtained the order for evidence to be taken¹⁴.

1 As to the meaning of 'regulation state' see CPR 34.16(2); and PARA 1002 note 1.

2 CPR 34.24(1), (2)(a). As to the meaning of 'designated court' see PARA 1002 note 2. Each regulation state must nominate a central body to be responsible for supplying information to courts, seeking solutions to any difficulties and forwarding, in exceptional cases, at the request of a requesting court, a request to the competent court: *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 9.1. The United Kingdom has nominated the Senior Master, Queen's Bench Division, to be the Central Body for England and Wales, responsible for taking decisions on requests pursuant to EC Council Regulation 1206/2001 (OJ L174, 27.6.2001, p 1) art 17: *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A paras 9.2, 9.3.

3 CPR 34.24(2)(b).

4 CPR 34.24(2)(c).

5 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 11.1.

6 I.e the order under CPR 34.24: *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 11.2.

7 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 11.3.

8 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 11.4. Where the form of request and any accompanying documents are received in French they will be translated into English by the Treasury Solicitor: para 11.4.

9 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 11.5.

10 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 11.6.

11 le in accordance with EC Council Regulation 1206/2001 (OJ L174, 27.6.2001, p 1).

12 *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 11.7.

13 le CPR 34.18(1), (2) (see PARAS 1059-1060) and *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A paras 4.3-4.12 apply: CPR 34.24(3); *Practice Direction--Depositions and Court Attendance by Witnesses* PD 34A para 11.8.

14 CPR 34.24(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/A. FACTS IN ISSUE/1065. Facts in issue.

(9) COMMON LAW RULES AS TO PROOF

(i) Facts which may be Proved

A. FACTS IN ISSUE

1065. Facts in issue.

The facts in issue are those facts which it is necessary to prove or disprove in order to establish or to refute a case. What these are will normally be clear from the statements of case¹, and are a matter for the judge to determine if the trial is with judge and jury². Facts in issue must normally be proved by evidence³. The distinction between proving the essential facts and drawing inferences or conclusions from those facts must be remembered⁴. A witness may speak as to the former, but not in general as to the latter⁵, since that is the province of the court⁶.

In practice, many matters which are matters of opinion or conclusion, such as speed and identity, are given in evidence⁷, fact and opinion being so closely bound up as to be substantially inseparable. Equally, a witness can give evidence of his feelings and condition⁸, although he may not testify directly as to the state of mind of another person, but should only state facts from which it may be inferred⁹; such facts may include the usual expression of bodily or mental feelings¹⁰. A patient's answers to inquiries are admissible to prove his state of health provided they are limited to symptoms¹¹, and what a doctor told his patient as to the patient's state of health has been held admissible¹². Where it is relevant to prove the terms on which people have lived, their correspondence with each other and with third parties is admissible¹³. It should be noted that, since the abolition of the rule against hearsay¹⁴, many of these limitations no longer have much practical significance.

1 As to the meaning of 'statement of case' see PARA 584. As to statements of case and the matters relied on which must be set out in them specifically see PARA 584 et seq. Subject to certain exceptions, a defendant who fails to deal with an allegation in his statement of case is taken to admit it: see CPR 16.5(5); and PARA 599. Statements of case must be verified by a statement of truth: see PARA 613. As to trial with no statement of case see PARA 796. As to the parties' obligation to put all relevant issues before the court see PARA 1676 note 5.

2 See PARA 795 et seq. As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

3 Sometimes they may be admitted (see PARAS 776-778), or a court may take judicial notice of a fact in issue. As to judicial notice see PARA 779 et seq; and see *Commonwealth Shipping Representative v P & O Branch Service*[1923] AC 191, HL. A judge has no right to nonsuit a claimant without his consent without hearing the evidence tendered by him: *Fletcher v London and North Western Ry Co*[1892] 1 QB 122, CA; *Cross v Rix*(1912) 77 JP 84; *Allen v Francis*[1914] 3 KB 1065, CA. If, however, it appears to the court that a statement of case discloses no reasonable grounds for bringing or defending a case, the statement of case may be struck out before trial: see PARA 520. If a claimant calls no evidence, the defendant is entitled to the verdict: *Fox v Star Newspaper Co Ltd*[1900] AC 19, HL. If the defendant admits all the facts pleaded, the claimant will not be allowed to call evidence, save on special grounds: *The Hardwick* (1884) 9 PD 32; *The Rothbury* (1893) 10 TLR 60. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

4 See *Hollington v F Hewthorne & Co Ltd*[1943] KB 587, [1943] 2 All ER 35, CA.

5 In many cases, no inference on the part of a witness may be involved, as in a claim for slander where the fact in issue may be simply whether or not words were spoken: see eg *Clarke v Main*(1904) Times, 24 March. A

witness may give evidence of opinion in order to convey relevant facts personally perceived: Civil Evidence Act 1972 s 3(2); and see the text to note 7.

6 *Bonfield v Smith* (1844) 12 M & W 405; *Rigg v Manchester, Sheffield and Lincolnshire Rly Co* (1866) 14 WR 834; *Seed v Higgins* (1860) 8 HL Cas 550; *Grove v Buluwayo Estate and Trust Co* (1898) Times, 30 March, CA. Thus, the views of those engaged in trade on the reasonableness of a contract in restraint of trade are inadmissible: *Haynes v Doman* [1899] 2 Ch 13, CA; *North Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461, HL; *Mason v Provident Clothing Co Ltd* [1913] AC 724, HL.

7 See the Civil Evidence Act 1972 s 3(2); and PARA 831.

8 *Angus v Clifford* [1891] 2 Ch 449, CA; *Davies v Fortior Ltd* [1952] 1 All ER 1359n.

9 See *Philippi v IRC* [1971] 3 All ER 61, [1971] 1 WLR 1272, CA. Evidence of what is said is always admissible to show a person's state of mind.

10 See note 8.

11 Nothing in the nature of a narrative as to causation is admissible: see *Gardner Peerage* (1824) Le Marchant's Report 169-179; *R v Blandy* (1752) 18 State Tr 1117; *Gilbey v Great Western Rly Co* (1910) 102 LT 202, CA; *R v Thomson* [1912] 3 KB 19, CCA; *Amyes v Barton* [1912] 1 KB 40, CA; *Sharp v Loddington Ironstone Co Ltd* (1924) 132 LT 229, CA. As to complaints made after the commission of sexual offences see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1441.

12 *Tickle v Tickle* [1968] 2 All ER 154, [1968] 1 WLR 937, DC.

13 *Trelawney v Coleman* (1817) 2 Stark 191; *Willis v Bernard* (1832) 1 LJCP 118; *Winter v Wroot* (1834) 1 Mood & R 404. Independent evidence may be necessary to show that letters were written before any question of collusion could arise: see *Edwards v Crock* (1801) 4 Esp 39; *Trelawney v Coleman* (1817) 2 Stark 191; *Houlston v Smyth* (1825) 2 C & P 22; *Wilton v Webster* (1835) 7 C & P 198.

14 See PARA 808.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/A. FACTS IN ISSUE/1066. Surrounding circumstances and the res gestae.

1066. Surrounding circumstances and the res gestae.

There is a distinction to be made between the bare facts in issue, and the tissue of circumstances and facts which surround them. These surrounding circumstances have sometimes been spoken of as the res gestae¹, but it is more accurate and satisfactory to limit that expression to those items of evidence relating to contemporaneous or almost contemporaneous statements which are admitted under the doctrine of the res gestae². Facts, as opposed to statements, of which the truth is in issue, which make up the surrounding circumstances are admissible in so far as they are relevant, and witnesses are naturally expected to give their evidence with reasonable fullness of detail and circumstance³.

1 See eg *Rouch v Great Western Rly* (1841) 1 QB 51.

2 *Ratten v R* [1972] AC 378, [1971] 3 All ER 801, PC. The doctrine of the res gestae is now mainly of significance in the context of criminal evidence, as such statements would now be admissible as hearsay under the Civil Evidence Act 1995: see PARAS 759, 825. As to the admissibility of hearsay see PARA 806 et seq.

3 *R v Stephenson* (1904) 68 JP 524; *A-G (Jersey) v Norton* [1967] 1 AC 464.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/B. FACTS RELEVANT TO THE ISSUE/(A) In general/1067. Classification of relevant facts.

B. FACTS RELEVANT TO THE ISSUE

(A) IN GENERAL

1067. Classification of relevant facts.

Facts which may be relevant in the course of a judicial inquiry may conveniently be considered under five principal headings: (1) facts probative of a fact in issue¹; (2) facts showing identity or connection of parties²; (3) facts showing states of mind³; (4) similar facts⁴; and (5) character⁵.

1 See PARAS 1068-1075.

2 See PARAS 1076-1077.

3 See PARAS 1078-1081.

4 See PARA 1082.

5 See PARA 1083.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/B. FACTS RELEVANT TO THE ISSUE/(B) Facts Probative of a Fact in Issue/1068. Facts logically probative.

(B) FACTS PROBATIVE OF A FACT IN ISSUE

1068. Facts logically probative.

Facts which have a natural and logical tendency to prove or disprove a fact in issue, or which experience ordinarily shows to have that effect, are in general admissible¹. Recourse may be had to circumstantial evidence, as well as direct evidence, of facts in issue².

Subsisting convictions by United Kingdom courts for offences are admissible in civil proceedings to prove, where relevant, that a person committed the offence for which he has been convicted³. Similarly, findings of adultery and paternity are admissible to prove the facts to which the findings relate⁴.

Statements made on previous occasions are frequently relevant, and are admissible when falling within the provisions of the Civil Evidence Act 1995⁵.

1 *Metropolitan Asylum District Managers v Hill (Appeal No 1)* (1882) 47 LT 29 at 35, HL, per Lord Watson; *Hampson v Powell* [1970] 1 All ER 929, DC. Thus, in paternity cases, the fact that in appearance the child resembles the putative parent is both relevant and admissible (*C v C and C* [1972] 3 All ER 577, [1972] 1 WLR 1335; *Bagot v Bagot* (1878) 1 LR 1r 308; *Burnaby v Baillie* (1889) 42 ChD 282; see also *Slingsby v A-G* (1916) 33 TLR 120, HL), but such evidence should be given little weight (*Russell v Russell and Mayer* (1923) 129 LT 151 (revsd on other grounds [1924] AC 687, HL); and see *C v C and C* [1972] 3 All ER 577, [1972] 1 WLR 1335) particularly since evidence of blood tests or DNA tests is likely to be available (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 113).

2 See eg *Joy v Phillips, Mills & Co Ltd* [1916] 1 KB 849, CA (indirect evidence of cause of death); and for examples of inferences to be drawn from circumstantial evidence see PARAS 1069-1071.

3 See the Civil Evidence Act 1968 s 11; and PARA 1208. In defamation claims, a conviction for a criminal offence is conclusive evidence that the claimant who stands convicted of the offence committed that offence: see s 13; and PARA 1209.

4 See the Civil Evidence Act 1968 s 12; and PARA 1211.

5 See the Civil Evidence Act 1995 ss 1-7; and PARA 808 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/B. FACTS RELEVANT TO THE ISSUE/(B) Facts Probative of a Fact in Issue/1069. Continuance of life and other facts.

1069. Continuance of life and other facts.

In many cases the existence of a fact in issue may be shown by proving its previous existence at a reasonably proximate date, there being a probability that certain conditions or relations continue. This was once regarded as a presumption of law¹, but the better opinion is that it is merely a probability, or presumption of fact, the effect of which will vary with the particular circumstances². The most important application of this principle arises in the case of human life³. There is no presumption of law in favour of the continuance of life, but an inference of fact may legitimately be drawn that a person alive and in health at a certain time was alive a short time⁴, or even several years⁵, later. Similar inferences have also been drawn in the case of sanity⁶, insanity⁷, religious opinions⁸, partnership⁹, and the tenure of land¹⁰ or office¹¹. So, in the absence of evidence to the contrary, a debt once proved to exist is presumed to remain unpaid¹². Where adultery has been proved, its continuance will be presumed while the parties live under the same roof¹³; but if the continuance of a condition is unlawful, it will not in general be presumed¹⁴.

The presumption of continuance may operate retrospectively¹⁵. Thus, the fact that a ship became unseaworthy, without visible cause, shortly after sailing is evidence that she was unseaworthy at the time of sailing¹⁶.

1 As to presumptions of law see PARA 1097 et seq.

2 Eg the fact that defendant was driving a car when stopped is some evidence that he had been driving it at a recent stage of the same journey: see *Beresford v St Albans Justices* (1905) 22 TLR 1.

3 As to presumptions of life and death see PARA 1100.

4 *R v Lumley* (1869) LR 1 CCR 196; *Re Phené's Trusts* (1870) 5 Ch App 139; *Re Connor* (1892) 29 LR Ir 261; *Re Aldersey, Gibson v Hall* [1905] 2 Ch 181; *Chard v Chard (otherwise Northcott)* [1956] P 259, [1955] 3 All ER 721.

5 *R v Willshire* (1881) 6 QBD 366, CCR (eleven years); *R v Jones* (1883) 15 Cox CC 284, CCR (17 years).

6 *Dyce Sombre v Troup and Solaroli* (1856) Dea & Sw 22 (on appeal sub nom *Prinser and East India Co v Dyce Sombre* (1856) 10 Moo PCC 232); *Sutton v Sadler* (1857) 26 LJCP 284.

7 *Smith v Tebbitt* (1867) LR 1 P & D 398. As to proof of the mental state of the accused see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 33; **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1264-1265.

8 *A-G v Bradlaugh* (1885) 14 QBD 667, CA; and see **ECCLESIASTICAL LAW**.

9 *Clark v Alexander* (1844) 8 Scott NR 147; *Brown v Wren Bros* [1895] 1 QB 390.

10 *Pickett v Packham* (1868) 4 Ch App 190. See also PARA 1071.

11 *R v Budd* (1805) 5 Esp 230; *Doe d Hopley v Young* (1845) 8 QB 63; and see PARA 1072.

12 *Jackson v Irvin* (1809) 2 Camp 48; but cf *Douglass v Lloyds Bank Ltd* (1929) 34 Com Cas 263, where Roche J presumed payment of a very old bank deposit account.

13 *Turton v Turton* (1830) 3 Hag Ecc 338.

14 *Price v Worwood* (1859) 4 H & N 512.

15 *Doe d Hopley v Young* (1845) 8 QB 63.

16 *Pickup v Thames and Mersey Marine Insurance Co Ltd* (1878) 3 QBD 594, CA; *Ajum Goolam Hossen & Co v Union Marine Insurance Co, Hajee Cassim Joosub v Ajum Goolam Hossen & Co* [1901] AC 362, PC.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/B. FACTS RELEVANT TO THE ISSUE/(B) Facts Probative of a Fact in Issue/1070. Course of business.

1070. Course of business.

The doing of an act may sometimes be inferred from the existence of a general course of business according to which it would ordinarily be done, there being a probability that the general practice will be followed in the particular case. The most common illustration under this heading arises in the case of letters which, if proved to have been addressed properly and posted, are presumed to have been received in due course¹. This presumption applies when a modern statute authorises or requires the service of any document by post, unless the contrary intention appears². A similar inference has been drawn where the question was whether a licence to export goods had been obtained, and proof was given that the goods had been entered at the Custom House for exportation; a licence was presumed from the fact that the course of office did not permit exportation without one³.

The principle, however, is not confined to public offices, but applies also to private concerns. Thus, where it was necessary to prove that an employer had paid certain wages to his employees, evidence was received that it was the employer's practice to pay all his employees regularly every Saturday, that the employee in question had been seen with the others waiting to be paid, and that he had not afterwards been heard to complain⁴.

The inference of the trustworthiness and reliability of business routine is presumably the justification⁵ for the admissibility of statements contained in the records of a business or public authority without further proof⁶.

1 *Kufh v Weston* (1799) 3 Esp 54; *Warren v Warren* (1834) 1 Cr M & R 250; *Dunlop v Higgins* (1848) 1 HL Cas 381; *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) 4 ExD 216, CA; *R v Rice* [1963] 1 QB 857, [1963] 1 All ER 832, CCA (airline ticket likely to have been used by person named on it). As to proof of the posting and delivery of letters see PARAS 945-946; as to when knowledge of the contents of letters will be inferred see PARA 1079 the text and note 3; and as to faxes and emails see PARA 947.

2 See the Interpretation Act 1978 s 7, Sch 2 para 3; and PARA 946.

3 *Van Omeron v Dowick* (1809) 2 Camp 42. As to the application of the maxim *omnia praesumuntur rite esse acta*, as in this case, see PARA 1103.

4 *Lucas v Novofilieski* (1795) 1 Esp 296. As to contemporaneous statements see PARA 1066.

5 See eg *Morris v Kanssen* [1946] AC 459, [1946] 1 All ER 586, HL.

6 Ie under the Civil Evidence Act 1995 s 9: see PARA 817.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/B. FACTS RELEVANT TO THE ISSUE/(B) Facts Probative of a Fact in Issue/1071. Acts of ownership.

1071. Acts of ownership.

As a general rule, title to property may be shown by the exercise of acts of ownership in connection with it¹. Thus, possession is not only prima facie evidence of ownership² but is also evidence of the highest title to the property in question³; as against mere wrongdoers, in cases of trespass to real property, it has even been said to be conclusive⁴. Moreover, the presumption from the possession of land will in general apply not only to the surface but also to the minerals underneath⁵, although an exception to this exists in mining districts where the two are frequently, or, where the mineral concerned is coal, usually⁶, held in different rights, and even in other cases the presumption may always be rebutted by proof of separate enjoyment⁷.

In addition to possession, other indicia of title are also admissible as evidence of ownership, for example receipt of the rents and profits of the property, and the discharge of its burdens and repairs⁸. On the same principle granting leases⁹, planting and felling timber¹⁰, cutting grass, and grazing cattle or turning off those of strangers¹¹ have been held evidence of a right to the soil; perambulations by the lord have been held evidence of the boundaries of a manor¹²; and user has been held evidence of title to an easement, the character of the user determining the extent of the easement¹³. Ancient documents produced from proper custody may themselves be evidence of acts of ownership if they purport to show the exercise of ownership¹⁴, but proof of modern enjoyment under them adds weight to such documentary evidence¹⁵.

In all these cases acts of ownership are receivable not as admissions, since they operate in favour of the party exercising them, but as evidence of possession, and thus as proof of title¹⁶.

1 *Barnes v Mawson* (1813) 1 M & S 77. The acts of ownership in connection with land must be exercised on land which forms part of the parcel of land in dispute; except where the question is whether the land belongs to the lord of the manor or to the owner of the adjoining land, evidence of acts done in connection with similar pieces of land is admissible, provided they lie within the same manor: *Leeke v Portsmouth Corp*n (1912) 107 LT 260; see **BOUNDARIES**. Acts of ownership on one part of the land may be evidence of title to the whole or of other parts: see *Jones v Williams* (1837) 2 M & W 326; *Lord Advocate v Lord Blantyre* (1879) 4 App Cas 770, HL; *Bristow v Cormican* (1878) 3 App Cas 641, HL; *Lord Advocate v Young, North British Rly Co v Young* (1887) 12 App Cas 544, HL; *Duke of Beaufort v John Aird & Co* (1904) 20 TLR 602; *Clark v Elphinstone* (1880) 6 App Cas 164, PC; *Coverdale v Charlton* (1878) 4 QBD 104, CA; *Stanley v White* (1811) 14 East 332; *Taylor v Parry* (1840) 1 Man & G 604; *Wild v Holt* (1842) 9 M & W 672.

2 *Webb v Fox* (1797) 7 Term Rep 391. The property may be either real property (*Clayton v Corby* (1842) 2 QB 813; *Asher v Whitlock* (1865) LR 1 QB 1; *Lord St Leonards v Ashburner* (1870) 21 LT 595), or personalty (*Mason v Lickbarrow* (1790) 1 Hy Bl 357 (on appeal sub nom *Lickbarrow v Mason* (1793) 4 Bro Parl Cas 57, HL); *Jeffries v Great Western Rly Co* (1856) 5 E & B 802; *Vance v Frost* (1894) 58 JP 398, DC; *The Winkfield* [1902] P 42, CA; *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405, PC; *Eastern Construction Co Ltd v National Trust Co Ltd and Schmidt* [1914] AC 197, PC; *The Tubantia* [1924] P 78; *Tingle Jacobs & Co v Kennedy* [1964] 1 All ER 888n, [1964] 1 WLR 638n). Where possession is doubtful, as in the case of property in a house jointly occupied by a man and his wife, the actual possession is determined by which of them has the right to possess: *Ramsay v Margrett* [1894] 2 QB 18, CA; cf *R v Murray* [1906] 2 KB 385.

3 *Jayne v Price* (1814) 5 Taunt 326; *Doe d Daniel v Coulthred* (1837) 7 Ad & El 235; *Doe d Graham v Penfold* (1838) 8 C & P 536; *Daintry v Brocklehurst* (1848) 3 Exch 207; *Metters v Brown* (1863) 1 H & C 686. For a discussion of the weight of acts of possession as evidence see *Lord Advocate v Lord Blantyre* (1879) 4 App Cas 770 at 791-792, HL, per Lord Blackburn.

4 *Elliott v Kemp* (1840) 10 LJ Ex 321; *Bristow v Cormican* (1878) 3 App Cas 641, HL; *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405, PC; *Foster v Warblington UDC* [1906] 1 KB 648, CA. As to trespass to air space above a person's land by aircraft see **AIR LAW** vol 2 (2008) PARAS 653, 657, 658.

5 *Rowbotham v Wilson* (1860) 8 HL Cas 348; and see **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 20.

6 See **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 22 et seq.

7 *Rowe v Grenfel* (1824) Ry & M 396; *Rowe v Brenton* (1828) 8 B & C 737; and see **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 21.

8 *Ferrand v Milligan* (1845) 7 QB 730. Declarations accompanying acts of ownership may also be proved as indicating the nature of the acts: *Bennison v Cartwright* (1864) 5 B & S 1. Notice to a purchaser that rents are paid by tenants to some person whose receipt is inconsistent with the vendor's title is notice of that person's rights: *Hunt v Luck* [1902] 1 Ch 428, CA. See also *Kirby v Cowderoy* [1912] AC 599, PC.

9 *Doe d Earl of Egremont v Pulman* (1842) 3 QB 622, where counterparts signed by the lessees were received; *Governors of Magdalen Hospital v Knotts* (1878) 8 ChD 709, CA; *Haigh v West* [1893] 2 QB 19, CA.

10 *Lord St Leonards v Ashburner* (1870) 21 LT 595; *Doe d Stansbury v Arkwright* (1833) 5 C & P 575.

11 *Countess Belmore v Kent County Council* [1901] 1 Ch 873.

12 *Woolway v Rowe* (1834) 1 Ad & El 114; and see *Leeke v Portsmouth Corpn* (1912) 107 LT 260. See also **BOUNDARIES**; and as to rights of perambulation see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 640. As to boundaries fixed by legal presumptions see **BOUNDARIES**.

13 *Stepney Corpn v Gingell, Son and Foskett Ltd* [1909] AC 245, HL; *Cowling v Higginson* (1838) 4 M & W 245; *Blackett v Lowes* (1814) 2 M & S 494; and see **EASEMENTS AND PROFITS A PRENDRE**.

14 See PARA 875.

15 *Fort v Clarke* (1826) 1 Russ 601.

16 *Jones v Williams* (1837) 2 M & W 326.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/B. FACTS RELEVANT TO THE ISSUE/(B) Facts Probative of a Fact in Issue/1072. Acting in a public or private capacity.

1072. Acting in a public or private capacity.

On the one hand, acting in a public capacity is evidence of title so to act, and acting in a public office is evidence of due appointment in accordance with the common law maxim that everything has been done according to due form¹. On the other hand, the fact that a person has acted in a private capacity is generally, although not always, excluded as evidence of title, since the same safeguards do not exist as in the case of public functionaries. Accordingly evidence of a person having acted in a particular private capacity² has been rejected to prove the authority of a solicitor to act for his client³ and that of a collector of tithes for a private owner⁴ although it has been allowed in order to establish the relations of master and apprentice, landlord and tenant, and co-partners⁵. Cohabitation following a marriage ceremony is prima facie evidence of a valid marriage⁶. A document purporting to contain the written consent of a person to act as trustee and to bear his signature verified by some other person is evidence of such consent⁷.

1 *le omnia praesumuntur rite esse acta*: see PARA 1103.

2 As to the evidential value of the ownership of motor vehicles in questions of agency and vicarious liability see *Barnard v Sully* (1931) 47 TLR 557, DC; *Rambarran v Gurrucharraan* [1970] 1 All ER 749, [1970] 1 WLR 556, PC; *Nottingham v Aldridge, Prudential Assurance Co Ltd, Third Party* [1971] 2 QB 739, [1971] 2 All ER 751; *Morgans v Launchbury* [1973] AC 127, [1972] 2 All ER 606, HL; *Carberry v Davies* [1968] 2 All ER 817, [1968] 1 WLR 1103, CA; *Klein v Caluori* [1971] 2 All ER 701, [1971] 1 WLR 619.

3 *Bright v Legerton* (1860) 29 Beav 60; affd (1861) 2 De GF & J 606.

4 *Short v Lee* (1821) 2 Jac & W 464.

5 *R v Fordingbridge Inhabitants* (1858) EB & E 678.

6 See PARA 1102.

7 CPR 33.8.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/B. FACTS RELEVANT TO THE ISSUE/(B) Facts Probative of a Fact in Issue/1073. Treatment of state of things as existing.

1073. Treatment of state of things as existing.

The fact that a person has treated a state of things as existing is not usually receivable as evidence of its existence, unless it can be regarded as an admission by conduct made by a party to the proceedings, in which case it will operate as evidence against, but not for, him¹. On a question as to the testator's mental health, the fact that his doctor permitted him to make a will, or that he was elected to a high and responsible office in his absence, would be rejected; as also, on a question of seaworthiness, the fact that the captain showed his faith in the vessel by embarking in it with his family².

In some cases, however, this rule is relaxed, and acts of treatment by a party, even in his own favour, are received, as well as those done by strangers to the proceedings. Thus, acts of ownership by a party are admissible for him to establish title to property³; and, on questions of pedigree, family conduct and treatment are receivable, even from non-parties, to show relationship⁴. So a marriage may be inferred, not only from the cohabitation of the parties, but also from the fact that they were treated as married by their friends and neighbours⁵.

1 *Pilot v Craze* (1888) 52 JP 311; *Wright v Doe d Tatham* (1837) 7 Ad & El 313 (affd (1838) 4 Bing NC 489, HL); *Re Marquis of Anglesey, Willmot v Gardner* [1901] 2 Ch 548, CA; *Way v Penrikyber Navigation Colliery Co Ltd* [1940] 1 KB 517, [1940] 1 All ER 164, CA. As to admissions generally see PARAS 776-778, 819; and as to admissions by conduct see PARA 1074.

2 *Wright v Doe d Tatham* (1837) 7 Ad & El 313. That is because such facts are merely hearsay evidence of the doctor, the appointer and the captain.

3 See PARA 1071.

4 *Greaves v Greenwood* (1877) 2 ExD 289, CA. As to pedigree generally see PARA 830.

5 See PARA 830. Such evidence is insufficient when strict proof of marriage is required, eg by the prosecution in case of bigamy: *R v Simpson* (1883) 15 Cox CC 323; *R v Althausen* (1893) 17 Cox CC 630; see also *McCarthy v Hastings* [1933] NI 100, CA; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 832.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/B. FACTS RELEVANT TO THE ISSUE/(B) Facts Probative of a Fact in Issue/1074. Conduct as an admission.

1074. Conduct as an admission.

A party's admissions by conduct¹ of any material fact may be proved against him, and evidence to explain or disprove such admissions is receivable in his favour. Thus, it has been held that payment of tithe by A to B would be an admission by conduct on the part of A that he owed B the tithe². In a claim by C and her husband for injuries sustained in a railway accident, evidence that C's husband and her solicitor's clerk had conspired to suborn false witnesses at the trial to support their case may be an admission by conduct that the claim was not genuine³; and in such a case the fact that C had attributed her injuries to a fall, and not to the accident, would be receivable under the same head; while, in rebuttal, C might show that she had had no such fall⁴. Again, the conduct of a parent may rebut the common law presumption of legitimacy of his or her child⁵.

1 Conduct may include remaining silent: see *Bessela v Stern* (1877) 2 CPD 265, CA; *Wiedemann v Walpole* [1891] 2 QB 534, CA. But silence should not be regarded as evidence of an admission unless there are circumstances which render it more reasonably probable that a person would answer the charge made against him than that he would not: see *Wiedemann v Walpole* [1891] 2 QB 534, CA. As to the adverse inferences which may be drawn in criminal cases from the silence of the accused see the Criminal Justice and Public Order Act 1994 ss 34-38; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1552-1555.

2 See *James v Biou, Owen v Flack* (1826) 2 Sim & St 600.

3 *Moriarty v London, Chatham and Dover Rly Co* (1870) LR 5 QB 314; *R v Watt* (1905) 70 JP 29.

4 *Melhuish v Collier* (1850) 15 QB 878.

5 See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 94-96.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/B. FACTS RELEVANT TO THE ISSUE/(B) Facts Probative of a Fact in Issue/1075. Complaints.

1075. Complaints.

On charges of sexual offences, the terms of complaints made by the victims are, subject to certain conditions, admissible¹. In civil cases, the terms of such complaints are admissible in so far as they are within the provisions of the Civil Evidence Act 1995².

1 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1440. Such complaints are not evidence of the facts complained of, but are only matters which may be taken into account by the jury when considering the consistency and therefore the credibility of the story: see *R v Lovell* (1923) 129 LT 638, CCA.

2 See the Civil Evidence Act 1995 ss 1-4; and PARA 808 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/B. FACTS RELEVANT TO THE ISSUE/(C) Facts Showing Identity/1076. Identity generally.

(C) FACTS SHOWING IDENTITY

1076. Identity generally.

Where the question of personal identity arises, without reference to the doing of any particular act, it may be proved or disproved not only by direct testimony but also by evidence of similarity or dissimilarity of personal characteristics¹, including a party's name². If A claims property on the ground that he is B, it is relevant to show that A possesses all, or any, of the known attributes or peculiarities of B³. The question of identity commonly occurs with respect to the doing of some specific act forming the subject matter of the proceedings, the point being whether A is or is not the author of that act. This act is often the signing of some contract or instrument, and in the absence of direct evidence of the identity of the alleged and the actual author, similarity of name and handwriting⁴, and sometimes also of residence and occupation, may have to be proved⁵.

¹ The reputation of a person's ancestors has been considered as evidence: *Lovat Peerage*(1885) 10 App Cas 763, HL.

² *Hennell v Lyon* (1817) 1 B & Ald 182; *Simpson v Dismore* (1842) 9 M & W 47; *Hamber v Roberts* (1849) 7 CB 861; *Smith v Henderson* (1842) 9 M & W 798; *Keohane v Byrne*[1934] NI 63, CA. There is prima facie evidence of identity if one calls at a house and a person within answers to the name asked for (*Wilton v Edwards* (1834) 6 C & P 677), or if a man's name appears on a door and a person within answers to the name (*Collier v Nokes* (1849) 2 Car & Kir 1012).

³ As to identification by comparison see PARA 1068 note 1; as to identity in pedigree cases see PARA 830; as to reputation of identity see PARA 829; as to the opinion of non-expert witnesses as to identity see PARA 831; as to the effect of birth, marriage and death certificates see PARAS 1094, 906 et seq; as to proof of identity by photographs see PARA 958; as to identity in relation to attestation see PARA 866; and as to the caution with which identification evidence may be treated see PARA 1054.

⁴ See PARA 864.

⁵ See eg *Whitelocke v Musgrove* (1833) 1 Cr & M 511; *Jones v Jones* (1841) 9 M & W 75; *Greenshields v Crawford* (1842) 9 M & W 314; *Roden v Ryde*(1843) 4 QB 626; *Sayer v Glossop*(1848) 2 Exch 409; *Keohane v Byrne*[1934] NI 63, CA. An important development of this principle occurs in criminal cases where similar fact evidence may be given to negative a plea of mistaken identity: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. As to identification by fingerprints, bodily samples etc see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 1021 et seq, vol 11(3) (2006 Reissue) PARA 1455.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/B. FACTS RELEVANT TO THE ISSUE/(C) Facts Showing Identity/1077. Proof of age.

1077. Proof of age.

Age may be proved by various means, including the statement by a witness of his own age and the opinion of a witness as to the age of another person¹, but when age is in issue stricter methods of proof may be required². These are considered subsequently³.

¹ *R v Cox* [1898] 1 QB 179 (evidence of opinion as to ages of children under 16 admissible on charge of neglect).

² *R v Rishworth Inhabitants* (1842) 2 QB 476 (evidence of own age inadmissible). See also *R v Day* (1841) 9 C & P 722; *R v Viasani* (1866) 15 LT 240; *R v Rogers* (1914) 111 LT 1115, CCA.

³ See PARA 1095.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/B. FACTS RELEVANT TO THE ISSUE/(D) Facts Showing States of Mind/1078. How state of mind is proved.

(D) FACTS SHOWING STATES OF MIND

1078. How state of mind is proved.

When the mental condition of a party is in question, it may be proved either directly by the party himself, or indirectly by other witnesses speaking to the outward expression of the condition by the party at the time¹. In addition to these sources², however, that supplied by circumstantial evidence has frequently to be invoked³.

1 Thus a letter written by the donee of a power of appointment is admissible to show what the donee's intentions at the time of exercise of the power were: *Re Wright, Hegan v Bloor*[1920] 1 Ch 108, and see PARA 1065. See also *Angus v Clifford*[1891] 2 Ch 449, CA; *Davies v Fortior Ltd*[1952] 1 All ER 1359n; *Lloyd v Powell Duffryn Steam Coal Co Ltd*[1914] AC 733, HL; *Re Wright, Hegan v Bloor*[1920] 1 Ch 108; and see *R v Gunnell* (1886) 16 Cox CC 154. As to questions of sanity see *Wright v Doe d Tatham* (1838) 4 Bing NC 489; *R v Davies*[1962] 3 All ER 97, [1962] 1 WLR 1111.

2 As to quasi-expert evidence of a witness's beliefs see *Process Church of the Final Judgment v Rupert Hart-Davis Ltd*(1975) Times, 29 January, CA.

3 In a claim for malicious prosecution, the question being whether the defendant acted in good faith in giving the plaintiff (now known as the 'claimant': see PARA 18) into custody, the fact that he had obtained counsel's opinion justifying such a course, together with the contents of the opinion, were received in his favour, although they would not have been evidence of any facts asserted in the opinion: *Ravenga v Mackintosh* (1824) 2 B & C 693.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/B. FACTS RELEVANT TO THE ISSUE/(D) Facts Showing States of Mind/1079. Proof of knowledge.

1079. Proof of knowledge.

A party's knowledge of a fact may be inferred circumstantially in a variety of cases¹. Thus, it may be shown that he had prior knowledge of the fact, in which case there will be a presumption that his knowledge continued for a more or less lengthened period². In judicial proceedings, however, knowledge is more generally shown by documentary evidence. In ordinary cases, the mere fact that opened letters were found in the possession of a party will imply his knowledge of their contents³. The execution⁴, though not the mere attestation⁵, of a written instrument will have the same effect. Access to documents sometimes affords presumptive evidence of knowledge, for example in the case of the rules of a club, or of books kept between partners or banker and customer⁶. Knowledge of the books of a company, however, will not be imputed either to a director or shareholder⁷, although it will generally be implied where there is a duty to know⁸ as distinct from a mere right to inspect⁹. Again, the notoriety of a fact in a party's calling or neighbourhood is some evidence that he knows of its existence¹⁰, while the mere existence of a rumour of the fact is none¹¹.

1 As to the knowledge of an agent being imputed or not to his principal see **AGENCY** vol 1 (2008) PARA 137; as to actual and constructive notice of facts affecting title to land see **EQUITY**; and as to liability for an animal's acts where an abnormal dangerous characteristic is known to its keeper see **ANIMALS** vol 2 (2008) PARA 748. The nature of the malady of a mentally disordered person may be proved to show that the defendant must have known of the disorder: *Beavan v M'Donnell* (1854) 10 Exch 184.

2 See PARA 1069.

3 *Wright v Doe d Tatham* (1837) 7 Ad & El 313; affd (1838) 4 Bing NC 489, HL. This inference does not arise where the sanity of the recipient is in issue: *Wright v Doe d Tatham* (1837) 7 Ad & El 313; and on appeal (1837) 7 Ad & El 313, HL.

4 *Re Cooper, Cooper v Vesey* (1882) 20 ChD 611, CA.

5 *Harding v Crethorn* (1793) 1 Esp 57.

6 *Wiltzie v Adamson* (1789) 1 Phillipps and Arnold's Law of Evidence (10th Edn) 339; *Raggett v Musgrave* (1827) 2 C & P 556; *Alderson v Clay* (1816) 1 Stark 405; *Symonds v Gas Light and Coke Co* (1848) 11 Beav 283; *Lodge v Prichard* (1853) 3 De GM & G 906. As to knowledge of the terms of special contracts limiting liability see **BAILMENT; CARRIAGE AND CARRIERS**. Where printed conditions are contained in a sold note, it is a question of fact whether, when the agreement of sale was entered into, the sellers took reasonable care to bring the conditions to the buyer's notice: see *Roe v RA Naylor Ltd* (1918) 87 LJB 958, CA; *Walls v Centaur Co Ltd* (1921) 126 LT 242; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 105. As to the rule that a lessee or purchaser of land has constructive notice of that which he would have discovered by a reasonable inquiry into the title see **EQUITY; LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 89; **MORTGAGE; SALE OF LAND**.

7 See **COMPANIES** vol 14 (2009) PARA 548. As to the admissibility of returns to the Registrar of Companies see *R v Halpin* [1975] QB 907, [1975] 2 All ER 1124, CA. As to the duty to deliver annual returns see **COMPANIES** vol 15 (2009) PARA 1421 et seq.

8 *Re Wincham Shipbuilding, Boiler and Salt Co, Hallmark's Case* (1878) 9 ChD 329, CA.

9 *Hill v Manchester and Salford Water Works Co* (1833) 5 B & Ad 866.

10 *Re Matthews, ex p Powell* (1875) 1 ChD 501, CA.

11 *Greenslade v Dare* (1855) 20 Beav 284.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/B. FACTS RELEVANT TO THE ISSUE/(D) Facts Showing States of Mind/1080. Intention.

1080. Intention.

It is a question of substantive law whether the intention with which any particular act was done is relevant. On the one hand, the intention with which a person did an act which he had a right to do is in general irrelevant¹; and in other cases, as where a defendant is charged with obtaining credit without disclosing the fact of his bankruptcy, his intent, however innocent, is under statute wholly immaterial, any evidence on the point being consequently excluded². It is the same with a party's intent in infringing copyright³, or inflicting cruelty to animals⁴.

On the other hand, intention can in many cases be properly put in issue, and when this is done it becomes the subject of evidence, for the state of a man's mind is as much a matter of fact as the state of his digestion⁵. Thus the state of a person's mind may be proved whenever it is relevant⁶. A party's intention may be proved by his own testimony, or by proof of his declarations made out of court at the time when the intention was material⁷. It may sometimes, especially in cases concerning domicile or residence, be established circumstantially by the party's conduct, whether prior to, contemporaneous with or subsequent to the act in question⁸. When the act is unequivocal, the proof that it was done may of itself be evidence of the intention which the nature of the act conveys. In such a case the inference is that the person intended the probable consequences of his deliberate act⁹.

1 *Bradford Corp'n v Pickles* [1895] AC 587, HL; *Allen v Flood* [1898] AC 1, HL; *Quinn v Leathem* [1901] AC 495, HL; *Fitzroy v Cave* [1905] 2 KB 364, CA; *Salt Union Ltd v Brunner, Mond & Co* [1906] 2 KB 822. See **TORT**.

2 *R v Dyson* [1894] 2 QB 176, CCR.

3 *Oxford and Cambridge Universities v Gill* (1899) 43 Sol Jo 570.

4 *Duncan v Pope* (1899) 80 LT 120: see **ANIMALS** vol 2 (2008) PARA 819. For a statement of the cases in which mens rea is or is not required to be proved see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 8 et seq.

5 *Edgington v Fitzmaurice* (1885) 29 ChD 459, CA; *Citizens' Bank of Louisiana v First National Bank of New Orleans* (1873) LR 6 HL 352; cf *R v Dent* [1955] 2 QB 590, [1955] 2 All ER 806, CCA; and see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 705.

6 See *Sheen v Bumpstead* (1863) 2 H & C 193; *Saxlehner v Apollinaris Co* [1897] 1 Ch 893.

7 *Thomas v Connell* (1838) 4 M & W 267; *Brodie v Brodie* (1861) 4 LT 307; *Sugden v Lord St Leonards* (1876) 1 PD 154. As to the intention of a deceased person cf PARA 1078 note 1. As to rebuttal of the presumption of advancement see *Shephard v Cartwright* [1955] AC 431, [1954] 3 All ER 649, HL; and **GIFTS** vol 52 (2009) PARA 247; **TRUSTS** vol 48 (2007 Reissue) PARA 715. See also *Philippi v IRC* [1971] 3 All ER 61 at 73, [1971] 1 WLR 1272 at 1277, CA, per Lord Denning MR (what a person says is not the only means of proving a person's state of mind; it is just one of the means of finding out what his intentions were).

8 *Re Grove, Vaucher v Treasury Solicitor* (1888) 40 ChD 216, CA. See further **CONFLICT OF LAWS**. It is sometimes possible to deduce the intention with which a party did an act from the document by which the act was effected (*Re Fletcher, Reading v Fletcher* [1917] 1 Ch 339, CA), or from a document evidencing an intention to do the act at some future time (*Re Wright, Hegan v Bloor* [1920] 1 Ch 108). As to evidence of similar facts to prove states of mind see PARA 1082.

9 See PARA 1099.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/B. FACTS RELEVANT TO THE ISSUE/(D) Facts Showing States of Mind/1081. Abnormal states of mind.

1081. Abnormal states of mind.

An abnormal state of mind, such as insanity, may itself be a fact in issue¹, or it may be relevant to an issue of knowledge or intention. A person's personality and mental make-up have a bearing upon his conduct². The admissibility of evidence of abnormality will then depend either on the substantive law or on the general principle of relevance. Insanity, for example, is a defence to a prosecution for a criminal offence³, but it may be irrelevant as a defence to a claim for damages for assault⁴. When relevant, insanity is usually the subject of expert evidence⁵, although other witnesses may depose to the symptoms⁶. Again, the state of mind resulting from intoxicants or drugs may be an element in a criminal offence⁷ or may affect civil capacity, for example the capacity to give real consent to a marriage⁸.

1 Eg as affecting testamentary capacity or capacity to marry: see *Re Park, Park v Park* [1954] P 112, [1953] 2 All ER 1411, CA; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 42; **MENTAL HEALTH; WILLS** vol 50 (2005 Reissue) PARA 324. As to the presumption of sanity see PARA 1106 text and note 11.

2 See *R v Turner* [1975] QB 834, [1975] 1 All ER 70, CA (psychiatric evidence not allowed to establish provocation where matters were within experience of life of judge and jury or to prove probability of accused's veracity).

3 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 31-33.

4 *Morriss v Marsden* [1952] 1 All ER 925; see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 611.

5 See PARA 835 et seq.

6 See *R v Loake* (1911) 7 Cr App Rep 71, CCA; *Wright v Doe d Tatham* (1838) 4 Bing NC 489; and cf *R v Davies* [1962] 3 All ER 97, [1962] 1 WLR 1111.

7 Eg under the Road Traffic Act 1988 s 4: see **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 975. As to whether intoxication can be a defence to a criminal charge see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 28-30.

8 See **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 43.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/B. FACTS RELEVANT TO THE ISSUE/(E) Similar Facts/1082. Exclusion of similar facts.

(E) SIMILAR FACTS

1082. Exclusion of similar facts.

The rule that facts similar to a fact in issue are not in general admissible to prove either the occurrence of the fact in issue or the identity of its author¹ and its exceptions are likely to be applied more flexibly in proceedings to which the Civil Procedure Rules apply. The general rule is based² on the ground that evidence of similar facts may be irrelevant³. In criminal cases, to which the rule is most frequently applied⁴, the judge has an additional discretion to exclude evidence of similar facts when to admit the evidence would operate unfairly against the accused⁵.

In civil proceedings it has been held that evidence that a brewer supplied good beer to other publicans during the material period was not admissible to prove that he supplied good beer to the particular publican in question⁶; that evidence that a surgeon had been negligent or skilful in performing similar operations on other patients was not admissible to prove whether or not he had performed a particular operation negligently⁷; and that in a claim against the acceptor of a bill of exchange who defended on the ground that his acceptance was a forgery by a particular person, evidence that that person had forged other bills was not admissible⁸. The principle has also been applied in a number of other situations⁹. However, valuations made in relation to similar premises or transactions have been held to be admissible as evidence of the value of land for various purposes¹⁰ and manorial and other customs and trade usages are provable by evidence of similar facts¹¹. Furthermore, evidence of similar facts may be relevant when the conduct of an animal is in issue. The actions of the same animal on other occasions may be proved¹², and even the actions of other animals of the same species¹³. The operation of physical agencies may be shown by evidence of the operation of those agencies on other occasions, for example of poisons¹⁴, explosives¹⁵, noxious discharges from works¹⁶, sparks from a railway engine¹⁷ or infection from a hospital¹⁸.

Various exceptions to the rule have been established, but the court may now generally be more flexible. In civil cases the cases established that the courts will admit evidence of similar facts if it is logically probative, provided it is not oppressive or unfair to the other side, and also that the other side has fair notice of it and is able to deal with it¹⁹. Similar fact evidence is admissible in civil proceedings if it is potentially probative of an issue in the action²⁰. When evidence of similar facts is relevant, namely when there is a nexus between the similar fact and the fact in issue, such evidence may be received to prove either the occurrence of the fact in issue or the identity of its author²¹. When a practice to do or omit an act is in issue, evidence of similar acts or omissions on other occasions by the person concerned is admissible. Thus, where a claimant contends that he has contracted a disease in consequence of the practice adopted by a barber regarding the care of his razors, evidence may be given that other customers have contracted disease²². Previous occurrences of the type complained of in the claim are frequently relevant in cases of industrial injury. Repeated acts of agency are admissible to establish agency²³, although no multiplication of acts by a special agent can be received to establish a general agency²⁴, nor is evidence of this kind allowable in proof of partnership²⁵.

Evidence of similar facts may sometimes be resorted to on questions of title to land and its value. Thus, not only are repeated acts of ownership with respect to the same property admissible in proof of title, but even acts done with respect to other places, provided the latter

are connected with the relevant place by such a common character of locality as to give rise to the inference that the owner of one is likely to be the owner of the other²⁶.

Where it is relevant to prove the state of a party's mind²⁷, evidence of similar facts may be admissible. Thus such evidence has been received to prove a party's knowledge of the nature of a transaction, or his intent with respect to it²⁸. The same principle is applicable to proof of fraud or malice²⁹. To establish malice in a claim for libel, the publication by the defendant of other libels concerning the claimant, both prior and subsequent to that in issue, may be shown, together with all the circumstances attending their publication³⁰. In general, wherever it is necessary to rebut the defence of accident, mistake or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same kind as that in question may be given³¹.

1 See eg *Brown v Eastern and Midlands Rly Co*(1889) 22 QBD 391 at 393, CA.

2 The rule is not based, as is sometimes said, on the ground that evidence of similar facts may be *res inter alios acta*, for such evidence might be inadmissible if it were inter partes; nor is it based primarily on the inconvenience and delay which the admission of such evidence might occasion: see *Hollingham v Head* (1858) 4 CBNS 388 at 392 per Willes J.

3 *Harris v DPP*[1952] AC 694, [1952] 2 All ER 1044, HL; approving *Makin v A-G for New South Wales*[1894] AC 57, PC. See also *Berger v Raymond Sun Ltd* [1984] 1 WLR 625 (applying *Makin v A-G for New South Wales*[1894] AC 57, PC); *R v Straffen*[1952] 2 QB 911, [1952] 2 All ER 657, CCA; *R v Morris*(1969) 54 Cr App Rep 69, CA. The court now has a general discretionary power to control the evidence: see PARA 791.

4 As to the application of the rule in criminal cases see *DPP v Boardman*[1975] AC 421, sub nom *Boardman v DPP* (1974) 60 Cr App Rep 165, HL; *DPP v P*[1991] 2 AC 447, sub nom *R v P*[1991] 3 All ER 337, HL; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1507.

5 *Harris v DPP*[1952] AC 694, [1952] 2 All ER 1044, HL; and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1507. It has been stated that in civil cases tried before a jury the court must be more careful about admitting evidence which is in truth merely prejudicial than is necessary where there is a trial by a judge alone who is trained to distinguish between what is probative and what is not: see *Thorpe v Chief Constable of Greater Manchester Police* [1989] 2 All ER 827 at 831, [1989] 1 WLR 665 at 670, CA, per Dillon LJ. As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

6 *Holcombe v Hewson* (1810) 2 Camp 391; but cf *Manchester Brewery Co Ltd v Coombs* (1900) as reported in 82 LT 347; *Richard Holden Ltd v Bostock & Co Ltd* (1902) 50 WR 323, CA; and *Bostock & Co Ltd v Nicholson & Sons Ltd*[1904] 1 KB 725.

7 *R v Whitehead* (1848) 3 Car & Kir 202; and see *Brown v Eastern and Midlands Rly Co*(1889) 22 QBD 391, CA; *McAllum v Reid*(1869) LR 3 A & E 57n. As to the standard of professional competence to be expected of a surgeon see generally **NEGLIGENCE** vol 78 (2010) PARA 23.

8 *Griffits v Payne* (1839) 11 Ad & El 131; *Viney v Barss* (1795) 1 Esp 293; *Balcetti v Serani* (1792) Peake 192.

9 Eg to roads (*R v Brightside Bierlow Inhabitants*(1849) 13 QB 933), rivers (*Neill v Duke of Devonshire*(1882) 8 App Cas 135, HL; cf *Frost v Richardson* (1910) 103 LT 22 (mill tail of mill built across navigable river not part of river); affd 103 LT 416, CA); inland lakes (*Bristow v Cormican*(1878) 3 App Cas 641, HL), woods, hedges (*Jones v Williams* (1837) 2 M & W 326) and other boundaries (see **BOUNDARIES**). Thus in the cases cited, acts of ownership and the exercise of rights on other land were irrelevant to the facts in issue.

10 *Pointer v Norwich Assessment Committee*[1922] 2 KB 471, CA; *Stockbridge Mill Co Ltd v Central Land Board*[1954] 2 All ER 360, [1954] 1 WLR 886, CA. Evidence of this character is, however, generally of little weight: see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 117.

11 See **CUSTOM AND USAGE**.

12 See *Bativala v West*[1970] 1 QB 716, [1970] 1 All ER 332, CA. Evidence that an animal had a propensity to bite other animals is irrelevant to its propensity to bite human beings: *Osborne v Chocquee*[1896] 2 QB 109; *Glanville v Sutton & Co Ltd*[1928] 1 KB 571, DC.

13 *Brown v Eastern and Midlands Rly Co*(1889) 22 QBD 391; affd (1889) 22 QBD 393, CA; *Gordon v Mackenzie*1913 SC 109; *Draper v Hodder*[1972] 2 QB 556, [1972] 2 All ER 210, CA (propensities of Jack Russell terriers); and see the Animals Act 1971 s 1; and **ANIMALS** vol 2 (2008) PARAS 702, 747 et seq.

14 *R v Geering* (1849) 18 LJMC 215; *R v Garner* (1864) 3 F & F 681; *R v Cotton* (1873) 12 Cox CC 400; *R v Flannagan and Higgins* (1884) 15 Cox CC 403.

15 *R v Bernard* (1858) 1 F & F 240; *R v McGrath and McKeivitt* (1881) 14 Cox CC 598.

16 *Tennant v Hamilton* (1839) 7 Cl & Fin 122, HL.

17 *Aldridge v Great Western Rly Co* (1841) 3 Man & G 515; *Piggot v Eastern Counties Rly Co* (1846) 3 CB 229.

18 *Metropolitan Asylum District Managers v Hill (Appeal No 1)* (1882) 47 LT 29, HL. Cf *A-G v Nottingham Corp*[1904] 1 Ch 673.

19 *Mood Music Publishing Co Ltd v De Wolfe Ltd*[1976] Ch 119, [1976] 1 All ER 763, CA (dictum of Lord Denning MR at 127 and 766 applied in *Berger v Raymond Sun Ltd* [1984] 1 WLR 625); and see *Moore v Ransome's Dock Committee* (1898) 14 TLR 539, CA; *EG Music v RF (Film) Distributors Ltd* [1978] FSR 121; *R v Crown Court at Isleworth, ex p Marland* (1998) 162 JP 251 (applicability to forfeiture proceedings in drug trafficking cases). As to the admission of similar fact evidence in civil trials before a jury see note 5.

20 *O'Brien v Chief Constable of South Wales Police*[2005] UKHL 26, [2005] 2 AC 534, [2005] 2 All ER 931.

21 To show that the defendant had given orders for work on a house, evidence that he had given similar orders for other work on the same house may be admitted: *Woodward v Buchanan*(1870) LR 5 QB 285. And see *Mood Music Publishing Co Ltd v De Wolfe Ltd*[1976] Ch 119, [1976] 1 All ER 763, CA (evidence of other breaches admitted in claim for breach of copyright).

22 *Hales v Kerr*[1908] 2 KB 601; *Joy v Phillips, Mills & Co Ltd*[1916] 1 KB 849, CA; and see *Martin v Osborne* (1936) 55 CLR 367.

23 *Blake v Albion Life Assurance Society* (1878) 4 CPD 94.

24 *Barrett v Irvine*[1907] 2 IR 462, CA; and see **AGENCY** vol 1 (2008) PARA 11.

25 *Kennedy v Dodson*[1895] 1 Ch 334, CA.

26 *Jones v Williams* (1837) 2 M & W 326; *Lord Advocate v Lord Blantyre*(1879) 4 App Cas 770, HL; *Leeke v Portsmouth Corp*n (1912) 107 LT 260.

27 As to other evidence of states of mind see PARAS 1065, 1078; and *R v Mackie*(1973) 57 Cr App Rep 453, CA (evidence of previous incidents admitted to prove victim's state of mind).

28 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1507.

29 *Blake v Albion Life Assurance Society* (1878) 4 CPD 94; *Barnes v Merritt & Co* (1899) 15 TLR 419, CA. As to the admission of evidence of similar facts to prove fraud or malice in criminal cases see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1507.

30 *Barrett v Long* (1851) 3 HL Cas 395; *Pearson v Lemaitre* (1843) 5 Man & G 700.

31 See eg *R v Church*[1966] 1 QB 59, [1965] 2 All ER 72, CCA; *R v Lipman*[1970] 1 QB 152, [1969] 3 All ER 410, CA; *R v Mackie*(1973) 57 Cr App Rep 453, CA; and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1507.

UPDATE

1082 Exclusion of similar facts

NOTES 29-31--See *Desmond v Bower*[2009] EWCA Civ 667, [2010] EMLR 109, [2009] All ER (D) 276 (Jul) (alleged libel by newspaper owner with personal vendetta against victim; summons to hear evidence from victim of 'strikingly similar' separate incident granted).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/B. FACTS RELEVANT TO THE ISSUE/ (F) Reputation/1083. Rule of exclusion.

(F) REPUTATION

1083. Rule of exclusion.

When a party's character, which in this context means his reputation¹, is not directly in issue in the proceedings, but evidence of it is tendered in proof of some other fact, it is generally excluded². This rule is observed, it is said, not because evidence of character is necessarily irrelevant, but for reasons of policy and fairness, since no litigant can be prepared to protect himself against imputations made without previous notice, which may range over the whole of his career³. The character of a witness, however, may be attacked for the purpose of impeaching his credit⁴, and in this context character is not confined to reputation.

It is not in general permissible in a criminal case for the prosecution to adduce evidence that the accused either bears a bad general reputation in the community, or has a natural disposition to commit crimes of the class charged⁵. The accused, nevertheless, is permitted to adduce or give evidence of his good reputation⁶, and if he thus puts his character in issue, the prosecution may attack it⁷.

In certain circumstances in civil cases, evidence of reputation⁸ is admissible for the purpose of establishing a person's good or bad character⁹. The admission of evidence of reputation¹⁰ is now largely confined to defamation claims, where what is relevant will depend upon the terms of the statements of case¹¹. Where damages are at large¹², the bad character¹³ of the claimant in such claims may be proved in chief in mitigation of damages, irrespective of the right to cross-examine¹⁴. In general, in civil cases, evidence as to character and reputation is not admissible to bolster a party's case¹⁵, although it may certainly be relevant in cross-examination, for example as to credibility¹⁶.

1 *Scott v Sampson*(1882) 8 QBD 491, DC; *Wood v Cox* (1888) 4 TLR 550, 652, 655 (affd (1889) 5 TLR 272, CA); and cf *Wood v Earl of Durham*(1889) 21 QBD 501, DC.

2 *Narracott v Narracott and Hesketh* (1864) 33 LJP & A 61. In general, evidence cannot be led in chief to bolster up the credibility of witnesses: see *R v Turner*[1975] QB 834, [1975] 1 All ER 70, CA; cf *Lowery v R*[1974] AC 85, [1973] 3 All ER 662, PC. As to the admissibility of evidence of reputation under the Civil Evidence Act 1995 see PARA 827 et seq.

3 *R v Rowton* (1865) 34 LJMC 57, but see the dissenting judgments of Erle CJ and Willes J.

4 See PARA 1047 et seq; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1433.

5 *R v Butterwasser*[1948] 1 KB 4, [1947] 2 All ER 415, CCA; *R v Rowton* (1865) 34 LJMC 57; *R v Cole* (1810) Judge's Note printed in [1946] KB 544; and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1505.

6 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1499.

7 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1515 et seq.

8 Reputation must be treated as a fact, and not as a statement or multiplicity of statements dealing with the matter reputed: Civil Evidence Act 1995 s 7(3). Evidence admissible under s 7(3) is not subject to the statutory safeguards contained in ss 2-4 (see PARAS 811-815): see s 1(4).

9 See the Civil Evidence Act 1995 s 7(3)(a); and see also PARA 827.

10 For the distinction between reputation and specific acts see *Plato Films v Speide*[1961] AC 1090, [1961] 1 All ER 876, HL.

11 *Maisel v Financial Times Ltd* (1915) 84 LJKB 2145, HL; see also *Scott v Sampson*(1882) 8 QBD 491, DC; and **LIBEL AND SLANDER**. As to statements of case see generally PARA 584 et seq. In defamation claims, statements of case should be confined to the information necessary to inform the other party of the nature of the case he has to meet. Such information should be set out concisely and in a manner proportionate to the subject matter of the claim: *Practice Direction--Defamation Claims* PD 53 para 2.1. A claimant must give full details of the facts and matters on which he relies in support of his claim for damages: para 2.10(1).

12 See **LIBEL AND SLANDER** vol 28 (Reissue) PARA 248.

13 To be admissible, previous convictions must be in the relevant sector of the claimant's life and have taken place within a relevant period such as to affect his current reputation: *Goody v Odhams Press Ltd*[1967] 1 QB 333, [1966] 3 All ER 369, CA; and see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 261.

14 In claims for malicious prosecution and false imprisonment (see **TORT**) evidence is probably not admissible at all to prove the claimant's bad character: *Newsam v Carr* (1817) 2 Stark 69; *Cornwall v Richardson* (1825) Ry & M 305; *Downing v Butcher* (1841) 2 Mood & R 374; cf *Rodriguez v Tadmire* (1799) 2 Esp 720.

15 *A-G v Bowman* (1791) 2 Bos & P 532n; *R v Turner*[1975] QB 834, [1975] 1 All ER 70, CA; and see note 2.

16 As to the credibility of witnesses see PARA 1047 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(i) Facts which may be Proved/C. COLLATERAL OR SUBORDINATE FACTS/1084. In general.

C. COLLATERAL OR SUBORDINATE FACTS

1084. In general.

There are three kinds of collateral or subordinate facts: (1) facts affecting the competence of a witness¹; (2) facts affecting the credibility of a witness²; and (3) facts which must be proved as a condition precedent to the admissibility of certain items of evidence³.

A collateral fact may also be a fact in issue⁴ if one party is seeking to establish it and its existence is denied by his opponent.

1 Eg the fact that a witness is not competent to testify because of mental illness. As to the competence of witnesses see PARA 966 et seq. Under the Civil Evidence Act 1995, hearsay evidence is not admissible if it consists of or is proved by means of a statement made by a person who was not competent as a witness: see s 5(1); and PARA 809.

2 Eg the fact that an eyewitness suffers from a visual impairment. As to the credibility of witnesses see PARA 1047 et seq.

3 Eg the common law rule that the loss of an original document must be proved before a copy can be admitted as evidence of its contents: see PARA 761. Under the Civil Evidence Act 1995, a statement contained in a document may now be proved by the production of an authenticated copy, regardless of whether or not the original is in existence: see s 8; and PARA 816.

4 As to the facts in issue see PARAS 1065-1066. In cases where there is a jury trial, the ascertainment of the issues is a function of the judge: see PARA 796. As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/A. PROOF OF LAW IN OTHER JURISDICTIONS/1085. Proof of foreign law; in general.

(ii) Special Modes of Proof

A. PROOF OF LAW IN OTHER JURISDICTIONS

1085. Proof of foreign law; in general.

In general, courts in England and Wales may not take judicial notice¹ of foreign law², which has to be determined when necessary as a question of fact³. The burden of proof rests upon the party who asserts that foreign law differs from English law⁴.

A decision on a question of foreign law is not binding, for such a question is a question of fact to be decided in each case on the actual evidence in that case⁵.

Provision is made for the proof of foreign and colonial acts of state, judgments and other legal documents under the Evidence Act 1851⁶. In determining a question of foreign law the court will generally hear expert evidence in accordance with the Civil Evidence Act 1972⁷ but may adopt the alternative statutory procedure under the British Law Ascertainment Act 1859⁸.

1 As to the meaning of 'judicial notice' see PARA 779.

2 *Brenan and Galen's Case*(1847) 10 QB 492. There are examples to the contrary: see eg *Saxby v Fulton*[1909] 2 KB 208, CA, where judicial notice was taken of the fact that roulette is legal in Monte Carlo; and see PARA 783. As to the meaning of 'foreign law' for the purposes of judicial notice see PARA 783.

3 As to the determination of what system of law, English or foreign, may need to be applied in cases having a foreign element see **CONFLICT OF LAWS**.

4 There is said to be a presumption that English and foreign law are the same unless the contrary is proved: see **CONFLICT OF LAWS**; but see also *Shaker v Al-Bedrawi (No 2)*[2002] EWCA Civ 1452, [2002] All ER (D) 255 (Oct).

5 *Lazard Bros & Co v Midland Bank Ltd*[1933] AC 289, HL. This is so despite the provisions of the Civil Evidence Act 1972 s 4 (see PARA 1088): see *Phoenix Marine Inc v China Ocean Shipping Co* [1999] 1 All ER (Comm) 138, [1999] 1 Lloyd's Rep 682.

6 See the Evidence Act 1851 s 7; and PARA 899.

7 See the Civil Evidence Act 1972 s 4; and PARA 1088.

8 See PARAS 1092-1093.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/A. PROOF OF LAW IN OTHER JURISDICTIONS/1086. Proof of decisions of the European Court of Human Rights.

1086. Proof of decisions of the European Court of Human Rights.

An English court or tribunal determining a question which has arisen in connection with a Convention right¹ must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights and any opinion of the European Human Rights Commission given in a report adopted under the Convention for the Protection of Human Rights and Fundamental Freedoms², whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen³. Evidence of any judgment, decision, declaration or opinion of which account may have to be taken is to be given in proceedings before any court or tribunal in such manner as may be provided by rules of court or, in the case of proceedings before a tribunal, rules made for these purposes⁴. If it is necessary for a party to give evidence of such an authority at a hearing before a court in which procedure is regulated by the Civil Procedure Rules, the authority to be cited must be an authoritative and complete report and the party must give to the court and any other party a list of the authorities he intends to cite and copies of the reports not less than three days before the hearing⁵.

Because of the status of such authority, cases decided in the organs of the Convention for the Protection of Human Rights and Fundamental Freedoms are not regarded as 'foreign' authorities for the purposes of citation by advocates in English courts⁶.

1 As to the meaning of 'Convention right' see the Human Rights Act 1998 s 1; and PARA 792. See also **JUDICIAL REVIEW** vol 61 (2010) PARA 651; **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

2 Ie adopted under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)) art 31: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

3 Human Rights Act 1998 s 2(1)(a), (b). Such a court or tribunal is also required to take into account any decision of the Commission in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms art 26 or art 27(2) or any decision of the Committee of Ministers taken under art 46: Human Rights Act 1998 s 2(1)(c), (d).

On 1 November 1998 Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (Strasbourg, 11 May 1994; ETS no 155) entered into force and the European Commission and Court of Human Rights were replaced with a new permanent Court although the Commission continued until 31 October 1999 to deal with those cases declared admissible prior to the date of entry into force.

4 Human Rights Act 1998 s 2(2), (3). Such rules are to be made by the Lord Chancellor or the Secretary of State, in relation to any proceedings outside Scotland, by the Secretary of State, in relation to proceedings in Scotland, or by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland which deals with transferred matters and for which no rules otherwise made for this purpose are in force: see the Human Rights Act 1998 s 2(3) (amended by SI 2005/3429).

5 *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 8.1(1), (2). Copies of the complete original texts issued by the European Court of Human Rights and the Commission either paper based or from the court's judgment database (HUDOC), which is available on the Internet, may be used: *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 8.1(3). As to the application of the CPR and complementary practice directions see PARA 32.

6 See PARA 1088 note 3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/A. PROOF OF LAW IN OTHER JURISDICTIONS/1087. Proof of decisions of the European Court.

1087. Proof of decisions of the European Court.

Any question arising before a court in England and Wales as to the meaning or effect of a European Union treaty or the validity, meaning or effect of another Community instrument is declared by statute to be a question of law to be determined by the court in accordance with the principles laid down by, and any relevant decision of, the European Court (the 'ECJ') or any court attached to it, unless it is referred to the ECJ¹. Judicial notice² must be taken of the Treaties, of the Official Journal of the Communities and of any decision of, or expression of opinion by, the ECJ or any court attached to it on any such question; and the Official Journal is admissible as evidence of any instrument or other act thereby communicated of any of the Communities or of any Community institution³.

Evidence of any instrument issued by a Community institution, including any judgment or order of the ECJ or any court attached to it, or of any document in the custody of a Community institution, or any entry in or extract from such a document, may be given in any legal proceedings by production of a copy certified as a true copy by an official of that institution; and any document purporting to be such a copy is to be received in evidence without proof of the official position or handwriting of the person signing the certificate⁴. Evidence of any Community instrument may also be given in any legal proceedings by production of a copy purporting to be printed by the Queen's Printer or, where the instrument is in the custody of a government department (including a department of the Government of Northern Ireland), by production of a copy certified on behalf of the department to be a true copy by an officer of the department generally or specially authorised so to do⁵.

National courts must regard themselves as bound by decisions of the ECJ relating to the interpretation of particular instruments or other matters of Community law⁶. Provision is made for certain domestic courts to refer a particular question of law to the ECJ for a ruling⁷.

The rules relating to the citation of authorities before the courts⁸ apply to the citation of ECJ decisions which are not regarded as 'foreign' decisions for the purposes of those rules⁹. When a question of law has been referred to the ECJ and that court has given its judgment, a certified copy of the judgment is transmitted to the court which made the reference¹⁰.

¹ European Communities Act 1972 s 3(1) (s 3(1)-(3) amended by the European Communities (Amendment) Act 1986 s 2). The European Communities Act 1972 s 3(1) is further amended, as from a day to be appointed, by the European Union (Amendment) Act 2008 s 3(3), Schedule Pt 1, to substitute a reference to an 'EU instrument' for the reference to a 'Community instrument' and a reference to 'the European Court' for the reference to 'the European Court or any court attached thereto'. At the date at which this title states the law, no such day had been appointed.

'European Court' means the Court of Justice of the European Communities or the Court of First Instance, and any reference to a court attached to the European Court is a reference to a judicial panel attached to the Court of First Instance: European Communities Act 1972 s 1(2), Sch 1 Pt II (definition amended by the European Communities (Amendment) Act 2002 s 2). The definition of 'European Court' in the European Communities Act 1972 Sch 1 Pt II is substituted, as from a day to be appointed, by the European Union (Amendment) Act 2008 s 3(3), Schedule Pt 1, so as to provide that 'European Court' means the Court of Justice of the European Union. At the date at which this title states the law, no such day had been appointed.

² As to judicial notice see PARA 779 et seq. Specific statutory provision is made for judicial notice of other Community law, eg the Brussels Conventions: see PARA 780.

3 European Communities Act 1972 s 3(2) (as amended: see note 1). Section 3(2) is further amended, as from a day to be appointed, by the European Union (Amendment) Act 2008 Schedule Pt 1, to substitute a reference to the 'Official Journal of the European Union' for the reference to the 'Official Journal of the Communities'; a reference to 'the European Court' for the reference to 'the European Court or any court attached thereto'; a reference to 'the EU' for the reference to 'any of the Communities'; and to 'EU institution' for the reference to 'Community institution'. At the date at which this title states the law, no such day had been appointed.

The European Communities Act 1972 s 3(2)-(4) also has effect in relation to the EFTA Court and the EFTA Surveillance Authority: see the European Economic Area Act 1993 s 4. As to the meaning of 'the Treaties' see the European Communities Act 1972 s 1(2)-(4).

4 European Communities Act 1972 s 3(3) (as amended: see note 1). Section 3(3) is further amended, as from a day to be appointed, by the European Union (Amendment) Act 2008 Schedule Pt 1, to substitute references to 'EU institution' for references to 'Community institution' and a reference to 'the European Court' for the reference to 'the European Court or any court attached thereto'. At the date at which this title states the law, no such day had been appointed.

5 European Communities Act 1972 s 3(4). Any document purporting to be a copy certified as mentioned in the text to be a true copy of an instrument in the custody of a government department is to be received in evidence without proof of the official position or handwriting of the person signing the certificate, or of his authority to do so, or of the document being in the custody of the department: s 3(4). Section 3(4) is amended, as from a day to be appointed, by the European Union (Amendment) Act 2008 Schedule Pt 1, to substitute a reference to 'EU instrument' for the reference to 'Community instrument'. At the date at which this title states the law, no such day had been appointed.

6 See Case 66/80 *SpA International Chemical Corp'n v Amministrazione delle Finanze dello Stato* [1981] ECR 1191, [1983] 2 CMLR 593, ECJ; Case 283/81 *SRL CILFIT and Lanificio di Gavado SpA v Ministry of Health* [1982] ECR 3415, [1983] 1 CMLR 472, ECJ; Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, [1988] 3 CMLR 57, ECJ.

7 See PARA 1720 et seq.

8 See *Practice Note* [2001] 2 All ER 510, sub nom *Practice Direction (citation of authorities)* [2001] 1 WLR 1001, CA, para 8: see PARA 91.

9 See *Practice Note* [2001] 2 All ER 510, sub nom *Practice Direction (citation of authorities)* [2001] 1 WLR 1001, CA, para 9.3.

10 See PARA 1720.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/A. PROOF OF LAW IN OTHER JURISDICTIONS/1088. Mode of proof of foreign law.

1088. Mode of proof of foreign law.

Where it is necessary¹ for an English court to know or apply the law of any country or territory outside the United Kingdom², or of any part of the United Kingdom other than England and Wales, other than European Union or European human rights law³, that law may be proved in civil proceedings⁴ by a person suitably qualified to give expert evidence of such law on account of his knowledge or experience⁵. It is immaterial whether he has acted or is entitled to act as a legal practitioner in the country concerned⁶. A court is not generally⁷ entitled to construe a foreign code itself⁸ without expert assistance⁹ but, where any question as to the law of any country or territory outside the United Kingdom or any part of the United Kingdom other than England or Wales with respect to any matter has already been determined¹⁰, and any finding made or decision given, and reported or recorded in citable form¹¹, then if such a finding or decision is adduced¹² before the court (which must be done in accordance with the relevant rules¹³), the law will be taken to be in accordance with the finding or decision unless the contrary is proved¹⁴, unless there are conflicting decisions on the same question adduced by virtue of the same provision in the same proceedings¹⁵. Nothing in the statutory provisions set out above prejudices any power of a court, in any civil proceedings, to exclude evidence, whether by preventing questions from being put or otherwise, at its discretion¹⁶ or the operation of any agreement, whenever made, between the parties to any civil proceedings as to the evidence which is to be admissible, whether generally or for any particular purpose, in those proceedings¹⁷.

When giving evidence as to foreign law, a witness may refer to authorities, laws and treaties upon it¹⁸, and is entitled to refer to and state the effect of any written law without having to produce a copy¹⁹.

If no witnesses are called to give expert evidence on the foreign law concerned the court itself may in exceptional circumstances and with the consent of the parties construe and apply that law²⁰ on the assumption that the rules of construction applicable are the same as the English rules²¹.

1 Foreign law need not be proved if it is admitted: *Moulis v Owen* [1907] 1 KB 746, CA; and see **CONFLICT OF LAWS**.

2 As to the meaning of 'United Kingdom' see PARA 221 note 2.

3 As to when an English court must apply a decision of the European Court of Human Rights or the Court of Justice of the European Communities ('ECJ') see PARAS 1086-1087; and PARAS 101-102. With regard to the rules for citation of authorities by advocates in civil courts, decisions of the European Court and cases decided in the organs of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969) (see PARA 1086) are not regarded as 'foreign' decisions: see *Practice Note* [2001] 2 All ER 510, sub nom *Practice Direction (citation of authorities)* [2001] 1 WLR 1001, CA, para 9.3.

4 For these purposes, 'civil proceedings' means civil proceedings, before any tribunal, in relation to which the strict rules of evidence apply, whether as a matter of law or by agreement, of the parties; and references to the 'court' are to be construed accordingly: Civil Evidence Act 1972 s 5(1) (s 5(1), (2) substituted by the Civil Evidence Act 1995 s 15(1), Sch 1 para 7).

5 See the Civil Evidence Act 1972 s 4(1). The witness should clearly be well acquainted with the legal system about which he is to give evidence: see eg *Brailey v Rhodesia Consolidated Ltd* [1910] 2 Ch 95 (reader in Roman-Dutch law for the Incorporated Council of Legal Education sufficiently expert to prove that law in the

former Rhodesia was the same as English, although he had not practised there); *Re Moses, Moses v Valentine* [1908] 2 Ch 235 (uncontested written opinion of ex-Chief Justice of the Transvaal on Roman-Dutch law); *Sussex Peerage Case* (1844) 11 Cl & Fin 85, HL (where a Roman Catholic bishop gave evidence upon the matrimonial law of Rome); *Vander Donckt v Thellusson* (1849) 8 CB 812 (where a Belgian merchant and stockbroker proved Belgian law with reference to negotiable instruments); *Re Dost Aly Khan* (1880) 6 PD 6 (where Persian diplomats proved Persian law); *Cooper-King v Cooper-King* [1900] P 65 (where an ex-governor of Hong Kong proved the law of Hong Kong); *De Beêche v South American Stores Ltd and Chilean Stores Ltd* [1935] AC 148, HL (London banker competent on the law as to bills drawn in Chile); *Ajami v Customs Comptroller* [1954] 1 WLR 1405, PC (Nigerian bank manager held competent on legal tender in French West Africa); *Associated Shipping Services Ltd v Department of Private Affairs of HH Sheikh Zayed Bin Sultan Al-Nahayan* (1990) Financial Times, 31 July, CA. Members of a consular post are entitled to decline to give evidence as expert witnesses regarding the law of their sending state: Consular Relations Act 1968 s 1(4), Sch 1 art 44(3).

6 Civil Evidence Act 1972 s 4(1). As to the particulars to be set out in affidavits made in non-contentious probate matters by persons qualified under s 4(1) see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 254.

7 For the exceptions see **CONFLICT OF LAWS**.

8 There is authority to the effect that, in exceptional circumstances and with the parties' consent, a court can itself decide questions of foreign law: *Beatty v Beatty* [1924] 1 KB 807, CA; *Jabbour v Custodian of Israeli Absentee Property* [1954] 1 All ER 145, [1954] 1 WLR 139. See also *United States of America v McRae* (1867) 3 Ch App 79.

9 *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853, [1966] 2 All ER 536, HL; *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, HL; *Baron de Bode's Case* (1844) 8 QB 208; *Buerger v New York Life Assurance Co* (1927) 96 LJBK 930, CA; see also *Camille and Henry Dreyfus Foundation Inc v IRC* [1954] Ch 672, [1954] 2 All ER 466, CA (admission of evidence of New York lawyers on meaning of English words capable, in the context in which they were used in American law, of being terms of art); affd on another point [1956] AC 39, [1955] 3 All ER 97, HL; *Sharif v Azad* [1967] 1 QB 605, [1966] 3 All ER 785, CA.

10 It is determined whether before or after the passing of the Civil Evidence Act 1972 in any of the following proceedings, whether civil or criminal: at first instance in the High Court, the Crown Court, quarter sessions (now replaced by the Crown Court) or the Lancaster or Durham Chancery Court (now merged with the High Court: see **COURTS** vol 10 (Reissue) PARA 606) or appeals therefrom, or proceedings before the Judicial Committee of the Privy Council on appeal from any decision of any court outside the United Kingdom: s 4(4).

11 Civil Evidence Act 1972 s 4(2)(a). A finding or decision is taken to be reported or recorded in citable form if, but only if, it is reported or recorded in writing in a report, transcript or other document which, if the question had been a question as to the law of England and Wales, could be cited as an authority in legal proceedings in England and Wales: s 4(5). As to the citation of authorities in courts in England and Wales see *Practice Note* [2001] 2 All ER 510, sub nom *Practice Direction (citation of authorities)* [2001] 1 WLR 1001, CA; note 13; and PARAS 91, 106.

12 Except with the leave of the court, a party to any civil proceedings is not to be permitted to adduce any such finding or decision as is mentioned in the Civil Evidence Act 1972 s 4(2), unless he has, in accordance with rules of court, given every other party to the proceedings notice that he intends to do so: s 4(3). The rules of court made for the purposes of the application of s 4 to proceedings in the High Court apply, except in so far as their application is excluded by agreement, to proceedings before tribunals other than the ordinary courts of law, subject to such modifications as may be appropriate; and any question arising as to what modifications are appropriate must be determined, in default of agreement, by the tribunal: s 5(2) (as substituted: see note 3).

13 See PARA 1089.

14 Civil Evidence Act 1972 s 4(2)(b). Although s 4(2)(b) effectively raises a presumption that the earlier decision is correct, the language of s 4 does not itself indicate how much weight the court should attach to a previous decision and although it is obviously desirable to reach consistent conclusions, that does not provide sufficient grounds for construing s 4 as if it laid down a general rule that the presumption could not be displaced except by particularly cogent evidence. A court which has to consider the question for a second time is in a good position to decide for itself what weight should be attached to the previous decision: see *Phoenix Marine Inc v China Ocean Shipping Co* [1999] 1 All ER (Comm) 138, [1999] 1 Lloyd's Rep 682.

15 Civil Evidence Act 1972 s 4(2) proviso. Where there is a conflict of expert testimony the judge must resolve it, as in eg *Re Duke of Wellington, Glentanar v Wellington* [1947] Ch 506, [1947] 2 All ER 854. See also PARA 1085 text and note 5.

16 Civil Evidence Act 1972 s 5(3)(a). As to the court's general power to control evidence see PARA 791.

- 17 Civil Evidence Act 1972 s 5(3)(b).
- 18 *Sussex Peerage Case* (1844) 11 Cl & Fin 85, HL; *Earl Nelson v Lord Bridport* (1845) 8 Beav 527.
- 19 *Baron de Bode's Case* (1844) 8 QB 208.
- 20 *Jabbour v Custodian of Israeli Absentee Property* [1954] 1 All ER 145, [1954] 1 WLR 139; see also *Re Cohn* [1945] Ch 5; *Beatty v Beatty* [1924] 1 KB 807, CA.
- 21 *Jabbour v Custodian of Israeli Absentee Property* [1954] 1 All ER 145, [1954] 1 WLR 139.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/A. PROOF OF LAW IN OTHER JURISDICTIONS/1089. Evidence of finding on question of foreign law.

1089. Evidence of finding on question of foreign law.

A party who intends to put in evidence a finding on a question of foreign law¹ must give any other party notice of his intention². If there are to be witness statements³, he must give the notice not later than the latest date for serving⁴ them⁵ or, otherwise, not less than 21 days before the hearing at which he proposes to put the finding in evidence⁶. The notice must specify the question on which the finding was made⁷ and enclose a copy of any document where it is reported or recorded⁸. A party failing to comply with these rules will be precluded from putting in evidence the finding on which he relies except with the leave of the court⁹.

1 Ie by virtue of the Civil Evidence Act 1972 s 4(2): see PARA 1088.

2 CPR 33.7(2).

3 As to the meaning of 'witness statement' see PARA 751 note 1.

4 As to the meaning of 'service' see PARA 138 note 2. As to the service of witness statements see PARA 982.

5 CPR 33.7(3)(a).

6 CPR 33.7(3)(b). As to time limits generally see PARA 88 et seq.

7 CPR 33.7(4)(a).

8 CPR 33.7(4)(b). As to the citation of authority from another jurisdiction see PARA 105 note 2.

9 See the Civil Evidence Act 1972 s 4(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/A. PROOF OF LAW IN OTHER JURISDICTIONS/1090. The duty of the court.

1090. The duty of the court.

The effect of the evidence given with respect to foreign law must be decided by the judge alone¹, and must not be submitted to the jury² even in a criminal trial³. If the experts' evidence is unsatisfactory or conflicting the court will itself examine the decisions of foreign courts, textbooks, codes and other documents in order to arrive at a satisfactory conclusion on the question⁴. Where, however, the expert witnesses are in agreement the court must base its findings on the effect of the foreign law on the evidence given by the experts and should not reject their evidence and conduct its own researches into the effect of the foreign law by recourse to textbooks and foreign law reports⁵.

Where the court is obliged to conduct its own researches it is not bound to accept the decisions of foreign courts as correctly setting out the law of the foreign state⁶ and it is entitled, on looking at or dealing with any textbook, decision, code or other legal document produced to it as stating or representing the foreign law, to construe them and form its own conclusion on them⁷.

The construction of a foreign document by the application to it of the foreign law, when ascertained, is for the judge, and not for the witness⁸.

1 See *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, HL. An appellate court may be more ready to come to a different conclusion to that reached at first instance: see *Parkasho v Singh* [1968] P 233, [1967] 1 All ER 737, DC.

2 Supreme Court Act 1981 s 69(5); County Courts Act 1984 s 68. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

3 *R v Hammer* [1923] 2 KB 786, CCA; *R v Okolie* (2000) Times, 16 June, [2000] All ER (D) 661, CA; and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1486.

4 *Trimbey v Vignier* (1834) 1 Bing NC 151; *Bremer v Freeman* (1857) 10 Moo PCC 306; *Buerger v New York Life Assurance Co* (1927) 96 LJB 930, CA; *Kolbin & Sons v Kinnear & Co Ltd* 1930 SC 724 (on appeal 1931 SC 128); *R v Secretary of State for India in Council, ex p Ezekiel* [1941] 2 KB 169, [1941] 2 All ER 546, DC; *Re Duke of Wellington, Glentanar v Wellington* [1947] Ch 506, [1947] 2 All ER 854 (affd on other grounds [1948] Ch 118, [1947] 2 All ER 864, CA) (where the experts agreed that there was no express provision in point); *Rouyer Guillet et Cie v Rouyer Guillet & Co Ltd, Rouyer Guillet v Jackson Knowland & Co* [1949] 1 All ER 244n, CA; and see *Sharif v Azad* [1967] 1 QB 605, [1966] 3 All ER 785, CA (trial judge entitled to construe a Pakistani Act himself). Where there are no foreign authorities precisely in point, and expert witnesses cannot agree, the Court of Appeal is entitled and bound to form its own independent view on the issue of construction, although regard should be paid to the relevant circumstances as found by the trial judge: *Macmillan Inc v Bishopsgate Investment Trust plc (No 4)* [1999] CLC 417, 478, (1998) Times, 7 December, CA.

5 *Bumper Development Corp Ltd v Metropolitan Police Comr (Union of India, claimants)* [1991] 4 All ER 638, [1991] 1 WLR 1362, CA.

6 *Guaranty Trust Co of New York v Hannay & Co* [1918] 2 KB 623, CA, per Pickford LJ and at 667 per Scrutton LJ. Where, however, the decision is that of the highest court of the country whose law is in question, a court of this country is most unlikely to hold that its decision is erroneous: *Guaranty Trust Co of New York v Hannay & Co* [1918] 2 KB 623 at 638, CA, per Pickford LJ; *Bankers and Shippers Insurance Co v Liverpool Marine and General Insurance Co* (1925) 24 Ll L Rep 85, HL. An English court does not exercise a discretion vested in a foreign court: *Kornatzki v Oppenheimer* [1937] 4 All ER 133; cf *Re Schnapper, Westminster Bank Ltd v Schnapper* [1936] 1 All ER 322. These authorities must now be read in the light of *Bumper Development Corp Ltd v Metropolitan Police Comr (Union of India, claimants)* [1991] 4 All ER 638, [1991] 1 WLR 1362, CA: see the

text and note 5. As to the position in relation to the International Court of Justice see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 499 et seq; and as to the European Court of Human Rights and the Court of Justice of the European Communities ('ECJ') see PARAS 1086-1087.

7 *Concha v Murrieta, De Mora v Concha* (1889) 40 ChD 543, CA; on appeal sub nom *Concha v Concha* [1892] AC 670, HL; *Buerger v New York Life Assurance Co* (1927) 96 LJB 930, CA; *De Beeche v South American Stores Ltd and Chilian Stores Ltd* [1935] AC 148, HL; *Bankers and Shippers Insurance Co v Liverpool Marine and General Insurance Co* (1925) 24 Ll L Rep 85, HL; *O'Callaghan v O'Sullivan* [1925] 1 IR 90; *Kolbin & Sons v Kinneir & Co Ltd* 1930 SC 724; *Parkasho v Singh* [1968] P 233, [1967] 1 All ER 737, DC. See also *Craster v Thomas* [1909] 2 Ch 348, CA; *Lindo v Belisario* (1795) 1 Hag Con 216; *Dalrymple v Dalrymple* (1811) 2 Hag Con 54; on appeal (1814) 2 Hag Con 137n; *Lacon v Higgins* (1822) 3 Stark 178; *Prowse v European and American Steam Shipping Co* (1860) 13 Moo PCC 484; *United States of America v McRae* (1867) 3 Ch App 79; *Macdonald v Macdonald* (1872) LR 14 Eq 60. These authorities must now be read in the light of *Bumper Development Corp Ltd v Metropolitan Police Comr (Union of India, claimants)* [1991] 4 All ER 638, [1991] 1 WLR 1362, CA: see the text and note 5.

A judge should evaluate expert evidence in the same way as he would evaluate the evidence of any witness of fact, testing it against the relevant documents and probabilities and taking account of any views he has formed as to the independence and impartiality of the witness. He should find the relevant facts, whether they be ordinary facts or facts of a peculiar kind, eg the principles of a relevant foreign law. In assessing expert evidence of foreign law, the role of a judge often differs in one respect from his role in assessing ordinary evidence of fact, ie that being a lawyer he will bring that legal training to bear on the issue to be decided notwithstanding that it is an issue of foreign law. However, where the principles of the foreign law in question are significantly different from the equivalent principles in English law, there is less room for a judge to apply his own training; in such a situation the correct approach is to consider the evidence of the foreign law in substantially the same way as the other evidence of fact and opinion: *Morgan Grenfell & Co Ltd v SACE - Istituto per I Servizi Assicurativi del Commercio* [2001] EWCA Civ 1932, [2001] All ER (D) 303 (Dec), considering *Bumper Development Corp Ltd v Metropolitan Police Comr (Union of India, claimants)* [1991] 4 All ER 638, [1991] 1 WLR 1362, CA (held that the judge had gone too far in rejecting the whole of the defendant's expert's evidence on Italian law).

8 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 201.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/A. PROOF OF LAW IN OTHER JURISDICTIONS/1091. Procedural law applicable.

1091. Procedural law applicable.

In considering a question of foreign law the court follows its own rules of evidence and procedure, and not those of the foreign country¹, except to the extent that statute provides otherwise².

¹ *Appleton v Lord Braybrook* (1817) 6 M & S 34; *Yates v Thomson* (1835) 3 Cl & Fin 544, HL; *Clark v Mullick* (1840) 3 Moo PCC 252; *Fergusson v Fyffe* (1841) 8 Cl & Fin 121, HL; and see **CONFLICT OF LAWS**. As to the general application of the law of evidence in the courts in England and Wales see PARA 753 et seq.

² See PARA 755 note 3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/A. PROOF OF LAW IN OTHER JURISDICTIONS/1092. Other methods of ascertaining overseas law.

1092. Other methods of ascertaining overseas law.

Copies of Acts, ordinances and statutes passed by or under the authority of the legislatures of British possessions are receivable in evidence by United Kingdom courts if they purport to be printed by the government printer of the possession, without proof that the copies were so printed¹.

Instead of deciding on the law of any part of Her Majesty's dominions upon the evidence of witnesses, the court may² have recourse to the provisions of the British Law Ascertainment Act 1859³. The court, if of opinion that it is necessary or expedient for the proper disposal of any proceedings⁴, may state a case to one of the superior courts in the appropriate part of Her Majesty's dominions for its opinion upon the law⁵.

1 See the Evidence (Colonial Statutes) Act 1907 s 1; and PARA 898.

2 *Lord v Colvin* (1860) 1 Drew & Sm 24 per Kindersley V-C; and see *Phosphate Sewage Co v Molleson* (1876) 1 App Cas 780, HL.

3 The British Law Ascertainment Act 1859 may be extended to territories in which Her Majesty has jurisdiction: Foreign Jurisdiction Act 1890 s 5, Sch 1. As to such extensions see PARA 899 note 2.

4 The statutory wording is 'action', which is defined as including every judicial proceeding instituted in any court, civil, criminal or ecclesiastical: British Law Ascertainment Act 1859 s 5. In England and Wales 'actions' in civil proceedings to which the Civil Procedure Rules apply are now known as 'claims': see PARA 18.

5 British Law Ascertainment Act 1859 s 1. The procedure is very little used: see Fentiman *Foreign Law in English Courts* (1998) pp 134-135.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/A. PROOF OF LAW IN OTHER JURISDICTIONS/1093. Procedure to ascertain overseas law under statute.

1093. Procedure to ascertain overseas law under statute.

The facts to be stated in the case may be ascertained by the verdict of a jury¹ or other competent mode, or may be agreed by the parties, or settled by such person or persons as may have been appointed by the court for the purpose in the event of the parties not agreeing². When the case has been prepared the court must approve it and settle the questions of law arising upon the facts stated, and the questions of law, together with the case, are then remitted to the court whose opinion is desired. That court may hear the parties or counsel on the case, or may pronounce its opinion without so doing, and may take such further procedure as it thinks proper for pronouncing its opinion³. Upon the opinion being pronounced, a copy, certified by an officer of the court pronouncing it, is given to each of the parties to the proceedings requiring it⁴, and any of the parties may lodge the copy of the opinion with the court in which the proceedings are pending, and move it to apply the opinion to the facts stated in the case⁵.

The opinion may be applied as a statement of the foreign law to the facts of the case, or be submitted to the jury with the other facts of the case as evidence, or conclusive evidence, as the court trying the case may think fit, of the foreign law stated in it⁶. The House of Lords and the Privy Council, in the event of an appeal in the proceedings, may review, adopt or reject any such opinion pronounced by any court whose judgments are respectively reviewable by them⁷.

1 British Law Ascertainment Act 1859 s 1. As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

2 British Law Ascertainment Act 1859 s 1; see *Lord v Colvin* (1860) 1 Drew & Sm 24 (case for opinion of Scottish court); *Topham v Duke of Portland* (1863) 1 De GJ & Sm 517; on appeal sub nom *Duke of Portland v Lady Topham* (1864) 11 HL Cas 32; *Wilson v Moore* (1864) 12 WR 1137; and *Earl of Eglinton v Lamb* (1867) 15 LT 657 (cases ordered to be sent for the opinion of the Court of Session); *Login v Princess Coorg* (1862) 30 Beav 632 (case for opinion of court in India); and *Re Moses, Moses v Valentine* [1908] 2 Ch 235 (case for the opinion of the Transvaal court suggested but not sent).

3 British Law Ascertainment Act 1859 s 1.

4 British Law Ascertainment Act 1859 s 2.

5 British Law Ascertainment Act 1859 s 3.

6 See note 5.

7 British Law Ascertainment Act 1859 s 4; and see *De Thoren v A-G* (1876) 1 App Cas 686, HL. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

UPDATE

1093 Procedure to ascertain overseas law under statute

NOTE 7--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/B. PROOF OF BIRTH, DEATH OR AGE/1094. Proof of birth and death.

B. PROOF OF BIRTH, DEATH OR AGE

1094. Proof of birth and death.

A person's birth or death is normally proved by the production of a certified copy of an entry in the register of births or deaths¹, supplemented by evidence identifying the person whose birth or death is there certified². Any certified copy of an entry in such a register purporting to be sealed or stamped with the seal of the General Register Office is³ to be received as evidence of the birth or death to which it relates without any further or other proof of the entry⁴. A person's birth or death may also be proved by the evidence of a witness who was present at the birth or death of the person concerned⁵; by the oral or written declarations of deceased persons⁶; and, in civil proceedings, by admissible hearsay evidence⁷.

Additionally, a person's death may be proved in reliance on the presumption of death which arises after seven years' absence⁸.

1 See the Births and Deaths Registration Act 1953 s 34; PARA 906; and **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 522 et seq. As to births and deaths outside England and Wales see PARA 918.

2 *R v Weaver*(1873) LR 2 CCR 85; *R v Bellis*(1911) 6 Cr App Rep 283, CCA; *R v Rogers* (1914) 111 LT 1115, CCA.

3 Is subject to the Births and Deaths Registration Act 1953 s 34(1)-(5) (see PARA 906): s 34(6).

4 Births and Deaths Registration Act 1953 s 34(6).

5 *R v Nicholls* (1867) 16 LT 466.

6 As to declarations as to matter of pedigree see PARA 830.

7 Is under the Civil Evidence Act 1995: see PARA 808 et seq.

8 See PARA 1100.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/B. PROOF OF BIRTH, DEATH OR AGE/1095. Proof of age.

1095. Proof of age.

Where strict proof of age is required¹, this is normally supplied by the production of a birth certificate² or a certified copy of an entry in the adopted children register³, supplemented by evidence identifying the person whose birth is there certified⁴. A person's age may also be proved by the admission of a party⁵; by the evidence of a witness who was present at the birth of the person concerned⁶; by the oral or written declarations of deceased persons⁷; and, in civil proceedings, by admissible hearsay evidence⁸. In certain criminal and other cases in which the age of a person is material, the age will be presumed or deemed to be what appears to the court to be his age at the relevant time after considering any available evidence⁹. There is a rebuttable presumption that the parties to a conveyance are of full age¹⁰.

1 As to proof by means of a statement by a witness of his own age and the opinion of a witness as to the age of another person see PARA 1077.

2 See PARA 1094. An examined copy of a baptismal register is inadequate: *R v Wedge* (1832) 5 P & C 298; and see PARA 910.

3 See the Adoption and Children Act 2002 s 77(5); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 383.

4 *R v Weaver* (1873) LR 2 CCR 85; *R v Bellis* (1911) 6 Cr App Rep 283, CCA; *R v Rogers* (1914) 111 LT 1115, CCA.

5 *R v Turner* [1910] 1 KB 346, CCA; *R v Grimsby Recorder, ex p Purser* [1951] 2 All ER 889, DC.

6 *R v Nicholls* (1867) 16 LT 466.

7 As to declarations as to matter of pedigree see PARA 830.

8 Ie under the Civil Evidence Act 1995: see PARA 808 et seq.

9 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1470.

10 See the Law of Property Act 1925 s 15; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 244. A person attains full age on reaching the age of 18 years: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/C. PRESUMPTIONS/1096. Presumptions of fact.

C. PRESUMPTIONS

1096. Presumptions of fact.

Presumptions of fact are inferences logically drawn from one fact as to the existence of other facts¹. There is no obligation upon a tribunal of fact to draw such inferences², and presumptions of fact are rebuttable by evidence to the contrary³. In the law of negligence the doctrine of *res ipsa loquitur*⁴ is a particular application of the effect of inferences of fact⁵.

1 *Chard v Chard (otherwise Northcott)* [1956] P 259, [1955] 3 All ER 721. Note that presumptions of fact may now be more readily understood as devices for distributing the burden of proof.

2 As to evidence which may be taken as probative of facts in issue, however, see PARA 1068.

3 Inferences to be drawn from evidence given in a case may affect the incidence of the burden of proof as the case proceeds: see PARA 771; and see eg *Gardiner v Motherwell Machinery and Scrap Co Ltd* [1961] 3 All ER 831n, [1961] 1 WLR 1424, HL (presumption of fact that industrial disease caused by conditions likely to cause it); *Over v Harwood* [1900] 1 QB 803, DC (use of presumption of fact to prove negative averment); *R v Schama*, *R v Abramovitch* (1914) 84 LJBK 396, CCA; *R v Aves* [1950] 2 All ER 330, CCA (presumption of guilty knowledge of accused on proof of his recent possession of stolen property); see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 304. For other cases in which presumptions of fact may arise see PARA 1069.

4 *le the thing speaks for itself.*

5 See *Chard v Chard (otherwise Northcott)* [1956] P 259, [1955] 3 All ER 721. The doctrine is no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances: *Lloyde v West Midlands Gas Board* [1971] 2 All ER 1240 at 1247, [1971] 1 WLR 749 at 755, CA, per Megaw LJ; and see *Bennett v Chemical Construction (GB) Ltd* [1971] 3 All ER 822, [1971] 1 WLR 1571, CA. Some authorities, however, suggest that the operation of the doctrine may cast the legal burden of proof upon the party against whom it operates: see eg *Barkway v South Wales Transport Co Ltd* [1949] 1 KB 54, [1948] 2 All ER 460, CA; *Moore v R Fox & Sons* [1956] 1 QB 596, [1956] 1 All ER 182, CA. See further **NEGLIGENCE** vol 78 (2010) PARA 64 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/C. PRESUMPTIONS/1097. Presumptions of law.

1097. Presumptions of law.

Presumptions of law are rules of substantive law rather than rules of evidence; and they may be either irrebuttable, so that no evidence to the contrary may be given¹, or rebuttable. A rebuttable presumption of law is a legal rule to be applied by the court in the absence of conflicting evidence². Where two inconsistent rebuttable presumptions arise they neutralise each other, and the issue must be decided upon the evidence actually adduced³.

The classification of many presumptions is uncertain⁴. In some cases the same rule has, at different periods in its history, been treated as a presumption of fact, a rebuttable presumption of law, an irrebuttable presumption, or a rule of substantive law⁵.

1 As to irrebuttable presumptions of law see PARA 1098.

2 Such a presumption may be regarded as having the effect of shifting the evidential burden of proof: see *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp'n Ltd* [1942] AC 154 at 193, [1941] 2 All ER 165 at 191, HL, per Lord Wright. As to the effect of rebuttable presumptions on the burden of proof see further PARA 772. A distinction may be made between compelling and provisional presumptions: see the article by Denning J in (1945) 61 LQR 379; and see *Huyton-with-Roby UDC v Hunter* [1955] 2 All ER 398, [1955] 1 WLR 603, CA.

3 *R v Willshire* (1881) 6 QBD 366, CCR; *Westwood v Chettle* (1895) 98 LT Jo 228; *Monckton v Tarr* (1930) 23 BWCC 504, CA; cf *Taylor v Taylor* [1967] P 25, [1965] 1 All ER 872.

4 For criticism of the existing classification see the article by Denning J in (1945) 61 LQR 379.

5 See *Bryant v Foot* (1867) LR 2 QB 161. As to the different ways in which the presumption of death has been treated see *Chard v Chard (otherwise Northcott)* [1956] P 259, [1955] 3 All ER 721; and PARAS 1100-1101. The common law presumption that a child born of a married woman is legitimate used to be regarded as indisputable (Co Litt 244a) but may now be rebutted: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 94-96.

For a discussion of operative presumptions in claims for representation, estoppel and undue influence see Alistair Craig 'Evidential Presumptions' [2002] 152 NLJ 217.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/C. PRESUMPTIONS/1098. Irrebuttable presumptions of law.

1098. Irrebuttable presumptions of law.

There are today few irrebuttable presumptions of law: many rules which were formerly regarded as such are not now so treated¹, and those that remain may equally be regarded as rules of substantive law². Thus, the rule that ignorance of the law does not excuse or relieve from the consequences of a crime³, or from liability under a contract⁴, has sometimes, and less aptly, been expressed as an irrebuttable presumption that every person who is subject to the law is acquainted with it⁵.

Examples of rules that have the effect of irrebuttable presumptions are the rule that no child under the age of ten years can be guilty of any offence⁶; that a judgment is conclusive as against all persons of the existence of the state of things which it actually affects, when the existence of that state is a fact in issue⁷; that a relevant conviction is conclusive evidence in a claim for libel or slander⁸; and that production of a copy of the London Gazette containing any notice of a bankruptcy order is conclusive evidence in all legal proceedings of an order having been duly made and of its date⁹. It has also been held that the flying of an enemy flag in wartime, if done voluntarily, is conclusive of the nationality of the ship¹⁰.

1 See PARA 1097 text and note 5.

2 See *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA* (1973) 117 Sol Jo 483, CA (in the absence of fraud or inaccuracy, the tendering of evidence which by agreement is declared to be conclusive precludes evidence to the contrary).

3 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 17.

4 See *Cooper v Phibbs* (1867) LR 2 HL 149, and **MISTAKE**.

5 *Brett v Rigden* (1568) 1 Plowd 340; *Mildmay's Case* (1584) 1 Co Rep 175a; *Bilbie v Lumley* (1802) 2 East 469; *Stevens v Lynch* (1810) 12 East 38; *R v Esop* (1836) 7 C & P 456; *Martindale v Falkner* (1846) 2 CB 706; *R v Tweekesbury Corp'n* (1868) LR 3 QB 629; *R v Coote* (1873) 9 Moo PCCNS 463.

6 See the Children and Young Persons Act 1933 s 50 (amended by the Children and Young Persons Act 1963 s 16(1)); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 29, **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1232.

7 See *Hollington v F Hewthorn & Co Ltd* [1943] KB 587, [1943] 2 All ER 35, CA. The judgment in this case, however, rejected the wider proposition that evidence of previous convictions or of previous civil judgments was admissible as evidence of the facts on which they were based. To that extent *Hollington v F Hewthorn & Co Ltd* [1943] KB 587, [1943] 2 All ER 35, CA, is now reversed by the Civil Evidence Act 1968 ss 11-13: see PARAS 1208-1211.

8 See the Civil Evidence Act 1968 s 13; PARA 1209, and **LIBEL AND SLANDER**.

9 See the Insolvency Rules 1986, SI 1986/125, r 12.20; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 787.

10 *Lever Bros and Unilever NV v HM Procurator-General, The Unitas and Cargo* [1950] AC 536, [1950] 2 All ER 219, PC. See further **PRIZE** vol 36(2) (Reissue) PARA 810.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/C. PRESUMPTIONS/1099. Rebuttable presumption of innocence.

1099. Rebuttable presumption of innocence.

There is a presumption that all acts and conduct are in accordance with law and morality¹, so that a person who charges another with wrongdoing must make out a prima facie case before the person accused can be called upon to answer². The rule is peculiarly important in criminal cases or matters³, but it is also true in civil disputes⁴. Thus, for example, there is a presumption against fraud⁵ and where unseaworthiness of a vessel is alleged, it must be proved⁶. It has also been held that there is a presumption against suicide⁷.

Where, in a civil case, the intention of a person is relevant, he is presumed to have intended the natural consequences of his acts⁸.

1 *R v Hawkins* (1808) 10 East 211; *Thomas v Thomas* (1855) 2 K & J 79; *Dysart Peerage Case* (1881) 6 App Cas 489, HL; *Re Postlethwaite, Postlethwaite v Rickman* (1888) 60 LT 514, CA; *Croft v Rickmansworth Highway Board* (1888) 39 ChD 272, CA; *Corea v Appuhamy* [1912] AC 230, PC; *Vatcher v Paull* [1915] AC 372, PC; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154, [1941] 2 All ER 165, HL.

2 *R v Burdett* (1820) 4 B & Ald 95; *Williams v East India Co* (1802) 3 East 192 (presumption that notice has been given where failure to give notice amounts to crime); and see *Huggins v Ward* (1873) LR 8 QB 521; *Over v Harwood* [1900] 1 QB 803, DC; *Lord v Lord* [1900] P 297. See also *Toleman v Portbury* (1870) LR 5 QB 288, Ex Ch; *Duke's Court Estates Ltd v Associated British Engineering Ltd* [1948] Ch 458, [1948] 2 All ER 137 (facts to be proved when forfeiture of lease is sought).

3 Before there can be a conviction for a crime, the accused's guilt must be proved beyond reasonable doubt: *Woolmington v DPP* [1935] AC 462, HL; see PARA 775; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1372. For a limited exception to this rule in the case of certain statutory offences see *R v Edwards* [1975] QB 27, [1974] 2 All ER 1085, CA; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1218.

4 See *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154, [1941] 2 All ER 165, HL. For the standard of proof required in a civil case where the commission of a crime is alleged see PARA 775.

5 *Low v Guthrie* [1909] AC 278, HL; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154, [1941] 2 All ER 165, HL. But the rule is sometimes different where undue influence is alleged (*Huguenin v Baseley* (1807) 14 Ves 273); and see **EQUITY** vol 16(2) (Reissue) PARA 417 et seq.

6 *Ajum Goolam Hossen & Co v Union Marine Insurance Co Ltd* [1901] AC 362, PC.

7 See *Harvey v Ocean Accident and Guarantee Corp Ltd* [1905] 2 IR 1, CA; *Bender v Zent (Owners)* [1909] 2 KB 41, CA.

8 *Re Trench, ex p Brandon* (1884) 25 ChD 500, CA; *Saxlehner v Apollinaris Co* [1897] 1 Ch 893; and see *Re Cohen, ex p Bankrupt v IRC* [1950] 2 All ER 36, CA. Cf the Criminal Justice Act 1967 s 8 (which provides that a court or jury, in determining whether a person has committed an offence, is not bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions but must decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances); and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 13. It is uncertain whether the Criminal Justice Act 1967 s 8 is applicable where the question arises in civil proceedings as to whether an offence has been committed.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/C. PRESUMPTIONS/1100. Presumptions of life and death.

1100. Presumptions of life and death.

There is generally no presumption of law¹ by which the fact that a person was alive or dead on a given date can be established, but the question must be decided on the facts of the particular case².

Certain exceptions to this general rule are provided by statute³, and, in addition, where there is no acceptable affirmative evidence that a person was alive at some time during a continuous period of seven years or more⁴ and it is proved that there are persons who would be likely to have heard of him over that period⁵, that those persons have not heard of him, and that all due inquiries have been made appropriate to the circumstances⁶, there arises a rebuttable presumption of law that he died sometime within that period⁷.

1 In so far as old cases speak of a presumption of continuance of life as if it were a presumption of law, they are not consistent with the modern authorities. For such cases see *Wilson v Hodges* (1802) 2 East 312; *Nepean v Doe d Knight* (1837) 2 M & W 894; *Lapsley v Grierson* (1848) 1 HL Cas 498; *R v Willshire* (1881) 6 QBD 366, CCR; *R v Jones* (1883) 11 QBD 118, CCR.

2 *R v Lumley* (1869) LR 1 CCR 196; *Re Phené's Trusts* (1870) 5 Ch App 139; *Re Aldersley, Gibson v Hall* [1905] 2 Ch 181; *MacDarmid v A-G* [1950] P 218, [1950] 1 All ER 497; *Chard v Chard (otherwise Northcott)* [1956] P 259, [1955] 3 All ER 721.

3 As to the presumption of death and dissolution of marriage see the Matrimonial Causes Act 1973 s 19(3); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 416. As to the statutory defence to a charge of bigamy where the defendant's spouse has been absent for seven years see the Offences against the Person Act 1861 s 57; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 831. In a claim by a lessor or reversioner to recover an estate dependent on a life, the court must presume death on proof of absence for seven years: *Cestui que Vie Act* 1666 s 1; and see *Doe d George v Jesson* (1805) 6 East 80; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 156.

4 Where no statute applies, the mere fact of absence for more than seven years does not raise a presumption that death has occurred: see *Prudential Assurance Co v Edmonds* (1877) 2 App Cas 487, HL; *Ivett v Ivett* (1930) 94 JP 237, DC; *Hogton v Hogton* (1933) 50 TLR 18, DC; *Re Watkins, Watkins v Watkins* [1953] 2 All ER 1113, [1953] 1 WLR 1323; *Chard v Chard (otherwise Northcott)* [1956] P 259, [1955] 3 All ER 721; *Bradshaw v Bradshaw* [1956] P 274n, DC. In so far as some cases lay stress on the mere fact of seven years' absence, they are not consistent with the trend of later authorities. For such cases see *Nepean v Doe d Knight* (1837) 2 M & W 894; *Re How* (1858) 1 Sw & Tr 53; *Re Turner's Goods* (1864) 3 Sw & Tr 476; *R v Lumley* (1869) LR 1 CCR 196; *Re Phené's Trusts* (1870) 5 Ch App 139; *Re Lewes' Trusts* (1871) 6 Ch App 356; *Re Rhodes, Rhodes v Rhodes* (1887) 36 ChD 586; *Chipchase v Chipchase* [1939] P 391, [1939] 3 All ER 895, DC. As to the practice in probate cases see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 145.

5 *Prudential Assurance Co v Edmonds* (1877) 2 App Cas 487, HL; *MacDarmid v A-G* [1950] P 218, [1950] 1 All ER 497; *Chard v Chard (otherwise Northcott)* [1956] P 259, [1955] 3 All ER 721; *Bradshaw v Bradshaw* [1956] P 274n, DC. See also *Watson v England* (1844) 14 Sim 28; *Bowden v Henderson* (1854) 2 Sm & G 360; *Re Liebeskind* (1952) Times, 11 December. Cf *Willyams v Scottish Widows' Fund Life Assurance Society* (1888) 52 JP 471; *Wills v Palmer* (1904) 53 WR 169 (death presumed although person concerned not likely to communicate with his friends). See also *Re Benjamin, Neville v Benjamin* [1902] 1 Ch 723.

6 *Hogton v Hogton* (1933) 50 TLR 18, DC; *Bradshaw v Bradshaw* [1956] P 274n, DC; *Bullock v Bullock* [1960] 2 All ER 307, [1960] 1 WLR 975, DC; cf *Re Watkins, Watkins v Watkins* [1953] 2 All ER 1113, [1953] 1 WLR 1323; but see *Chipchase v Chipchase* [1939] P 391, [1939] 3 All ER 895, DC.

7 *Chard v Chard (otherwise Northcott)* [1956] P 259, [1955] 3 All ER 721; *Prudential Assurance Co v Edmonds* (1877) 2 App Cas 487, HL; *Wills v Palmer* (1904) 53 WR 169; *Re Bowden* (1904) 21 TLR 13; *Lal Chand*

Marwari v Mahant Ramrup Gir (1925) 42 TLR 159, PC; *Bullock v Bullock* [1960] 2 All ER 307, [1960] 1 WLR 975, DC.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/C. PRESUMPTIONS/1101. Proof of life or death at a particular time.

1101. Proof of life or death at a particular time.

He who asserts that a person was alive on a given date, or dead on that date, must prove the fact by evidence¹, since there is no presumption of continuance of life², and, generally³, no presumption of death at a particular time. Where there is insufficient evidence in support of the fact alleged, the party bearing the burden of proof will fail⁴.

Where the presumption of death after seven years' absence applies⁵, the person will be presumed to have died by the end of that period⁶; where the presumption does not apply, or is displaced by evidence, the issue will be decided on the facts of the particular case⁷. In some old cases, where neither the evidence nor the incidence of the burden of proof was decisive, the court made the best order it could in the circumstances⁸. Where the question to be decided for purposes affecting the title to property is which of two persons died first, a statutory rule may apply⁹.

The question of whether a person was alive or dead at a given date will be decided on all the evidence available at the date of the hearing¹⁰.

1 See PARA 1100 the text and notes 1-2.

2 *Re Phené's Trusts* (1870) 5 Ch App 139; *Re Rhodes, Rhodes v Rhodes* (1887) 36 ChD 586; *Re Aldersey, Gibson v Hall* [1905] 2 Ch 181; *MacDarmid v A-G* [1950] P 218, [1950] 1 All ER 497; *Chard v Chard (otherwise Northcott)* [1956] P 259, [1955] 3 All ER 721; *Re Wilson* [1964] 1 All ER 196, [1964] 1 WLR 214.

3 See the text and notes 6, 9.

4 *Nepean v Doe d Knight* (1837) 2 M & W 894; *Re Phené's Trusts* (1870) 5 Ch App 139; *Re Lewes' Trusts* (1871) 6 Ch App 356; *Re Nicholls* (1872) LR 2 P & D 461; *Hickman v Upsall* (1875) LR 20 Eq 136; *Re Corbishley's Trusts* (1880) 14 ChD 846; *Elliott v Smith* (1882) 22 ChD 236; *Re Rhodes, Rhodes v Rhodes* (1887) 36 ChD 586; *Re Benjamin, Neville v Benjamin* [1902] 1 Ch 723; *Re Aldersey, Gibson v Hall* [1905] 2 Ch 181; *Lal Chand Marwari v Mahant Ramrup Gir* (1925) 42 TLR 159, PC; *Chard v Chard (otherwise Northcott)* [1956] P 259, [1955] 3 All ER 721.

5 As to the requirements of the presumption of death see PARA 1100.

6 *Re Westbrook's Trusts* [1873] WN 167; *Re Aldersey, Gibson v Hall* [1905] 2 Ch 181; *Re Thompson* (1905) 39 ILT 372; *Chipchase v Chipchase* [1939] P 391, [1939] 3 All ER 895, DC; *Bullock v Bullock* [1960] 2 All ER 307, [1960] 1 WLR 975, DC; but see contra *Re Phené's Trusts* (1870) 5 Ch App 139; *Re Rhodes, Rhodes v Rhodes* (1887) 36 ChD 586; *Lal Chand Marwari v Mahant Ramrup Gir* (1925) 42 TLR 159, PC.

7 Thus the court may infer as a matter of fact that death occurred within seven years of the disappearance: see eg *Re Beasley's Trusts* (1869) LR 7 Eq 498; *Hickman v Upsall* (1875) LR 20 Eq 136; *Re Winstone* [1898] P 143; *Re Matthews* [1898] P 17; *Re Hurlston* [1898] P 27; *Hogton v Hogton* (1933) 50 TLR 18, DC; and see *Greig v Merchant Co of Edinburgh* 1921 SC 76.

On the other hand, in some cases death may not be presumed, even though a much longer period than seven years has elapsed since the person was last seen: see *Re Lidderdale* (1912) 57 Sol Jo 3; *Chard v Chard (otherwise Northcott)* [1956] P 259, [1955] 3 All ER 721 (14 years' absence); *Bradshaw v Bradshaw* [1956] P 274n, DC (19 years' absence).

8 See eg *Bailey v Hammond* (1802) 7 Ves 590; *Cuthbert v Purrier* (1847) 2 Ph 199; *Re Mileham's Trust* (1852) 15 Beav 507; *Danby v Danby* (1859) 5 Jur NS 54; *Lord Woodhouselee v Dalrymple* (1861) 30 LJ Ch 607; *Re Rhodes, Fraser v Renton* (1873) 28 LT 392; *Wollaston v Berkeley* (1876) 2 ChD 213. For a common form of order as to the distribution of assets where a person's death is presumed see *Re Benjamin, Neville v Benjamin* [1902] 1 Ch 723.

9 See the Law of Property Act 1925 s 184 (in all cases where, after 1 January 1926, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths must (subject to any order of the court), for all purposes affecting the title of property, be presumed to have occurred in order of seniority, and accordingly the younger is to be deemed to have survived the elder). This presumption may be excluded by an express contrary provision in a will or by order of the court (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 146; **WILLS** vol 50 (2005 Reissue) PARA 335); and where a husband and wife or civil partners die intestate in such circumstances their estates are distributed as if neither had survived the other (see the Administration of Estates Act 1925 s 46(3) (added by the Intestates' Estates Act 1952 s 1(4); and amended by the Civil Partnership Act 2004 s 71, Sch 4 Pt 2 para 7); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 146). Further, for certain inheritance tax purposes, where it cannot be known which of two or more persons who have died survived the other or others they are assumed to have died at the same instant: see the Inheritance Tax Act 1984 s 4(2); and **INHERITANCE TAXATION** vol 24 (Reissue) PARA 454.

10 *Deakin v Deakin* (1869) 33 JP 805; *Hogton v Hogton* (1933) 50 TLR 18, DC; *Bullock v Bullock* [1960] 2 All ER 307, [1960] 1 WLR 975, DC.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/C. PRESUMPTIONS/1102. Marriage and issue.

1102. Marriage and issue.

There is no presumption of law that a deceased person died unmarried or without issue¹, but where he was last heard of unmarried and childless, it may readily be inferred as a matter of fact that he died in that condition².

There is generally no presumption as to the age at which a woman is or is not past childbearing³, but for the purposes of the rule against perpetuities⁴ where the ability of a person to have a child at a future date is at issue there is a rebuttable presumption that a female can have a child between the ages of 12 and 55, and that a male can have a child at the age of 14 years or over, but not under that age⁵.

Where a ceremony of marriage has been celebrated, followed by cohabitation of the parties, there will generally be a presumption that a lawful marriage exists⁶ or that the ceremony was valid⁷.

1 *Re Jackson, Jackson v Ward* [1907] 2 Ch 354.

2 *Greaves v Greenwood* (1877) 2 ExD 289, CA; and see *Re Callan* (1905) 39 ILT 372. In many cases only slight evidence has been required to raise a presumption of fact that a person died without issue (*Greaves v Greenwood* (1877) 2 ExD 289, CA; *Rawlinson v Miller* (1875) 1 ChD 52) or unmarried (*Dunn v Snowden* (1862) 32 LJ Ch 104; *Re Westbrook's Trusts* [1873] WN 167; *Re Benjamin, Neville v Benjamin* [1902] 1 Ch 723). See also *Re Doherty* [1961] IR 219.

3 *Re Westminster Bank Ltd's Declaration of Trust* [1963] 2 All ER 400n, [1963] 1 WLR 820; *Re White, White v Edmond* [1901] 1 Ch 570; *Re Thornhill, Thornhill v Nixon* [1904] WN 112, CA; see *Re Hocking, Michell v Loe* [1898] 2 Ch 567, CA. But it has been said that trustees may with complete safety and propriety deal with their funds on the basis that a woman of 70 will not have a further child: *Re Pettifor's Will Trusts, Roberts v Roberts* [1966] Ch 257 at 260, [1966] 1 All ER 913 at 915 per Pennycuik J. It should be borne in mind that more accurate medical evidence is now available than when the old cases were decided and ought to be put before the court: see *Re Westminster Bank Ltd's Declaration of Trust* [1963] 2 All ER 400n at 401, [1963] 1 WLR 820 at 823 per Wilberforce J.

4 See **PERPETUITIES AND ACCUMULATIONS**.

5 Perpetuities and Accumulations Act 1964 s 2(1)(a). In the case of a living person evidence may, however, be given to show that he or she will or will not be able to have a child at the time in question: s 2(1)(b). See **PERPETUITIES AND ACCUMULATIONS** vol 35 (Reissue) PARA 1066. Note that the former statutory presumption that a boy under the age of 14 years was incapable of sexual intercourse has been abolished: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 29.

6 See eg *Re Shephard, George v Thyer* [1904] 1 Ch 456; *Taczanowska (otherwise Roth) v Taczanowski* [1957] P 301, [1957] 2 All ER 563, CA. As to the presumption of validity see *Tweney v Tweney* [1946] P 180, [1946] 1 All ER 564.

7 See **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/C. PRESUMPTIONS/1103. Legality and regularity.

1103. Legality and regularity.

In accordance with the common law maxim that everything has been done according to due form¹, formal requisites to judicial, official or public acts, or to titles to property which are good in substance, will be presumed². The maxim has a wide application in different areas of the law. Thus a lawful origin will be presumed for proprietary rights which have been exercised for a long time where the exercise of any such right might have been interrupted or prevented by the person against whom the right is claimed³; evidence of long user of a chapel as such raises a presumption of its due consecration⁴; there is a presumption in favour of the good faith and validity of transactions which have long stood unchallenged⁵, and of the validity of documents not less than 20 years old produced from proper custody⁶; where a document has been lost there is a presumption that it was properly stamped⁷; erasures or interlineations in a deed are presumed to have been made before the execution of the instrument⁸; where a will is in proper form and due attestation is proved the court will presume that the testator knew and approved of its contents⁹; there is a presumption in favour of persons dealing with a company that acts within its constitution and powers have been properly and duly performed¹⁰; and where the consent of an officer or authority is required before a prosecution may be brought there is a rebuttable presumption that the consent has been given¹¹.

The fact that a person acted in an official capacity raises a rebuttable¹² presumption of due appointment to that office, even though the appointment is required to be by deed¹³ and is directly in issue in the proceedings¹⁴, and even though it can only be shown that the person so acted on a single occasion, and the case is a criminal one¹⁵.

This common law rule has, in some cases, found statutory expression, for example in the proof of appointment of officers of Revenue and Customs¹⁶. Under the Civil Procedure Rules, a document purporting to contain the written consent of a person to act as trustee and to bear his signature verified by some other person is evidence of such consent¹⁷.

1 *le omnia praesumuntur rite esse acta.*

2 *Monke v Butler* (1614) 1 Roll Rep 83; *Doe d Hammond v Cooke* (1829) 6 Bing 174; *MacDougall v Purrier* (1830) 2 Dow & Cl 135, HL; *Miles v Bough* (1842) 3 QB 845; *Northampton County, Northern Division Case*, *Simpson v Wilkinson* (1844) 7 Man & G 50; *Harrison v Southampton Corpn* (1853) 4 De GM & G 137; *Baker v Cave* (1857) 1 H & N 674; *Gibson v Doeg* (1857) 2 H & N 615; *Waddington v Roberts* (1868) LR 3 QB 579; *Lee v Johnstone* (1869) LR 1 Sc & Div 426, HL; *Re Cruttenden, Davey v Lansdell* (1881) 45 LT 465; *St Matthew, Bethnal Green Vestry v London School Board* [1898] AC 190, HL; *Whelan v R* [1921] 2 IR 310; *Harper v Hedges* [1924] 1 KB 151, CA; and see *Kuruma, Son of Kaniu v R* [1955] AC 197, [1955] 1 All ER 236, PC, applied in *International Electronics Ltd v Weigh Data Ltd* [1980] FSR 423.

3 *Dalton v Angus & Co* (1881) 6 App Cas 740, HL; *Goodtitle d Parker v Baldwin* (1809) 11 East 488; *Doe d Devine v Wilson* (1855) 10 Moo PCC 502; *Chasemore v Richards* (1859) 7 HL Cas 349; *Webb v Bird* (1862) 13 CBNS 841; *Leconfield v Lonsdale* (1870) LR 5 CP 657; *Phillips v Halliday* [1891] AC 228, HL; *Whitmores (Edenbridge) Ltd v Stanford* [1909] 1 Ch 427, following *Baily & Co v Clark, Son and Morland* [1902] 1 Ch 649, CA, and distinguishing *Burrows v Lang* [1901] 2 Ch 502; and see *Davis v Whitby* [1974] Ch 186, [1974] 1 All ER 806, CA; *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689, CA; *Whitfield v Gowling* (1974) 72 LGR 765, DC. The law will not presume any right which could not have had a legal origin: *Lord Chesterfield v Harris* [1908] 2 Ch 397, CA; affd sub nom *Harris v Earl of Chesterfield* [1911] AC 623, HL. A lost grant of ferry rights from the Crown may be presumed: see *Earl of Dysart v Hammerton & Co* [1914] 1 Ch 822, CA (revsd on other grounds sub nom *Hammerton v Earl of Dysart* [1916] 1 AC 57, HL); *General Estates Co v Beaver* [1914] 3 KB 918, CA. See further **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 789 et seq; **CUSTOM AND USAGE; EASEMENTS AND PROFITS A PRENDRE; REAL PROPERTY; SHIPPING AND MARITIME LAW.**

4 *Rugg v Kingsmill* (1867) LR 1 A & E 343; *R v Cresswell* (1876) 1 QBD 446, CCR.

5 *Vatcher v Paull* [1915] AC 372, PC.

6 See PARA 869.

7 See PARA 961.

8 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 81. However, alterations and erasures in a will are presumed to be made after its execution: see eg *Cooper v Bockett* (1846) 4 Moo PCC 419, and **WILLS** vol 50 (2005 Reissue) PARA 375. As to alterations in bills of exchange see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1561.

9 *Harris v Knight* (1890) 15 PD 170, CA; *Re Musgrove, Davis v Mayhew* [1927] P 264, CA.

10 See the Companies Act 1985 s 35 (prospectively replaced by the Companies Act 2006 s 39); and **COMPANIES** vol 14 (2009) PARA 265; and as to the previous position at common law see eg *Morris v Kanssen* [1946] AC 459, [1946] 1 All ER 586, HL, per Lord Simonds.

11 *R v Waller* [1910] 1 KB 364, CCA; *Price v Humphries* [1958] 2 QB 353, [1958] 2 All ER 725, DC. But the prosecution must be in a position to prove consent if the matter is raised by the defence before the end of the prosecution's case: *R v Waller* [1910] 1 KB 364, CCA; and *Price v Humphries* [1958] 2 QB 353, [1958] 2 All ER 725, DC. As to cases in which the direction or consent of an officer or authority is required see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1071-1072.

12 As to rebuttal see *Woollett v Minister of Agriculture and Fisheries* [1955] 1 QB 103, [1954] 3 All ER 529, CA.

13 *Doe d James v Brawn* (1821) 5 B & Ald 243.

14 *Faulkner v Johnson* (1843) 11 M & W 581; *Dexter v Hayes* (1860) 11 ICLR 106; affd sub nom *Hayes v Dexter* (1861) 13 ICLR 22, Ex Ch.

15 *R v Roberts* (1878) 38 LT 690, CCR; *R v Lawson* [1905] 1 KB 541, CCR. The appointment of the following officials has been held to be provable in this manner: Lords of the Treasury (*R v Jones* (1809) 2 Camp 131); deputy county court judges (*R v Roberts* (1878) 38 LT 690, CCR); commissioners for oaths (*R v Howard* (1832) 1 Mood & R 187; *R v Newton* (1844) 1 Car & Kir 469; and see *R v Murphy and Douglas* (1837) 8 C & P 297); surrogates (*R v Verelst* (1813) 3 Camp 432); incumbents (*Bevan v Williams* (1776) 3 Term Rep 635n; cf *Miller v Wheatley* (1890) 28 LR Ir 144); sheriffs and under-sheriffs (*Bunbury v Matthews* (1844) 1 Car & Kir 380; *Doe d James v Brawn* (1821) 5 B & Ald 243; *Plumer v Briscoe* (1847) 11 QB 46; *Robinson v Collingwood* (1864) 17 CBNS 777); justices of the peace, constables and watchmen, even though the appointments were, in some cases, made under local Acts (*Berryman v Wise* (1791) 4 Term Rep 366; *Butler v Ford* (1833) 1 Cr & M 662); churchwardens (*Doe d Bowley v Barnes* (1846) 8 QB 1037); trustees for raising rates under local Acts (*R v Murphy and Douglas* (1837) 8 C & P 297); trustees under a turnpike Act (*Pritchard v Walker* (1827) 3 C & P 212); bank directors (*R v Boaler* (1892) 67 LT 354, and see *R v Lawson* [1905] 1 KB 541, CCR); surgeons (*Gremare v Le Clerk Bois Valon* (1809) 2 Camp 144; *Cope v Rowlands* (1836) 2 M & W 149; but in a claim for fees, registration in accordance with statute must be proved: see the Medical Act 1983 s 46(1) (amended by SI 2002/3135; SI 2006/1914; and SI 2007/3101)); weigh-masters of market towns (*M'Mahon v Lennard* (1858) 6 HL Cas 970; *Dexter v Hayes* (1860) 11 ICLR 106; affd sub nom *Hayes v Dexter* (1861) 13 ICLR 22, Ex Ch); and attested soldiers in the recruiting services (*Wolton v Gavin* (1850) 16 QB 48).

16 See the Customs and Excise Management Act 1979 s 154(1)(c); and **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 1204.

17 CPR 33.8. See further **TRUSTS**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/C. PRESUMPTIONS/1104. When the presumption of regularity does not apply.

1104. When the presumption of regularity does not apply.

The force of the common law maxim that everything has been done according to due form¹ varies with all the circumstances². It may be applied in a criminal case only with great care³, and it has no application where there is definite evidence to prove or disprove what is sought to be presumed⁴, nor where the giving or taking away of jurisdiction is in question⁵, nor where it is sought to impose by it an obligation rather than to presume a right⁶.

1 *le omnia praesumuntur rite esse acta.*

2 *Re Bercovitz, Canning v Enever* [1961] 2 All ER 481, [1961] 1 WLR 892; on appeal [1962] 1 All ER 552, [1962] 1 WLR 321, CA.

3 See *Scott v Baker* [1969] 1 QB 659, [1968] 2 All ER 993, DC.

4 *Harris v Knight* (1890) 15 PD 170, CA; and see *Re Bercovitz, Canning v Enever* [1962] 1 All ER 552, [1962] 1 WLR 321, CA.

5 See *Edwick v Sunbury-on-Thames UDC* (1959) 12 P & CR 38, CA.

6 *Simpson v A-G* [1904] AC 476, HL.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/C. PRESUMPTIONS/1105. Unexplained circumstances and suppression of evidence.

1105. Unexplained circumstances and suppression of evidence.

As between an innocent and a guilty party¹, unexplained circumstances are presumed unfavourably to the wrongdoer². Thus a person who, having converted property, refuses to produce it so that its exact value may be known, is liable for the greatest value such an article could have³; and an unfavourable inference will be drawn in the case of one who destroys or suppresses⁴, or fails to produce, evidence⁵, or who declines to give evidence in support of his case, even though he is in court⁶.

1 This rule does not apply to a client who, in the exercise of his privilege, refuses to allow his solicitor to disclose confidential communications: *Wentworth v Lloyd* (1864) 10 HL Cas 589.

2 *Childrens v Saxby* (1683) 1 Vern 207; *Armory v Delamirie* (1722) 1 Stra 505; *Hammersmith and City Rly Co v Brand* (1869) LR 4 HL 171; cf *Williamson v Rover Cycle Co* [1901] 2 IR 615, CA. This rule is sometimes expressed in the maxim *omnia praesumuntur contra spoliatores*.

3 *Armory v Delamirie* (1722) 1 Stra 505; *Coldman v Hill* [1919] 1 KB 443, CA; *Smith Ltd v Great Western Rly Co* [1921] 2 KB 237, CA; *Banco de Portugal v Waterlow & Sons Ltd* (1931) 145 LT 362, CA; on appeal [1932] AC 452, HL. As to conversion see **TORT** vol 45(2) (Reissue) PARA 548 et seq.

4 *Lewis v Lewis* (1680) Cas temp Finch 471; *Wardour v Berisford* (1687) 1 Vern 452; *Cowper v Earl Cowper* (1734) 2 P Wms 720; *Delany v Tenison* (1758) 3 Bro Parl Cas 659, HL; *James v Biou*, *Owen v Flack* (1826) 2 Sim & St 600; *Gray v Haig* (1855) 20 Beav 219; *A-G v Dean and Canons of Windsor* (1858) 24 Beav 679; *The Ophelia* [1916] 2 AC 206, PC. But where the means of ascertaining the truth have not been suppressed by the defendant's wrongful act, there is a presumption against the claimant's demand. Hence, in a claim for goods sold and delivered, it should be presumed, in the absence of proof of value, that the goods delivered were the cheapest in which the claimant dealt (*Clunnes v Pezzey* (1807) 1 Camp 8), and similarly, in a claim for money lent, on failure to prove value, it should be presumed that the bank note lent to the defendant was the lowest in circulation in this country (*Lawton v Sweeney* (1844) 8 Jur 964).

5 *Roe v Harvey* (1769) 4 Burr 2484; *Lumley v Wagner* (1852) 1 De GM & G 604; *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324, CA (adverse inferences drawn from the failure of a party to a medical negligence claim to call a key individual as a witness).

6 *Barker v Furlong* [1891] 2 Ch 172. This rule has no application to a witness who declines to answer on the ground of privilege: *Wentworth v Lloyd* (1864) 10 HL Cas 589. In criminal cases, adverse inferences may be drawn from the accused's failure to answer questions or account for certain matters during police interviews and from his failure to give evidence at trial: see the Criminal Justice and Public Order Act 1994 ss 34-38; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1552-1555.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/C. PRESUMPTIONS/1106. Other presumptions.

1106. Other presumptions.

Various presumptions are dealt with elsewhere in this work. These include the presumptions of a resulting trust on a conveyance to a stranger¹; of advancement on a conveyance to a wife or child²; of satisfaction of legacies by portions and portions by legacies³ or of debts by legacies⁴; of performance of covenants to purchase and settle land by a purchase of suitable land⁵; of presumptions for and against merger⁶; as to the boundaries of property⁷; as to easements⁸; as to the existence and ownership of copyright⁹; of legitimacy¹⁰; of sanity and the continuance of insanity¹¹; in matrimonial proceedings¹²; and as to the construction of statutes¹³.

In addition, many statutes establish particular presumptions in order to facilitate proof of material facts¹⁴; and where in any civil proceedings, evidence is admitted¹⁵ of the fact that a person has been convicted of an offence, or has been found guilty of adultery in any matrimonial proceedings, or has been adjudged to be the father of a child in any relevant court proceedings, the burden is cast on the person against whom the conviction or finding was made to disprove the facts upon which it was based¹⁶, except that in a claim for libel or slander proof that a claimant stands convicted of an offence is conclusive evidence that he committed that offence¹⁷.

¹ See *Shephard v Cartwright* [1955] AC 431, [1954] 3 All ER 649, HL; and **TRUSTS** vol 48 (2007 Reissue) PARA 713.

² See **GIFTS** vol 52 (2009) PARA 244; **CHILDREN AND YOUNG PERSONS**; **TRUSTS** vol 48 (2007 Reissue) PARA 715.

³ See **EQUITY** vol 16(2) (Reissue) PARA 740.

⁴ See **EQUITY** vol 16(2) (Reissue) PARA 751.

⁵ See **EQUITY** vol 16(2) (Reissue) PARA 754.

⁶ See **EQUITY** vol 16(2) (Reissue) PARAS 767-768.

⁷ See **BOUNDARIES; WATER AND WATERWAYS**.

⁸ See **EASEMENTS AND PROFITS A PRENDRE**.

⁹ See **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARAS 431-432.

¹⁰ See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 94-97.

¹¹ See **MENTAL HEALTH** vol 30(2) (Reissue) PARA 597.

¹² See **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 352 (adultery), PARA 394 (desertion), and PARA 415 et seq (death and dissolution).

¹³ See eg **STATUTES** vol 44(1) (Reissue) PARAS 1285-1288, 1416, 1433, 1440, 1470 et seq.

¹⁴ Eg persons expressed to be parties to a conveyance must be presumed, until the contrary is proved, to be of full age at the date of the conveyance: see the Law of Property Act 1925 s 15; and PARA 1095. There is a rebuttable presumption that a bill of exchange has been validly delivered by all parties: Bills of Exchange Act 1882 s 21(3). Any document purporting to have been issued or signed by or with the authority of the Commissioners for Revenue and Customs is to be treated as having been so issued or signed unless the contrary is proved, and is admissible in any legal proceedings: Commissioners for Revenue and Customs Act 2005 s 24(1). For the purposes of the Road Traffic Act 1988 s 36 (failure to comply with traffic directions), a traffic sign placed on or near a road is deemed to be of the prescribed size, colour and type, or of another

character authorised by the Secretary of State, and to have been lawfully so placed, unless the contrary is proved (s 36(1), (3)); and cf *Woodriff v Plowman* (1962) 60 LGR 183, DC; *Tingle Jacobs & Co v Kennedy* [1964] 1 All ER 888n, [1964] 1 WLR 638n, CA (presumption that traffic light is working properly unless there is evidence to the contrary). See further **ROAD TRAFFIC**.

15 See the Civil Evidence Act 1968 ss 11-13; and PARAS 1208-1211.

16 See the Civil Evidence Act 1968 ss 11(2), 12(2); and PARAS 1208, 1211.

17 See the Civil Evidence Act 1968 s 13(1) (amended by the Defamation Act 1996 s 12(1)); and PARA 1209.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/D. VIEWS AND INSPECTIONS/1107. Inspection in court.

D. VIEWS AND INSPECTIONS

1107. Inspection in court.

Information as to the facts of a case may be given to the court or jury¹, not only by the spoken words of witnesses or the written words of documents², but also by means of the court's or jury's own observation of persons or things in court³; or of pictures, photographs⁴, plans⁵, models⁶, tape recordings⁷ or films⁸; or of experiments made in the presence of the court⁹. The most common instance of this mode of proof is supplied by the demeanour and manner of a witness under examination. These constitute relevant elements in the consideration of the truthfulness of his statements¹⁰. The appearance of a person is admissible evidence, and in some cases sufficient evidence, as to his age¹¹.

Disputed handwriting may be compared in court by judge, jury or a witness with a specimen which is proved to be genuine¹². Where a party complains that his exclusive right to a picture, design, mark or name has been infringed, or where the question is whether a picture, design, mark or name is so like another as to be calculated to deceive the public, the most satisfactory test is an appeal to the eyesight or hearing of the judge¹³. No witness, indeed, should be asked whether the thing complained of is likely to deceive, because that is the very question which the court has to decide¹⁴.

1 As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

2 As to inspection of documents in general see PARA 538 et seq; and as to the inspection of documents by the court to determine whether they should be withheld on grounds of public interest immunity see PARA 579.

3 In an action (now known as a 'claim': see PARA 18) in respect of a dog bite, the dog itself may be brought into the presence of the jury, in order that its temper may be judged by its demeanour: *Line v Taylor* (1862) 3 F & F 731. Such evidence is often classified as 'real' evidence: see PARA 965. On a charge of being in possession of special paper, such as is used in the production of bank notes, it is not necessary for a genuine bank note to be produced to the jury for comparison: *R v Woods* (1922) 91 LJB 728, CCA; cf *R v Keith* (1855) Dears CC 486.

4 As to photographs see PARA 958.

5 As to plans see PARAS 954-955.

6 *Nalder v Clayton and Shuttleworth* (1859) Macr 371.

7 As to tape recordings etc see PARA 958.

8 *The Statue of Liberty* [1968] 2 All ER 195, [1968] 1 WLR 739. See also PARA 958.

9 *Bigsby v Dickinson* (1876) 4 ChD 24, CA; *Twentyman v Barnes* (1848) 2 De G & Sm 225. As to view or inspection out of court see PARA 1108. As to orders for a person to submit to inspection out of court see PARA 794. As to orders for the inspection or preservation etc of property see PARA 793.

10 As to witnesses generally see PARA 966 et seq.

11 Cf PARA 1077. Evidence is admissible to show the likeness of a child to its alleged parent where its parentage is in issue, but little weight is likely to be given to it: see *C v C and C* [1972] 3 All ER 577, [1972] 1 WLR 1335; and PARA 1068. The court will examine injuries and their effect when assessing damages, but it is

generally impractical and undesirable for the Court of Appeal to do so: *Stevens v William Nash Ltd*[1966] 3 All ER 156, [1966] 1 WLR 1550, CA.

12 See PARA 834.

13 *Holdsworth v M'Crea*(1867) LR 2 HL 380; *Hecla Foundry Co v Walker, Hunter & Co*(1889) 14 App Cas 550, HL; *J Harper & Co Ltd v Wright and Butler Lamp Manufacturing Co Ltd*[1896] 1 Ch 142, CA; *Bourne v Swan and Edgar Ltd, Re Bourne's Trade-Marks*[1903] 1 Ch 211. However, a claim for deceit, based on the resemblance between an article of the defendant and that of the claimant, cannot be decided merely by the judge's inspection: *London General Omnibus Co Ltd v Lavelle*[1901] 1 Ch 135, CA (as explained by Farwell J in *Bourne v Swan and Edgar Ltd, Re Bourne's Trade-Marks*[1903] 1 Ch 211); *Mitchell v Henry*(1880) 15 ChD 181, CA; *London General Omnibus Co Ltd v Felton* (1896) 12 TLR 213.

14 *North Cheshire and Manchester Brewery Co Ltd v Manchester Brewery Co Ltd*[1899] AC 83, HL; *Payton & Co Ltd v Snelling, Lampard & Co Ltd*[1901] AC 308, HL. A witness may be asked, however, if in fact he was or was not deceived: *Royal Warrant Holders' Association v Edward Deane and Beal Ltd*[1912] 1 Ch 10; *Claudius Ash, Sons & Co Ltd v Invicta Manufacturing Co Ltd* (1912) 29 RPC 465, HL. As to evidence of opinion generally see PARA 826.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/20. EVIDENCE/(9) COMMON LAW RULES AS TO PROOF/(ii) Special Modes of Proof/D. VIEWS AND INSPECTIONS/1108. View or inspection out of court.

1108. View or inspection out of court.

The judge may arrange to view a relevant place¹ or to inspect an object out of court if it is impossible or inconvenient to bring that object to court². The authorities indicate that each of the parties, and the jury, if there is one³, should normally be present at a view or out of court inspection or demonstration in civil proceedings⁴ but that in appropriate circumstances the judge may visit a relevant location in order to see what has previously been represented to him in court by plan and photograph on his own and without reference to the parties⁵. Under the old civil procedure specific provision was made by rules of court⁶ for holding a view but such provision has not been reproduced in the Civil Procedure Rules⁷. Views and out of court inspections or demonstrations thus take place in the exercise of the court's inherent jurisdiction to regulate its own procedure⁸ and in the exercise of its specific powers to control the evidence under the Civil Procedure Rules⁹.

1 Often referred to as the 'locus in quo'.

2 See eg *London General Omnibus Co Ltd v Lavell* [1901] 1 Ch 135, CA (inspection of an omnibus); *Buckingham v Daily News Ltd* [1956] 2 QB 534, [1956] 2 All ER 904, CA (demonstration of a machine). As to orders for a person to submit to inspection out of court see PARA 794. As to orders for the inspection or preservation etc of property see PARA 793.

3 As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

4 *Goold v Evans & Co* [1951] 2 TLR 1189, CA. The expression 'view' is used indifferently to describe two different things; a view of the static condition of a public place, and a demonstration in which events with which the court is concerned are simulated: *Salsbury v Woodland* [1970] 1 QB 324 at 343, [1969] 3 All ER 863 at 873, CA, per Widgery LJ. A view is part of the evidence: *Karamat v R* [1956] AC 256, [1956] 1 All ER 415, PC (a view is in substitution for or supplemental to plans, photographs and the like). As to applications for a view see *Tito v Waddell* [1975] 3 All ER 997, [1975] 1 WLR 1303. Every demonstration by a witness on a view is evidence in the case. If a witness on oath makes a false demonstration, he is guilty of perjury: *Tameshwar v R* [1957] AC 476, [1957] 2 All ER 683, PC; *Goold v Evans & Co* [1951] 2 TLR 1189, CA; *Buckingham v Daily News Ltd* [1956] 2 QB 534, [1956] 2 All ER 904, CA, where the restrictive statement of the evidential value of a view expressed in *London General Omnibus Co Ltd v Lavell* [1901] 1 Ch 135, CA, was disapproved. See also *Payton & Co Ltd v Snelling, Lampard & Co Ltd* [1901] AC 308, HL; cf *Kessowji Issur v Great Indian Peninsular Rly Co* (1907) 96 LT 859, PC (where a judgment based on the Court of Appeal's own inspection of the locus in quo, and not on the evidence given at the trial, was reversed, such procedure being irregular); *Roberts v Great Eastern Rly Co* (1872) 36 JP Jo 52; *R v Lawrence* [1968] 1 All ER 579, [1968] 1 WLR 341, CA; *R v Nixon* [1968] 2 All ER 33, [1968] 1 WLR 577, CA. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

5 Where there is anything in the nature of a demonstration, representatives of all parties should be present: *Goold v Evans & Co* [1951] 2 TLR 1189, CA; *Salsbury v Woodland* [1970] 1 QB 324, [1969] 3 All ER 863, CA. Where there is a static view, the judge may go alone, although it is undesirable that he should do so without warning the parties of his intention: *Salsbury v Woodland* [1970] 1 QB 324, [1969] 3 All ER 863, CA. See also *Hare v British Transport Commission* [1956] 1 All ER 578, [1956] 1 WLR 250. Where a jury attends a view, and there is a demonstration by a witness, it is eminently desirable for the judge to be present (*Karamat v R* [1956] AC 256, [1956] 1 All ER 415, PC); but in the case of a simple view, without witnesses, and where no demonstration takes place, the judge's absence is not a fatal defect in the trial (*Tameshwar v R* [1957] AC 476, [1957] 2 All ER 683, PC). See also *Re Gregson and Armstrong* (1894) 70 LT 106 (view by arbitrator); and for a discussion of the recent authorities see *Gibbons v DPP* CO/1480/2000 (12 December 2000, unreported) at paras [5]-[11], DC, per Waller LJ.

6 See RSC Ord 35 r 8; CCR Ord 22 r 6 (both revoked).

7 As to the application of the CPR see PARA 32.

8 As to a court's inherent jurisdiction to regulate its own procedure see generally **COURTS** vol 10 (Reissue) PARA 303. Sittings of the High Court may be held, and any other business of the High Court may be conducted, at any place in England or Wales: Supreme Court Act 1981 s 71(1); PARA 64; and see **COURTS** vol 10 (Reissue) PARA 505. As to the inherent jurisdiction of county courts see *Langley v North West Water Authority* [1991] 3 All ER 610, [1991] 1 WLR 697, CA; and **COURTS** vol 10 (Reissue) PARA 702. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

9 As to the power to control evidence see CPR 32.1; and PARA 791.

UPDATE

1108 View or inspection out of court

TEXT AND NOTES 4, 5--Where there is a multi-member tribunal, all members must attend a view: *R (on the application of Broxbourne BC) v North and East Hertfordshire Magistrates' Court* [2009] EWHC 695 (Admin), [2009] LLR 493, [2009] All ER (D) 96 (Apr).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/ (1) PLACE OF TRIAL/1109. In general.

21. THE TRIAL PROCESS

(1) PLACE OF TRIAL

1109. In general.

The court may deal with a case at any place that it considers appropriate¹. The High Court has power to hold hearings, receive evidence and conduct trials anywhere within or outside the jurisdiction². The jurisdiction of a county court to hold hearings and conduct trials is generally limited to the court for the district in which the court is situated³. Certain claims relating, in particular, to land must normally be commenced in the county court for the district in which the land is situated⁴ unless there are factors justifying the commencement of proceedings in the High Court⁵.

1 See CPR 2.7; and PARA 72.

2 See *Tito v Waddell* [1975] 3 All ER 997 at 1002, [1975] 1 WLR 1303 at 1308 per Megarry J (a view of the locus concerned in a case is the reception of evidence, so that it is part of the trial process).

3 See the County Courts Act 1984 s 1; and PARA 58. Proceedings may, however, be transferred between county courts or between a county court and the High Court: see CPR Pt 30; and PARA 66 et seq. As to the place of trial of claims in the various case management tracks see PARAS 1110-1112.

4 See CPR 56.2(1); CPR 55.1, 55.3; and PARA 116 text and notes 22-24.

5 See *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 2.4; *Practice Direction--Possession Claims* PD 55 paras 1.1-1.4; and PARA 116 text and notes 22-24.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/ (1) PLACE OF TRIAL/1110. Place of hearing in small claims track.

1110. Place of hearing in small claims track.

The hearing of a claim in the small claims track¹ will normally be held in the judge's² room at the county court where the claim was commenced, but it may take place in a courtroom³. Moreover, it may be held at a place other than at the court, such as at the home or business premises of a party⁴. In such case the hearing will not be in public⁵.

1 As to cases normally allocated to the small claims track see PARA 267; and as to case management in the small claims track see PARA 274 et seq.

2 As to the meaning of 'judge' see PARA 49.

3 See *Practice Direction--Small Claims Track* PD 27 para 4.2.

4 See CPR 2.7; *Practice Direction--Small Claims Track* PD 27 para 4.1(3).

5 *Practice Direction--Small Claims Track* PD 27 para 4.1(3). See also CPR 39.2; and PARAS 6, 1117.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/ (1) PLACE OF TRIAL/1111. Place of hearing in fast track.

1111. Place of hearing in fast track.

The trial of a claim allocated to the fast track¹ will normally take place at the county court where the case has been managed, but it may be heard at another court if it is appropriate having regard to the needs of the parties and the availability of court resources².

1 As to cases normally allocated to the fast track see PARA 268; and as to case management in the fast track see PARA 286 et seq.

2 See *Practice Direction--The Fast Track* PD 28 para 8.1; and PARA 291.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/ (1) PLACE OF TRIAL/1112. Place of hearing in multi-track.

1112. Place of hearing in multi-track.

The trial of a claim which has been commenced and is being managed at the Royal Courts of Justice will take place there, unless it is transferred elsewhere¹. The trial of a claim allocated to the multi-track² will normally take place at a civil trial centre³.

1 As to cases which are suitable for trial at the Royal Courts of Justice see *Practice Direction--The Multi-track* PD 29 para 2.6; and PARA 294. As to the transfer of certain cases for trial (and management) at a county court trial centre see paras 2.2, 2.3; and PARA 294 note 1. As to transfer generally see CPR Pt 30; and PARA 66 et seq.

2 As to claims normally allocated to the multi-track see PARA 269.

3 See *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 10.2(3); and PARA 269. If a claim, which has been commenced in a court which is not a civil trial centre (called a 'feeder court': see PARA 269) is allocated to the multi-track, it will be transferred to a civil trial centre for case management and trial: see *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26A para 10.2(4)-(12); and PARA 269. For the exceptions to this rule see PARA 269 text and notes 6-7.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(2) DATE OF TRIAL AND LISTING FOR TRIAL/1113. Date and listing in the small claims track.

(2) DATE OF TRIAL AND LISTING FOR TRIAL

1113. Date and listing in the small claims track.

The date for the hearing of a claim allocated to the small claims track¹ will be fixed as part of the process of allocating the claim² or, if the date for a preliminary hearing is fixed, at that hearing, if the claim is not disposed of at the preliminary hearing³.

1 As to cases normally allocated to the small claims track see PARA 267.

2 See CPR 27.4; and PARA 277.

3 See CPR 27.6(5); and PARA 278.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(2) DATE OF TRIAL AND LISTING FOR TRIAL/1114. Date and listing in the fast track.

1114. Date and listing in the fast track.

When the court allocates a claim to the fast track¹ and gives directions², the court will fix the trial date³ or fix a period, not exceeding three weeks, within which the trial is to take place⁴. The trial date or trial period will be specified in the notice of allocation⁵. The standard period between the giving of directions and the trial will be not more than 30 weeks⁶. The fast track is the normal track for a claim only where the court considers that the trial is likely to last for no longer than a day⁷. So that the court can assess the likely length of the trial and fix a date for it to be held having regard to the availability of witnesses, the court sends pre-trial check lists⁸ to the parties, who must complete and file them not more than eight weeks before the trial date or the beginning of the trial period⁹. An order for the postponement of a trial will only be made in exceptional circumstances¹⁰ and will be an order of last resort¹¹.

1 As to cases normally allocated to the fast track see PARA 268. As to the meaning of 'court' see PARA 22.

2 Ie under CPR 28.2, CPR 28.3: see PARA 287.

3 See CPR 28.2(2)(a); and PARA 287.

4 See CPR 28.2(2)(b); and PARA 287.

5 See CPR 28.2(3); and PARA 287.

6 See CPR 28.2(4); and PARA 287.

7 See CPR 26.6(5)(a); and PARA 291. If the trial is not finished on the day for which it is listed for trial, the judge will normally sit on the next court day in order to complete it: see *Practice Direction--The Fast Track* PD 28 para 8.6; and PARA 291. As to the meaning of 'judge' see PARA 49.

There are also limits on the number of expert witnesses who may give oral evidence: see CPR 26.6(5)(b); and PARA 291.

8 See Form N170 in *The Civil Court Practice*.

9 See CPR 28.5; and PARA 290. As to the meaning of 'filing' see PARA 1832 note 8.

10 See *Practice Direction--The Fast Track* PD 28 para 5.4(1); and PARA 289. If case management directions have not been complied with so that the parties may not be ready for trial on the date fixed, the court will give such directions as are necessary to ensure, so far as possible, that at least some of the issues in the case can be tried on that date: see generally PARA 289.

11 See *Practice Direction--The Fast Track* PD 28 para 5.4(6); and PARA 289 note 4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(2) DATE OF TRIAL AND LISTING FOR TRIAL/1115. Date and listing in the multi-track.

1115. Date and listing in the multi-track.

When the court allocates a claim to the multi-track¹ and gives directions², consideration is given to the date of trial or the period within which the trial is to take place, and, either at that stage or at a case management conference³, the court will fix the date or period as soon as practicable⁴. So that the court can assess the likely length of the trial and fix a date for it to be held having regard to the availability of witnesses, the court may send pre-trial check lists⁵ to the parties, who must complete and file them⁶ by the date specified⁷. If no party files the completed pre-trial check list by the date specified, the court will order that unless a completed pre-trial check list is filed within seven days from service of that order, the claim, defence and any counterclaim will be struck out without further order of the court⁸.

If:

- 182 (1) a party files a completed pre-trial check list but another party does not;
- 183 (2) a party has failed to give all the information requested by the pre-trial check list; or
- 184 (3) the court considers that a hearing is necessary to enable it to decide what directions to give in order to complete preparation of the case for trial,

the court may give such directions as it thinks appropriate⁹. The court may also fix a date for a pre-trial review¹⁰.

An order for the postponement of a trial will only be made in exceptional circumstances¹¹.

There are special provisions for the listing of trials at the Royal Courts of Justice¹².

1 As to cases normally allocated to the multi-track see PARA 269. As to the meaning of 'court' see PARA 22.

2 *Ie* under CPR 29.2(1): see PARA 294.

3 The hearing of the case management conference is fixed when the claim is allocated: see CPR 29.2(1)(b); and PARA 294.

4 See CPR 29.2(2); and PARA 294.

5 See Form N170 in *The Civil Court Practice*.

6 See CPR 29.6; and PARA 299.

7 *Ie* under CPR 29.2(3)(b): see PARA 294.

8 See CPR 29.6(3); and PARA 299.

9 See CPR 29.6(4); and PARA 299.

10 See CPR 29.3(1)(b); CPR 29.7; and PARAS 295, 300. Where the trial is estimated to last more than ten days or where the circumstances require it, the court may direct that a pre-trial review be held, usually before a judge, between eight and four weeks before the trial date: see *The Queen's Bench Guide* (2007 Edn) paras 7.6.1, 7.6.2; and see *The Civil Court Practice*.

11 See *Practice Direction--The Multi-track* PD 29 para 7.4(1); and PARA 298. If case management directions have not been complied with so that the parties may not be ready for trial on the date fixed, the court will give

such directions as are necessary to ensure, so far as possible, that at least some of the issues in the case can be tried on that date: see generally PARA 298.

Courts cannot perform their duty of conducting cases justly if the preferences for hearing dates of doctors are always given priority over all other considerations. The right course for the parties to adopt is to attempt to reach agreement themselves as to the dates which can be met, to consult with court, and with the court's co-operation to find a date within a reasonable time for the hearing: see *Matthews v Tarmac Bricks and Tiles Ltd* [1999] CPLR 463, CA (application for permission to appeal from a decision of a county court judge, before the new civil procedure came into force, setting a hearing date when expert witnesses would be unavailable). It is not acceptable when a trial date is fairly imminent for a solicitor to seek to instruct an expert without checking the availability of that expert for the trial. If the solicitor does carry out the check and there is no reasonable prospect of securing his attendance for a year, then the solicitor should instruct another expert: *Rollinson v Kimberly Clark Ltd* [1999] All ER (D) 617, [1999] CPLR 581, CA. As to adjournment of a trial see also *Great Future International Ltd v Sealand Housing Corp*n [2001] All ER (D) 56 (Jun), [2001] CPLR 293.

12 See *The Chancery Guide* (2005 Edn) Ch 8; and *The Queen's Bench Guide* (2007 Edn) para 9.1 et seq, which provide for the jury list and the trial list and for the listing of claims for trial after the court has directed, under its case management powers, that the trial take place within a particular period under CPR 29.2(2) (see the text and note 4); and see *The Civil Court Practice*. As to jury trial see PARA 1132.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(2) DATE OF TRIAL AND LISTING FOR TRIAL/1116. Date and listing for Part 8 claims.

1116. Date and listing for Part 8 claims.

Where a claim has been commenced using the alternative procedure¹, the court may fix a date for the hearing immediately it is issued, either on the application of a party or on its own initiative². Where the court has not fixed a date for the hearing upon the issue of the claim, it will do so as soon as practicable after the defendant has acknowledged service of the claim form³ or, if he does not do so, after the period for doing so has expired⁴. In certain claims required to be brought using the alternative procedure⁵, the court will fix a date for the hearing when the claim form is issued⁶.

1 Ie under CPR Pt 8: see PARA 127 et seq.

2 See *Practice Direction--Alternative Procedure for Claims* PD 8 para 6.1; and PARA 137. As to the meaning of 'court' see PARA 22.

3 Ie under CPR 8.3: see PARA 130.

4 See *Practice Direction--Alternative Procedure for Claims* PD 8 para 6.2; and PARA 137.

5 As to claims required to be brought using the alternative procedure see PARA 127; and see *The Civil Court Practice*.

6 See *Practice Direction--Alternative Procedure for Claims* PD 8 para 20.9; and PARA 127 note 5.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(3) MODE OF TRIAL AND PROCEEDINGS AT TRIAL/1117. General rule that hearing is to be in public.

(3) MODE OF TRIAL AND PROCEEDINGS AT TRIAL

1117. General rule that hearing is to be in public.

The general rule is that a hearing, which includes a trial¹, is to be held in public². The requirement for a hearing to be in public does not require the court³ to make special arrangements for accommodating members of the public⁴. A hearing, or any part of it, may, however, be in private if certain conditions are satisfied⁵. These conditions have already been discussed in connection with the hearing of applications⁶.

The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness⁷.

If the hearing of a claim in the small claims track is held otherwise than at a court or if the parties agree, the hearing will not be in public⁸.

When a hearing takes place in public, members of the public may obtain a transcript of any judgment given or a copy of any order made, subject to payment of the appropriate fee⁹.

1 In CPR Pt 39 (see PARA 1120 et seq), reference to a hearing includes a reference to the trial: CPR 39.1.

2 CPR 39.2(1); see also the Human Rights Act 1998 s 1(3), Sch 1 art 6(1); and PARA 5; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

3 As to the meaning of 'court' see PARA 22.

4 CPR 39.2(2). The judge may, if appropriate, adjourn a hearing to a larger room or court in order to accommodate members of the public: *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 1.10. As to the meaning of 'judge' see PARA 49.

5 See CPR 39.2(3); and PARA 6. The decision as to whether to hold a hearing in public or in private must be made by the judge conducting the hearing having regard to any representations which may have been made to him: *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 1.4. If the court or judge's room in which the proceedings are taking place has a sign on the door indicating that the proceedings are private, members of the public who are not parties to the proceedings will not be admitted unless the court permits: para 1.9. Where there is no such sign on the door of the court or judge's room, members of the public will be admitted where practicable: para 1.10.

References to hearings being in public or private or in a judge's room contained in the Civil Procedure Rules (including the Rules of the Supreme Court and the County Court Rules scheduled to CPR Pt 50: see CPR Schs 1, 2; and PARA 30 text and note 20) and the practice directions which supplement them do not restrict any existing rights of audience or confer any new rights of audience in respect of applications or proceedings which under the rules previously in force would have been heard in court or in chambers respectively: *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 1.14.

6 See PARA 6.

7 See CPR 39.2(4); and PARA 6.

8 See *Practice Direction--Small Claims Track* PD 27 para 4.1; *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 1.7; and PARAS 279, 6, 1110.

9 *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 1.11. When a judgment is given or an order is made in private, if any member of the public who is not a party to the proceedings seeks a transcript of the judgment or a copy of the order, he must seek the leave of the judge who gave the judgment or made the order: para 1.12. A judgment or order given or made in private, when drawn up, must have clearly

marked in the title: 'Before [*title and name of judge*] sitting in Private': para 1.13. As to judgments and orders see further PARA 1136 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(3) MODE OF TRIAL AND PROCEEDINGS AT TRIAL/1118. Evidence generally.

1118. Evidence generally.

The court¹ may control the evidence by giving directions as to the issues on which it requires evidence², the nature of the evidence which it requires to decide those issues³, and the way in which the evidence is to be placed before the court⁴. The court may use this power to exclude evidence that would otherwise be admissible⁵ and it may limit cross-examination⁶. The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved at trial, by their oral evidence given in public⁷. The court may allow a witness to give evidence through a video link or by other means⁸. Expert evidence is limited to that which is reasonably required to resolve the proceedings⁹.

In any legal proceedings in Wales the Welsh language may be spoken by any party, witness or other person who desires to use it, subject in the case of proceedings in a court other than a magistrates' court to such prior notice as may be required by rules of court; and any necessary provision for interpretation must be made accordingly¹⁰. Any power to make rules of court includes power to make provision as to the use, in proceedings in or having a connection with Wales, of documents in the Welsh language¹¹. A translation in the Welsh language of any prescribed form of oath or affirmation to be administered and taken or made by any person in any court may be prescribed¹². The Lord Chancellor may make rules as to the provision and employment of interpreters of the Welsh and English languages for the purposes of proceedings before courts in Wales¹³.

If any question or difficulty arises concerning the implementation of the practice direction which has been made under these provisions¹⁴, contact must be made in the first place with the liaison judge for the Welsh language¹⁵.

1 As to the meaning of 'court' see PARA 22.

2 See CPR 32.1(1)(a); and PARA 791.

3 See CPR 32.1(1)(b); and PARA 791.

4 See CPR 32.1(1)(c); and PARA 791.

5 See CPR 32.1(2); and PARA 791.

6 See CPR 32.1(3); and PARA 791. As to the meaning of 'cross-examination' see PARA 50 note 4.

7 See CPR 32.2(1)(a); and PARA 750. As to evidence in Part 8 claims see CPR 8.6(2), (3); and PARA 133.

8 See CPR 32.3; and PARA 750.

9 See CPR 35.1; and PARA 838. As to expert evidence generally see CPR Pt 35 and PARA 838 et seq; and as to limiting expert evidence in claims in the small claims track, the fast track and the multi-track see PARAS 280, 268, 295 respectively.

10 Welsh Language Act 1993 s 22(1). The existing practice of conducting a hearing entirely in Welsh on an ad hoc basis and without notice continues to apply when all parties and witnesses directly involved at the time consent to the proceedings being so conducted: *Practice Direction relating to the use of the Welsh Language in Cases in the Civil Courts in Wales* CPR PD 39 Wel para 1.2. In every case in which it is possible that the Welsh language may be used by any party or witness or in any document which may be placed before the court, the parties or their legal representatives must inform the court of that fact so that appropriate arrangements can be made for the management and listing of the case: para 1.3. If costs are incurred as a result of a party failing to

comply with the relevant practice direction, a costs order may be made against him or his legal representative: para 1.4.

11 Welsh Language Act 1993 s 22(2). In any proceedings in which a party is required to complete an allocation questionnaire, he must include details relating to the possible use of Welsh, ie details of any person wishing to give oral evidence in Welsh and of any documents in Welsh (eg documents to be disclosed under CPR Pt 31 (see PARA 538 et seq) or witness statements) which that party expects to use: *Practice Direction relating to the use of the Welsh Language in Cases in the Civil Courts in Wales* CPR PD 39 Wel para 2.1. A party must include these details in the allocation questionnaire even if he has already informed the court of the possible use of Welsh in accordance with the provisions of para 1 (see note 10): para 2.2.

At any interlocutory hearing, the court will take the opportunity to consider whether it should give case management directions. To assist the court, a party or his legal representative must draw the court's attention to the possibility of Welsh being used in the proceedings, even where he has already done so in compliance with other provisions of the relevant practice direction: *Practice Direction relating to the use of the Welsh Language in Cases in the Civil Courts in Wales* CPR PD 39 Wel para 3.1. In any case where a party is required to complete a pre-trial check list and has already intimated the intention to use Welsh, he must confirm the intended use of Welsh in the pre-trial check list and provide any details which have not been set out in the allocation questionnaire: para 3.2. The diary manager, in consultation with the designated civil judge, will ensure that a case in which the Welsh language is to be used is listed, wherever practicable, before a Welsh speaking judge and, where translation facilities are needed, at a court with simultaneous translation facilities: para 4.1.

12 See the Welsh Language Act 1993 s 23; and PARA 1021 note 5.

13 See the Welsh Language Act 1993 s 24; and PARA 1031 text and note 4. Whenever an interpreter is needed to translate evidence from English to Welsh or from Welsh to English, the court manager in whose court the case is to be heard will take steps to secure the attendance of an interpreter whose name is included in the list of approved court interpreters: *Practice Direction relating to the use of the Welsh Language in Cases in the Civil Courts in Wales* CPR PD 39 Wel para 5.1.

14 Ie *Practice Direction relating to the use of the Welsh Language in Cases in the Civil Courts in Wales* CPR PD 39 Wel: see notes 10-13; and PARA 1132.

15 *Practice Direction relating to the use of the Welsh Language in Cases in the Civil Courts in Wales* CPR PD 39 Wel para 7.1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(3) MODE OF TRIAL AND PROCEEDINGS AT TRIAL/1119. Exhibits at trial; in general.

1119. Exhibits at trial; in general.

The detailed rules relating to exhibits to evidence are discussed elsewhere in this title¹. Exhibits which are proved at trial and handed in should be recorded on an exhibit list and kept in the custody of the court² until the conclusion of the trial, unless the judge³ directs otherwise. At the conclusion of the trial it is the parties' responsibility to obtain the return of those exhibits which they handed in and to preserve them for the period in which any appeal may take place⁴.

1 See PARAS 981, 990.

2 As to the meaning of 'court' see PARA 22.

3 As to the meaning of 'judge' see PARA 49.

4 *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 7. As to appeals see PARA 1657 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(3) MODE OF TRIAL AND PROCEEDINGS AT TRIAL/1120. Timetable for trial.

1120. Timetable for trial.

When giving directions for trial, the court will consider setting a timetable for the trial¹ and will do so in consultation with the parties². A timetable will set or limit the time allowed for speeches, submissions and for the reception of evidence, including that allowed for the cross-examination of each witness, and may set the time when certain witnesses are to be called to give evidence³.

1 As to setting the timetable for cases allocated to the fast track see CPR 28.6(1)(b); and PARA 291; and as to setting the timetable for trial for cases allocated to the multi-track see CPR 29.8(i); and PARA 301. As to the meaning of 'court' see PARA 22.

2 CPR 39.4. See also *Practice Direction--The Fast Track* PD 28 para 7.2(2)(b) (for cases allocated to the fast track); *Practice Direction--The Multi-track* PD 29 para 9.2(2)(b) (for cases allocated to the multi-track) which provide that the parties may submit an agreed timetable for consideration by the court; see also *Practice Direction--The Fast Track* PD 28 para 2.7, Appendix, which includes a sample timetable for a trial of a claim allocated to the fast track as part of standard directions. As to standard directions see PARA 287.

3 See the sample timetable in *Practice Direction--The Fast Track* PD 28, Appendix. As to the meaning of 'cross-examination' see PARA 50 note 4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(3) MODE OF TRIAL AND PROCEEDINGS AT TRIAL/1121. Trial in the small claims track.

1121. Trial in the small claims track.

The court¹ may adopt any method of proceeding at a hearing of a claim allocated to the small claims track that it considers to be fair². The hearing will be informal³ and the strict rules of evidence will not apply⁴. The conduct of such hearings is discussed elsewhere in this title⁵.

After allocation to the small claims track, the court may give notice to the parties that it proposes to deal with the claim without a hearing and invite the parties to notify the court of their agreement by a specified date⁶.

1 The hearing of a claim allocated to the small claims track will generally be before a district judge but may be before a circuit judge if it is assigned to and heard by him with his consent: see *Practice Direction--Small Claims Track* PD 27 para 1; *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B paras 11.1(a), 11.2; and PARAS 279, 62 respectively. As to claims normally allocated to the small claims track see PARA 267.

2 See CPR 27.8(1); and PARA 279.

3 See CPR 27.8(2); and PARA 279.

4 See CPR 27.8(3); and PARA 279.

5 See PARA 279. As to the restriction on expert evidence at the trial see PARA 280.

6 See CPR 27.4(1)(e); and PARA 277 head (5) in the text.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(3) MODE OF TRIAL AND PROCEEDINGS AT TRIAL/1122. Trial in the fast track.

1122. Trial in the fast track.

The trial of a claim allocated to the fast track¹ may be heard by a circuit judge² or a district judge³ in a county court.

There are restrictions on the use of expert evidence⁴. Unless the trial judge otherwise directs, the trial will be conducted in accordance with any order previously made⁵; in particular, such an order may set a timetable for the trial⁶. The statements of witnesses, which have been served⁷, will stand as the witnesses' evidence in chief, unless the court orders otherwise⁸.

The conduct of fast track hearings is discussed elsewhere in this title⁹.

1 As to claims normally allocated to the fast track see PARA 268.

2 As to circuit judges see PARA 59.

3 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 11.1(a); and PARA 62.

4 See PARA 268. See also *Practice Direction--The Fast Track* PD 28 para 7.2(4), which makes provision for directions to be given as to whether expert evidence is to be given by written report or orally, when the court has given permission for expert evidence.

5 See CPR 28.7; and PARA 291. If the trial is not finished on the day for which it is listed for trial, the judge will normally sit on the next court day in order to complete it: see *Practice Direction--The Fast Track* PD 28 para 8.6; and PARA 291.

6 See PARA 287 text and note 9. See also *Practice Direction--The Fast Track* PD 28 para 8.3 (which provides for the trial judge to confirm or vary the timetable: see PARA 291) and the Appendix to that practice direction which includes a sample timetable; such a timetable will set or limit the time allowed for speeches, submissions and the reception of evidence, including cross-examination of each witness, and may set the time at which particular witnesses are to be called.

7 Ie under CPR 32.4 (see PARA 982) and in accordance with the case management directions previously given under eg CPR 28.3 (see PARA 287).

8 See CPR 32.5(2); and PARA 983. The court may order otherwise, ie that the evidence in chief be given orally, where the witness's credibility is in issue and his evidence is strongly disputed: *Mercer v Chief Constable of the Lancashire Constabulary* [1991] 2 All ER 504, [1991] 1 WLR 367, CA. As to the use of cases decided under the old rules as an aid to interpreting the current Civil Procedure Rules see PARA 33 text and note 2.

9 See PARA 291.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(3) MODE OF TRIAL AND PROCEEDINGS AT TRIAL/1123. Trial in the multi-track.

1123. Trial in the multi-track.

The trial of a claim commenced in the High Court and allocated to the multi-track¹ will normally take place before a High Court judge² or a deputy sitting as a High Court judge³, but may take place before a master or a district judge of a district registry with the consent of the parties⁴. In proceedings in the Chancery Division, certain additional matters may only be dealt with by a master or district judge with the consent of the Chancellor of the High Court⁵. The trial of a claim commenced in a county court and allocated to the multi-track will normally take place before a circuit judge or a recorder, but in certain circumstances may be heard by a district judge⁶.

The conduct of multi-track hearings is discussed elsewhere in this title⁷.

1 As to cases normally allocated to the multi-track see PARA 269.

2 See *The Queen's Bench Guide* (2007 Edn) para 10.1.1; and see *The Civil Court Practice*.

3 I.e. a deputy appointed under the Supreme Court Act 1981 s 9 (see **COURTS**); but deputies may not try claims for a declaration of incompatibility or in respect of a judicial act under the Human Rights Act 1998 ss 4, 6: see *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 7A; and PARA 50 text and notes 28-29. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

4 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 4.1; and PARA 50 text and note 21. Masters and district judges may not try claims for a declaration of incompatibility or in respect of a judicial act under the Human Rights Act 1998 ss 4, 6, even with the consent of the parties: see *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 7A; and PARA 50 text and notes 28-29.

5 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 5.1; and PARA 50.

6 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 11.1; and PARA 62.

7 See PARA 301.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(3) MODE OF TRIAL AND PROCEEDINGS AT TRIAL/1124. Trial of Part 8 claims.

1124. Trial of Part 8 claims.

The trial of a Part 8 claim¹ in the High Court may be heard by a master or district judge² and in a county court by a district judge³, provided that they have jurisdiction to make all the orders sought by the claim⁴. Since the Part 8 procedure is to be used to obtain the court's decision on, or resolve, a question which is unlikely to involve a substantial dispute of fact⁵, witnesses do not generally give their evidence orally at the trial or hearing, but the court may require or permit oral evidence⁶ or give directions requiring a witness to attend for cross-examination⁷. All written evidence should have been filed and served by the date of the hearing⁸, but the court may permit a party to rely upon written evidence filed and served later⁹.

1 As to Part 8 claims see PARA 127 et seq.

2 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 4.1; and PARA 50.

3 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 11.1; and PARA 62. This is subject to exceptions: see PARA 62 note 19.

4 Where the proceedings include, eg a claim for an injunction, then the hearing will normally be before a judge, since neither a master nor a district judge has the power to make such an order except in limited circumstances: see *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 2.3; and PARA 62. As to the meaning of 'injunction' see PARA 315 note 2.

5 See CPR 8.1(2)(a); and PARA 127.

6 See CPR 8.6(2); and PARA 133.

7 See CPR 8.6(3); and PARA 133. As to the meaning of 'cross-examination' see PARA 50 note 4.

8 See CPR 8.5; CPR 8.6(1)(a); and PARAS 132, 133. As to the meaning of 'filing' see PARA 1832 note 8; and as to the meaning of 'service' see PARA 138 note 2.

9 See CPR 8.6(1)(b); and PARA 133.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(3) MODE OF TRIAL AND PROCEEDINGS AT TRIAL/1125. Bundles of documents for use at trial.

1125. Bundles of documents for use at trial.

Unless the court¹ orders otherwise, the claimant² must file³ a trial bundle containing documents required by a relevant practice direction⁴ and any court order⁵. The claimant must file the trial bundle not more than seven days and not less than three days before the start of the trial⁶.

Unless the court orders otherwise, the trial bundle must include a copy of:

- 185 (1) the claim form⁷ and all statements of case⁸;
- 186 (2) a case summary and/or chronology where appropriate;
- 187 (3) requests for further information and responses to the requests⁹;
- 188 (4) all witness statements¹⁰ to be relied on as evidence;
- 189 (5) any witness summaries¹¹;
- 190 (6) any notices of intention to rely on hearsay evidence¹²;
- 191 (7) any notices of intention to rely on evidence (such as a plan, photograph etc)¹³ which is not either contained in a witness statement, affidavit¹⁴ or expert's report¹⁵, or being given orally at trial or hearsay evidence¹⁶;
- 192 (8) any medical reports and responses to them;
- 193 (9) any experts' reports and responses to them;
- 194 (10) any order giving directions as to the conduct of the trial; and
- 195 (11) any other necessary documents¹⁷.

The originals of the documents contained in the trial bundle, together with copies of any other court orders, should be available at the trial¹⁸.

The preparation and production of the trial bundle, even where it is delegated to another person, is the responsibility of the legal representative¹⁹ who has conduct of the claim on behalf of the claimant²⁰.

If there are numerous bundles, a core bundle should be prepared containing the core documents essential to the proceedings, with references to the supplementary documents in the other bundles²¹. If a document to be included in the trial bundle is illegible, a typed copy must be included in the bundle next to it, suitably cross-referenced²².

The contents of the trial bundle should be agreed where possible. The parties should also agree where possible that the documents contained in the bundle are authentic even if not disclosed under Part 31 of the Civil Procedure Rules²³ and that documents in the bundle may be treated as evidence of the facts stated in them even if a notice under the Civil Evidence Act 1995 has not been served²⁴. Where it is not possible to agree the contents of the bundle, a summary of the points on which the parties are unable to agree should be included²⁵.

The party filing the trial bundle should supply identical bundles to all the parties to the proceedings and for the use of the witnesses²⁶.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'claimant' see PARA 18.

3 As to the meaning of 'filing' see PARA 1832 note 8.

4 CPR 39.5(1)(a). The trial bundle should be paginated (continuously) throughout, and indexed with a description of each document and the page number. Where the total number of pages is more than 100, numbered dividers should be placed at intervals between groups of documents: *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 3.5. The bundle should normally be contained in a ring binder or lever arch file. Where more than one bundle is supplied, they should be clearly distinguishable, eg by different colours or letters: para 3.6. For further requirements see the text and notes 7-26.

Any bundle or list of authorities prepared for the use of the court must bear a certification by the advocate responsible for arguing the case that the requirements of *Practice Note* [2001] 2 All ER 510, sub nom *Practice Direction (citation of authorities)* [2001] 1 WLR 1001, CA, para 8 have been complied with: see PARA 91 text and notes 16-18.

5 CPR 39.5(1)(b). As to court bundles in family proceedings see *Re X & Y (Bundles)* [2008] EWHC 2058 (Fam).

6 CPR 39.5(2).

7 As to the claim form see PARA 117.

8 As to statements of case see PARA 584 et seq.

9 As to requests for further information see CPR Pt 18; and PARA 611.

10 As to the meaning of 'witness statement' see PARA 751 note 1.

11 As to witness summaries see PARA 986.

12 Ie under CPR 33.2: see PARA 811.

13 Ie under CPR 33.6: see PARA 817.

14 As to the meaning of 'affidavit' see PARA 540 note 5.

15 As to experts' reports see PARA 839. For convenience, experts' reports may be contained in a separate bundle and cross-referenced in the main bundle: *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 3.7.

16 See note 12.

17 *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 3.2.

18 *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 3.3.

19 As to the meaning of 'legal representative' see PARA 1833 note 13.

20 *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 3.4.

21 *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 3.6.

22 *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 3.8.

23 As to disclosure see CPR Pt 31; and PARAS 112, 538 et seq.

24 *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 3.9. As to the Civil Evidence Act 1995 see further PARA 808 et seq.

25 *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 3.9.

26 *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 3.10.

For further provisions as to the contents of bundles and their lodging at court see *The Chancery Guide* (2005 Edn) paras 7.9-7.19, Appendix 6; *The Queen's Bench Guide* (2007 Edn) paras 7.11.7, 7.11.8; *The Admiralty and Commercial Courts Guide* (2006 Edn) para D7.1 et seq, Appendix 10; and *The Civil Court Practice*. As to trial bundles for the Court of Appeal see PARA 1710.

UPDATE

1125 Bundles of documents for use at trial

NOTE 26--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para D7.1 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(3) MODE OF TRIAL AND PROCEEDINGS AT TRIAL/1126. Representation at trial.

1126. Representation at trial.

At any hearing, a written statement containing the following information must be provided for the court: (1) the name and address of each advocate; (2) his qualification or entitlement to act as an advocate; and (3) the party for whom he so acts¹.

A company or other corporation may be represented at trial by an employee if the employee has been authorised by the company or corporation to appear at trial on its behalf² and the court gives permission³. Permission is not normally granted in jury trials⁴ or in contempt proceedings⁵.

A litigant in person may be assisted at a hearing by another person often referred to as a 'McKenzie friend'⁶, if the court gives permission⁷. Applications for such permission are considered carefully and on a case by case basis⁸.

Rights of audience are discussed elsewhere in this work⁹.

1 *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 5.1.

2 CPR 39.6(a). If a company or other corporation is to be represented by an employee, the court must be provided with a written statement giving the full name of the company or corporation as stated in its certificate of registration, its registered number, the position or office in the company or corporation of the proposed representative and details of the date on which and the manner in which he has been authorised to represent the company or corporation: see *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 5.2.

3 CPR 39.6(b). CPR 39.6 is intended to enable a company or other corporation to represent itself as a litigant in person. Permission under CPR 39.6(b) should therefore be given by the court unless there is some particular and sufficient reason why it should be withheld. In considering whether to grant permission the matters to be taken into account include the complexity of the issues and the experience and position in the company or corporation of the proposed representative: *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 5.3. Such permission should be obtained in advance of the hearing from, preferably, the judge who is to hear the case, but may, if it is for any reason impracticable or inconvenient to do so, be obtained from any judge by whom the case could be heard: para 5.4. The permission may be obtained informally and without notice to the other parties. The judge who gives the permission should record in writing that he has done so and supply a copy to the company or corporation in question and to any other party who asks for one: para 5.5. As to the meaning of 'judge' see PARA 49.

4 As to jury trials see PARA 1132.

5 *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 5.6. As to contempt proceedings see generally **CONTEMPT OF COURT**.

6 See *McKenzie v McKenzie* [1971] P 33, [1970] 3 All ER 1034, CA.

7 See *The Chancery Guide* (2005 Edn) paras 15.11-15.13; and see *The Civil Court Practice*. For guidance on the role of a McKenzie friend in care proceedings which concern children, see *Re O (Children) (Hearing in Private: Assistance)*, *Re WR (A Child)*, *Re W (Children)* [2005] EWCA Civ 759, [2006] Fam 1; *Re N (a child) (McKenzie friends: rights of audience)* [2008] EWHC 2042 (Fam), [2008] 1 WLR 2743, [2008] All ER (D) 116 (Aug). For guidance in regard to using a McKenzie friend in family proceedings, see *Practice Direction (President's guidance: McKenzie friends)* [2008] 2 FCR 90, [2008] All ER (D) 193 (Apr).

8 See eg *Izzo v Philip Ross & Co (a firm)* (2001) Times, 9 August.

9 As to rights of audience see **LEGAL PROFESSIONS** vol 66 (2009) PARAS 732 et seq, 1109 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(3) MODE OF TRIAL AND PROCEEDINGS AT TRIAL/1127. Citation of authorities at the trial.

1127. Citation of authorities at the trial.

The citation of judicial decisions as authorities is discussed elsewhere in this title¹. Particular provision is made by the practice direction supplementing Part 39 of the Civil Procedure Rules in relation to the giving of evidence of certain judgments, decisions, declarations and advisory opinions of the European Court of Human Rights, reports of the European Human Rights Commission and other related matters².

¹ As to judicial decisions as authorities see PARA 91 et seq; and see, in particular, *Practice Note* [2001] 2 All ER 510, sub nom *Practice Direction (citation of authorities)* [2001] 1 WLR 1001, CA, para 8; and PARA 91 text and notes 16-18.

² See *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 8; and PARA 102 note 4. As to the replacement of the Court and the Commission with a new permanent Court see PARA 102 note 3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(3) MODE OF TRIAL AND PROCEEDINGS AT TRIAL/1128. Failure to attend final hearing of a claim in the small claims track.

1128. Failure to attend final hearing of a claim in the small claims track.

If a claimant¹ does not attend the hearing and does not give notice seven days before the hearing that he will not attend which also requests the court to decide the claim in his absence², the court may strike out the claim³. If a defendant⁴ does not attend the hearing or give similar notice and the claimant either does attend the hearing or gives such a notice, the court may decide the claim on the basis of the evidence of the claimant alone⁵. If neither party attends or gives such notice, the court may strike out the claim and any defence and counterclaim⁶.

A party who was neither present nor represented at the hearing of the claim and who has not given written notice to the court may apply for an order that any judgment be set aside and the claim re-heard⁷. A party may not, however, apply to set aside a judgment under this provision if the court dealt with the claim without a hearing⁸ with the agreement of all parties⁹.

1 As to the meaning of 'claimant' see PARA 18.

2 See CPR 27.9(1); see PARA 281. As to the meaning of 'court' see PARA 22.

3 See CPR 27.9(2); and PARA 281. As to the meaning of 'striking out' see PARA 218 note 2.

4 As to the meaning of 'defendant' see PARA 18.

5 See CPR 27.9(3); and PARA 281.

6 See CPR 27.9(4); and PARA 281. As to the meaning of 'counterclaim' see PARA 618 note 3.

7 See CPR 27.11(1); and PARA 283. As to the procedure on such application see PARA 283. As to the meaning of 'set aside' see PARA 197 note 6.

8 See CPR 27.10; see PARA 282.

9 See CPR 27.11(5); and PARA 283.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(3) MODE OF TRIAL AND PROCEEDINGS AT TRIAL/1129. Failure to attend trial of claims in the fast track and multi-track.

1129. Failure to attend trial of claims in the fast track and multi-track.

The court¹ may proceed with a trial in the absence of a party but:

- 196 (1) if no party attends the trial, it may strike out² the whole of the proceedings³;
- 197 (2) if the claimant⁴ does not attend, it may strike out his claim and any defence to counterclaim⁵; and
- 198 (3) if a defendant⁶ does not attend, it may strike out his defence or counterclaim (or both)⁷.

Where the court strikes out proceedings, or any part of them, under these provisions, it may subsequently restore the proceedings, or that part⁸.

Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside⁹.

An application for an order to restore proceedings, or for the judgment or order to be set aside, must be supported by evidence¹⁰. Where such an application is made by a party who failed to attend the trial, the court may grant the application only if the applicant acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him, if he had a good reason for not attending the trial and if he has a reasonable prospect of success at the trial¹¹.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'striking out' see PARA 218 note 2.

3 CPR 39.3(1)(a); and see *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 2.2(3).

4 As to the meaning of 'claimant' see PARA 18.

5 CPR 39.3(1)(b); and see *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 2.2(2). As to the meaning of 'counterclaim' see PARA 618 note 3.

6 As to the meaning of 'defendant' see PARA 18.

7 CPR 39.3(1)(c); and see *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 2.2(1).

8 CPR 39.3(2).

9 CPR 39.3(3). See *Nelson v Clearsprings (Management) Ltd* [2006] EWCA Civ 1252, [2007] 2 All ER 407. As to the meaning of 'set aside' see PARA 197 note 6.

10 CPR 39.3(4). The application must be made in accordance with CPR Pt 23 (see PARA 303 et seq): *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 2.3. The supporting evidence must give reasons for the failure to attend court and state when the applicant found out about the order against him: para 2.4.

11 CPR 39.3(5). As to the meaning of 'a reasonable prospect of success' in the context of summary judgment see PARA 524 note 7.

UPDATE

1129 Failure to attend trial of claims in the fast track and multi-track

NOTES 1-6--A hearing of an undefended claim will not necessarily amount to a 'trial': *Forcelux Ltd v Binnie* [2009] EWCA Civ 854, [2009] All ER (D) 216 (Oct) (hearing of undefended possession proceedings usually would not constitute a trial).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(3) MODE OF TRIAL AND PROCEEDINGS AT TRIAL/1130. Settlement or discontinuance after trial date fixed.

1130. Settlement or discontinuance after trial date fixed.

Where an offer to settle a claim is accepted¹, or a settlement is reached², or a claim is discontinued³, which disposes of the whole of a claim for which a date or 'window' has been fixed for the trial, the parties must ensure that the listing officer for the trial court is notified immediately⁴. If an order is drawn up giving effect to the settlement or discontinuance, a copy of the sealed⁵ order should be filed⁶ with the listing officer⁷.

Whilst the court will always encourage litigants to settle their differences, even at a late stage, in a case where judgment has been reserved it is the duty of the parties and their professional advisers to inform the court immediately when they become aware that there is a possibility of agreement, in order that the court's resources may be properly and efficiently deployed⁸.

1 As to offers to settle see PARA 729 et seq.

2 As to settlements see PARA 505.

3 As to discontinuance see PARA 723 et seq.

4 *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 4.1.

5 As to the meaning of 'seal' see PARA 81 note 2.

6 As to the meaning of 'filing' see PARA 1832 note 8.

7 *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 4.2. As to the disposal of proceedings without trial see PARA 503 et seq.

8 See *HFC Bank plc v Midland Bank plc* [2000] All ER (D) 159, [2000] CPLR 197, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(3) MODE OF TRIAL AND PROCEEDINGS AT TRIAL/1131. Impounded documents.

1131. Impounded documents.

Documents impounded by order of the court¹ must not be released from the custody of the court except in compliance with a court order² or with a written request made by a Law Officer or the Director of Public Prosecutions³. While they are in the custody of the court such documents may not be inspected except by a person authorised to do so by a court order⁴.

1 As to the meaning of 'court' see PARA 22.

2 CPR 39.7(1)(a).

3 CPR 39.7(1)(b). A document released from the custody of the court under CPR 39.7(1)(b) must be released into the custody of the person who requested it: CPR 39.7(2).

4 See CPR 39.7(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(4) TRIAL OTHERWISE THAN BY JUDGE ALONE/1132. Trial by judge and jury.

(4) TRIAL OTHERWISE THAN BY JUDGE ALONE

1132. Trial by judge and jury.

On the application of any party¹ to a claim to be tried in the Queen's Bench Division, where the court is satisfied that there is in issue:

- 199 (1) a charge of fraud against that party²; or
- 200 (2) a claim in respect of libel, slander, malicious prosecution or false imprisonment³; or
- 201 (3) any question or issue of a kind prescribed for this purpose⁴,

the claim will be ordered to be tried with a jury⁵, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury⁶.

Where a claim to be tried in the Queen's Bench Division does not fall within the classes of claims mentioned above, it will be ordered to be tried without a jury unless the court in its discretion orders it to be tried with a jury⁷.

Jury trial in a county court is not permitted in respect of certain specified proceedings⁸. In all other proceedings in a county court the trial must be without a jury unless the court otherwise orders on an application made in that behalf by any party to the proceedings in such manner and within such time before the trial as may be prescribed⁹. Where, on any such application, the court is satisfied that there is in issue any such matter as is mentioned in head (1) or head (2) above, or any question or issue of a kind prescribed for these purposes, the claim must be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury¹⁰.

The court has a wide discretion to refuse an order for trial with a jury¹¹, but it is not an untrammelled¹², unfettered or unrestrained discretion, and its exercise will, if necessary, be reviewed by the Court of Appeal to ensure that it is exercised upon proper considerations and materials¹³. Thus, in claims for personal injuries, trial by jury will not be ordered unless there are exceptional circumstances¹⁴. It is not an exceptional circumstance that the claim involves issues of credibility nor, except at the instance of the party affected, that it involves issues of integrity and honour¹⁵. If a person has already been tried and convicted, his honour or integrity cannot be still at stake in a civil claim raising the same issues as in the criminal proceedings¹⁶. A trial by jury in the Commercial Court will be refused¹⁷.

In the civil courts in Wales, where a case is tried with a jury, the law does not permit the selection of jurors in a manner which enables the court to discover whether a juror does or does not speak Welsh or to secure a jury whose members are bilingual to try a case in which the Welsh language may be used¹⁸. The court officer swearing in the jury will, however, inform the jurors in open court that each juror may take the oath or may affirm in Welsh or English as he wishes¹⁹.

In proceedings in the High Court, the verdict of the jury need not be unanimous and the court will accept a majority verdict where, with a jury of not less than eleven jurors²⁰, ten of them agree on the verdict²¹, and where there are ten jurors, nine of them agree on the verdict²².

The trial judge has a discretion to discharge a juror, even during the trial, on the ground of evident necessity²³. He also has discretion, where the jury has made a mistake and the interests of justice so require, to set aside the discharge of the jury and allow the jurors to deliberate further under properly controlled circumstances²⁴.

1 The application must be made within 28 days of service of the defence: see CPR 26.11; and the Supreme Court Act 1981 s 69(2). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to service of the defence see PARA 199; and as to time limits generally see PARA 88 et seq. As to the meaning of 'service' see PARA 138 note 2.

2 Supreme Court Act 1981 s 69(1)(a); and see also the County Courts Act 1984 s 66(3)(a). As to jury trial in county courts see the text and notes 8-10. A charge of fraud is equivalent to the common law action of deceit within the meaning of *Derry v Peek* (1889) 14 App Cas 337, HL (see **MISREPRESENTATION AND FRAUD**), and does not therefore include a charge of robbery (*Barclays Bank Ltd v Cole* [1967] 2 QB 738, [1966] 3 All ER 948, CA), nor a general charge of dishonesty (*Stafford Winfield Cook & Partners Ltd v Winfield* [1980] 3 All ER 759, [1981] 1 WLR 458). However, the right of a party charged with fraud to trial by jury arises only if the claim is brought in the Queen's Bench Division and not if it is brought in the Chancery Division, although, if the court thinks it appropriate to do so and the interests of justice so require, it may order that the proceedings be transferred to the Queen's Bench Division, but not otherwise: *Stafford Winfield Cook & Partners Ltd v Winfield* [1980] 3 All ER 759, [1981] 1 WLR 458. The party by whom a charge of fraud is made has no right to apply for trial by jury: *Williams v Beesley* [1973] 3 All ER 144 at 147, [1973] 1 WLR 1295 at 1299, HL, per Lord Diplock. As to the transfer of proceedings in the High Court see PARA 67.

3 Supreme Court Act 1981 s 69(1)(b); and see also the County Courts Act 1984 s 66(3)(b); but a county court has no original jurisdiction to hear and determine any claim for libel or slander (see s 15(2)(c)), unless the claim has been transferred from the High Court under s 40 or by agreement between the parties under s 18 (see PARA 69) or the cause of action is confined to malicious falsehood: *Joyce v Sengupta* [1993] 1 All ER 897, [1999] 1 WLR 337, CA. As to jury trial in county courts see the text and notes 8-10.

4 Supreme Court Act 1981 s 69(1)(c). 'Prescribed' means prescribed by rules of court: s 151(1). At the date at which this title states the law no kind of question or issue had been so prescribed.

5 Supreme Court Act 1981 s 69(1). As to the earlier legislation see *Ford v Blurton*, *Ford v Sauber* (1922) 38 TLR 801, CA. In the classes of case specified there is therefore a prima facie right to trial by jury, although in practice in a considerable number of such cases the parties forgo this right.

6 Supreme Court Act 1981 s 69(1). The right to trial by jury is not lost simply because of the length or complexity of a case, but only if it comes within the terms of this provision. Even in such a case the court retains a discretion to order trial by jury: see *Rothermere v Times Newspapers Ltd* [1973] 1 All ER 1013, [1973] 1 WLR 448, CA, where the honour and reputation of a party was at stake and the action concerned matters of national importance. Nor is that right necessarily overridden by CPR 24.3 (summary judgment): see PARA 524 note 12.

Where for the purpose of disposing of any claim or other matter which is being tried in the High Court by a judge with a jury it is necessary to ascertain the law of any other country which is applicable to the facts of the case, any question as to the effect of the evidence given with respect to that law must, instead of being submitted to the jury, be decided by the judge alone: see the Supreme Court Act 1981 s 69(5).

7 Supreme Court Act 1981 s 69(3). Even if the case falls within one of the classes mentioned (eg a claim for libel), the court may in its discretion, where the case is complicated because the issues of law and fact are commingled and it is in everybody's interests to have it tried by a judge alone, refuse to order trial with a jury: see *Richards v Naum* [1967] 1 QB 620, [1966] 3 All ER 812, CA.

8 See the County Courts Act 1984 s 66(1) (amended by the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 57(2); and the Housing Act 1988 s 140(1), Sch 17 para 35(1)). In the following proceedings in a county court the trial must be without a jury: (1) Admiralty proceedings; (2) proceedings arising under the Rent (Agriculture) Act 1976 Pt I (ss 1-5), Pt II (ss 6-19) or Pt III (ss 20-26) (all as amended), or under any provision of the Rent Act 1977 (other than a provision contained in Pt V (ss 77-85) (restricted contracts), ss 103-106 or Pt IX (ss 119-128 (premiums etc)), or under the Protection from Eviction Act 1977 Pt I (ss 1-4) or under the Housing Act 1988 Pt I (ss 1-45) (rented accommodation); (3) any appeal to the county court under the Housing Act 1985: County Courts Act 1984 s 66(1) (as so amended). See further **AGRICULTURAL LAND; LANDLORD AND TENANT**.

9 County Courts Act 1984 s 66(2). As to the time limit for making an application see note 1.

10 See the County Courts Act 1984 s 66(3). As to fees payable in respect of jury trial in a county court see s 66(4) (amended by the Courts Act 2003 s 109(1), Sch 8 para 271(a)). As to empanelling the jury see the County Courts Act 1984 s 67; and as to the judge's duty to determine foreign law in jury trials see s 68; and PARA 1090.

11 The Civil Procedure Rules do not specifically make provisions for orders for trial by jury, but the court's powers under Supreme Court Act 1981 s 69(3) will be exercised in accordance with the overriding objective (see PARA 33) and under its general case management powers (see eg CPR 3.1(2)(m); and PARA 247). Nothing in the Supreme Court Act 1981 s 69(1)-(3) affects the power of the court to order, in accordance with rules of court, that different questions of fact arising in any action be tried by different modes of trial; and where any such order is made, s 69(1) has effect only as respects questions relating to any such charge, claim, question or issue as is mentioned in that provision: s 69(4).

12 See *Hope v Great Western Rly Co*[1937] 2 KB 130, [1937] 1 All ER 625, CA, where it had been so described. This case has been drained of any authority by *Ward v James*[1966] 1 QB 273, [1965] 1 All ER 563, CA.

13 *Ward v James*[1966] 1 QB 273, [1965] 1 All ER 563, CA.

14 *Ward v James*[1966] 1 QB 273, [1965] 1 All ER 563, CA. See also *Hennell v Ranaboldo*[1963] 3 All ER 684, [1963] 1 WLR 1391, CA; *Sims v William Howard & Son Ltd*[1964] 2 QB 409, [1964] 1 All ER 918, CA; *Watts v Manning*[1964] 2 All ER 267, [1964] 1 WLR 623, CA; *Hodges v Harland and Wolff Ltd*[1965] 1 All ER 1086, [1965] 1 WLR 523, CA; *H v Ministry of Defence* [1991] 2 QB 103, [1991] 2 All ER 834, CA.

15 *Williams v Beesley*[1973] 3 All ER 144, [1973] 1 WLR 1295, HL, negating dicta of Lord Denning MR to the contrary in *Ward v James*[1966] 1 QB 273, [1965] 1 All ER 563, CA. Nor is it an exceptional circumstance that a party believes, however honestly, that judges as a class might be prejudiced against him or in favour of his opponent: *Williams v Beesley*[1973] 3 All ER 144, [1973] 1 WLR 1295, HL.

16 *Barclays Bank Ltd v Cole*[1967] 2 QB 738, [1966] 3 All ER 948, CA.

17 *Woodvine v Midland Bank Ltd, Cliff v Midland Bank Ltd* (1965) 109 Sol Jo 234, CA.

18 *Practice Direction relating to the use of the Welsh Language in Cases in the Civil Courts in Wales* CPR PD 39 Wel para 1.5.

19 *Practice Direction relating to the use of the Welsh Language in Cases in the Civil Courts in Wales* CPR PD 39 Wel para 6.2. As to the meaning of 'court officer' see PARA 49 note 3. As to the use of the Welsh language in civil proceedings see further PARA 1118.

20 A jury consists of 12 individuals chosen at random from the appropriate panel: *Practice Note*[1973] 1 All ER 240, sub nom *Practice Direction* [1973] 1 WLR 134, DC. See further **JURIES** vol 61 (2010) PARA 801 et seq.

21 Juries Act 1974 s 17(1)(a). However, a majority verdict will not be accepted unless it appears to the court that the jury had had such a period of time for deliberation as the court thinks reasonable having regard to the nature and complexity of the case: s 17(4). The practice by which a court in a civil case may accept a majority verdict with the consent of the parties or by which the parties may agree to proceed with an incomplete jury is preserved by s 17(5). See further **JURIES** vol 61 (2010) para 801 et seq.

22 Juries Act 1974 s 17(1)(b). See also note 19.

23 See *R v Hambery*[1977] QB 924, [1977] 3 All ER 561, CA. In a proper case this discharge may be authorised otherwise than in open court: see *R v Richardson*[1979] 3 All ER 247, [1979] 1 WLR 1316, CA. See further **JURIES** vol 61 (2010) para 801 et seq.

24 See *Igwemma v Chief Constable of Greater Manchester Police* [2001] EWCA Civ 953, [2002] QB 1012, [2001] 4 All ER 751.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(4) TRIAL OTHERWISE THAN BY JUDGE ALONE/1133. Trial by judge with assessors.

1133. Trial by judge with assessors.

In any cause or matter the court may, if it thinks it expedient to do so¹, call in the aid of one or more assessors specially qualified, and hear and dispose of the cause or matter wholly or partially with their assistance². Assessors may also be called in to assist the Court of Appeal³ and the House of Lords⁴.

Special provision is made for assessors in Admiralty proceedings⁵. Assessors are usually appointed to assist a judge hearing appeals from costs judges or district judges relating to the detailed assessment of costs⁶. An independent scientific adviser may be appointed to assist the Patents Court⁷ and provision is made for assessors to assist on the hearing of certain race relations claims⁸.

An assessor is an expert, specially qualified in the subject matter of the cause or matter in which he is appointed. His function is to assist and advise the court on the technical questions or issues arising. He is not generally permitted to take an active part in the proceedings, and thus he may not examine the witnesses; nor may he be examined or cross-examined by the parties. His presence acts as a restraining influence on the parties' own expert witnesses. Whatever advice or assistance the trial judge may receive from an assessor, the sole responsibility for the ultimate decision in the case rests with the judge⁹, who is not bound to follow the assessor's advice¹⁰.

1 As to the desirability of hearing cases concerning shipping casualties or involving questions of seamanship or navigation with the assistance of assessors, see the remarks of Devlin J in *Waddle v Wallsend Shipping Co Ltd* [1952] 2 Lloyd's Rep 105 at 131, and in *Southport Corpn v Esso Petroleum Co Ltd* [1953] 2 All ER 1204 at 1206 (on appeal [1954] 2 QB 182, [1954] 2 All ER 561, CA; and sub nom *Esso Petroleum Co Ltd v Southport Corpn* [1956] AC 218, [1955] 3 All ER 864, HL).

2 Supreme Court Act 1981 s 70(1); County Courts Act 1984 s 63(1) (amended by SI 1998/2940; substituted by the Courts and Legal Services Act 1990 s 14(2) as from a day to be appointed; at the date at which this title states the law, no such day had been appointed); and see CPR 35.15; and PARA 863. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. Any remuneration to be paid to an assessor is to be determined by the court and will form part of the costs of the proceedings: Supreme Court Act 1981 s 70(2); County Courts Act 1984 s 63(3) (amended by SI 1998/2940); CPR 35.15(5).

3 Supreme Court Act 1981 s 54(8), (9). See eg *The Llanelly* (1925) 23 Ll L Rep 187, CA; *The Sobieski* [1949] P 313, [1949] 1 All ER 701, and especially as reported in 82 Ll L Rep 370, CA. It is convenient if the Court of Appeal addresses its questions to the assessors in writing: see *SS Melanie (Owners) v SS San Onofre (Owners)* [1927] AC 162n, HL.

4 See eg *The Llanelly* (1926) 25 Ll L Rep 37, HL; *The Marinegra* [1960] 2 Lloyd's Rep 1, HL. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

5 In Admiralty claims case management directions will determine whether the trial is to be without assessors or with one or more assessors, whether Elder Brethren of Trinity House, nautical assessors or other assessors: see CPR 61.13; and **SHIPPING AND MARITIME LAW**. The function of nautical assessors is to advise the court upon such nautical matters as seamanship or navigation.

6 Appeals from decisions as to the detailed assessment of costs (under CPR Pt 47) lie to a judge: see PARA 1658 note 23. As to costs generally see PARA 1729 et seq.

7 See the Supreme Court Act 1981 s 70(3), (4); *Practice Direction--Patents and other Intellectual Property Claims* PD 63 para 4.10; and **PATENTS AND REGISTERED DESIGNS**.

8 See the Race Relations Act 1976 s 67(4); and **DISCRIMINATION** vol 13 (2007 Reissue) PARA 500 note 20. For guidance as to the role of assessors in race discrimination claims before a county court, see *Ahmed v Governing Body of the University of Oxford* [2002] EWCA Civ 1907, [2003] 1 All ER 915, [2003] 1 WLR 995.

9 *The Gannet* [1900] AC 234, HL; *The City of Berlin* [1908] P 110, CA; *SS Melanie (Owners) v SS San Onofre (Owners)* [1927] AC 162n, HL.

10 *The Magna Charta* (1871) 1 Asp MLC 153, PC; *The Aid* (1881) 6 PD 84, CA; *The Beryl* (1884) 9 PD 137, CA.

UPDATE

1133 Trial by judge with assessors

NOTE 4--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(5) RECORDING OF PROCEEDINGS/1134. Recording of proceedings.

(5) RECORDING OF PROCEEDINGS

1134. Recording of proceedings.

At any hearing, whether in the High Court or a county court, the proceedings will be tape recorded, unless the judge otherwise orders¹. A transcript of the recording may be obtained by any party or person upon payment of the authorised charges², except that, if the hearing or any part of it is in private³, then, if the person requiring the transcript is not a party, he must obtain an order of the court permitting him to obtain it⁴. It is the duty of advocates to take as full a note as possible of the judgment and evidence, so that if, for any reason, there is no recording or transcript available, those notes may be referred to at any appeal⁵. It is a contempt of court for any party or member of the public to use unofficial recording equipment in any court or judge's room without the court's permission⁶.

¹ *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 6.1. As to the meaning of 'judge' see PARA 49.

² *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 6.3. See also *Practice Direction--Appeals* PD 52 paras 5.12, 5.17, 5.18; and PARA 1663 notes 14-15.

³ See CPR 39.2(3); and PARA 6.

⁴ *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 6.4.

⁵ See *Practice Direction--Appeals* PD 52 paras 5.12(2), (3), 5.14; and PARA 1663 note 14; and see *Letts v Letts* (1987) Times, 8 April.

⁶ See *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 6.2; and see further **CONTEMPT OF COURT**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/21. THE TRIAL PROCESS/(6) TRIAL OF SEPARATE ISSUES/1135. Trial of separate issues; in general.

(6) TRIAL OF SEPARATE ISSUES

1135. Trial of separate issues; in general.

As part of its general case management powers, the court¹ may direct that part of any proceedings be dealt with as separate proceedings², direct the separate trial of any issue³ and decide the order in which issues are to be tried⁴.

Where the court so decides or directs, the trial of the separate proceedings or issue is conducted in the same manner as if it were the trial of the whole proceedings, except that any assessment of damages⁵ following a trial of the issue of liability may be dealt with by a master or district judge⁶.

Credibility of witnesses is best assessed after the survey of all the issues and it is only in exceptional circumstances that the court will allow a separate trial where the credibility of the same witness is crucial in a later trial too⁷.

1 As to the meaning of 'court' see PARA 22.

2 See CPR 3.1(2)(e); and PARA 247 head (5) in the text. For example, a counterclaim (see PARA 618 note 3) or a claim against a party not a party to the original claim (under CPR Pt 20: see PARA 618 et seq) may be ordered to be tried separately.

3 See CPR 3.1(2)(i); and PARA 247 head (9) in the text. For example, the issue of liability might be tried first with the assessment of damages to be tried thereafter.

4 See CPR 3.1(2)(j); and PARA 247 head (10) in the text.

5 As to the meaning of 'damages' see PARA 37 note 1.

6 See *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 4.2 (High Court), para 11.1(c) (county court); and PARAS 50, 62.

7 *Umm Qarn Management Co Ltd v Bunting* [2000] All ER (D) 1421, [2001] CPLR 568, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1136. Scope of this part of the title.

22. JUDGMENTS AND ORDERS

(1) JUDGMENTS AND ORDERS GENERALLY

1136. Scope of this part of the title.

The following paragraphs deal with Part 40 of the Civil Procedure Rules¹ which sets out rules about judgments and orders which apply except where any other rule or a practice direction makes a different provision in relation to the judgment or order in question². Part 40 also contains rules about the sale of land and conveyancing counsel³ and makes provision in relation to declaratory judgments⁴. Practice directions supplementing that Part make provision in respect of accounts and inquiries (discussed elsewhere in this title)⁵ and periodical payments⁶. Orders for provisional damages are provided for by Part 41 of the rules⁷.

The particular provisions made in relation to default judgments⁸, summary judgments⁹, interim remedies¹⁰ and the payment of money out of court¹¹ are discussed elsewhere in this title. The procedure for applications to make an order of the House of Lords an order of the High Court is discussed elsewhere in this title¹².

The provisions made by Part 21 of the rules in relation to orders respecting children and protected parties are discussed elsewhere in this work¹³.

Provision is made by the County Courts Act 1984 in relation to the satisfaction of county court judgments and orders for the payment of money¹⁴, set-off in cases of cross-judgments in county courts and the High Court¹⁵ and the keeping of a register of county court judgments and orders¹⁶.

1 Ie CPR Pt 40: see PARA 1137 et seq.

2 CPR 40.1. See further CPR 40.2-CPR 40.14; and PARA 1137 et seq. As to orders where the parties are agreed as to the terms on which proceedings can be disposed of, as to the terms of an interim order, or as to the discontinuance or withdrawal of proceedings see *Practice Statement (Administrative Court: uncontested proceedings)*[2009] 1 All ER 651.

3 See CPR 40.15-CPR 40.19; PARAS 1215-1216; and **SALE OF LAND** vol 42 (Reissue) PARA 133 et seq.

4 See CPR 40.20; and PARA 1145.

5 See *Practice Direction--Accounts, Inquiries etc* PD 40; and PARA 1524 et seq.

6 See *Practice Direction--Periodical Payments Under the Damages Act 1996* PD 41B; PARA 1222; and **DAMAGES** vol 12(1) (Reissue) PARA 931.

7 See CPR Pt 41; PARAS 1217-1221; and **DAMAGES** vol 12(1) (Reissue) PARAS 930, 1154.

8 See CPR Pt 12; and PARA 506 et seq.

9 See CPR Pt 24; and PARA 524 et seq.

10 See CPR Pt 25; and PARA 315 et seq.

11 See CPR Pts 36, 37; and PARA 729 et seq.

12 See *Practice Direction--Judgments and Orders* PD 40B paras 13.1-13.3; and PARA 1718 text and notes 22-23. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

13 See CPR Pt 21; and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1411 et seq. As to the meaning of 'child' and 'protected party' see PARA 222 notes 3, 1 respectively.

14 See the County Courts Act 1984 s 71; and PARA 1229.

15 See the County Courts Act 1984 s 72; and PARA 1230.

16 See the Courts Act 2003 s 98; and PARA 1147.

UPDATE

1136 Scope of this part of the title

NOTE 12--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1137. Standard requirements and certain specific orders.

1137. Standard requirements and certain specific orders.

Every judgment or order must state the name and judicial title of the person who made it¹, unless it is:

- 811 (1) a default judgment entered by a court officer² or a default costs certificate³;
- 812 (2) a judgment entered on admission where judgment is entered by a court officer⁴;
- 813 (3) a consent order⁵ made by a court officer⁶;
- 814 (4) an order⁷ made by a court officer to enforce an award as if it were payable under a court order⁸; or
- 815 (5) an order to obtain information from a judgment debtor⁹ made by a court officer¹⁰.

Every judgment or order must bear the date on which it is given or made¹¹ and be sealed¹² by the court¹³. Where a judgment, order or direction imposes a time limit for doing any act, wherever practicable the last date for compliance must be expressed as a calendar date and the time of day by which the act is to be done must be stated¹⁴.

The court may order that an account be taken or that an inquiry be made¹⁵ and may order the preparation, execution or signature of any deed or other document¹⁶. An order which restrains a party from doing an act or requires an act to be done should, if disobedience is to be dealt with by an application to bring contempt of court proceedings, have a penal notice indorsed on it¹⁷.

Where a party to proceedings which have gone to trial requires a statement to be included in the judgment as to where, and by what means, the claim form issued in those proceedings was served¹⁸, application should be made to the trial judge when judgment is given¹⁹. If the judge so orders, the statement will be included in a preamble to the judgment as entered²⁰.

Where judgment is ordered to be entered in a foreign currency, the order should be in the prescribed form²¹.

Where a judgment is to be paid by instalments, the judgment should set out the total amount of the judgment, the amount of each instalment, the number of instalments and the date on which each is to be paid and to whom the instalments should be paid²².

If an order makes no mention of costs, no costs are payable in respect of the proceedings to which the order relates²³.

Where a party applies for permission to appeal against a judgment or order at the hearing at which the judgment or order was made, the judgment or order must state (a) whether or not the judgment or order is final; (b) whether an appeal lies from the judgment or order and, if so, to which appeal court; (c) whether the court gives permission to appeal; and (d) if not, the appropriate appeal court to which any further application for permission may be made²⁴.

1 CPR 40.2(1).

2 ie default judgment by a court officer entered under CPR 12.4(1): see PARA 508. As to the meaning of 'court officer' see PARA 49 note 3.

3 CPR 40.2(1)(a). Ie a default costs certificate obtained under CPR 47.11: see *The Civil Court Practice*. As to costs generally see also PARA 1729 et seq.

4 CPR 40.2(1)(b). Ie judgment entered under CPR 14.4, CPR 14.5, CPR 14.6, CPR 14.7 and CPR 14.9: see PARAS 191-195.

5 Ie a consent order under CPR 40.6(2): see PARA 1141.

6 CPR 40.2(1)(c).

7 Ie under CPR 70.5: see PARA 1231.

8 CPR 40.2(1)(d).

9 Ie under CPR 71.2: see PARA 1252.

10 CPR 40.2(1)(e).

11 CPR 40.2(2)(a). The following general forms may be used: (1) judgment after trial before judge without jury: Form no 45; (2) judgment after trial before judge with jury: Form no 46; (3) judgment after trial before a master or district judge: Form no 47; (4) judgment after trial before a judge of the Technology and Construction Court (as to which see PARA 1546): Form no 47 but with any necessary modifications: *Practice Direction--Judgments and Orders* PD 40B para 14.1. A trial judgment should, in addition to the matters set out in paras 5, 6 and 7 (adjustments in respect of compensation recovery payments or an interim payment and statement as to service of a claim form: see the text and notes 18-20; and PARA 1151), have the following matters set out in a preamble: (a) the questions put to a jury and their answers to those questions; (b) the findings of a jury and whether unanimous or by a majority; (c) any order made during the course of the trial concerning the use of evidence; (d) any matters that were agreed between the parties prior to or during the course of the trial in respect of (i) liability, (ii) contribution, (iii) the amount of the damages or part of the damages; and (e) the findings of the judge in respect of each head of damage in a personal injury case: para 14.2. Form no 49 should be used for a trial judgment against an estate: para 14.3. The forms referred to are listed in *Practice Direction--Forms* PD 4: see PARA 14; and see *The Civil Court Practice*. As to jury trial see PARA 1132.

On any application or appeal concerning a committal order, a refusal to grant habeas corpus (see PARA 1531; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 207 et seq) or a secure accommodation order made under the Children Act 1989 s 25 (see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1037 et seq), if the court ordering the release of the person concludes that his Convention rights have been infringed by the making of the order to which the application or appeal relates, the judgment or order should so state. If the court does not do so, that failure will not prevent another court from deciding the matter: *Practice Direction--Judgments and Orders* PD 40B para 14.4. The rights referred to are the person's rights under European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)) as incorporated into domestic law: see the Human Rights Act 1998 s 1(3), Sch 1; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to the meaning of 'Convention rights' see s 1(1); and **JUDICIAL REVIEW** vol 61 (2010) PARA 651; **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

12 As to the meaning of 'seal' see PARA 81 note 2.

13 CPR 40.2(2)(b). As to the meaning of 'court' see PARA 22.

14 See CPR 2.9; and PARA 89. As to the calculation of periods of time expressed as days see CPR 2.8; and PARA 88; and as to the meaning of 'months' in judgments etc see CPR 2.10; and PARA 90.

An order which requires an act to be done (other than a judgment or order for the payment of an amount of money) must specify the time within which the act should be done: *Practice Direction--Judgments and Orders* PD 40B para 8.1. The consequences of failure to do an act within the time specified may be set out in the order. In this case the wording of the following examples suitably adapted must be used:

84 (1) Unless the [claimant] [defendant] serves his list of documents by 4.00 pm on Friday, January 22, 1999 his [claim] [defence] will be struck out and judgment entered for the [defendant] [claimant].; or

85 (2) Unless the [claimant] [defendant] serves his list of documents within 14 days of service of this order his [claim] [defence] will be struck out and judgment entered for the [defendant] [claimant].

Example (1) should be used wherever possible: para 8.2.

15 See *Practice Direction--Accounts, Inquiries etc* PD 40A; and PARA 1524 et seq.

16 Where the High Court has given or made a judgment or order directing a person to execute any conveyance, contract or other document, or to indorse any negotiable instrument, then, if that person neglects or refuses to comply with the judgment or order or cannot after reasonable inquiry be found, the High Court may, on such terms and conditions, if any, as may be just, order that the conveyance, contract or other document shall be executed, or that the negotiable instrument shall be indorsed, by such person as the court may nominate for that purpose: Supreme Court Act 1981 s 39(1). A conveyance, contract, document or instrument executed or indorsed in pursuance of such an order operates, and is to be for all purposes available, as if it had been executed or indorsed by the person originally directed to execute or indorse it: s 39(2). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

Where a judgment or order directs any deed or document to be prepared, executed or signed, the order will state (1) the person who is to prepare the deed or document; and (2) if the deed or document is to be approved, the person who is to approve it: *Practice Direction--Judgments and Orders* PD 40B para 2.1. If the parties are unable to agree the form of the deed or document, any party may apply in accordance with CPR Pt 23 (see PARA 303 et seq) for the form of the deed or document to be settled: *Practice Direction--Judgments and Orders* PD 40B para 2.2. In such case the judge may (a) settle the deed or document himself; or (b) refer it to a master, or a district judge, or a conveyancing counsel to settle: para 2.3. As to conveyancing counsel see PARA 1216; and **SALE OF LAND** vol 42 (Reissue) PARAS 134, 137.

17 See *Practice Direction--Judgments and Orders* PD 40B para 9.1. The notice to be indorsed is as follows: 'If you the within-named [...] do not comply with this order you may be held to be in contempt of court and imprisoned or fined, or [in the case of a company or corporation] your assets may be seized.': para 9.1.

The provisions of para 8.1 (see note 14) also apply to an order which contains an undertaking by a party to do or not to do an act; but the court has the power to decline to accept an undertaking and deal with disobedience in respect of an undertaking by contempt of court proceedings, unless the party giving the undertaking has made a signed statement to the effect that he understands the terms of his undertaking and the consequences of failure to comply with it: paras 9.2, 9.3. The statement may be indorsed on the court copy of the order containing the undertaking or may be filed in a separate document such as a letter: para 9.4. As to the meaning of 'filing' see PARA 1832 note 8.

18 As to service of the claim form see PARA 120; and as to the meaning of 'service' see PARA 138 note 2.

19 *Practice Direction--Judgments and Orders* PD 40B para 7.1.

20 *Practice Direction--Judgments and Orders* PD 40B para 7.2.

21 See *Practice Direction--Judgments and Orders* PD 40B para 10. The order must be in the following form: 'It is ordered that the defendant pay the claimant (*state the sum in the foreign currency*) or the sterling equivalent at the time of payment.': para 10.

22 *Practice Direction--Judgments and Orders* PD 40B para 12.

23 See CPR 44.13(1); and *Practice Direction--Judgments and Orders* PD 40B para 11.2. See also *The Civil Court Practice*. Attention is drawn to the costs practice direction and, in particular, to the court's power to make a summary assessment of costs and the provisions relating to interest in detailed assessment proceedings (see PARAS 1752, 1783): *Practice Direction--Judgments and Orders* PD 40B para 11.1. Where the court makes an order which does not mention costs (1) the general rule is that no party is entitled to costs in relation to that order; but (2) this does not affect any entitlement of a party to recover costs out of a fund held by him as trustee or personal representative, or pursuant to any lease, mortgage or other security: CPR 44.13(1). Where the court makes (a) an order granting permission to appeal; (b) an order granting permission to apply for judicial review; or (c) any other order or direction sought by a party on an application without notice, and its order does not mention costs, it will be deemed to include an order for applicant's costs in the case: CPR 44.13(1A). Any party affected by a deemed order for costs under CPR 44.13(1A) may apply at any time to vary the order: CPR 44.13(1B).

24 CPR 40.2(3), (4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1138. Reserved judgments.

1138. Reserved judgments.

Where judgment is to be reserved the judge (or presiding judge) may, at the conclusion of the hearing, invite the views of the parties' legal representatives as to the arrangements made for the handing down of the judgment¹. Unless the court directs otherwise, the following provisions apply where the judge or presiding judge is satisfied that the judgment will attract no special degree of confidentiality or sensitivity². The court will provide a copy of the draft judgment to the parties' legal representatives by 4 pm on the second working day³ before handing down, or at such other time as the court may direct⁴. A copy of the draft judgment may be supplied, in confidence, to the parties provided that (1) neither the draft judgment nor its substance is disclosed to any other person or used in the public domain; and (2) no action is taken (other than internally) in response to the draft judgment, before the judgment is handed down⁵. The case will be listed for judgment, and judgment handed down at the appropriate time⁶.

Unless the parties or their legal representatives are told otherwise when the draft judgment is circulated, any proposed corrections to the draft judgment should be sent to the clerk of the judge who prepared the draft with a copy to any other party⁷.

Following the circulation of the draft judgment the parties or their legal representatives must seek to agree orders consequential upon the judgment⁸. In respect of any draft agreed order the parties must fax or e-mail a copy to the clerk to the judge or presiding judge (together with any proposed corrections or amendments to the draft judgment) and file⁹ four copies (with completed backsheets) in the relevant court office, by 12 noon on the working day before handing down¹⁰.

Where a party wishes to apply for an order consequential on the judgment the application must be made by filing written submissions with the clerk to the judge or presiding judge by 12 noon on the working day before handing down¹¹. Unless the court orders otherwise, where judgment is to be given by an appeal court¹², the application will be determined without a hearing and, where judgment is to be given by any other court, the application will be determined at a hearing¹³.

If there is not to be an oral hearing of an application for an order consequential on judgment, the parties' advocates need not attend on the handing down of judgment¹⁴ and the judgment may be handed down by a judge sitting alone¹⁵.

1 *Practice Direction--Reserved Judgments* PD 40E para 2.1. The practice direction applies to all reserved judgments which the court intends to hand down in writing: para 1. As to the meaning of 'court' see PARA 22.

2 *Practice Direction--Reserved Judgments* PD 40E para 2.2.

3 'Working day' means any day on which the relevant court office is open; and 'relevant court office' means the office of the court in which judgment is to be given: *Practice Direction--Reserved Judgments* PD 40E para 1.2.

4 *Practice Direction--Reserved Judgments* PD 40E para 2.3.

5 *Practice Direction--Reserved Judgments* PD 40E para 2.4. Where a copy of the draft judgment is supplied to a party's legal representatives in electronic form, they may supply a copy to that party in the same form: para 2.5. If a party to whom a copy of the draft judgment is supplied under para 2.4 is a partnership, company, government department, local authority or other organisation of a similar nature, additional copies may be distributed in confidence within the organisation, provided that all reasonable steps are taken to preserve its confidential nature and the requirements of para 2.4 are adhered to: para 2.6. If the parties or their legal

representatives are in any doubt about the persons to whom copies of the draft judgment may be distributed they should inquire of the judge or presiding judge: para 2.7. Any breach of the obligations or restrictions under para 2.4 or failure to take all reasonable steps under para 2.6 may be treated as contempt of court: para 2.8. It is inappropriate for a draft judgment to be disseminated to anyone other than the parties and their immediate legal advisers; if there is any doubt as to whether a draft judgment should be considered by any other person, permission should be sought from the judge concerned: *DPP v P* [2007] EWHC 1144 (Admin), [2007] 4 All ER 648, [2008] 1 WLR 1024.

6 *Practice Direction--Reserved Judgments* PD 40E para 2.9.

7 *Practice Direction--Reserved Judgments* PD 40E para 3.1.

8 *Practice Direction--Reserved Judgments* PD 40E para 4.1.

9 As to the meaning of 'filing' see PARA 1832 note 8.

10 *Practice Direction--Reserved Judgments* PD 40E para 4.2. A copy of a draft order must bear the case reference, the date of handing down and the name of the judge or presiding judge: para 4.3.

11 *Practice Direction--Reserved Judgments* PD 40E para 4.4.

12 'Appeal court' has the same meaning as in CPR 52.1(3)(b): see PARA 1660 note 2.

13 *Practice Direction--Reserved Judgments* PD 40E para 4.5.

14 Where this applies but an advocate does attend the handing down of judgment, the court may if it considers such attendance unnecessary, disallow the costs of the attendance: *Practice Direction--Reserved Judgments* PD 40E para 5.2.

15 *Practice Direction--Reserved Judgments* PD 40E para 5.1.

UPDATE

1138 Reserved judgments

NOTE 5--Observations on draft judgments by any party are covered by confidentiality principles which govern circulation of judgments in draft: *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] All ER (D) 3031 (Feb), CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1139. Drawing up and filing of judgments and orders.

1139. Drawing up and filing of judgments and orders.

With certain exceptions¹, every judgment or order will be drawn up by the court² unless:

- 816 (1) the court orders a party to draw it up³;
- 817 (2) a party, with the permission of the court, agrees to draw it up⁴;
- 818 (3) the court dispenses with the need to draw it up⁵; or
- 819 (4) it is a consent order⁶.

The court may direct that a judgment or an order drawn up by a party must be checked by the court before it is sealed⁷ or that, before a judgment or an order is drawn up by the court, the parties must file an agreed statement⁸ of its terms⁹. Where a judgment or an order is to be drawn up by a party he must file it no later than seven days after the date on which the court ordered or permitted him to draw it up so that it can be sealed by the court¹⁰ and if he fails to file it within that period, any other party may draw it up and file it¹¹.

However, except for orders made by the court of its own initiative and unless the court otherwise orders, every judgment or order made in claims proceeding in the Queen's Bench Division at the Royal Courts of Justice, other than in the Administrative Court, will be drawn up by the parties¹².

1 le except as is provided in CPR 40.3(4) (see the text to note 12) or by any practice direction: CPR 40.3(1).

2 As to the meaning of 'court' see PARA 22. Provided that the recording of his decision has not been formally completed, a judge has power to reconsider his conclusion and in effect reverse his own decision. This jurisdiction, if exercised very cautiously and sparingly, is fully in accord with the overriding objective of enabling the court to deal with cases justly (as to which see PARA 33) and may be justifiably invoked eg where there is a plain mistake on the part of the court, where the parties have failed to draw the court's attention to a fact or point of law which is plainly relevant, where new facts have been discovered after judgment has been given, or where a party can argue that he has not been given fair opportunity to consider an application which has taken him by surprise: see *Stewart v Engel* [2000] 3 All ER 518, [2000] 1 WLR 2268, CA; applied in *Kirin-Amgen Inc v Transkaryotic Therapies Inc (No 2)* [2002] RPC 187, [2001] All ER (D) 111 (May); *Cie Noga D'Importation et D'Exportation SA v Abacha* [2001] 3 All ER 513, [2001] All ER (D) 49 (May). The power of a judge to review his own judgment before the drawing up of the order includes a discretion to permit the amendment of statements of case, even if that involves the putting forward of a new argument or the adducing of further evidence: see *Charlesworth v Relay Roads Ltd (in liquidation)* [1999] 4 All ER 397, [2000] 1 WLR 230. See also *Robinson v Bird* [2003] EWCA Civ 1820, (2004) Times, 20 January (exercise of discretion to amend draft judgment depended on circumstances of particular case), applied in *Gravgaard v Aldridge & Brownlee (a firm)* (2004) Times, 2 December, CA. Where the parties compromise their action before the judgment has been delivered to them, it is doubtful whether a first instance judge has a discretion to publish the judgment: *Gurney Consulting Engineers (a firm) v Gleeds Health and Safety Ltd* [2006] EWHC 536 (TCC), (2006) 108 ConLR 43. But see *Prudential Assurance Co Ltd v McBains Cooper (a firm)* [2001] 3 All ER 1014, [2000] 1 WLR 2000, CA (where a judge circulated a draft judgment to the parties' legal advisers, he had begun the process of delivering judgment and, providing that a list was in being at that stage, he then had a discretion whether to continue the process by handing down the judgment or to abort it at the parties' request). As to applications to vary a judgment or order see PARA 1143.

3 CPR 40.3(1)(a).

4 CPR 40.3(1)(b).

5 CPR 40.3(1)(c).

6 CPR 40.3(1)(d). As to consent orders see CPR 40.6; and PARA 1141.

7 CPR 40.3(2)(a). If the court directs that a judgment or order which is being drawn up by a party must be checked by the court before it is sealed, the party responsible must file the draft within seven days of the date the order was made with a request that the draft be checked before it is sealed: *Practice Direction--Judgments and Orders* PD 40B para 1.3. As to the meaning of 'seal' see PARA 81 note 2; and as to the meaning of 'filing' see PARA 1832 note 8.

8 If the court directs the parties to file an agreed statement of terms of an order which the court is to draw up, the parties must do so no later than seven days from the date the order was made, unless the court directs otherwise: *Practice Direction--Judgments and Orders* PD 40B para 1.4.

9 CPR 40.3(2)(b). If the court requires the terms of an order which is being drawn up by the court to be agreed by the parties the court may direct that a copy of the draft order is to be sent to all the parties (1) for their agreement to be indorsed on it and returned to the court before the order is sealed; or (2) with notice of an appointment to attend before the court to agree the terms of the order: *Practice Direction--Judgments and Orders* PD 40B para 1.5. As to the position where the parties compromise their dispute before the judgment is formally handed down see *Prudential Assurance Co Ltd v McBains Cooper (a firm)* [2001] 3 All ER 1014, [2000] CPLR 475, CA.

10 CPR 40.3(3)(a); and see *Practice Direction--Judgments and Orders* PD 40B para 1.2.

11 CPR 40.3(3)(b); and see *Practice Direction--Judgments and Orders* PD 40B para 1.2.

12 CPR 40.3(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1140. Service of judgments and orders.

1140. Service of judgments and orders.

Where a judgment or an order has been drawn up by a party and is to be served¹ by the court², the party who drew it up must file³ a copy to be retained at court and sufficient copies for service on him and on the other parties⁴. Once it has been sealed⁵, the court will serve a copy of it on each party to the proceedings⁶.

Unless the court directs otherwise, any order made otherwise than at trial must be served on the applicant and the respondent⁷ and any other person on whom the court orders it to be served⁸.

Where the party on whom a judgment or order is to be served is acting by a solicitor, the court may order the judgment or order to be served on the party as well as on his solicitor⁹.

1 As to the meaning of 'service' see PARA 138 note 2. As to who may serve judgments and orders see CPR 6.21; and PARA 141.

2 As to the meaning of 'court' see PARA 22.

3 As to the meaning of 'filing' see PARA 1832 note 8.

4 CPR 40.4(1)(a).

5 As to the meaning of 'seal' see PARA 81 note 2.

6 CPR 40.4(1)(b).

7 CPR 40.4(2)(a).

8 CPR 40.4(2)(b).

9 CPR 40.5.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1141. Consent judgments and orders.

1141. Consent judgments and orders.

Where all the parties agree the terms in which a judgment should be given or an order should be made¹, a court officer² may enter and seal³ an agreed judgment or order if:

- 820 (1) none of the parties is a litigant in person⁴;
 - 821 (2) the approval of the court⁵ is not required by the Civil Procedure Rules, by a practice direction or by any enactment before an agreed order can be made⁶; and
 - 822 (3) either the judgment or order is a judgment or order for the payment of an amount of money⁷ or for the delivery up of goods with or without the option of paying the value of the goods or the agreed value⁸, or it is an order for:
- 17
- 26. (a) the dismissal of any proceedings, wholly or in part⁹;
 - 27. (b) the stay¹⁰ of proceedings on agreed terms, disposing of the proceedings, whether those terms are recorded in a schedule to the order or elsewhere¹¹;
 - 28. (c) the stay of enforcement of a judgment, either unconditionally or on condition that the money due under the judgment is paid by instalments specified in the order¹²;
 - 29. (d) the setting aside¹³ of a default judgment which has not been satisfied¹⁴;
 - 30. (e) the payment out of money which has been paid into court¹⁵;
 - 31. (f) the discharge from liability of any party¹⁶;
 - 32. (g) the payment, assessment or waiver of costs, or such other provision for costs as may be agreed¹⁷.
- 18

Where heads (1) to (3) above do not apply, any party may apply for a judgment or order in the terms agreed¹⁸.

Where these provisions apply, the order which is agreed by the parties must be drawn up in the terms agreed and must be expressed as being 'By Consent'¹⁹. It must be signed by the legal representative²⁰ acting for each of the parties to whom the order relates or, where the judgment or order has been entered on the application of a party²¹, by the party if he is a litigant in person²².

1 See CPR 40.6(1).

2 As to the meaning of 'court officer' see PARA 49 note 3.

3 As to the meaning of 'seal' see PARA 81 note 2.

4 CPR 40.6(2)(b).

5 As to the meaning of 'court' see PARA 22.

6 CPR 40.6(2)(c); see eg CPR 21.10, which requires the approval of the court to be given before a consent order settling a claim made on behalf of a child or protected party is valid; and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1422. As to the meaning of 'child' and 'protected party' see PARA 222 notes 3, 1 respectively.

7 ie including a judgment or order for damages or the value of goods to be decided by the court: see CPR 40.6(3)(a)(i). As to the meaning of 'damages' see PARA 37 note 1.

8 CPR 40.6(2)(a), (3)(a)(ii).

9 CPR 40.6(2)(a), (3)(b)(i). As to the court's power to dismiss proceedings see CPR 3.1(2)(l); and PARA 247 head (12) in the text.

10 As to the meaning of 'stay' see PARA 233 note 11; and as to the stay of proceedings see PARA 529 et seq.

11 CPR 40.6(2)(a), (3)(b)(ii). Where the parties draw up a consent order in the form of a stay of proceedings on agreed terms, disposing of the proceedings, and where the terms are recorded in a schedule to the order, any direction for the payment of money out of court (see eg CPR Pt 36; and PARAS 115, 729 et seq) or as to the payment or the assessment of costs should be contained in the body of the order and not in the schedule: *Practice Direction--Judgments and Orders* PD 40B para 3.5. An order in such terms is known as a 'Tomlin' order. As to costs generally see also PARA 1729 et seq.

12 CPR 40.6(2)(a), (3)(b)(iii). As to judgments paid by instalments see *Practice Direction--Judgments and Orders* PD 40B para 12; and PARA 1137.

13 Ie under CPR Pt 13: see PARA 516 et seq. As to the meaning of 'set aside' see PARA 197 note 6.

14 CPR 40.6(2)(a), (3)(b)(iv). As to the meaning of 'default judgment' see PARA 506.

15 CPR 40.6(2)(a), (3)(b)(v).

16 CPR 40.6(2)(a), (3)(b)(vi).

17 CPR 40.6(2)(a), (3)(b)(vii). CPR 40.3 (drawing up and filing of judgments and orders: see PARA 1139) applies to judgments and orders entered and sealed by a court officer under CPR 40.6(2) as it applies to other judgments and orders: CPR 40.6(4). A consent judgment or order must (1) be drawn up in the terms agreed; (2) bear on it the words 'By Consent'; and (3) be signed by (a) solicitors or counsel acting for each of the parties to the order; or (b) where a party is a litigant in person, the litigant: *Practice Direction--Judgments and Orders* PD 40B para 3.4. If a consent order filed for sealing appears to be unclear or incorrect the court officer may refer it to a judge for consideration: para 3.2. As to the meaning of 'judge' see PARA 49.

18 CPR 40.6(5). An application notice requesting a judgment or order in the agreed terms must be filed with the draft judgment or order to be entered or sealed and the draft judgment or order must be drawn so that the judge's name and judicial title can be inserted: *Practice Direction--Judgments and Orders* PD 40B para 3.3. The court may deal with an application without a hearing: CPR 40.6(6).

19 CPR 40.6(7)(a), (b).

20 As to the meaning of 'legal representative' see PARA 1833 note 13.

21 Ie where CPR 40.6(5) applies: see the text and note 18.

22 CPR 40.6(7)(c).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1142. When judgment or order takes effect.

1142. When judgment or order takes effect.

A judgment or order takes effect from the day when it is given or made, or such later date as the court¹ may specify². This rule applies to all judgments and orders except to those against a state which are described below³.

Where the claimant⁴ obtains default judgment⁵ on a claim against a state⁶ where the defendant⁷ has failed to file⁸ an acknowledgment of service⁹, the judgment does not take effect until two months after service on the state of a copy of the judgment and a copy of the evidence¹⁰ in support of the application for permission to enter default judgment¹¹.

1 As to the meaning of 'court' see PARA 22.

2 CPR 40.7(1).

3 CPR 40.7(2). The exception referred to in the text is in respect to judgments to which CPR 40.10 applies: see the text and notes 4-10.

4 As to the meaning of 'claimant' see PARA 18.

5 I.e. under CPR Pt 12: see PARA 506 et seq. As to the meaning of 'default judgment' see PARA 506.

6 For these purposes, 'state' has the meaning given by the State Immunity Act 1978 s 14 (see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 245): CPR 40.10(2).

7 As to the meaning of 'defendant' see PARA 18.

8 As to the meaning of 'filing' see PARA 1832 note 8.

9 As to the requirement for filing an acknowledgment of service see PARAS 184, 186. As to the meaning of 'service' see PARA 138 note 2.

10 I.e. unless the evidence has already been served on the state in accordance with an order made under CPR Pt 12 (see PARA 506 et seq): see CPR 40.10(1)(b).

11 CPR 40.10(1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1143. Setting aside or varying a judgment or order.

1143. Setting aside or varying a judgment or order.

A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside¹ or varied².

A judgment which has been obtained by fraud either in the court³ or of one or more of the parties⁴ may be set aside⁵ if challenged in fresh proceedings alleging and proving the fraud⁶. In such proceedings it is not sufficient merely to allege fraud without giving any particulars⁷, and the fraud must relate to matters which prima facie would be a reason for setting the judgment aside if they were established by proof⁸, and not to matters which are merely collateral⁹. The court requires a strong case to be established before it will set aside a judgment on this ground¹⁰ and the proceedings will be stayed or dismissed as vexatious unless the fraud alleged raises a reasonable prospect of success and was discovered since the judgment¹¹. Theoretically, it may be true that even a party to a judgment which has been obtained by fraud is entitled to ask the court to disregard it in subsequent proceedings, but a party who has taken no proceedings to set the judgment aside would have great difficulty in establishing fraud, and a party to a consent judgment obtained by fraud must apply to set aside the judgment in order to avoid the estoppel¹². As a rule a judgment can only be set aside, if at all, against those who procured it by fraud, but this does not apply to probate proceedings to set aside the probate of a will¹³.

A judgment may be set aside on the ground of the discovery of new evidence which would have had a material effect upon the decision of the court¹⁴. It must be shown that (1) the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the further evidence is such that, if given, it would have an important influence on the result of the trial, although it need not be decisive; and (3) the evidence is such as is presumably to be believed¹⁵.

A judgment given or an order made by consent may be set aside on any ground which would invalidate a compromise not contained in a judgment or order¹⁶. Compromises have been set aside on the ground that the agreement was illegal as against public policy¹⁷, or was obtained by fraud¹⁸ or misrepresentation, or non-disclosure of a material fact which there was an obligation to disclose¹⁹, or by duress²⁰, or was concluded under a mutual mistake of fact²¹, ignorance of a material fact²², or without authority²³. A compromise in ratification of a contract which is incapable of being ratified is not enforceable²⁴; and a compromise which is conditional on some term being carried out, or on the assent of the court or other persons being given to the arrangement, is not enforceable if the term is not carried out or the assent is given effectually²⁵. The court may refuse to set aside a compromise when the party seeking to set it aside is guilty of delay in questioning it²⁶. It has been held that a consent order cannot be set aside by way of appeal²⁷ but in a recent case the Court of Appeal set aside a consent order in circumstances where it had been presented with all the information which the judge was likely to have had²⁸.

There is a residual jurisdiction for a court of appeal to re-open a case in exceptional circumstances to avoid real injustice²⁹.

1 As to the meaning of 'set aside' see PARA 197 note 6.

2 CPR 40.9. See *Gerrard Ltd v Read* (2002) Times, 17 January (disputed term not unenforceable and, therefore, deletion of it not appropriate); and *Hepworth Group Ltd v Stockley* [2006] EWHC 3626 (Ch), [2007] 2

All ER (Comm) 82. As to the court's general powers to set aside or vary a judgment or order see CPR 3.1(2)(m), CPR 3.1(7); and PARA 247; and as to whether a person who is not a party but is directly affected may appeal a judgment see PARA 1703. As to the judge's power to re-open a judgment that has not been finally issued see PARA 1139 notes 1, 8. As to setting aside a judgment on the ground that there is a real danger or reasonable apprehension or suspicion of bias by the judge see PARA 95 note 8; and **JUDICIAL REVIEW** vol 61 (2010) PARA 631 et seq.

3 *Cammell v Sewell* (1858) 3 H & N 617.

4 *Birch v Birch* [1902] P 130, CA; *Coaks v Boswell* (1886) 11 App Cas 232, HL; *Boswell v Coaks (No 2)* (1894) 86 LT 365n, HL; *Thorne v Smith* [1947] KB 307, [1947] 1 All ER 39, CA. Where a party is a corporation, it is possible for evidence perjured by a natural person to be treated as that of the company, even where it is neither procured or knowingly adopted by the company, nor given by someone who was part of the company's directing mind and will or a person to whom the conduct of the litigation had been delegated. The test to be adopted is whether the natural person in question has the status and authority which in law make his acts in the matter under consideration the acts of the company, so that he is to be treated as the company itself: *Odyssey Re (London) Ltd (formerly Sphere Drake Insurance plc) v OIC Run-Off Ltd (formerly Orion Insurance Co plc)* [2001] Lloyd's Rep IR 1, CA.

5 *Flower v Lloyd* (1877) 6 ChD 297, CA, citing *Lord Redesdale on Pleadings* (5th Edn) 112, 113; *Cole v Langford* [1898] 2 QB 36; *Baker v Wadsworth* (1898) 67 LJQB 301; *Wyatt v Palmer* [1899] 2 QB 106, CA; *Charles Bright & Co Ltd v Sellar* [1904] 1 KB 6, CA; *Gordon-Smith v Peizer* (1921) 65 Sol Jo 607. The validity of a judgment debt on which an adjudication in bankruptcy has been founded may only be contested by the bankrupt in the bankruptcy court. So long as the adjudication stands, any right of action to set aside the judgment is a chose (or thing) in action vested in the trustee: *Boaler v Power* [1910] 2 KB 229, CA.

6 *Kuwait Airways Corpn v Iraqi Airways Co (No 2)* [2001] 1 WLR 429, HL; and see *Jonesco v Beard* [1930] AC 298, HL; *Stern v Friedmann* [1953] 2 All ER 565, [1953] 1 WLR 969. See also *Cinpres Gas Injection Ltd v Melea Ltd* [2008] EWCA Civ 9, [2008] All ER (D) 165 (Jan).

7 *Boswell v Coaks (No 2)* (1894) 86 LT 365n, HL. The particulars must be exactly given and the allegation established by the strict proof such a charge requires: *Jonesco v Beard* [1930] AC 298, HL. The court will refuse to set aside a judgment on mere allegation of perjury without new facts: *Baker v Wadsworth* (1899) 67 LJQB 301; *Everett v Ribbands* (1946) 175 LT 143, CA.

8 *Boswell v Coaks (No 2)* (1894) 86 LT 365n, HL.

9 *Birch v Birch* [1902] P 130, CA.

10 See the observations of James LJ in *Flower v Lloyd* (1879) 10 ChD 327, CA, and of Cozens-Hardy LJ in *Birch v Birch* [1902] P 130, CA. See also *Priestman v Thomas* (1884) 9 PD 210, CA (will admitted to probate under a compromise subsequently discovered to be a forgery); *Colclough v Bolger* (1816) 4 Dow 54, HL (sale under court order set aside on ground of fraud and collusion); *Brooke v Lord Mostyn* (1864) 2 De GJ & Sm 373 (setting aside a compromise).

11 *Birch v Birch* [1902] P 130, CA; *Shedden v Patrick* (1854) 1 Macq 535, HL, per Lord Cranworth LJ; cf *White v Hall* (1806) 12 Ves 321; *Cotter v Earl Barrymore* (1733) 4 Bro Parl Cas 203, HL. On the defendant's move to stay the proceedings as vexatious the court should receive evidence on either side as to whether or not there has been a discovery of new and material evidence since the judgment: *Boswell v Coaks (No 2)* (1894) 86 LT 365n, HL. It has been held that the fact that there exists a more summary way of setting aside a judgment by default does not prevent recourse being had to such fresh proceedings: see *Wyatt v Palmer* [1899] 2 QB 106, CA. If proceedings are begun they ought not to be stayed on terms although such terms could have been imposed had the summary procedure been utilised: *Kennedy v Dandrick* [1943] Ch 291, [1943] 2 All ER 606, distinguishing *Wyatt v Palmer* [1899] 2 QB 106, CA.

12 *Parker v Simpson* (1869) 18 WR 204; cf *Priestman v Thomas* (1884) 9 PD 210, CA.

13 *Birch v Birch* [1902] P 130, CA.

14 For the power to adduce fresh evidence on appeal under CPR 52.11 see PARA 1672.

15 *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, CA. See also *Re Barrell Enterprises* [1972] 3 All ER 631, [1973] 1 WLR 19, CA. For earlier cases see *Boswell v Coaks (No 2)* (1894) 6 R 167, HL, where fraudulent suppression of evidence was alleged; *Falcke v Scottish Imperial Insurance Co* (1887) 57 LT 39; *The Alfred Nobel* [1918] P 293; and cf *Re Scott and Alvarez's Contract, Scott v Alvarez* [1895] 1 Ch 596; on appeal [1895] 2 Ch 603, CA; *JH Rayner (Mincing Lane) Ltd v Cafénorte SA Importadora* [1999] 1 All ER (Comm) 120, affd on different grounds [1999] 2 All ER (Comm) 577, CA. Where an application is made to adduce new evidence before a trial judge after judgment but prior to the making of the order for relief, the principles derived from authority should

be applied more flexibly than they might be by the Court of Appeal: *Fisher v Cadman* [2005] EWHC 377 (Ch), [2006] 1 BCLC 499, applying *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, CA.

16 *Wilding v Sanderson* [1897] 2 Ch 534, CA; *Hickman v Berens* [1895] 2 Ch 638, CA; *Kinch v Walcott* [1929] AC 482, PC. See further *Sturrock v Littlejohn* (1898) 68 LJQB 165. As to consent orders see PARA 1141. It has been held that, unless all the parties agree, a consent order, when entered, can only be set aside by fresh proceedings (*Emeris v Woodward* (1889) 43 ChD 185; *Ainsworth v Wilding* [1896] 1 Ch 673; and see also *Marsden v Marsden* [1972] Fam 280, [1972] 2 All ER 1162) and that an application cannot be made to the court of first instance in the original proceedings to set aside the judgment or order (*Harrison v Rumsey* (1752) 2 Ves Sen 488; *Stannard v Harrison* (1871) 19 WR 811; *Ainsworth v Wilding* [1896] 1 Ch 673. See also *Munster v Cox* (1885) 10 App Cas 680; *Australasian Automatic Weighing Machine Co v Walter* [1891] WN 170), except, apparently, in the case of an interim order (*Mullins v Howell* (1879) 11 ChD 763; *B (GC) v B (BA)* [1970] 1 All ER 913, sub nom *Brister v Brister* [1970] 1 WLR 664; and see *Chanel Ltd v FW Woolworth & Co Ltd* [1981] 1 All ER 745, [1981] 1 WLR 485, CA, distinguished in *Butt v Butt* [1987] 3 All ER 657, [1987] 1 WLR 1351, CA). These decisions may, however, no longer be authoritative in view of the court's wide powers under CPR 3.1(7): see PARA 247.

17 *Windhill Local Board of Health v Vint* (1890) 45 ChD 351, CA (compromise of prosecution).

18 *Priestman v Thomas* (1884) 9 PD 210, CA.

19 *Gilbert v Endean* (1878) 9 ChD 259, CA: see **MISREPRESENTATION AND FRAUD**.

20 *Cumming v Ince* (1847) 11 QB 112.

21 *Wilding v Sanderson* [1897] 2 Ch 534, CA; *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273, CA. A compromise will not be set aside merely upon the ground of mistake of law: *Holsworthy UDC v Holsworthy RDC* [1907] 2 Ch 62. See also **MISTAKE**. For the difference between an application to set aside a judgment on grounds of mistake when made before, as compared with after, the judgment has been entered see *A-G v Tomline* (1887) 7 ChD 388.

22 *Furnival v Bogle* (1827) 4 Russ 142.

23 *Shepherd v Robinson* [1919] 1 KB 474, CA. Bad or negligent legal advice can never be a ground for setting aside a consent order: *Tibbs v Dick* [1999] 2 FCR 322, CA.

24 *Great North-West Central Rly Co v Charlebois* [1899] AC 114, PC (ultra vires, but see *Holsworthy UDC v Holsworthy RDC* [1907] 2 Ch 62); *Smith v King* [1892] 2 QB 543, DC (infancy).

25 *Plumley v Horrell* (1869) 20 LT 473.

26 *Watt v Assets Co, Bain v Assets Co* [1905] AC 317, HL.

27 *Re Elstein's Affairs* [1945] 1 All ER 272, CA.

28 See *Middleton v Middleton* [1999] 2 FCR 681, CA.

29 See *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528, [2002] 2 All ER 353. See also eg *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, [1999] 1 All ER 577, HL.

UPDATE

1143 Setting aside or varying a judgment or order

NOTE 7--See also *Noble v Owens* [2010] EWCA Civ 224, [2010] All ER (D) 87 (Mar).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1144. Correction of errors in judgments and orders.

1144. Correction of errors in judgments and orders.

The court¹ may at any time correct an accidental slip or omission in a judgment or order².

A party may apply for a correction without notice³. The application notice (which may be an informal document such as a letter) must describe the error and set out the correction required. An application may be dealt with without a hearing where the applicant so requests, with the consent of the parties or where the court does not consider that a hearing would be appropriate⁴.

The judge may deal with the application without notice if the slip or omission is obvious or may direct notice of the application to be given to the other party or parties⁵. If the application is opposed it should, if practicable, be listed for hearing before the judge who gave the judgment or made the order⁶.

The court has an inherent power to vary its own orders to make the meaning and intention of the court clear⁷.

1 As to the meaning of 'court' see PARA 22.

2 CPR 40.12(1).

3 CPR 40.12(2); and see *Practice Direction--Judgments and Orders* PD 40B para 4.2.

4 *Practice Direction--Judgments and Orders* PD 40B para 4.2.

5 *Practice Direction--Judgments and Orders* PD 40B para 4.3.

6 *Practice Direction--Judgments and Orders* PD 40B para 4.4.

7 *Practice Direction--Judgments and Orders* PD 40B para 4.5. As to the inherent jurisdiction of the court see PARA 15.

UPDATE

1144 Correction of errors in judgments and orders

NOTE 2--See *JSC BTA Bank v Ablyazov* [2009] EWHC 3267 (Comm), [2009] All ER (D) 137 (Dec) (correction of freezing order).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1145. Declaratory judgments.

1145. Declaratory judgments.

The court¹ may make binding declarations, whether or not any other remedy is claimed². Some recent examples are a declaration (1) that the court had jurisdiction to make a scheme dividing the assets of a charity and holding them on trusts³; (2) that office premises owned by the defendant were subject to an equitable mortgage in favour of the claimant⁴; (3) that a tenancy was an assured shorthold tenancy⁵; (4) that the claimants were to be allowed access from their land onto a private road⁶; (5) that a parent had wrongfully removed children from the jurisdiction⁷; and (6) that artificial hydration and nutrition of a protected party in a persistent vegetative state could lawfully be withdrawn⁸.

The court has refused to make a declaration that a person registered as male at birth was female for the purposes of the marriage laws⁹. Except in exceptional circumstances, it is not appropriate for a member of the public to bring proceedings against the Crown for a declaration that certain proposed conduct is not criminal¹⁰.

A number of statutes provide for the court to make declarations; for example, the court may make a declaration under the Companies Act 1985 that the dissolution of a company is void¹¹ or a declaration under the Human Rights Act 1998 that a statutory provision is incompatible with the European Convention on Human Rights¹².

1 As to the meaning of 'court' see PARA 22.

2 CPR 40.20. This power appears to be unfettered: see *Financial Services Authority v Rourke* [2001] All ER (D) 266 (Oct) per Neuberger J.

3 *Varsani v Jesani* [2001] All ER (D) 458 (Jul).

4 *Al Wazir v Islamic Press Agency Inc* [2001] EWCA Civ 1276, [2002] 2 P & CR 157, [2001] All ER (D) 437 (Jul).

5 *Yenula Properties Ltd v Naidu* [2001] All ER (D) 236 (Jul), [2001] 31 EG 100 (CS).

6 *Lomax v Wood* [2001] EWCA Civ 1099, [2001] All ER (D) 80 (Jun).

7 See *Re L (children) (abduction: declaration)* [2001] 2 FCR 1. This declaration was made in the Family Division, as were the first-instance judgments in the cases cited in notes 8, 9. As to the limited application of the Civil Procedure Rules to family proceedings see PARA 32.

8 See eg *NHS Trust v H* [2001] All ER (D) 363 (Mar), [2001] 2 FLR 501, applying *Airedale NHS Trust v Bland* [1993] 1 All ER 821, [1994] 1 FCR 485, CA; affd [1993] AC 789, [1993] 1 All ER 821, HL.

9 See eg *Bellinger v Bellinger* [2001] EWCA Civ 1140, [2002] Fam 150, [2001] 3 FCR 1.

10 See *R (on the application of Rusbridger) v A-G* [2003] UKHL 38, [2004] 1 AC 357, [2003] 3 All ER 784 (claimants proposed to publish articles advocating abolition of monarchy; court refused to declare whether such publications would be felony treason); applied in *Blackland Park Exploration Ltd v Environment Agency* [2003] EWCA Civ 1795, [2003] All ER (D) 249 (Dec) (interests of justice required that claimant be able to obtain ruling of civil court before continuing with course of conduct that could lead to prosecution).

11 Under the Companies Act 1985 s 651: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 937; and see *Smith v White Knight Laundry Ltd* [2001] EWCA Civ 660, [2001] 3 All ER 862, [2002] 1 WLR 616.

12 See the Human Rights Act 1998 s 4. A county court has no power to make such a declaration: see PARA 58 the text and note 13; and see eg *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2001] 3 WLR 183, sub nom *Donoghue v Poplar Housing and Regeneration Community Association Ltd* [2001] 3 FCR 74.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1146. Media neutral judgments.

1146. Media neutral judgments.

With effect from 11 January 2001, all judgments in every Division of the High Court and the Court of Appeal are prepared for delivery, or issued as approved judgments, with single spacing and paragraph numbering in the margins but no page numbers. In courts with more than one judge, the paragraph numbering continues sequentially through each judgment, and does not start again at the beginning of the second judgment. Indented paragraphs are not given a number¹.

Also with effect from 11 January 2001, a form of neutral citation has been introduced in both Divisions of the Court of Appeal and in the Administrative Court. A unique number is given by the official shorthand writers to each approved judgment issued out of these courts². The neutral citation will be the official number attributed to the judgment by the court and must always be used on at least one occasion when the judgment is cited in a later judgment. Once the judgment is reported, the neutral citation will appear in front of the familiar citation from the law report series³.

The neutral citation arrangements will be extended to include other parts of the High Court as soon as the necessary administrative arrangements can be made⁴. They now apply to all judgments given by judges in the High Court in London⁵.

1 See *Practice Note (judgments: neutral citation)* [2001] 1 All ER 193 para 1.1. The main reason for these changes was to facilitate the publication of judgments on the World Wide Web and their subsequent use by the increasing numbers of those who have access to the Web. The changes should also assist those who use and wish to search judgments stored on electronic databases: see para 1.2. It is desirable in the interests of consistency that all judgments prepared for delivery (or issued as approved judgments) in county courts, should also contain paragraph numbering (in the margins): para 1.3. The reasoning in judgments should be set out in manageable paragraphs and sub paragraphs, with cross-headings where appropriate, so that the documents can be understood and analysed: *Jasim v Secretary of State for the Home Department* [2006] EWCA Civ 342, [2006] All ER (D) 453 (Mar).

2 See *Practice Note (judgments: neutral citation)* [2001] 1 All ER 193 paras 2.1, 2.2. The judgments will be numbered in the following way: (1) Court of Appeal (Civil Division): [2000] EWCA Civ 1, 2, 3 etc; (2) Court of Appeal (Criminal Division): [2000] EWCA Crim 1, 2, 3 etc; (3) High Court (Administrative Court): [2000] EWHC Admin 1, 2, 3 etc: para 2.1. Under these new arrangements, para 59 in *Smith v Jones*, the tenth numbered judgment of the year in the Civil Division of the Court of Appeal, would be cited: *Smith v Jones* [2001] EWCA Civ 10 at [59]: *Practice Note (judgments: neutral citation)* [2001] 1 All ER 193 para 2.2. The paragraph number must be the number allotted by the court in all future versions of the judgment: para 2.3. If it is desired to cite more than one paragraph of a judgment each numbered paragraph should be enclosed with a square bracket: para 2.5. The Administrative Court citation will be given to all judgments in the Administrative Court, whether they are delivered by a Divisional Court or by a single judge: para 2.7.

3 See *Practice Note (judgments: neutral citation)* [2001] 1 All ER 193 para 2.3.

4 See *Practice Note (judgments: neutral citation)* [2001] 1 All ER 193 para 2.6.

5 See *Practice Direction* [2002] 1 All ER 351, with effect from 14 January 2002. The judgments will be numbered in the following way: Chancery Division EWHC *number* (Ch); Patents Court EWHC *number* (Pat); Queen's Bench Division EWHC *number* (QB); Administrative Court EWHC *number* (Admin); Commercial Court EWHC *number* (Comm); Admiralty Court EWHC *number* (Admlty); Technology & Construction Court EWHC *number* (TCC); Family Division EWHC *number* (Fam). For example, [2002] EWHC 123 (Fam), or [2002] EWHC 124 (QB), or [2002] EWHC 125 (Ch): *Practice Direction* [2002] 1 All ER 351 para 2. It is unnecessary to include the descriptive word in brackets when citing the paragraph number of a judgment. Thus para 59 in *Smith v Jones* [2002] EWHC 124 (QB) would be cited: *Smith v Jones* [2002] EWHC 124 at [59]: *Practice Direction* [2002] 1 All ER 351 para 3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1147. Register of judgments and orders.

1147. Register of judgments and orders.

A register is to be kept, in accordance with regulations¹, of (1) judgments entered in the High Court; (2) judgments entered in county courts; (3) administration orders²; (4) orders restricting enforcement³; (5) sums which are, for the purposes of the Magistrates' Courts Act 1980, sums adjudged to be paid by a conviction or order of a magistrates' court; and (6) a decision or award of the First-tier Tribunal, the Upper Tribunal, an employment tribunal, or the Employment Appeal Tribunal, in pursuance of which any sum is payable⁴. The Lord Chancellor may fix charges to be made for (a) making information in an entry in the register available for inspection; (b) carrying out an official search of the register; (c) supplying a certified copy of information in an entry in the register⁵. The proceeds of those charges are to be applied in paying the expenses incurred in maintaining the register; and any surplus is to be paid into the Consolidated Fund⁶. If there is in force an agreement between the Lord Chancellor and a body corporate relating to the keeping by that body corporate of the register the register is to be kept by that body corporate⁷. If in accordance with such an agreement the register is kept by a body corporate, the Lord Chancellor may recover from the body corporate any expenses incurred by the Lord Chancellor in connection with the supply of information to that body for the purposes of the register and different provisions apply as to the charges⁸. If there is no longer an agreement in force with a body corporate as a result of the termination (for any reason) of the agreement, the Lord Chancellor may require the information contained in the entries in the register to be transferred to such person as he may direct⁹.

1 'Regulations' means regulations made by the Lord Chancellor for the purposes of the Courts Act 2003 s 98: s 98(2). The regulations may (1) provide for prescribed classes of judgments, decisions, awards, orders or adjudged sums to be exempt from registration; (2) prescribe circumstances in which judgments, decisions, awards, orders or adjudged sums (or classes of them) are to be exempt from registration; (3) prescribe circumstances in which an entry in the register is to be cancelled; (4) in the case of sums adjudged to be paid by conviction of a magistrates' court or in the case of sums payable in pursuance of decisions or awards of a tribunal mentioned in s 98(1)(f) (see head (6) in the text), provide for sums to be registered only in prescribed circumstances or subject to prescribed conditions: s 98(3) (amended by the Tribunals, Courts and Enforcement Act 2007 s 48(1), Sch 8 para 55(1), (3)).

In exercise of this power the Lord Chancellor has made the Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, which came into force on 30 December 2005 (regs 1, 2, 4) and 6 April 2006 (all other provisions): see reg 2. As to the power of the Lord Chancellor or Lord Chief Justice to make regulations under the Courts Act 2003 generally see s 108 (amended by the Constitutional Reform Act 2005 Sch 4 para 348).

2 Ie under the County Courts Act 1984 s 112: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 893. As from a day to be appointed, the Courts Act 2003 s 98(1)(c) is amended by the Tribunals, Courts and Enforcement Act 2007 s 106(2), Sch 16 para 15 to substitute a reference to the County Courts Act 1984 Pt 6 for the reference to s 112. At the date at which this title states the law, no such day had been appointed.

3 Ie made under the County Courts Act 1984 s 112A (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 893). As from a day to be appointed, the Courts Act 2003 s 98(1)(d) is substituted by the Tribunals, Courts and Enforcement Act 2007 s 107(3) to refer to enforcement restriction orders under the County Courts Act 1984 Pt 6A (ss 117A-117X) (power of county courts to make enforcement restriction orders). At the date at which this title states the law, no such day had been appointed.

4 Courts Act 2003 s 98(1) (amended by the Tribunals, Courts and Enforcement Act 2007 Sch 8 para 55(2)).

The appropriate officer must send to the registrar a return of every judgment entered in the High Court and a county court (Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, reg 8(1)(a)), every administration order made under the County Courts Act 1984 s 112 (Register of Judgments, Orders and Fines

Regulations 2005, SI 2005/3595, reg 8(1)(b)), every sum to be registered by virtue of the Courts Act 2003 Sch 5 para 38(1)(b) (Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, reg 8(1)(c)), and every tribunal decision made by the First-tier Tribunal, the Upper Tribunal, an employment tribunal or the Employment Appeal Tribunal in pursuance of which a sum of money is payable (reg 8(1)(d) (added by SI 2009/474)). However, the Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, reg 8(1)(d) does not apply until, pursuant to CPR 70.5(2A)(a) (see PARA 1231), a copy of the tribunal decision is filed with the High Court or a county court (in the case of a tribunal decision made by the First-tier Tribunal or the Upper Tribunal) or a copy of the tribunal decision is filed with a county court (in the case of a tribunal decision made by an employment tribunal or the Employment Appeal Tribunal): Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, reg 9A (added by SI 2009/474). As to the details to be contained in the return see the Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, reg 10 (amended by SI 2009/474). Following receipt of a return, the registrar must record the details of the return as an entry in the register: Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, reg 8(2). As to the appropriate officer see reg 3 (amended by SI 2009/474). Where the register is kept by a body corporate in accordance with the Courts Act 2003 s 98(6) (see the text and note 7), 'registrar' means that body corporate; or otherwise, it means the Lord Chancellor: Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, reg 3.

Judgments made in family proceedings, by the Administrative Court or by the Technology and Construction Court are exempt from registration (see reg 9(a)), as are the following (reg 9(b)-(e)):

- 86 (1) any judgment made in proceedings which are the subject of an appeal under CPR Pt 52, until that appeal has been determined;
- 87 (2) any judgment, other than a liability order designated under the Child Support Act 1991 s 33(5), where the hearing was contested, until an order is made for payment by instalments following an application by the judgment creditor; an application is made for payment by instalments by the judgment debtor; the judgment creditor takes any step to enforce the judgment under CPR Pt 70 (general rules about enforcement of judgments and orders); the judgment creditor applies for an order under CPR Pt 71 (orders to obtain information from judgment debtors); (e) the judgment creditor applies for a certificate of judgment under CPR Sch 2 CCR Ord 22 r 8;
- 88 (3) an order for the payment of money arising from an action for the recovery of land (whether for costs, payments due under a mortgage, arrears of rent, or otherwise), until the creditor takes any step to enforce the order under CPR Pt 70;
- 89 (4) an order of a county court under the Road Traffic Act 1991 s 73(15) (order for the recovery of an amount which is payable under an adjudication of a parking adjudicator) or Sch 6 para 7 (order for the recovery of an increased penalty charge).

In the case of an entry in the register to which the Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, reg 8(1)(a) or reg 8(1)(d) applies, where it comes to the attention of the appropriate officer that (a) the debt to which the entry relates has been satisfied one month or less from the date of the judgment or the date on which the tribunal decision was filed with the court in accordance with reg 9A; (b) the judgment to which the entry relates has been set aside or reversed; or (c) the tribunal decision to which the entry relates has been set aside, that officer must send a request to the registrar to cancel the entry: Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, reg 11(1), (2) (amended by SI 2009/474). Where it comes to the attention of the appropriate officer that the debt has been satisfied more than one month from the date of the judgment or the date on which the tribunal decision was filed with the court in accordance with reg 9A, that officer must send a request to the registrar to indorse the entry as to the satisfaction of the debt: Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, reg 11(3) (amended by SI 2009/474). As to the cancellation or endorsement of entries relating to fines see the Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, regs 13, 14 (reg 14 amended by SI 2009/474). Where it comes to the attention of the appropriate officer that an administrative error has been made and he is of the opinion that the error is such to require the cancellation of an entry in the register, that officer must send a request to the registrar to cancel the relevant entry: Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, reg 15. Provision is made for amendment of entries in the register: see regs 20-25 (regs 20, 21 amended by SI 2009/474). The registrar must remove any entry in the register registered (i) by virtue of the Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, reg 8(1)(a) or (b), six years from the date of the judgment; (ii) by virtue of reg 8(1)(c), five years from the date of conviction; (iii) by virtue of reg 8(1)(d), six years from the date on which the tribunal decision was filed with the court in accordance with reg 9A: reg 26 (amended by SI 2009/474). A registered debtor may apply for a certificate of satisfaction in respect of the payment in full of a debt owed under a judgment or administration order and in respect of the payment in full of a fine: see the Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, regs 17-19 (reg 18 amended by SI 2009/474). Any step to be taken under the regulations by the appropriate officer or the registrar must be taken within one working day in respect of:

90 (A) the registration of judgments to which the Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, reg 8(1)(a) applies;

91 (B) the registration of administration orders to which reg 8(1)(b) applies; and

92 (C) the registration of tribunal decisions to which reg 8(1)(d) applies,

and as soon as may be reasonably practicable in respect of the registration of sums to which reg 8(1)(c) applies: reg 5 (amended by SI 2009/474).

5 Courts Act 2003 s 98(4). Searches of a section of the register may be carried out on payment of the applicable charge relevant to the type and method of search: see the Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, reg 27. On receipt of a written request for a certified copy of an entry in the register and the applicable charge for such a request, the registrar must provide a copy of that entry, certified by him as a true and complete copy of the entry in the register: see reg 28. However, the registrar may refuse a person access to the register, or to a part of the register and refuse to carry out a search of the register if he believes that the purpose for which access has been requested or for which the results of the search will be used contravenes any of the data protection principles or the provisions of any other enactment: reg 29(1). Where such a refusal is made, the person who has been denied access to, or has been denied a search of, the register may appeal to a county court against the decision of the registrar: reg 29(2).

6 Courts Act 2003 s 98(5).

7 Courts Act 2003 s 98(6). Where the registrar is a body corporate, the register is to be kept in accordance with the terms of the agreement between the Lord Chancellor and that body: Register of Judgments, Orders and Fines Regulations 2005, SI 2005/3595, reg 6(1). The terms of the agreement between the Lord Chancellor and the body corporate must specify (1) the manner in which the register is to be kept; (2) the form of the register; and (3) the place at which the register is to be kept: reg 6(2). Where the registrar is not a body corporate, the register is to be kept by the Lord Chancellor in such a manner and at such a place as he shall determine: reg 7.

8 The Courts Act 2003 s 98(4) (see the text to note 5) applies as if it enabled the Lord Chancellor to fix the maximum charges to be made (instead of the charges to be made), and s 98(5) (see the text to note 6) does not apply: s 98(7).

9 Courts Act 2003 s 98(8).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1148. Time from which interest begins to run.

1148. Time from which interest begins to run.

Where interest is payable on a judgment¹, the interest will begin to run from the date that judgment is given unless a rule² or a practice direction makes different provision³ or the court⁴ orders otherwise⁵.

The court may order that interest shall begin to run from a date before the date that judgment is given⁶.

1 Ie pursuant to the Judgments Act 1838 s 17 or the County Courts Act 1984 s 74: see PARA 1149.

2 Ie a rule in another Part of the Civil Procedure Rules: see CPR 40.8(1)(a).

3 CPR 40.8(1)(a).

4 As to the meaning of 'court' see PARA 22.

5 CPR 40.8(1)(b).

6 CPR 40.8(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1149. Interest on judgment debts.

1149. Interest on judgment debts.

Every judgment debt, including a debt due to or from the Crown¹, carries interest² at the rate of 8 per cent per annum from the date that judgment is given³ until the debt is satisfied, unless a rule or practice direction makes a different provision or the court orders otherwise⁴. Rules of court may provide for the court to disallow all or part of any interest otherwise so payable⁵.

This rule applies also to debts due to any person⁶ under orders of the High Court, including orders for costs⁷. Owing to the merger of a cause of action in the judgment⁸, interest in respect of a period after judgment can only be recovered under the judgment, as the judgment operates as a bar to a separate claim⁹, and if the judgment becomes unenforceable so does the claim for subsequent interest¹⁰. When, however, there is an agreement between the parties that a higher rate is to be secured by a judgment or order¹¹, then a fieri facias will issue on the judgment or order at that higher rate¹². Interest on a judgment by consent for instalments does not run until the instalments fall due¹³. The same rule applies when an order has been made for payment of a judgment debt by instalments¹⁴. A judgment for damages to be assessed carries interest from the date of entry of judgment and not from the date of assessment¹⁵. Interest on costs normally runs from the date of judgment rather than from the date of issue of the costs certificate¹⁶ but the court has power to award interest on costs from or until a certain date, including a date before judgment¹⁷.

When a claimant loses at first instance but recovers judgment in the Court of Appeal, interest only runs from the date of the order of the Court of Appeal¹⁸ unless that court for special reasons decides to date its order differently¹⁹. Where on an appeal to the House of Lords the decision of the court of first instance and of the Court of Appeal is reversed, and judgment is, for the first time, directed to be entered in favour of any litigant party by the House of Lords, the date which that judgment bears is, in the absence of any direction by the House, the date when the order is made²⁰; but, when the effect of an order of the House of Lords is to restore a judgment of the court of first instance which was reversed by an order of the Court of Appeal, the judgment of the court of first instance is expressly restored and remains standing as from the date when it was given²¹.

Interest on a judgment debt has been held not to be yearly interest for the purposes of the Income Tax Acts²².

A judgment entered in foreign currency will carry the statutory rate of interest on the amount of the judgment in foreign currency and such interest will be added to the amount of the judgment itself for the purposes of enforcement of the judgment²³.

Proceedings to enforce a charging order are not proceedings to enforce a judgment but proceedings to recover a sum due to the claimant as a secured creditor and, as such, the claimant is not restricted to recovering only six years' interest out of the proceeds of enforcing his security²⁴.

An arbitrator's award carries interest at the rate applicable to judgment debts²⁵.

1 See **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 135.

2 As to the power of the High Court to award interest on debts and damages up to the date of judgment or, in the case of any sum paid before judgment, the date of the payment, under the Supreme Court Act 1981 s 35A and the like power of county courts under the County Courts Act 1984 s 69 see **DAMAGES** vol 12(1)

(Reissue) PARA 848. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

3 See CPR 40.8(1); and PARA 1148. The rate of interest can be varied either up or down in accordance with a particular case: *Jaura v Ahmed* [2002] EWCA Civ 210, (2002) Times, 18 March, CA (higher rate of interest awarded to reflect higher borrowing costs generally incurred by small businesses).

4 See the Judgments Act 1838 s 17(1) (amended by the Statute Law Revision (No 2) Act 1888; the Civil Procedure Acts Repeal Act 1879 s 2, Schedule Pt I; and SI 1993/564; renumbered and amended SI 1998/2940; and amended by virtue of CPR 40.8(1)). The Judgment Debts (Rate of Interest) Order 1993, SI 1993/564, was made under the Administration of Justice Act 1970 s 44. The interest is recoverable as a debt: *Re Clagett, ex p Lewis* [1888] WN 100, CA. For the liability to pay interest of a person who has agreed that an action to which he is not a party shall be a test action see *Zachariassen v London General Insurance Co Ltd* (1925) 133 LT 604.

In relation to county courts, the Lord Chancellor may by order made with the concurrence of the Treasury provide that any sums payable under judgments or orders given or made in a county court, including sums payable by instalments and sums which by virtue of any enactment are, if the county court so orders, recoverable as if payable under an order of that court, and in respect of which the county court has so ordered, are to carry interest at such rate and between such times as may be prescribed by the order: County Courts Act 1984 s 74(1), (2). The payment of interest so due is enforceable as a sum payable under the judgment or order: s 74(3). The power conferred by s 74(1) includes power: (1) to specify the descriptions of judgment or order in respect of which interest is to be payable; (2) to provide that interest is to be payable only on sums exceeding a specified amount; (3) to make provision for the manner in which and the periods by reference to which the interest is to be calculated and paid; (4) to provide that any enactment is or is not to apply in relation to interest so payable or is to apply to it with such modifications as may be specified in the order; and (5) to make such incidental or supplementary provisions as the Lord Chancellor considers appropriate: s 74(4). Without prejudice to the generality of s 74(4), an order under s 74(1) may provide that the rate of interest is to be the rate specified in the Judgments Act 1838 s 17 as that enactment has effect from time to time: s 74(5). The power to make such an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 74(6). In exercise of the power so conferred, the Lord Chancellor has made the County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184, which prescribes the rate of interest specified in the Judgments Act 1838 s 17 as that applicable: see the County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184, art 5 (substituted by SI 1996/2516). Every judgment debt under a relevant judgment, to the extent that it remains unsatisfied, carries interest under the 1991 Order from the date on which the relevant judgment was given: County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184, art 2(1). In the case of a judgment or order for the payment of a judgment debt, other than costs, the amount of which has to be determined at a later date, the judgment debt carries interest from that later date: art 2(2). Interest is not, however, payable under the 1991 Order where the relevant judgment is given in proceedings to recover money due under an agreement regulated by the Consumer Credit Act 1974 or grants either the landlord of a dwelling house, or the mortgagee under a mortgage of land which consists of or includes a dwelling house, a suspended order for possession: County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184, art 2(3). Where the relevant judgment makes financial provision for a spouse or a child, interest is only payable on an order for the payment of not less than £5,000 as a lump sum (whether or not the sum is payable by instalments); and for these purposes, no regard must be had to any interest payable under the Matrimonial Causes Act 1973 s 23(6) (see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 479): County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184, art 2(4).

Where a judgment creditor takes proceedings in a county court to enforce payment under a relevant judgment, the judgment debt ceases to carry interest thereafter, except where those proceedings fail to produce any payment from the debtor in which case interest accrues as if those proceedings had never been taken: art 4(1). For these purposes, 'proceedings to enforce payment under a relevant judgment' include any proceeding for examining or summoning a judgment debtor or attaching a debt owed to him, but do not include proceedings under the Charging Orders Act 1979 (see PARA 1467 et seq): County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184, art 4(2). Where an administration order or an attachment of earnings order is made, interest does not accrue during the time the order is in force: art 4(3).

5 Judgments Act 1838 s 17(2) (added by SI 1998/2940).

6 Orders for payment of money into or out of court do not carry interest unless expressed to do so: see *Taylor v Roe* [1894] 1 Ch 413; *A-G v Lord Carrington* (1843) 6 Beav 454; *A-G v Nethercote* (1841) 11 Sim 529. A charging order for a judgment debt carries interest from the date of the judgment (*Stoker v Elwell* [1942] Ch 243, [1942] 1 All ER 261), and a judgment charging costs on land or a fund bears interest from the date when the land or fund becomes subject to them (*Re MacDermott's Estate* [1912] 1 IR 166, CA).

7 See the Judgments Act 1838 s 18; and the Supreme Court Act 1981 s 19. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to costs, however, see the text and notes 16-17.

8 See PARA 1157.

9 *Re European Central Rly Co, ex p Oriental Financial Corpn* (1876) 4 ChD 33, CA; *Re Sneyd, ex p Fewings* (1883) 25 ChD 338, CA; *Arbuthnot v Bunsilall* (1890) 62 LT 234. But a mortgagee may be entitled to retain his security until the full interest stipulated by his mortgage has been paid: *Economic Life Assurance Society v Usborne* [1902] AC 147, HL. The doctrine of merger cannot contradict a statutory right to interest after judgment: *Ealing London Borough Council v El Isaac* [1980] 2 All ER 548, [1980] 1 WLR 932, CA. As to the doctrine of merger see PARA 1157.

10 *Amam v Southern Rly Co* [1926] 1 KB 59, CA.

11 It is common practice in mortgages and charges to require interest to be paid at a specified rate 'as well before as after any judgment'. See also in this connection *Economic Life Assurance Society v Usborne* [1902] AC 147, HL; *Ealing London Borough Council v El Isaac* [1980] 2 All ER 548, [1980] 1 WLR 932, CA.

12 As to execution see PARA 1265 et seq.

13 *Caudery v Finnerty* (1892) 66 LT 684.

14 See the County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184, art 3; and *Morse v Muir* [1939] 2 KB 106, [1939] 2 All ER 40.

15 See *Borthwick v Elderslie Steamship Co (No 2)* [1905] 2 KB 516, CA: but cf *Ashover Fluor Spar Mines Ltd v Jackson* [1911] 2 Ch 355, where a consent order was made referring the assessment of damages to a special referee, the defendants agreeing to pay the amount so found due, and it was held that there was no order to pay to any person and so interest could only be awarded from the date of the certificate. See now *Thomas v Bunn, Wilson v Graham, Lea v British Aerospace plc* [1991] 1 AC 362, [1991] 1 All ER 193, HL (interest runs from the date of judgment on damages and not from the date of judgment on liability).

16 *Hunt v RM Douglas (Roofing) Ltd* [1990] 1 AC 398, [1988] 3 All ER 823, HL (overruling *K v K* [1977] Fam 39, [1977] 1 All ER 576, CA).

17 See CPR 44.3(6)(g); and see *The Civil Court Practice*. Interest payable on costs deemed to have been ordered runs from the date on which the event which gave rise to the entitlement to costs occurred: see CPR 44.12(2); and PARA 1754. As to costs generally see also PARA 1729 et seq.

18 See *Borthwick v Elderslie Steamship Co (No 2)* [1905] 2 KB 516, CA (unliquidated sum); *Belgian Grain and Produce Co Ltd v Cox & Co (France) Ltd* [1919] WN 317, CA (liquidated sum). See also *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305, [1997] 1 WLR 1627, HL (the court does not have power to order the payment of interest on costs from a date earlier than the date on which the court gives judgment).

19 *Belgian Grain and Produce Co Ltd v Cox & Co (France) Ltd* [1919] WN 317, CA.

20 *Nitrate Producers Steamship Co Ltd v Short Bros Ltd* (1922) 127 LT 726, HL. The fact that the cause is remitted to the High Court 'to do therein as shall be just and consistent with the judgment' does not give the High Court any discretion to vary the House of Lords judgment by giving a different date to it from the date it bears: *Nitrate Producers Steamship Co Ltd v Short Bros Ltd* (1922) 127 LT 726, HL, distinguishing *Macbeth & Co Ltd v Maritime Insurance Co Ltd* (1908) 24 TLR 559, where the House of Lords had directed that the whole question of damages should be determined by the High Court, and in pursuance of that direction interest was given as damages from the date of the original judgment, and *Deeley v Lloyds Bank (No 2)* (1912) 57 Sol Jo 158, CA, where the House of Lords judgment was confined to part only of the original dispute. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

21 *Nitrate Producers Steamship Co Ltd v Short Bros Ltd* (1922) 127 LT 726, HL. Cf *Stickney v Keeble (No 2)* (1915) 84 LJ Ch 927, where the House of Lords order restored a judgment of the court of first instance and remitted the cause to that court to do therein as should be just and consistent with the judgment, and interest was allowed on the costs of the appeal to the Court of Appeal from the date of the order of the Court of Appeal, and not from the date of the judgment of the House of Lords.

22 *Re Cooper* [1911] 2 KB 550, CA; and see **INCOME TAXATION** vol 23(1) (Reissue) PARA 513.

23 Where a judgment is given for a sum expressed in a currency other than sterling and the judgment debt is one to which the Judgments Act 1838 s 17 applies, the court may order that the interest rate applicable to the debt is such rate as the court thinks fit: Administration of Justice Act 1970 s 44A(1) (s 44A added by the Private International Law (Miscellaneous Provisions) Act 1995 s 1). If such an order is made, the Judgments Act 1838 s 17 has effect in relation to the judgment debt as if the rate specified in the order were substituted for the rate

specified in s 17: Administration of Justice Act 1970 s 44A(2) (as so added). Section 44A applies to judgment debts to or from the Crown: see the Crown Proceedings Act 1947 s 24(1) (amended by the Private International Law (Miscellaneous Provisions) Act 1995 s 4(1)). The power conferred by the County Courts Act 1984 s 74(1) (see note 4) includes power to make provision enabling a county court to order that the rate of interest applicable to a sum expressed in a currency other than sterling is to be such rate as the court thinks fit (instead of the rate otherwise applicable): s 74(5A) (added by the Private International Law (Miscellaneous Provisions) Act 1995 s 2). See also the County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184, art 5(2) (as substituted: see note 4).

24 See *Ezekiel v Orakpo* [1997] 1 WLR 340, CA; and **LIMITATION PERIODS** vol 68 (2008) PARA 1111. A judgment debt carries interest of its own force and it is not necessary to mention interest in the judgment or a charging order carrying it into effect: *Ezekiel v Orakpo* [1997] 1 WLR 340, CA. Common law rules applicable to equitable charges generally apply to the right of the holder of a charging order to add to the security conferred by the order further sums for interest and costs: *Holder v Supperstone* [2000] 1 All ER 473.

25 *Rocco Giuseppe & Figli v Tradax Export SA* [1983] 3 All ER 598, [1984] 1 WLR 742.

UPDATE

1149 Interest on judgment debts

NOTE 20--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1150. Time for complying with a judgment or order for the payment of money.

1150. Time for complying with a judgment or order for the payment of money.

A party must comply with a judgment or order for the payment of an amount of money (including costs) within 14 days of the date of the judgment or order, unless: (1) the judgment or order specifies a different date for compliance (including specifying payment by instalments)¹; (2) any of the Civil Procedure Rules specifies a different date for compliance²; or (3) the court³ has stayed⁴ the proceedings or judgment⁵.

1 CPR 40.11(a).

2 CPR 40.11(b). See CPR Pt 12, CPR Pt 14 which specify different dates for complying with certain default judgments and judgments on admissions; and PARAS 506-518.

3 As to the meaning of 'court' see PARA 22.

4 As to the meaning of 'stay' see PARA 233 note 11. As to stay of proceedings see PARA 529 et seq.

5 CPR 40.11(c).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1151. Adjustment of final judgment figure in respect of compensation recovery payments or interim payments.

1151. Adjustment of final judgment figure in respect of compensation recovery payments or interim payments.

In a final judgment¹ where some or all of the damages² awarded fall under the relevant heads of damage set out in the Social Security (Recovery of Benefits) Act 1997³ in respect of recoverable benefits⁴ received by the claimant⁵ and where the defendant⁶ had paid the recoverable benefits to the Secretary of State in accordance with the certificate⁷, there will be stated in the preamble to the judgment or order the amount awarded under each head of damage and the amount by which it has been reduced in accordance with the relevant provisions⁸ of the 1997 Act⁹. The judgment or order must then provide for entry of judgment and payment of the balance¹⁰.

In a final judgment where an interim payment¹¹ has previously been made which is less than the total amount awarded by the judge¹², the judgment or order should set out in a preamble the total amount awarded by the judge and the amount and date of the interim payment¹³. The total amount awarded by the judge should then be reduced by the total amount of any interim payments, and the judgment or order should then provide for entry of judgment and payment of the balance¹⁴.

In a final judgment where an interim payment has previously been made which is more than the total amount awarded by the judge, the judgment or order should likewise set out in a preamble the total amount awarded by the judge and the amount and date of the interim payment. An order should then be made for repayment, reimbursement, variation or discharge¹⁵ and for interest¹⁶ on an overpayment¹⁷.

1 For the purposes of *Practice Direction--Judgments and Orders* PD 40B paras 5, 6 (see the text and notes 2-17), 'final judgment' includes any order to pay a sum of money, a final award of damages and an assessment of damages: paras 5.1, 6.1 note.

2 As to the meaning of 'damages' see PARA 37 note 1.

3 Ie set out in the Social Security (Recovery of Benefits) Act 1997 s 8(1), Sch 2 col 1: see **DAMAGES** vol 12(1) (Reissue) PARA 919.

4 Ie recoverable benefits as set out in the Social Security (Recovery of Benefits) Act 1997 Sch 2 col 2: see **DAMAGES** vol 12(1) (Reissue) PARA 919.

5 As to the meaning of 'claimant' see PARA 18.

6 As to the meaning of 'defendant' see PARA 18.

7 Ie the certificate as defined in CPR 36.15(1)(e): see PARA 741 note 9. As to certificates relating to recoverable benefits see **DAMAGES** vol 12(1) (Reissue) PARA 906 et seq.

8 Ie reduced in accordance with the Social Security (Recovery of Benefits) Act 1997 s 8, Sch 2: see **DAMAGES** vol 12(1) (Reissue) PARA 919 et seq.

9 *Practice Direction--Judgments and Orders* PD 40B para 5.1. Where damages are awarded in a case where a lump sum payment (to be construed in accordance with the Social Security (Recovery of Benefits) Act 1997 s 1A) has been made to a dependant, then s 15 (as modified by the Social Security (Recovery of Benefits) (Lump Sum Payments) Regulations 2008, SI 2008/1596, Sch 1) sets out what the court order must contain: *Practice Direction--Judgments and Orders* PD 40B para 5.1A.

- 10 *Practice Direction--Judgments and Orders* PD 40B para 5.2. As to compensation recovery payments see also PARA 326.
- 11 As to the meaning of 'interim payment' see PARA 324 note 3.
- 12 As to the meaning of 'judge' see PARA 49.
- 13 *Practice Direction--Judgments and Orders* PD 40B para 6.1. As to the court's powers where it has made an order for interim payment see PARA 328.
- 14 *Practice Direction--Judgments and Orders* PD 40B para 6.2.
- 15 Ie under CPR 25.8(2): see PARA 327.
- 16 Ie under CPR 25.8(5): see PARA 327.
- 17 *Practice Direction--Judgments and Orders* PD 40B para 6.4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1152. Cases where court gives judgment both on claim and counterclaim.

1152. Cases where court gives judgment both on claim and counterclaim.

Where the court¹ gives judgment for specified amounts both for the claimant² on his claim and against the claimant on a counterclaim³, then if there is a balance in favour of one of the parties, the court may order the party whose judgment is for the lesser amount to pay the balance⁴.

In a case to which these provisions apply, the court may make a separate order as to costs against each party⁵.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'claimant' see PARA 18.

3 CPR 40.13(1). As to the meaning of 'counterclaim' see PARA 618 note 3.

4 CPR 40.13(2).

5 CPR 40.13(3). As to costs generally see also PARA 1729 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(1) JUDGMENTS AND ORDERS GENERALLY/1153. Judgment in favour of certain part owners relating to the detention of goods.

1153. Judgment in favour of certain part owners relating to the detention of goods.

Where a part owner¹ makes a claim relating to the detention of the goods and the claim is not based on a right to possession, any judgment or order given or made in respect of the claim is to be for the payment of damages² only, unless the claimant³ had the written authority of every other part owner of the goods to make the claim on his behalf as well as for himself⁴.

1 For these purposes, 'part owner' means one of two or more persons who have an interest in the same goods: CPR 40.14(1). As to interpleader relief where two or more persons make adverse claims to goods see PARA 1585 et seq.

2 As to the meaning of 'damages' see PARA 37 note 1.

3 As to the meaning of 'claimant' see PARA 18.

4 CPR 40.14(2). CPR 40.14 applies notwithstanding anything in the Torts (Interference with Goods) Act 1977 s 3(3), but does not affect the remedies and jurisdiction mentioned in s 3(8): CPR 40.14(3). See further **TORT** vol 45(2) (Reissue) PARAS 653, 672.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(i) Finality of Judgments and Orders/A. CIVIL JUDGMENTS AND ORDERS/(A) Conclusiveness and Finality/1154. Conclusiveness of judgments in general.

(2) FINALITY OF JUDGMENTS AND OF LITIGATION

(i) Finality of Judgments and Orders

A. CIVIL JUDGMENTS AND ORDERS

(A) CONCLUSIVENESS AND FINALITY

1154. Conclusiveness of judgments in general.

Every final judgment is conclusive evidence against all the world of its existence, date and legal consequences¹. The reason is that a judgment, being a public transaction of a solemn nature, is conclusively presumed to have been truly recorded; but this presumption only extends to what has been called the substantive as distinguished from the judicial portions of the record².

It is a fundamental doctrine of all courts that there must be an end of litigation³, and a party may plead the doctrine of *res judicata*⁴ by way of estoppel. Where a judgment has been given which is a matter of record, an 'estoppel by record' arises⁵ and may take the form of cause of action estoppel⁶ or of issue estoppel⁷. It may also be said that the cause of action has merged in the judgment⁸.

1 *Green v New River Co* (1792) 4 Term Rep 589; *Legatt v Tollervey* (1811) 14 East 302.

A judgment may be of two kinds, namely a judgment in rem or a judgment in personam; this distinction is significant in determining who is bound by a judgment: see PARAS 1158-1159. The conclusiveness of judgments in rem of the matters actually decided is against all persons, whether parties, privies or strangers to the decision; but, except to prove their existence, date and legal consequences, judgments in personam are generally inadmissible for or against strangers. As to the classification of judgments see further PARA 1158 et seq; and as to the parties estopped by a judgment see PARA 1191 et seq. As to privies see eg PARAS 1155 note 5, 1196-1198.

As to finality of judgments see PARA 1156.

2 *Legatt v Tollervey* (1811) 14 East 302; *King v Norman* (1874) 4 CB 884; and cf *Re Kitchin, ex p Young* (1881) 17 ChD 668, CA. There is old authority to the effect that where a claim is brought against a person for acts done in a judicial capacity, the judgment is conclusive in favour of that person of the truth of the facts stated in it: *Brittain v Kinnaird* (1819) 1 Brod & Bing 432. As to claims for a remedy under the Human Rights Act 1998 s 7 in respect of judicial acts see, however, PARA 1213.

3 Co Rep 9a (*interest reipublicae ut sit finis litium*); *Re May* (1885) 28 ChD 516, CA; and see *Re Graydon, ex p Official Receiver* [1896] 1 QB 417; *Philips v Bury* (1696) Holt KB 715; *Badar Bee v Habib Merican Noordin* [1909] AC 615, PC; *Hoystead v Taxation Comr* [1926] AC 155, PC; *R v Middlesex Justices, ex p Bond* [1933] 2 KB 1, CA; and PARA 1184. Thus a judgment for the claimant on a plea of set-off, being a matter distinctly put in issue, may be pleaded by way of estoppel in an action (now a claim) subsequently brought against him by the defendant for the debt which he sought to set off (*Eastmure v Laws* (1839) 5 Bing NC 444; *Danks v Farley* (1853) 1 WR 291; cf *Webster v Armstrong* (1885) 54 LJQB 236); a judgment for the defendant in a libel claim in respect of certain parts of a publication constitutes a defence of *res judicata* to a second claim in respect of other parts of the same publication, the subject matter of both claims being the same (*Macdougall v Knight* (1890) 25 QBD 1, CA); and an unsatisfied judgment against a woman for payment of a sum of money misapplied by her as trustee, such sum with costs to be payable out of her separate estate, estopped the plaintiff from obtaining in another action on practically the same facts judgment in a different form for payment into court of the money proved to have reached her hands as a trustee (*Green v Weatherill* [1929] 2 Ch 213).

4 As to the doctrine of res judicata see PARA 1168 et seq. 'In many of the older cases the terms 'res judicata', 'issue estoppel' and 'cause of action estoppel', 'estoppel by record' or 'collateral estoppel' were sometimes used loosely and the distinction between them was not always clear. The modern tendency has been to use 'res judicata' comprehensively to cover all those terms of estoppel. Cause of action estoppel is confined to cases where the cause of action and the parties are the same in the second suit as they are in the first suit': *North West Water Ltd v Binnie & Partners (a firm)*[1990] 3 All ER 547 at 551, 30 ConLR 136 at 141-142 per Drake J, whose 'broad approach' to issue estoppel in that case was considered eg in *Lloyds TSB Bank Ltd v Cooke-Arkwright (a firm)*[2001] All ER (D) 127 (Oct). Cf *Specialist Group International Ltd v Deakin* [2001] EWCA Civ 777 at [10], [2001] All ER (D) 287 (May) per Aldous LJ, where the terms 'cause of action finality' and 'issue finality' are suggested for 'cause of action estoppel' and 'issue estoppel' and they are described as forms of abuse of process; and see at [22]-[23] per May LJ. See also *Blackburn Chemicals Ltd v BIM Kemi AB*[2004] EWCA Civ 1490, [2004] All ER (D) 168 (Nov); and *Laemthong International Lines Co Ltd v Artis*[2004] EWHC 2226 (Comm), [2004] 2 All ER (Comm) 797.

The principle of res judicata had no application in affiliation proceedings: *R v Sunderland Justices, ex p Hodgkinson*[1945] KB 502, [1945] 2 All ER 175, DC. Although affiliation proceedings were abolished by the Family Law Reform Act 1987 s 17, this rule remains important, as allowing an applicant in proceedings for financial relief under what is now the Children Act 1989 s 15(1), Sch 1 para 1 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 539 et seq) to re-open the question of paternity by eg reliance on DNA genetic finger-printing evidence not available at the time of earlier proceedings under the old law: *Hager v Osborne* [1992] Fam 94, [1992] 2 All ER 494. As to the inappropriateness of the strict application of estoppel by record in proceedings under the Children Act 1989 see PARAS 1169, 1178.

As to the application of the doctrine of res judicata to proceedings under the former Workmen's Compensation Acts see *Green v Cammell Laird & Co Ltd*[1913] 3 KB 665, CA; *Smith v Cutler & Sons* (1932) 25 BWCC 408, CA.

5 See PARA 1168 et seq.

6 As to cause of action estoppel see PARA 1174 et seq.

7 As to issue estoppel see PARA 1179 et seq.

8 As to merger of the cause of action in the judgment see PARAS 1157, 1190.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(i) Finality of Judgments and Orders/A. CIVIL JUDGMENTS AND ORDERS/(A) Conclusiveness and Finality/1155. Conclusiveness of judgments between the parties etc.

1155. Conclusiveness of judgments between the parties etc.

Subject to appeal¹ and to being amended or set aside², a judgment³ is conclusive as between the parties⁴ and their privies⁵, and is conclusive evidence against all the world of its existence, date and legal consequences⁶. Thus a verdict followed by judgment operates as an estoppel⁷ or conclusive evidence of the facts found as between parties and privies, and in subsequent proceedings between the same parties on the same cause of action the defendant can plead the former judgment as an estoppel ('cause of action estoppel')⁸. If an order made by the court necessarily involves a finding, whether there was argument or not, on a point which is later sought to be litigated, that point cannot subsequently be argued ('issue estoppel')⁹; but an order directing an inquiry as to facts, although clearly made on a certain hypothesis of the relevant law, is not conclusive as to that hypothesis when the whole question of law involved has been reserved until the inquiry has been answered¹⁰.

In order to ascertain what was in issue between the parties the judgment, verdict, if any, and pleadings may be examined, but no evidence is admissible to contradict the record¹¹. When a judgment is clear as to its terms, not even the pleadings nor the history of the proceedings may be utilised to construe the judgment contrary to its clear meaning¹²; but a judgment is not conclusive of any matter that is neither directly decided nor a necessary ground for the decision¹³.

In general a judgment relates back to the earliest moment of the day on which it is entered¹⁴, but this rule is hedged by exceptions. In particular, it does not apply if the precise time of signing judgment is made material by statute or when its application would result in injustice¹⁵.

A claimant who has once sued a defendant to judgment may not, while the judgment stands, even though unsatisfied, sue him again for the same cause, not because he is estopped from doing so (although he, as well as the defendant, is estopped from averring anything contrary to the record¹⁶), but because the cause of action is merged in the judgment, which creates an obligation of a higher nature¹⁷. It is also probably true to say that a person who has once recovered judgment for a sum of money is estopped from averring that he ought to recover any further sum for the same cause of action¹⁸. Thus the recovery of the maximum amount recoverable in a county court for fraudulent misrepresentation is a bar to a claim for damages subsequently accruing from the same misrepresentation¹⁹, and the recovery in a magistrates' court of a statutory penalty 'by way of satisfaction' for damage to property is a bar to a claim at common law for negligence to recover the balance of the damage²⁰. So a consent order in the Chancery Division restraining the defendant from parting with shares is a bar to a claim in the Queen's Bench Division for damages for detention of the same shares, as the claimant might have obtained the relief in the first proceedings. Moreover where there is but one cause of action, the damages (except in a case where an award of provisional damages is available) must be assessed once for all²¹, and there would appear to be no distinction on this point between the award of an arbitrator and the judgment of a court²².

1 As to appeals generally see PARA 1657 et seq. Even where a judgment is reversed on appeal, acts done under an order made pursuant to the judgment are lawful if done before the appeal: *Hillgate House Ltd v Expert Clothing Service and Sales Ltd* [1987] 1 EGLR 65.

2 See PARA 1143. For the right to go behind judgments in bankruptcy proceedings see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**. A person ought to be entitled to act in pursuance of a court order without being at risk of his action being judged unlawful retrospectively: *Brent London Borough Council v Botu* (2000) 33 HLR 151, CA.

3 An arbitrator's award, until set aside, is final and binding both on the parties and on any persons claiming through or under them, unless otherwise agreed by the parties (see the Arbitration Act 1996 s 58(1); and **ARBITRATION**), but is inadmissible as between strangers except as proving acts of ownership (see PARA 1188). As to the conclusiveness of foreign judgments and their effect as implied contracts see **CONFLICT OF LAWS**.

4 See the County Courts Act 1984 s 70, which provides that every judgment and order of a county court is final and conclusive between the parties, except as provided by that or any other Act or as may be prescribed. A judge ought not to disregard a previous order in the same proceedings which has not been appealed against even if he considered it was made without jurisdiction: *Cohen v Jonesco* [1926] 2 KB 1, CA; *Re Gale, Gale v Gale* [1966] Ch 236, [1966] 1 All ER 945, CA. See *Roche v Chief Constable of Greater Manchester Police* [2005] EWCA Civ 1454, [2005] All ER (D) 283 (Oct), (2005) Times, 10 November (in circumstances of case, court entitled, when hearing appeal against one judgment, to consider second judgment given in relation to same issue).

5 Privies are either 'in estate', 'in blood' or 'in law'; they are those persons having the same interest to, or claiming through, an original party. See further PARAS 1196-1198.

6 See PARA 1154. In *Amphill Peerage* [1977] AC 547, [1976] 2 All ER 411, HL, it was held that a declaration made in 1926 by the High Court under the Legitimacy Declaration Act 1858 s 8 (repealed), was binding in 1976 on all persons, including the Crown and the House of Lords. See also *Strachan v Gleaner Co Ltd* [2005] UKPC 33, [2005] 1 WLR 3204 (default judgment set aside).

7 There can be no estoppel without a judgment: see PARA 1171. As to estoppel by record see PARA 1168 et seq.

8 Default judgments and refusals to set them aside should, however, be carefully scrutinised before entertaining an estoppel: see *Pugh v Cantor Fitzgerald International* [2001] EWCA Civ 307, [2001] All ER (D) 67 (Mar), [2001] CPLR 271. For the earlier authorities see PARA 1172. As to cause of action estoppel see PARA 1174 et seq. As to merger of the cause of action in the judgment see PARAS 1157, 1190.

9 *Re Koenigsberg, Public Trustee v Koenigsberg* [1949] Ch 348, [1949] 1 All ER 804, CA, per Somervill LJ, approved in *Re Wright, Blizard v Lockhart* [1954] Ch 347, [1954] 2 All ER 98, CA. For the earlier authorities see PARA 1164. As to issue estoppel see PARA 1179 et seq.

10 *Re Wright, Blizard v Lockhart* [1954] Ch 347, [1954] 2 All ER 98, CA, where an inquiry as to the practicability of a charitable legacy after the death of the tenant for life was held not to estop the Attorney General from arguing subsequently that the material date for the ascertainment of practicability was the date of the testator's death.

11 See PARA 1168 et seq.

12 *Gordon v Gonda* [1955] 2 All ER 762, [1955] 1 WLR 885, CA.

13 See PARA 749 et seq.

14 *Edwards v R* (1854) 9 Exch 628. See also CPR 40.7(1); and PARA 1142.

15 *Re Seaford, Seaford v Seifert* [1968] P 53, [1968] 1 All ER 482, CA. Nor does it apply when judgment is entered against a foreign state: see CPR 40.10; and PARA 1142.

16 *Webster v Armstrong* (1885) 54 LJQB 236; *Stewart v Todd* (1846) 9 QB 767, Ex Ch. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

17 See *King v Hoare* (1844) 13 M & W 494; *Re Hodgson, Beckett v Ramsdale* (1885) 31 ChD 177, CA; *Florence v Jennings* (1857) 2 CBNS 454; *Stewart v Todd* (1846) 9 QB 767, Ex Ch; *Isaacs & Sons v Salbstein* [1916] 2 KB 139, CA; cf *Savile v Jackson* (1824) 13 Price 715.

18 *Stewart v Todd* (1846) 9 QB 767, Ex Ch; *Hills v Co-operative Wholesale Society Ltd* [1940] 2 KB 435, [1940] 3 All ER 233, CA.

19 *Clarke v Yorke* (1882) 52 LJ Ch 32; cf *Wright v London General Omnibus Co* (1877) 2 QBD 271; *Sanders v Hamilton* (1907) 96 LT 679. As to the abandonment of excess so as to give the county court jurisdiction see **COURTS**.

20 *Birmingham Corpn v S Allsopp & Sons Ltd* (1918) 88 LJB 549, DC. For the effect of summary conviction or dismissal of information in respect of common assault or of aggravated assault see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 151 et seq.

21 *Serrao v Noel* (1885) 15 QBD 549, CA, per Bowen LJ; distinguished in *Worman v Worman* (1889) 43 ChD 296 (relief claimed in second action entirely outside the former compromise); *Conquer v Boot* [1928] 2 KB 336, DC. See further **DAMAGES**. See also *Lord Bagot v Williams* (1824) 3 B & C 235. As to provisional damages see PARAS 1217-1222.

22 *HE Daniels Ltd v Carmel Exporters and Importers Ltd* [1953] 2 QB 242, [1953] 2 All ER 401 obiter per Pilcher J.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(i) Finality of Judgments and Orders/A. CIVIL JUDGMENTS AND ORDERS/(A) Conclusiveness and Finality/1156. Finality of judgment.

1156. Finality of judgment.

When the word 'final' is used with reference to a judgment, it does not mean a judgment which is not open to appeal but merely a judgment which is 'final' as opposed to 'interim'¹. A judgment which purports finally to determine rights is nonetheless effective for the purposes of creating an estoppel because it is liable to be reversed on appeal², or because an appeal is pending³, or because the judgment includes an order for damages to be assessed and inquiries or accounts have to be taken for the purpose of such assessment⁴.

1 *Marchioness of Huntly v Gaskell* [1905] 2 Ch 656, CA; *Allnutt v Mills* (1925) 42 TLR 68. A judgment which has been communicated to the other parties may be final although certain procedural steps remain to be complied with: *Jowett v Earl of Bradford* [1977] 2 All ER 33, [1977] ICR 342, EAT (second tribunal therefore unable to re-hear matter de novo). As a general rule the principles of estoppel by record can apply in proceedings before employment tribunals: see PARA 1186. As to final and interim judgments see PARAS 315 et seq, 1136 et seq.

The same principle applies to foreign judgments: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 158. As to the position relating to a sheriff's return to a writ of execution, which is not a judgment, see PARA 1282.

2 *Doe v Wright* (1839) 10 Ad & El 763; *Overton v Harvey* (1850) 9 CB 324; *Marchioness of Huntly v Gaskell* [1905] 2 Ch 656, CA; cf *Horrocks v Stubbs* (1896) 74 LT 58, CA; *Uxbridge Union v Winchester Union* (1904) 91 LT 533 (appeal failed, but not on merits); *Lady Clanmorris v Lord Clanmorris* (1862) 14 I Ch R 420. The same principle applies to foreign judgments: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 158.

3 *Harris v Willis* (1855) 15 CB 710.

4 *Poulton v Adjustable Cover and Boiler Block Co* [1908] 2 Ch 430, CA; applied in *Coflexip SA v Stolt Offshore MS Ltd* [2003] EWHC 1892 (Pat), [2003] All ER (D) 572 (Jul); affd [2004] EWCA Civ 213, [2004] FSR 708.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(i) Finality of Judgments and Orders/A. CIVIL JUDGMENTS AND ORDERS/(B) Merger of Cause of Action/1157. Merger of cause of action in judgment.

(B) MERGER OF CAUSE OF ACTION

1157. Merger of cause of action in judgment.

When judgment has been given in a claim (formerly known as an 'action')¹, the cause of action in respect of which it was given is merged in the judgment and its place is taken by the rights created by the judgment², so that a second claim may not be brought on that cause of action³. Merger is not effected by an order which is not a judgment⁴, nor by a judgment which is not final⁵, or which is void⁶.

There will be no merger unless the cause of action is the same in both claims⁷, and the claimant (formerly the 'plaintiff')⁸ had an opportunity of recovering in the first claim (namely the claim in which judgment was given) what he seeks to recover in the second; otherwise the defendant is not to be twice vexed for the same cause⁹. A claimant, therefore, is not precluded by an order in administration proceedings to which he was a party from afterwards beginning proceedings relating to the same subject matter for relief for which he was not in a position to ask in the earlier proceedings¹⁰; and this principle applies even though the claimant might have set up in the first claim the case which he made in the second, and did not do so¹¹.

The same applies where the matters in question in the second claim arose while the first was pending, and could only have been raised (if at all) in the first by amendment of the proceedings¹², or where, though the causes of action in the first and the second claim have a common origin, they are not the same¹³, as in the case of a continuing trespass¹⁴ or of successive breaches of the same contract¹⁵. A claimant is allowed to bring successive claims in respect of the same circumstances, provided those circumstances give rise to different causes of action¹⁶.

Under the court's case management powers, however, it has a duty to deal with as many aspects of the case as it can on the same occasion¹⁷ and it has power to consolidate proceedings¹⁸, to try two or more claims on the same occasion¹⁹ and to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective²⁰.

1 See PARA 18.

2 *Greathead v Bromley* (1798) 7 Term Rep 455; *Langmead v Maple* (1865) 18 CBNS 255; *Re European Central Rly Co, ex p Oriental Financial Corp'n* (1876) 4 ChD 33, CA. A judgment obtained by a mortgagee in an action on the personal covenant in the mortgage merely operated as an additional security for due payment of the debt, and if the debt was extinguished the judgment was extinguished too: *Aman v Southern Rly Co* [1926] 1 KB 59, CA. In a claim for the detention of goods, a judgment in favour of the claimant does not of itself and apart from special circumstances, without satisfaction, vest the property in the goods in the defendant from the time of the judgment: *Brinsmead v Harrison* (1871) LR 6 CP 584 (affd (1872) LR 7 CP 547, Ex Ch); *Ellis v John Stenning & Son* [1932] 2 Ch 81. This is so whether the judgment is for the value of the goods or for damages for their conversion, or is one with an alternative provision for the return of the goods: *Ellis v John Stenning & Son* [1932] 2 Ch 81. See *Lloyds Bank plc v Hawkins* [1998] 3 EGLR 109, [1998] 47 EG 137, CA (plaintiff (now known as 'claimant') estopped from bringing second action (now known as a 'claim': see PARA 18) following merger of cause of action in an earlier judgment despite inadvertent error in the judgment). As to the defence of 'judgment recovered' see further PARA 1190. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

3 As to the defence of 'judgment recovered' see further PARA 1190.

4 *Westmoreland Green and Blue Slate Co v Feilden*[1891] 3 Ch 15, CA.

5 *Langmead v Maple* (1865) 18 CBNS 255.

6 *Vibart v Coles*(1890) 24 QBD 364, CA.

7 *Leggott v Great Northern Rly Co*(1876) 1 QBD 599 (recovery by personal representatives of damages sustained by relatives of deceased from his death by accident was no bar to action for damage to his estate; followed in *Daly v Dublin, Wicklow and Wexford Rly Co* (1892) 30 LR Ir 514, CA); *Goldrei, Foucard & Son v Sinclair and Russian Chamber of Commerce in London*[1918] 1 KB 180, CA.

8 See PARA 18.

9 See *Nelson v Couch* (1863) 15 CBNS 99; *Few v Backhouse* (1838) 8 Ad & El 789; *Webster v Armstrong* (1885) 54 LJQB 236 (High Court action on cause raised as counterclaim in county court, but as respects which the county court had no jurisdiction to give relief in excess of the plaintiff's claim in the county court action: no estoppel of High Court plaintiff by judgment in his favour on the counterclaim in the county court, and High Court defendant estopped by the county court judgment from denying the plaintiff's cause of action; as to the jurisdiction of county courts on a counterclaim see now PARA 58); cf *Midland Rly Co v Martin & Co*[1893] 2 QB 172. A party who selects a tribunal having jurisdiction may not afterwards, however, seek the same remedy before another tribunal on the ground that the first had not power to award him adequate damages: *Wright v London General Omnibus Co*(1877) 2 QBD 271; *Birmingham Corp'n v S Allsopp & Sons Ltd* (1918) 88 LJB 549, DC. See generally *Henderson v Henderson* (1843) 3 Hare 100; and PARA 1167. The principle behind the rule is that to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings is an abuse of process: *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd*[1975] AC 581, PC; *Brisbane City Council v A-G for Queensland*[1979] AC 411, [1978] 3 All ER 30, PC; and see PARA 534.

10 *Guidici v Kinton* (1843) 6 Beav 517; cf *Whittaker v Kershaw*(1890) 45 ChD 320, CA; *Re Hampshire Co-operative Milk Co Ltd, Purcell's Case* (1880) 29 WR 170.

11 *Hunter v Stewart* (1861) 4 De G F & J 168; *Simpson v Fogo* (1863) 1 Hem & M 195; *Stewart v Kennedy (No 2)*(1890) 15 App Cas 108, HL; *Wilding v Sanderson*[1897] 2 Ch 534, CA; *Mulgrew v O'Brien*[1953] NI 10. See, however, the rule in *Henderson v Henderson* (1843) 3 Hare 100; and PARA 1167. For the position where the cause of action is really the same see PARA 1175.

12 *National Bolivian Navigation Co v Wilson*(1880) 5 App Cas 176, HL.

13 *Payana Reena Saminathan v Pana Lana Palaniappa*[1914] AC 618, PC.

14 *Clarke v Midland and Great Western Rly Co*[1895] 2 IR 294, CA, following *Thompson v Gibson* (1841) 7 M & W 456; and see *Bulmer Rayon Co Ltd v Freshwater*[1933] AC 661, HL.

15 *Bristowe v Fairclough* (1840) 1 Man & G 143; *Ebbetts v Conquest* (1900) 82 LT 560, DC (breaches of covenant to keep, and to deliver up, in repair).

16 *Brunsdon v Humphrey*(1884) 14 QBD 141, CA (injury to a man's person and to his carriage). 'The test is not whether the plaintiff had the opportunity of recovering in the first action what he claims to receive in the second': *Brunsdon v Humphrey*(1884) 14 QBD 141 at 146, CA, per Bowen LJ), but whether he in fact sought to do so; cf *Florence v Jennings* (1857) 2 CBNS 454 (plaintiff recovered the principal due on a bill in one action, and in another interest due on the bill under a separate agreement, but only down to the date of the first judgment, for thereupon the bill passed in rem judicatum); *Whittaker v Kershaw*(1890) 45 ChD 320, CA; *Gibbs v Cruikshank*(1873) LR 8 CP 454; see the cases cited in note 8. See also *Derrick v Williams*[1939] 2 All ER 559, CA (different heads of damage arising from same cause of action, distinguishing *Brunsdon v Humphrey*(1884) 14 QBD 141, CA). An action for false imprisonment was no bar to a subsequent action for a malicious prosecution following on the same arrest, even though a jury improperly gave damages in the first action for imprisonment consequential on the prosecution: *Guest v Warren*(1854) 9 Exch 379.

17 See CPR 1.4(2)(i); and PARA 246 head (9) in the text.

18 See CPR 3.1(2)(g); and PARAS 75, 247 head (7) in the text.

19 See CPR 3.1(2)(h); and PARAS 75, 247 head (8) in the text.

20 See CPR 3.1(2)(m); and PARA 247 head (14) in the text. As to the overriding objective see PARA 33.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(i) Finality of Judgments and Orders/B. CLASSIFICATION OF JUDGMENTS/(A) In general/1158. Classification of judgments; in general.

B. CLASSIFICATION OF JUDGMENTS

(A) IN GENERAL

1158. Classification of judgments; in general.

Final judgments which give rise to an estoppel are divided into two classes: judgments determining status, known as 'judgments in rem'¹ and judgments determining the rights of parties, known as 'judgments in personam'² or 'judgments between parties'³. The distinction is important because it is relevant in determining who will be bound by the judgment⁴.

1 As to judgments in rem see PARAS 1160-1162.

2 As to judgments in personam see PARAS 1163-1164.

3 This term is adopted by the author of the notes to Smith's Leading Cases.

4 As to the importance of the distinction between the two classes see PARA 1159.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(i) Finality of Judgments and Orders/B. CLASSIFICATION OF JUDGMENTS/(A) In general/1159. Importance of distinction between judgments in rem and judgments in personam or between parties.

1159. Importance of distinction between judgments in rem and judgments in personam or between parties.

A judgment in rem¹ (that is, a judgment of a court of competent jurisdiction determining the status of a person or thing or the disposition of a thing, as distinct from a particular interest in it of a party to the litigation) is conclusive of the facts or state of things actually decided or effected; and is conclusive against all persons, whether parties, privies² or strangers to the decision³. Other judgments which affect the interests of the parties rather than their status, often referred to as judgments in personam⁴ (or judgments between parties), have the effect that the parties to them, and their privies, are prevented from denying what the judgment itself establishes, and the grounds upon which it was founded⁵; but, save to prove their existence, date and consequences, such judgments are generally inadmissible for or against strangers⁶.

Thus the most important distinction between judgments in rem and judgments in personam is that, whereas the latter are binding only as between the parties to them and those who are privy to them, the judgment in rem of a court of competent jurisdiction is, as regards persons domiciled and property situated within the jurisdiction of the court pronouncing the judgment⁷, conclusive against all the world⁸ in whatever it settles as to the status of the persons or property⁹, or as to the right or title to the property, and as to whatever disposition it makes of the property itself, or of the proceeds of its sale¹⁰. In other words all persons, whether party to the proceedings or not, are estopped by a judgment in rem from averring that the status of persons or things, or the right or title to property, is other than the court has by such a judgment declared or made it to be.

1 As to judgments in rem see PARA 1160 et seq.

2 As to privies see eg PARAS 1155 note 5, 1196-1198.

3 *Lazarus-Barlow v Regent Estates Co Ltd* [1949] 2 KB 465, [1949] 2 All ER 118, CA. This principle is often analysed as being an example of estoppel by record, as to which see PARA 1168 et seq.

4 As to judgments in personam see PARA 1163 et seq.

5 If one party brings a claim against another for a particular cause and judgment is given upon it, there is a strict rule of law that he cannot bring another claim against the same party for the same cause: *Fidelitas Shipping Co Ltd v VO Exportchleb* [1966] 1 QB 630 at 640, [1965] 2 All ER 4 at 8, CA, per Lord Denning MR. As to cause of action estoppel see PARA 1174 et seq; and as to merger of the cause of action in the judgment see PARAS 1157, 1190. The same principle applies where the same issue has previously been raised and determined: *R v Hartington Middle Quarter Inhabitants* (1885) 4 E & B 780; *Hoystead v Taxation Comr* [1926] AC 155, PC; *Fidelitas Shipping Co Ltd v VO Exportchleb* [1966] 1 QB 630, [1965] 2 All ER 4, CA. As to issue estoppel see PARA 1179 et seq. The judge's notes of evidence are admissible to show what was decided in the earlier proceedings: *Randolph v Tuck* [1962] 1 QB 175, [1961] 1 All ER 814.

6 *Castrique v Imrie* (1870) LR 4 HL 414; *Evans v Evans* (1844) 1 Rob Eccl 165 at 170; *Doe d Bacon v Lady Brydges* (1843) 6 Man & G 282. See also *Yates v Kyffin-Taylor and Wark* [1899] WN 141; *Leyman v Latimer* (1878) 3 ExD 352, CA. The rule that a judgment in personam is inadmissible against strangers is subject to the following exceptions in addition to those mentioned in the text: (1) when the judgment determines a question of public right and is admissible as evidence of reputation (see *Reed v Jackson* (1801) 1 East 355; *Brisco v Lomax* (1838) 8 Ad & El 198; *Pim v Curell* (1840) 6 M & W 234; *Petrie v Nuttall* (1856) 11 Exch 569; *Berry v Banner* (1792) Peake 156; *City of London v Clerke* (1691) Carth 181; *Cort v Birkbeck* (1779) 1 Doug KB 218; *Neill v Duke of Devonshire* (1882) 8 App Cas 135, HL; *Hemphill v M'Kenna* (1845) 8 ILR 43; *Mulholland v Killen* (1874) 9

IR Eq 471; *R v Lordsmere District Inhabitants* (1886) 16 Cox CC 65, CCR); (2) in bankruptcy proceedings (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**); (3) in proceedings relating to the administration of estates (see *Harvey v Wilde* (1872) LR 14 Eq 438; and see also **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 36); and (4) to an extent in patent claims (see *Edison and Swan United Electric Light Co v Holland* (1889) 6 RPC 243, CA; *Pneumatic Tyre Co Ltd v Leicester Pneumatic Tyre and Automatic Valve Co* (1889) 16 RPC 531, HL; and see also **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 425).

7 See *R v St Pancras Inhabitants* (1794) Peake 220; *Wakefield Corp v Cooke* [1904] AC 31, HL (highway cases). As to privies see eg PARAS 1155 note 5, 1196-1198. As to domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 35 et seq. As to international conventions affecting jurisdiction see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 125.

8 *Simpson v Fogo* (1860) 1 John & H 18; *Hill v Clifford*, *Clifford v Timms*, *Clifford v Phillips* [1907] 2 Ch 236, CA, per Cozens-Hardy MR (on appeal sub nom *Clifford v Timms*, *Clifford v Phillips* [1908] AC 12, 15, HL). A judgment in rem can have no effect as such, however, beyond the limits of the state within which the court delivering the judgment exercises jurisdiction, unless the thing affected is situated within those limits (see *Castrique v Imrie* (1870) LR 4 HL 414 at 435 per Blackburn J, citing *Novelli v Rossi* (1831) 2 B & Ad 757; and see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 162 et seq, 385 et seq) or the person affected is domiciled within them (see *Shaw v Gould* (1868) LR 3 HL 55; *Bonaparte v Bonaparte* [1892] P 402).

9 *R v Wick St Lawrence Inhabitants* (1833) 5 B & Ad 526 (settlement of pauper); *Noell v Wells and Page* (1668) 1 Lev 235; *Poulton v Adjustable Cover and Boiler Block Co* [1908] 2 Ch 430, CA. The decree of a probate court establishing a will, or the status of an administrator, although conclusive against all parties and in all courts until set aside, is not, as against persons who had no opportunity of intervening or upon whom a fraud had been practised in obtaining the decree, so far conclusive as to prevent their taking proceedings in the same court for revocation of the probate or the grant: see *Priestman v Thomas* (1884) 9 PD 210, CA; *Young v Holloway* [1895] P 87; *Ritchie v Malcolm* [1902] 2 IR 403; *Re Langton's Estate* [1964] P 163, sub nom *Re Langton*, *Langton v Lloyd's Bank Ltd* [1964] 1 All ER 749, CA (former procedure by citation and intervener); PARA 1194; and **EXECUTORS AND ADMINISTRATORS**.

10 *Minna Craig Steamship Co v Chartered Mercantile Bank of India, London and China* [1897] 1 QB 460, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(i) Finality of Judgments and Orders/B. CLASSIFICATION OF JUDGMENTS/(B) Judgments Determining Status/1160. Meaning of 'judgment in rem'.

(B) JUDGMENTS DETERMINING STATUS

1160. Meaning of 'judgment in rem'.

The term 'judgment in rem' has been judicially described as 'a specialised and somewhat misleading term of art limited to judgments concerned with status'¹. A judgment in rem may be defined as the judgment of a court of competent jurisdiction² determining the status of a person or thing, or the disposition of a thing, as distinct from the particular interest in it of a party to the litigation³. Apart from the application of the term to persons, it must affect the subject matter of the proceedings in the way of condemnation, forfeiture, declaration of status or title, or order for sale or transfer⁴.

1 See *Skyparks Group plc v Marks* [2001] EWCA Civ 319 at [46], [2001] All ER (D) 102 (Mar) per Robert Walker LJ.

2 *R v Hutchings* (1881) 6 QBD 300, CA.

3 *Castrique v Imrie* (1870) LR 4 HL 414; cf *Warren v Baring Bros & Co Ltd* (1910) 54 Sol Jo 720; *Lazarus-Barlow v Regent Estates Co Ltd* [1949] 2 KB 465 at 475, [1949] 2 All ER 118 at 122, CA, citing the meaning given in the text to this note.

4 *Fracis Times & Co v Carr* (1900) 82 LT 698, CA; revsd on other grounds sub nom *Carr v Fracis Times & Co* [1902] AC 176, HL. As to declarations of the status of highways see *R v St Pancras Inhabitants* (1794) Peake 220 (record of conviction on indictment against parish not repairing road conclusive evidence of liability of parish to repair); *Wakefield Corpn v Cooke* [1904] AC 31, HL (determination of court of summary jurisdiction that a street was a highway repairable by the inhabitants at large a judgment in rem). See also *The City of Mecca* (1881) 6 PD 106, CA (court had no jurisdiction to enforce judgment in personal action by proceedings in rem).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(i) Finality of Judgments and Orders/B. CLASSIFICATION OF JUDGMENTS/(B) Judgments Determining Status/1161. Examples of judgments in rem.

1161. Examples of judgments in rem.

The following are examples of judgments in rem: the judgment of a prize court condemning a vessel as prize¹; the judgment of an Admiralty court establishing a lien², or condemning a vessel in a claim (for example for the supply of goods) where there was no lien before the commencement of proceedings³, or disposing of the proceeds of a sale in enforcement of a lien⁴; the judgment of a probate court establishing a will or creating the status of administrator⁵; the judgment of a divorce court of competent jurisdiction dissolving or establishing a marriage⁶, or declaring the nullity of a marriage or affirming its existence⁷; the judgment on a parliamentary election petition⁸; a conviction for non-repair of a highway⁹; a determination of justices that a street was a highway repairable by the inhabitants at large¹⁰, establishing the status of the highway and the liability to repair; a determination that a path was subject to a public right of way¹¹; an order for revocation of a patent¹²; a sentence or order of expulsion or rustication from a college¹³ or deprivation of a living¹⁴. Condemnations in the old Court of Exchequer for breach of revenue laws¹⁵ and the order of justices for the removal of a poor person, establishing both his status and the place of his settlement¹⁶, were also examples of judgments in rem.

Upon the same principles it would seem that a bankruptcy order or an order of discharge in bankruptcy¹⁷, and an order for the dissolution of a company or an order declaring such a dissolution void¹⁸, are in the nature of judgments in rem¹⁹.

1 *Hughes v Cornelius* (1682) 2 Show 232; 2 Smith LC (13th Edn) 654; *Castrique v Imrie* (1870) LR 4 HL 414. As to the High Court's prize jurisdiction see **PRIZE** vol 36(2) (Reissue) PARA 837.

2 *Castrique v Imrie* (1870) LR 4 HL 414; *Simpson v Fogo* (1863) 1 Hem & M 195; *Ballantyne v Mackinnon* [1896] 2 QB 455, CA; cf *The City of Mecca* (1881) 6 PD 106, CA (foreign judgment in personam not enforceable against the ship by subsequent proceedings).

3 *The Cella* (1888) 13 PD 82, CA.

4 *Minna Craig Steamship Co v Chartered Mercantile Bank of India, London and China* [1897] 1 QB 460, CA.

5 *Noell v Wells and Page* (1668) 1 Lev 235; *Douglas v Cooper* (1834) 3 My & K 378; *Beardsley v Beardsley* [1899] 1 QB 746, approving the dictum of Sir C Cresswell in *Emberley v Trevanion* (1860) 4 Sw & Tr 197; *Concha v Concha* (1886) 11 App Cas 541, HL. See also PARA 1159 note 7. For a similar rule which is peculiar to the court's probate jurisdiction and not, strictly speaking, an instance of estoppel see *Re Langton's Estate* [1964] P 163, sub nom *Re Langton, Langton v Lloyd's Bank Ltd* [1964] 1 All ER 749, CA.

6 *Bater v Bater* [1906] P 209, CA. A decree of divorce, granted after trial by a competent court, puts an end to the status of marriage between the parties: see *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)* [1955] P 272, [1955] 3 All ER 129, CA; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 879.

7 *Bunting v Lepingwell* (1585) 4 Co Rep 29a; *Duchess of Kingston's Case* (1776) 2 Smith LC (13th Edn) 644; *Salvesen (or Von Lorang) v Austrian Property Administrator* [1927] AC 641, HL.

8 *Taunton Case, Waygood v James* (1869) LR 4 CP 361.

9 *R v St Pancras Inhabitants* (1794) Peake 220; *R v Haughton Inhabitants* (1853) 1 E & B 501.

10 See *Wakefield Corpn v Cooke* [1904] AC 31, HL, distinguishing *R v Hutchings* (1881) 6 QBD 300, CA. The determination in *Wakefield Corpn v Cooke* [1904] AC 31, HL, was made under the Private Street Works Act 1892

ss 7, 8 (repealed). Under the Highways Act 1980 the determination would be whether the path in question is a private street or a highway maintainable at the public expense: see s 208(1)(a); and **HIGHWAYS, STREETS AND BRIDGES**.

11 *Armstrong v Whitfield* [1974] QB 16, [1973] 2 All ER 546, DC; *LE Walwin & Partners Ltd v West Sussex County Council* [1975] 3 All ER 604.

12 *Poulton v Adjustable Cover and Boiler Block Co* [1908] 2 Ch 430, CA.

13 *R v Grundon* (1775) 1 Cowp 315.

14 *Philips v Bury* (1696) 1 Ld Raym 5; as to the effect of an order of the dental board (now the Professional Conduct Committee) removing the name of a dentist from the register cf *Hill v Clifford*, *Clifford v Timms*, *Clifford v Phillips* [1907] 2 Ch 236, CA; affd on other grounds sub nom *Clifford v Timms*, *Clifford v Phillips* [1908] AC 12, HL; and see PARA 1193.

15 *Scott v Shearman* (1775) 2 Wm Bl 977; *R v Matthews* (1797) 5 Price 202n; *Geyer v Aguilar* (1798) 7 Term Rep 681; *Hart v M'Namara* (1817) 4 Price 154n. A judgment of acquittal is a further example of a judgment in rem: see *Cooke v Sholl* (1793) 5 Term Rep 255; Buller's Nisi Prius 241.

16 *Uxbridge Union v Winchester Union* (1904) 91 LT 533, following *R v Corsham Inhabitants* (1809) 11 East 308; and *R v Township of Catterall* (1817) 6 M & S 83; *R v Hartington Middle Quarter Inhabitants* (1855) 4 E & B 780; and see *R v Kenilworth Inhabitants* (1788) 2 Term Rep 598. An order quashing an order of removal was conclusive only between the parties as to what it decided: *R v Wick St Lawrence Inhabitants* (1833) 5 B & Ad 526.

17 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 195 et seq, 692 et seq; cf *Re Bremner, ex p Harper* (1875) 10 Ch App 379.

18 See **COMPANY AND PARTNERSHIP INSOLVENCY**.

19 The former finding upon an inquisition of lunacy was also in the nature of a judgment in rem, although this was not conclusive in subsequent proceedings and could be traversed: see *Hill v Clifford*, *Clifford v Timms*, *Clifford v Phillips* [1907] 2 Ch 236, CA; on appeal sub nom *Clifford v Timms*, *Clifford v Phillips* [1908] AC 12, HL; and PARA 1193.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(i) Finality of Judgments and Orders/B. CLASSIFICATION OF JUDGMENTS/(B) Judgments Determining Status/1162. Judgments resembling judgments in rem.

1162. Judgments resembling judgments in rem.

A judgment is not a judgment in rem because it has, in a suit between parties, determined an issue concerning the status of a particular person or family¹. Nor, it seems, is a judgment determining that a sale of personal property was valid according to the law of the country where it was made and that the property had passed to the purchaser a judgment in rem².

The following have also been held not to be judgments in rem: a conviction in the old Court of Exchequer for penalties for adulteration³; a verdict in the divorce court, followed by the dismissal of the suit, effecting no change of status⁴; a conviction on an indictment for obstructing a highway⁵; a finding of magistrates, on a summons for payment of expenses⁶, that the street in question was a highway repairable by the inhabitants at large⁷; an order for the winding up of a company⁸; a coroner's inquisition⁹; and a judgment determining the status of premises under the Rent Acts¹⁰.

It has been held that the re-registration of the birth of a legitimated child¹¹ does not create *res judicata*¹², as the Registrar General, in authorising the re-registration, is not acting in a judicial capacity¹³.

1 *Katama Natchiar v Rajah of Shivagunga* (1863) 9 Moo Ind App 539, PC.

2 *Cammell v Sewell* (1860) 5 H & N 728, Ex Ch. The Court of Exchequer had held ((1858) 3 H & N 617) that the judgment of the Norwegian court was 'in the nature of' a judgment in rem, but the Exchequer Chamber declined to concur in this view, while affirming the judgment on the ground that the sale was governed by Norwegian law and therefore valid. As to the conclusiveness of foreign judgments see PARA 1189.

3 *Hart v M'Namara* (1817) 4 Price 154n; cf PARA 1161 the text and note 15 (condemnations of goods in that court).

4 *Needham v Bremner* (1866) LR 1 CP 583; cf *R v Wick St Lawrence Inhabitants* (1833) 5 B & Ad 526 (quashing an order for the removal of a pauper).

5 *Petrie v Nuttall* (1856) 11 Exch 569.

6 *Ie* under the Public Health Act 1875 s 150 (repealed). As to the recovery of the expenses of street works see now the Highways Act 1980 Pt XI (ss 203-237); and **HIGHWAYS, STREETS AND BRIDGES**.

7 *R v Hutchings* (1881) 6 QBD 300, CA, followed in *Scott v Lowe* (1902) 86 LT 421; cf *A-G for Trinidad and Tobago v Eriché* [1893] AC 518, PC; and see PARA 1161 the text and note 10.

8 *Ie* under the Insolvency Act 1986: see *Re Bowling and Welby's Contract* [1895] 1 Ch 663, CA; and **COMPANY AND PARTNERSHIP INSOLVENCY**.

9 *Bird v Keep* [1918] 2 KB 692, CA.

10 *Lazarus-Barlow v Regent Estates Co Ltd* [1949] 2 KB 465, [1949] 2 All ER 118, CA; and see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 808 et seq.

A custody order did not import a declaration of legitimacy binding in rem merely because the order was embodied in the same document as a decree of divorce: see *B v A-G* [1965] P 278, [1965] 1 All ER 62. Custody orders in family proceedings have now been replaced by residence orders and other orders under the Children Act 1989 s 8: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 247 et seq.

11 le under the Births and Deaths Registration Act 1953 s 14: see **REGISTRATION CONCERNING THE INDIVIDUAL**
vol 39(2) (Reissue) PARA 552 et seq.

12 As to the meaning of 'res judicata' see PARA 1154 note 4.

13 *Jones v Jones* (1929) 98 LJP 74.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(i) Finality of Judgments and Orders/B. CLASSIFICATION OF JUDGMENTS/(C) Judgments Determining Parties' Rights/1163. Meaning of 'judgment in personam' or 'judgment between parties'.

(C) JUDGMENTS DETERMINING PARTIES' RIGHTS

1163. Meaning of 'judgment in personam' or 'judgment between parties'.

Judgments which determine the rights of parties as between one another to or in respect of the subject matter in dispute, whether it be corporeal property of any kind whatever or a liquidated or unliquidated demand, but which do not affect the status of either persons or things, or make any disposition of property or declare or determine any interest in it except as between the parties litigant¹, may be referred to as 'judgments in personam' or 'judgments between parties'². All judgments which are not judgments in rem are in personam³. Some examples have been given⁴ of judgments which, although having some resemblance to judgments in rem, were only judgments between parties. Judgments in claims for conversion by wrongful detention of goods⁵ and recovery of land may also be mentioned; they determine rights of possession, and may (as does also the judgment on an interpleader issue) decide questions of title as between the parties; but none of them at all affects any interests which third parties may have in the subject matter. It may be added that as a judgment between parties, though binding between them, does not affect the rights of third parties, so neither does a sale by way of execution for giving effect to that judgment; it is only a disposition of the particular interest⁶.

1 *Castrique v Imrie*(1870) LR 4 HL 414; *Simpson v Fogo* (1863) 1 Hem & M 195.

2 See PARA 1158.

3 As to the meaning of 'judgment in rem' see PARA 1160.

4 See PARA 1162.

5 See *Brinsmead v Harrison*(1871) LR 6 CP 584; *affd* (1872) LR 7 CP 547, Ex Ch.

6 See *Castrique v Imrie*(1870) LR 4 HL 414.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(i) Finality of Judgments and Orders/B. CLASSIFICATION OF JUDGMENTS/(C) Judgments Determining Parties' Rights/1164. Estoppel arising on judgments between parties.

1164. Estoppel arising on judgments between parties.

The most usual manner in which questions of estoppel by record arise in respect of judgments between parties is where a party in an action or claim pleads that a matter in question in the current proceedings has already been determined by a court of competent jurisdiction in a previous action or claim between the current parties. A prior judgment may give rise to cause of action estoppel or issue estoppel¹. In order to prove cause of action estoppel it is necessary to show that the subject matter in dispute is the same, namely that everything that is in controversy in the second suit as the foundation of the claim for relief was also in controversy or open to controversy in the first suit²; while in order to prove issue estoppel it is necessary to show that an issue which arose in the previous proceedings has been raised in the current proceedings³.

The cause of action or the issue must have come in question before a court of competent jurisdiction⁴; the result must have been conclusive (or final) so as to bind every other court⁵; and the parties to the judicial decision or their privies must have been the same persons as the parties to the proceedings in which the estoppel is raised or their privies⁶.

1 As to cause of action estoppel and issue estoppel see further PARAS 1169, 1174 et seq.

2 *Hoystead v Taxation Comr* [1926] AC 155, PC; *Moss v Anglo-Egyptian Navigation Co* (1865) 1 Ch App 108 (explaining *Brandlyn v Ord* (1738) 1 Atk 571); *Behrens v Sieveking* (1837) 2 My & Cr 602; *Re Hilton, ex p March* (1892) 67 LT 594; *Worman v Worman* (1889) 43 ChD 296, following *Henderson v Henderson* (1843) 3 Hare 100; *Humphries v Humphries* [1910] 2 KB 531, CA; *Re Surfleet's Estate, Rawlings v Smith* (1911) 105 LT 582; *Bradshaw v McMullan* [1920] 2 IR 412, HL; *Re Waring, Westminster Bank v Burton-Butler* [1948] Ch 221, [1948] 1 All ER 257 (Court of Appeal decision remained binding on actual party, although held to have been wrong by the House of Lords in a subsequent case); *Patchett v Sterling Engineering Co Ltd* (1953) 71 RPC 61, CA; revsd on appeal on other grounds sub nom *Sterling Engineering Co Ltd v Patchett* [1955] AC 534, [1955] 1 All ER 369, HL; and see PARA 1183. A decision relating to an assessment to tax in one year does not create an estoppel binding upon the parties in relation to an assessment to tax in another year, as the question in each year is different: see *Edwards v Old Bushmills Distillery Co Ltd* (1926) 10 TC 285, HL (income tax); *Broken Hill Pty Co v Broken Hill Municipal Council* [1926] AC 94, PC (rating valuations); *IRC v Sneath* [1932] 2 KB 362, CA (the former surtax); *Society of Medical Officers of Health v Hope (Valuation Officer)* [1960] AC 551, [1960] 1 All ER 317, HL (decision that body is exempt for rating purposes in one year's valuation list creates no estoppel in respect of later year's list); *Hood Barrs v IRC (No 3)* [1960] TR 113, CA; *Caffoor (Trustees of the Abdul Caffoor Trust) v Income Tax Comr, Colombo* [1961] AC 584, [1961] 2 All ER 436, PC (exemption of trust income from income tax); cf *IRC v Brooks* [1915] AC 478, HL. See also *Re Koenigsberg, Public Trustee v Koenigsberg* [1949] Ch 348, [1949] 1 All ER 804, CA, commenting on *Hoystead v Taxation Comr* [1926] AC 155, PC; *Matuszczyk v National Coal Board* 1955 SLT 101 (action for damages for injury from accident brought on grounds of common law duty precluded second action in respect of the same accident alleging breach of statutory duty); *Mills v Cooper* [1967] 2 QB 459, [1967] 2 All ER 100, DC (justices not estopped by decision that a man was not a gypsy in December 1965 from holding that in March 1966 he was a gypsy); *Public Trustee v Kenward* [1967] 2 All ER 870, [1967] 1 WLR 1062; cf *Vernon v IRC* [1956] 3 All ER 14, [1956] 1 WLR 1169 (Attorney General not estopped from denying charitable nature of scheme merely because he agreed to the making of an order in earlier proceedings that a scheme should be set up).

3 *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853, [1966] 2 All ER 536, HL, per Lord Guest; *DSV Silo- und Verwaltungsgesellschaft mbH v Owners of the Sennar, The Sennar* [1985] 2 All ER 104, [1985] 1 WLR 490, HL. As competition proceedings before the EC Commission are administrative rather than judicial and, therefore, cannot be described in English terminology as civil proceedings between the complainant and the investigatee, it cannot be said that issue estoppel arises in a national case between the same parties; however, it is not right that national courts and Community institutions should both independently determine a case where there is a possibility that they might reach different conclusions; English

courts must therefore take all reasonable steps to avoid or reduce the risk of drawing conclusions which are inconsistent with decisions of the Commission: *Iberian UK Ltd v BPB Industries plc* [1996] 2 CMLR 601, [1997] ICR 164. As to parties and privies see PARA 1196.

4 *A-G for Trinidad and Tobago v Eriché* [1893] AC 518, PC; *Eastwood and Holt v Studer* (1926) 31 Com Cas 251; *IRC v Sneath* [1932] 2 KB 362, CA. A judgment of a court which has no jurisdiction to pronounce it is void and cannot give rise to estoppel: see PARA 1170. The court may be a private tribunal, such as an arbitrator, whose forum is a domestic one constituted by the parties themselves: *IRC v Sneath* [1932] 2 KB 362, CA; and see *Re Dances Way, West Town, Hayling Island* [1962] Ch 490, [1962] 2 All ER 42, CA (Chief Land Registrar's decision to delete a note of an exception and reservation of a right of way held not to be a final determination giving rise to an estoppel as to the construction of the exception and reservation). The plea of *res judicata* is available in prize if the necessary conditions exist: *The Annie Johnson* (1921) 91 LJP 64, PC. As to prize cases see PARA 1192.

5 *Behrens v Sieveking* (1837) 2 My & Cr 602; *Eastwood and Holt v Studer* (1926) 31 Com Cas 251; *Bradshaw v McMullan* [1920] 2 IR 412, HL.

6 As to privies see eg PARAS 1155 note 5, 1196-1198.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(i) Finality of Judgments and Orders/C. LIBERTY TO APPLY/1165. Liberty to apply.

C. LIBERTY TO APPLY

1165. Liberty to apply.

The circumstances or the nature of a judgment or order often render necessary subsequent applications to the court for assistance in working out the rights declared. All orders of the court carry with them inherent liberty to apply to the court¹, and there is no need to reserve expressly such liberty in the case of orders which are not final². Where in the case of a final judgment the necessity for subsequent application is foreseen, it is usual to insert in the judgment words expressly reserving liberty to any party to apply to the court as he may be advised³. The judgment is not thereby rendered any the less final; the only effect of the declaration is to permit persons having an interest under the judgment to apply to the court touching their interest in a summary way without again setting the case down⁴. It does not enable the court to deal with matters which do not arise in the course of working out the judgment⁵, or to vary the terms of the order except possibly on proof of change of circumstances⁶. Should the declaration be omitted, application may be made to have the judgment rectified by inserting it⁷. It will not, however, be made or implied in favour of a defendant as against whom the claim has been dismissed for any other purpose than for enforcing the terms of the order⁸, nor in favour of a claimant whose cause of action disappeared before trial but who fears that the circumstances giving rise to the cause of action may recur⁹.

1 *Fritz v Hobson*(1880) 14 ChD 542, following *Viney v Chaplin* (1858) 3 De G & J 282; *Chandless-Chandless v Nicholson*[1942] 2 KB 321, [1942] 2 All ER 315, CA. See also *Practice Direction*[1980] 1 All ER 1008, [1980] 1 WLR 322.

2 *Penrice v Williams*(1883) 23 ChD 353. A judgment for an amount to be ascertained on taking an account implies liberty to apply: *Light v William West & Sons Ltd*[1926] 2 KB 238, CA. See also *Practice Direction*[1980] 1 All ER 1008, [1980] 1 WLR 322. Orders in the Family Division relating to residence, contact and maintenance are not final, and liberty to apply is not normally inserted in such an order.

3 *Kevan v Crawford*(1877) 6 ChD 29, CA; *Pawley v Pawley*[1905] 1 Ch 593.

4 *Bund v Green* [1875] WN 213. For an example of an order in the 'Tomlin' form staying proceedings on terms with liberty to apply to enforce the terms see *The Chancery Guide* (2005 Edn) para 9.16.

5 *Poisson and Woods v Robertson and Turvey* (1902) 50 WR 260, CA.

6 *Cristel v Cristel*[1951] 2 KB 725, [1951] 2 All ER 574, CA.

7 As to rectifying judgments see PARA 1144.

8 *Huntley v Link* (1881) 26 Sol Jo 59.

9 *Carr & Co v Bath Gas Light and Coke Co* (1899) [1900] WN 265n; *Dunning v Grosvenor Dairies Ltd* [1900] WN 265.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(ii) Abuse of Process and the Rule in *Henderson v Henderson*/1166. Re-litigation and abuse of process.

(ii) Abuse of Process and the Rule in *Henderson v Henderson*

1166. Re-litigation and abuse of process.

The law discourages re-litigation of the same issues except by means of an appeal¹. It is not in the interests of justice that there should be re-trial of a case which has already been decided by another court, leading to the possibility of conflicting judicial decisions, or that there should be collateral challenges to judicial decisions; there is a danger, not only of unfairness to the parties concerned, but also of bringing the administration of justice into disrepute². The principles of res judicata, issue estoppel and abuse of process have been used to address this problem³.

1 *Arthur JS Hall v Simons, Barratt v Ansell (t/a Seddon (a firm)), Harris v Scholfield Roberts & Hill (a firm)* [2000] 3 All ER 673 at 701, HL, per Lord Hoffmann. As to appeals see PARA 1657 et seq.

2 See *Rondel v Worsley*[1969] 1 AC 191 at 251, [1967] 3 All ER 993 at 1013, HL, per Lord Morris of Borth-y-Gest; *Saif Ali v Sydney Mitchell & Co (a firm) (P, third party)*[1980] AC 198 at 222-223, [1978] 3 All ER 1033 at 1045, HL, per Lord Diplock; *Arthur JS Hall v Simons, Barratt v Ansell (t/a Seddon (a firm)), Harris v Scholfield Roberts & Hill (a firm)*[2000] 3 All ER 673 at 700-703 and 706, HL, per Lord Hoffmann.

3 See eg *Hunter v Chief Constable of West Midlands*[1982] AC 529, [1981] 3 All ER 727 (abuse of process). As to the rules relating to res judicata see PARA 1168 et seq; as to issue estoppel see PARAS 1169, 1179 et seq; and as to abuse of process see further PARA 534.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(ii) Abuse of Process and the Rule in *Henderson v Henderson*/1167. The rule in *Henderson v Henderson*.

1167. The rule in *Henderson v Henderson*.

Where a case does not fall within the rules relating to res judicata¹, the court may still exercise its discretion under its general inherent jurisdiction to prevent litigation that amounts to abuse of process² so as to stop a party from raising an issue which was or could have been determined in earlier proceedings. The rule in *Henderson v Henderson*³ has been described as being essentially part of the court's wider jurisdiction for striking claims out as an abuse of process⁴, and as a form of issue estoppel⁵. Although the rule as now understood is separate and distinct from cause of action estoppel and issue estoppel, it has much in common with them and the underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter⁶.

The rule provides that a claimant is barred from litigating a claim that has already been adjudicated upon or which could and should have been brought before the court in earlier proceedings arising out of the same facts⁷. Parties are expected to bring their whole case to the court and will in general not be permitted to re-open the same litigation in respect of a matter which they might have brought forward but did not, whether from negligence, inadvertence or even accident⁸. The abuse in question need not involve the re-opening of a matter already decided in proceedings between the same parties, but may cover issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow new proceedings to be started in respect of them⁹. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive¹⁰; the question is whether in all the circumstances a party's conduct is an abuse¹¹.

The scope of the rule has been extended to claims where there has been a settlement rather than a judgment or a consent order¹².

1 As to the rules relating to res judicata see PARA 1168 et seq.

2 As to abuse of process see further PARA 534.

3 See *Henderson v Henderson* (1843) 3 Hare 100.

4 See *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, PC; *Brisbane City Council v A-G for Queensland* [1979] AC 411, [1978] 3 All ER 30, PC; and see PARA 534. Lord Hailsham of St Marylebone LC described the rule as 'both a rule of public policy and an application of the law of res judicata': *Vervaeke v Smith* [1983] 1 AC 145 at 157, [1982] 2 All ER 144 at 152, HL. See also *Barrow v Bankside Members Agency Ltd* [1996] 1 All ER 981 at 983, [1996] 1 WLR 257 at 260, CA. The rule may also be seen as an aspect of the court's power to restrict vexatious civil proceedings, as to which see PARA 258.

5 As to issue estoppel see PARAS 1169, 1179 et seq.

6 *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at 31, [2001] 1 All ER 481 at 498-499, HL, per Lord Bingham of Cornhill.

7 *Henderson v Henderson* (1843) 3 Hare 100. See also *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, [2001] 1 All ER 481, HL; and see eg *Watson v Irwin Mitchell (a firm)* [2009] EWHC 441 (QB), [2009] All ER (D) 113 (Mar) (applying *Henderson v Henderson* (1843) 3 Hare 100 and *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, [2001] 1 All ER 481, HL).

8 *Henderson v Henderson* (1843) 3 Hare 100.

9 *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257, CA, per Somervell LJ; *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at 23, [2001] 1 All ER 481 at 491, HL, per Lord Bingham of Cornhill (note that much of the recent case law on abuse of process was considered in this case). See also *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, PC; *Brisbane City Council v A-G for Queensland* [1979] AC 411, [1978] 3 All ER 30, PC; *Hunter v Chief Constable of West Midlands* [1982] AC 529, [1981] 3 All ER 727, HL; *Vervaeke v Smith* [1983] 1 AC 145, [1982] 2 All ER 144, HL; *Ashmore v British Coal Corp* [1990] 2 QB 338, [1990] 2 All ER 981, CA; *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241, [1990] 2 All ER 990, CA; *Arnold v National Westminster Bank plc* [1991] 2 AC 93, [1991] 3 All ER 41, HL; *Talbot v Berkshire County Council* [1994] QB 290, [1993] 4 All ER 9, CA; *C (a minor) v Hackney London Borough Council* [1996] 1 All ER 973, [1996] 1 WLR 789, CA; *Barrow v Bankside Members Agency Ltd* [1996] 1 All ER 981, [1996] 1 WLR 257, CA; *Manson v Vooght* [1999] BPIR 376, [1998] All ER (D) 531, CA; *Bradford & Bingley Building Society v Seddon* [1999] 4 All ER 217, [1999] 1 WLR 1482, CA.

See further *Dexter Ltd (in administrative receivership) v Vlieland-Boddy* [2003] EWCA Civ 14, [2003] All ER (D) 221 (Jan), where at [49] Peter Gibson LJ summarised the principles to be derived from the authorities:

- 93 (1) where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process;
- 94 (2) a later action against B is much more likely to be held to be an abuse of process than a later action against C;
- 95 (3) the burden of establishing abuse of process is on B or C or as the case may be;
- 96 (4) it is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive;
- 97 (5) the question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process;
- 98 (6) the court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C.

10 *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at 31, [2001] 1 All ER 481 at 499, HL, per Lord Bingham of Cornhill. See note 9 head (4).

11 *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at 31, [2001] 1 All ER 481 at 499, HL, per Lord Bingham of Cornhill.

12 See *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, [2001] 1 All ER 481, HL. See also *Dexter Ltd (in administrative receivership) v Vlieland-Boddy* [2002] EWHC 1561 (Ch), [2002] All ER (D) 376 (Jul); affd [2003] EWCA Civ 14, [2003] All ER (D) 221 (Jan) (earlier claim set aside for want of jurisdiction; further claim not an abuse of process). As to offers to settle see PARA 115 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/A. ESTOPPEL BY RECORD/1168. Origin of term 'estoppel by record'.

(iii) Res Judicata

A. ESTOPPEL BY RECORD

1168. Origin of term 'estoppel by record'.

Under the doctrine of res judicata¹, a matter that has been adjudicated on by a competent court cannot be re-litigated²; thus a form of estoppel known as 'estoppel by record' arises when a judgment has been given which is a matter of record, principally matters appearing on the records of courts of law³. Estoppel by record may now arise whether or not the judicial decision in question has been pronounced by a tribunal that is required to keep a written record of its decisions⁴.

The rationale for the existence of estoppel by record can be summed up in two expressions, that it is in the public interest that there should be an end of litigation⁵, and that no one should be proceeded against twice for the same cause⁶. It accords with the first of these expressions that a party relying on estoppel by record should be able to show that the matter has been determined by a court of competent jurisdiction⁷ in a judgment which is final⁸.

1 As to the term 'res judicata' see PARA 1154 note 4.

2 See *Ord v Ord*[1923] 2 KB 432 at 439; and see also eg *Arthur JS Hall v Simons, Barratt v Ansell (t/a Seddon (a firm)), Harris v Scholfield Roberts & Hill (a firm)*[2000] 3 All ER 673 at 701, HL, per Lord Hoffmann.

3 As to courts of record and courts not of record see 3 BI Com (14th Edn) 24-25, 30 et seq; 4 BI Com (14th Edn) 258 (criminal courts); **COURTS** vol 10 (Reissue) PARA 308. As to the conclusiveness of such records see also Co Litt 260a, cited by Lord Tenterden CJ in *R v Carlile* (1831) 2 B & Ad 362 at 367-368; 3 BI Com (14th Edn) 24.

A number of matters were enumerated by Lord Coke as matters of record giving rise to an estoppel including, among others which are obsolete, letters patent, pleadings and warrants of attorney: Co Litt 352a.

4 As to estoppel arising from judgments and decisions not made by courts of record see PARA 1184 et seq.

5 *le 'interest reipublicae ut sit finis litium'*. Parties involved in litigation have a duty to put before the court all the issues relevant to that litigation: see *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528, [2002] 2 All ER 353.

6 *le 'nemo debet bis vexari pro una et eadem causa'*.

7 See PARA 1170.

8 *Langmead v Maple* (1865) 18 CBNS 255; *Massam v Thorley's Cattle Food Co*(1880) 14 ChD 748, CA; *Badar Bee v Habib Merican Noordin*[1909] AC 615, PC; and see *Pitt v Hill and Broadway* (1673) Cas temp Finch 70; *Temple v Viscountess Baltinglass* (1677) Cas temp Finch 275; *Brunsdon v Humphrey*(1884) 14 QBD 141, CA. It is on this principle that no claim may be brought to recover money paid under a judgment which has not been set aside, or for maliciously and without probable cause setting the law in motion while a judgment against the party complaining stands unreversed: see *Huffer v Allen*(1866) LR 2 Exch 15; cf *Wildes v Russell*(1866) LR 1 CP 722; *Bynoe v Bank of England*[1902] 1 KB 467, CA (following *Basébé v Matthews*(1867) LR 2 CP 684; *Vanderbergh v Blake* (1662) Hard 194; *Castrique v Behrens* (1861) 3 E & E 709; and applied in *Turley v Daw* (1906) 94 LT 216); cf *Huddleston v Asbugg* (1675) Cas temp Finch 204. A decree for foreclosure is a bar to proceedings for redemption: *Mallock v Galton* (1735) 1 Dick 65; cf *Ford v Tynte* (1864) 10 LT 93. For cases in which an interim judgment intended finally to determine rights has been allowed to have the effect of res judicata (ie a final decision) see PARA 1184 note 12. See also *Buehler AG v Chronos Richardson Ltd*[1998] 2 All ER 960, [1998] RPC 609 (no cause of action estoppel arising from decision of Opposition Division of European

Patent Office since under the European Patent Convention the national courts have exclusive jurisdiction over revocation proceedings, and therefore validity is finally decided by those courts). See further PARA 1156.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/A. ESTOPPEL BY RECORD/1169. Where estoppel by record arises.

1169. Where estoppel by record arises.

Estoppel by record, also known as estoppel per rem judicatam, arises:

- 823 (1) where an issue of fact has been judicially determined in a final manner between the parties by a tribunal having jurisdiction¹, concurrent or exclusive, in the matter, and the same issue comes directly in question in subsequent proceedings between the same parties (this is known as 'cause of action estoppel')²;
- 824 (2) where the first determination was by a court having exclusive jurisdiction, and the same issue comes incidentally in question in subsequent proceedings between the same parties³ (this is known as 'issue estoppel')⁴;
- 825 (3) in some cases⁵ where an issue of fact affecting the status of a person or thing has been necessarily⁶ determined in a final manner as a substantive part⁷ of a judgment of a tribunal having jurisdiction to determine that status⁸, and the same issue comes directly in question in subsequent civil or criminal proceedings⁹ between any parties whatever.

It has been held that issue estoppel applies only to the issues actually determined in the earlier proceedings and does not extend to issues which the parties, by exercising reasonable diligence, could have raised in those proceedings¹⁰, whereas cause of action estoppel applies in respect of all claims or defences which the parties by exercising reasonable diligence could have brought forward in those proceedings¹¹. The latter proposition has, however, been held to have no application in the case of a default judgment¹²; and the practical effect of the former may be diminished by the duty of parties who are involved in litigation to put before the court all the issues relevant to that litigation¹³. Issue estoppel cannot arise where a party has come into possession of fresh evidence which brings into question the findings in the earlier proceedings¹⁴ but cause of action estoppel may arise notwithstanding such fresh evidence¹⁵.

A change in the law between the date of the earlier and later proceedings cannot prevent a party from raising a cause of action estoppel but may prevent a party from raising an issue estoppel depending on the circumstances¹⁶.

Estoppel by record does not operate according to the ordinary principles in matrimonial and family proceedings. Under the Matrimonial Causes Act 1973, on a petition for divorce it is the duty of the court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent¹⁷ and it has been said that estoppels bind the parties but do not bind the court¹⁸. Strict application of the doctrine of estoppel by record is inappropriate in proceedings under the Children Act 1989¹⁹.

1 Lack of jurisdiction deprives the judgment of any effect, whether by estoppel or otherwise: *Rogers v Wood* (1831) 2 B & Ad 245 (decree of court unknown to the law composed of some members of the Court of Exchequer and other distinguished persons); *Archbishop of Dublin v Lord Trimleston* (1849) 12 I Eq R 251. The court must have proceeded to final judgment: see PARA 1156. The finality of a judgment is not affected by the fact that an appeal may be brought (*Huntly v Gaskell* [1905] 2 Ch 656, CA) or is actually pending (*Harris v Willis* (1855) 15 CB 710) but the judgment of a lower court will only give rise to an estoppel if it was open to appeal (*Concha v Concha* (1886) 11 App Cas 541, HL). As to appeals in civil proceedings see generally PARA 1657 et seq. As to issue estoppel (see head (2) in the text) arising from an interim decision of a foreign court on a

procedural issue see *Desert Sun Loan Corpn v Hill* [1996] 2 All ER 847, CA. No cause of action or issue estoppel can arise from a decision of the Opposition Division of the European Patent Office because the final decision as to the validity of any patent it has granted rests with the courts of the contracting states to the European Patent Convention: *Buehler AG v Chronos Richardson Ltd* [1998] 2 All ER 960, [1998] RPC 609, CA. There is no estoppel by record in cases of dismissal for want of prosecution: *Pople v Evans* [1969] 2 Ch 255, [1968] 2 All ER 743.

2 As to cause of action estoppel see PARA 1174 et seq. As to merger of the cause of action in the judgment see PARAS 1157, 1190.

3 *Duchess of Kingston's Case* (1776) 2 Smith LC (13th Edn) 644; *Mackintosh v Smith and Lowe* (1865) 4 Macq 913, HL.

4 As to issue estoppel see PARA 1179 et seq.

5 See *Hill v Clifford*, *Clifford v Timms*, *Clifford v Phillips* [1907] 2 Ch 236, CA.

6 *R v Hartington Middle Quarter Inhabitants* (1855) 4 E & B 780; *Concha v Concha* (1886) 11 App Cas 541, HL, affg *De Mora v Concha* (1885) 29 ChD 268, CA. *R v Hartington Middle Quarter Inhabitants* (1855) 4 E & B 780 was doubted by Lord Selborne LC in *R v Hutchings* (1881) 6 QBD 300 at 303, CA, but it appears to be well established: see *Wakefield Corpn v Cooke* [1903] 1 KB 417, CA; affd [1904] AC 31, HL.

7 *R v Hartington Middle Quarter Inhabitants* (1855) 4 E & B 780; *Hobbs v Henning* (1865) 17 CBNS 791 (foreign judgment in rem). As to foreign judgments see PARAS 899, 1189.

8 Is a judgment in rem: see PARA 1160.

9 *Armstrong v Whitfield* [1974] QB 16, [1973] 2 All ER 546, DC (a decision in civil proceedings that a lane was subject to a public right of way estopped a party charged in later criminal proceedings with wilfully obstructing a highway from calling evidence to show that there was no public right of way); cf *Murphy v Culhane* [1977] QB 94, [1976] 3 All ER 533, CA (a conviction for manslaughter did not prevent the defences of *ex turpi causa non oritur actio* and *volenti non fit injuria* being raised in a subsequent civil action (now known as a 'claim': see PARA 18) brought by the widow of the deceased).

10 See *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, [1966] 2 All ER 536 HL.

11 See *Henderson v Henderson* (1843) 3 Hare 100.

12 *New Brunswick Rly Co v British & French Trust Corpn Ltd* [1939] AC 1, HL.

13 As to that duty see *Taylor v Lawrence* [2002] EWCA Civ 90 at [6], [2003] QB 528 at [6], [2002] 2 All ER 353 at [6] per Lord Woolf CJ. See also *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, [2001] 1 All ER 481, HL.

14 See *McIlkenny v Chief Constable of West Midlands Police Force* [1980] QB 283 at 320, [1980] 2 All ER 227; affd sub nom *Hunter v Chief Constable of West Midlands Police* [1982] AC 529, [1981] 3 All ER 727, HL.

15 See *Workington Harbour Board v Trade Indemnity Co (No 2)* [1938] 2 All ER 101, HL.

16 See *Arnold v National Westminster Bank plc* [1991] 2 AC 93, [1991] 3 All ER 41, HL.

17 See the Matrimonial Causes Act 1973 s 1(3) (prospectively repealed); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 348.

18 See *Thompson v Thompson* [1957] P 19, [1957] 1 All ER 161, CA. As to estoppels in ancillary relief proceedings see *Porter v Porter* [1971] P 282, [1971] 2 All ER 1037.

19 See *K v P (Children Act proceedings: estoppel)* [1995] 2 FCR 457, [1995] 1 FLR 248; *Re S (minors) (care orders: appeal out of time)* [1996] 2 FCR 838, sub nom *Re S (minors) (discharge of care order)* [1995] 2 FLR 639, CA; *Re L (minors) (care proceedings: issue estoppel)* [1996] 1 FCR 221, sub nom *Re S, S and A (care proceedings: issue estoppel)* [1995] 2 FLR 244. See also *Re B (minors) (care proceedings: issue estoppel)* [1997] Fam 117, sub nom *Re B (minors) (care proceedings: evidence)* [1997] 2 All ER 29.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/A. ESTOPPEL BY RECORD/1170. Court must have jurisdiction to pronounce judgment.

1170. Court must have jurisdiction to pronounce judgment.

In order that estoppel by record may arise out of a judgment the court which pronounced the judgment must have had jurisdiction to do so¹; lack of jurisdiction deprives the judgment of any effect, whether by estoppel or otherwise². This rule applies even where the party alleged to be estopped himself sought the assistance of the court whose jurisdiction is impugned³. The absence of a condition necessary to found the jurisdiction to make an order or give a decision deprives the order or decision of any conclusive effect⁴. It is otherwise where the order is good on its face and the court adjudicating has jurisdiction to determine the existence or not of the condition necessary to confer jurisdiction, and the party denying its existence has neglected his opportunity of raising the objection at the hearing⁵.

1 Cf *Rosenfeld v Newman* [1953] 2 All ER 885, [1953] 1 WLR 1135, CA. A decision of a superior court of record remains binding until set aside; the concepts of void and voidable are inapplicable: *Isaacs v Robertson* [1985] AC 97, [1984] 3 All ER 140, PC; *IRC v Hoogstraten* [1985] QB 1077, [1984] 3 All ER 25, CA.

2 *Rogers v Wood* (1831) 2 B & Ad 245 (decree of court unknown to the law composed of some members of the Court of Exchequer and other distinguished persons); *Archbishop of Dublin v Lord Trimleston* (1849) 12 I Eq R 251.

3 *Toronto Rly Co v Toronto Corp* [1904] AC 809, PC; see and distinguish *Wright v London General Omnibus Co* (1877) 2 QBD 271; and see *Hines v Birkbeck College (No 2)* [1992] Ch 33, [1991] 4 All ER 450, CA (plaintiff's claim for wrongful dismissal by college struck out on ground that subject matter exclusively within jurisdiction of visitor; subsequent legislation conferred jurisdiction on court; plaintiff not estopped either from asserting that court now had jurisdiction or from suing again in that court). As to the effect of nomination of an unqualified arbitrator see *Oakland Metal Co Ltd v D Benaim & Co Ltd* [1953] 2 QB 261, [1953] 2 All ER 650; and PARA 1188. A 'plaintiff' is now known as a 'claimant': see PARA 18.

Thus a magistrate hearing a summons for the expenses of making up a new street under the Public Health Act 1875 s 150 (repealed) (see *R v Hutchings* (1881) 6 QBD 300, CA, followed in *Scott v Lowe* (1902) 86 LT 421 (decided under the Metropolis Management Act 1855 (largely repealed))); *Crown Estate Comrs v Dorset County Council* [1990] Ch 297, [1990] 1 All ER 19; and PARA 1162 text and notes 6-7) or for trespass to land (see *A-G for Trinidad and Tobago v Eriché* [1893] AC 518, PC), and having jurisdiction for that purpose, might dismiss the summons on the express ground in the one case that the street was repairable by the inhabitants, or in the other that the defendant had established a title to the property; but, although such a finding was embodied in the order as drawn up, it created no estoppel between the parties, for it related to a matter which the magistrate had no jurisdiction directly and immediately to adjudicate upon, being at most incidentally cognisable, so far only as necessary to his decision on the actual question submitted: cf *Dover v Child* (1876) 1 ExD 172 (magistrate's refusal to order delivery up of goods under the Metropolitan Police Courts Act 1839 s 40 (repealed) was not an adjudication on title which he had no jurisdiction to make).

4 *Reed v Nutt* (1890) 24 QBD 669 (certificate of dismissal of charge of assault without a hearing on the merits (Offences against the Person Act 1861 s 44) given without jurisdiction, and no bar (under s 45) to an action for the same cause); *Davis v Morton* [1913] 2 KB 479, DC; cf *Jungheim, Hopkins & Co v Foukelmann* [1909] 2 KB 948 (arbitrator lacking qualification which was a condition of his appointment); and see PARA 1188. The question of jurisdiction or no jurisdiction and its effect on estoppel is well illustrated by old compensation cases. The verdict of a jury assessing compensation under the Lands Clauses Consolidation Act 1845 s 50 (repealed), and the sheriff's signed judgment on it, was held to constitute a record. The parties were not, however, estopped in subsequent proceedings as to the right to compensation, whether it turned on the claimant's title to the property (*R v London and North Western Rly Co* (1854) 3 E & B 443), or on the question whether any damage had been occasioned by the execution of the works (*Read v Victoria Station and Pimlico Rly Co* (1863) 1 H & C 826), which matters the sheriff's jury had no jurisdiction to determine. When once it was determined, however, in an action on the judgment that any damage whatever had been sustained, that jury's verdict was conclusive between the parties as to the amount: *Barber v Nottingham Canal Co* (1864) 15 CBNS 726; *Read v Victoria Station and Pimlico Rly Co* (1863) 1 H & C 826. This procedure for assessing compensation

is obsolete; as to assessment by the Lands Tribunal see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq.

5 *River Ribble Joint Committee v Croston UDC* [1897] 1 QB 251.

Under the old practice demurrers were frequently allowed to pleas of res judicata on the ground that the pleas did not show that the court adjudicating had jurisdiction to do so: *Harris v Willis* (1855) 15 CB 710 (demurrer to plea of res judicata in Admiralty court); *Briscoe v Stephens* (1824) 2 Bing 213 (inferior court); see also *O'Grady v Synan* [1900] 2 IR 602, CA. The same principle has been applied where it has been sought to give effect, whether as a cause of action or a ground of defence, to foreign judgments: *Ferguson v Mahon* (1839) 11 Ad & El 179 (Irish judgment). As to international jurisdiction see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 142 et seq. See also PARA 1189.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/A. ESTOPPEL BY RECORD/1171. Judgment essential.

1171. Judgment essential.

The proceedings must have resulted in a final judgment or decree¹; a pending action without judgment creates no estoppel². Where a case has been commenced and subsequently an earlier case comes to judgment that earlier case can give rise to an estoppel in the later case³. However, where the verdict has been given in the earlier case but no judgment has yet been delivered the earlier case will not create an estoppel, the reason being that there is nothing to show that the verdict may not have been set aside, or that the court has not declined to act upon it⁴. Nor will a verdict which has come to judgment be admitted in evidence unless the judgment which is founded upon it is also proved⁵. In those divorce proceedings which can give rise to a plea of estoppel⁶ a decision, followed by decree nisi, is conclusive evidence in a subsequent suit between the same parties, even though the decree has been set aside on the intervention of the Queen's Proctor⁷, if this has been done on grounds outside the decision, and not affecting its correctness⁸.

The dismissal of a claim for want of prosecution is no bar to a new claim; it amounts to nothing⁹ and this is so where the dismissal is by consent, if there was no compromise of the cause of action¹⁰. However, a claimant who discontinues a claim now needs the court's permission to make another claim against the same defendant if he discontinued after a defence was filed and if the other claim arises out of the same, or substantially the same, facts as those relating to the discontinued claim¹¹.

1 *Jenkins v Robertson* (1867) LR 1 Sc & Div 117, HL; *Bradshaw v McMullan* [1920] 2 IR 412, HL; *Ellerman Lines Ltd v Read* (1927) 44 TLR 7 (on appeal [1928] 2 KB 144, CA). The withdrawal of a summons, not leading to an adverse adjudication, does not operate as an estoppel: see *Land v Land* [1949] P 405, [1949] 2 All ER 218, DC; and PARA 1184 note 8.

2 *Hitchin v Campbell* (1772) 2 Wm Bl 827. The pendency of another suit for the same cause might formerly be pleaded in abatement, however, not on the ground of estoppel, but for the prevention of vexatious litigation: see *Henry v Goldney* (1846) 15 M & W 494. The object is now attained by application to stay: see *McHenry v Lewis* (1882) 22 ChD 397, CA; and PARA 529 et seq. As to vexatious litigants see PARAS 244, 258; and as to the effect of the registration under the Land Charges Act 1972 of a pending action see **LAND CHARGES**.

It has been held that the record of the court's act on which the estoppel is founded must be forthcoming, or some valid reason given why it cannot be produced: *The Annie Johnson* (1921) 91 LJP 64, PC. However, estoppel by record may now arise whether or not the judicial decision in question has been pronounced by a tribunal that is required to keep a written record of its decisions: see PARA 1168.

3 *Re Defries, Norton v Levy* (1883) 48 LT 703; *Bell v Holmes* [1956] 3 All ER 449, [1956] 1 WLR 1359; *Morrison Rose & Partners v Hillman* [1961] 2 QB 266, [1961] 2 All ER 891, CA.

4 *O'Connor v Malone* (1839) 6 Cl & Fin 572, HL (verdict on an issue directed in a chancery suit); *Bancroft v Bancroft and Rumney* (1864) 3 Sw & Tr 597; cf *Robinson v Duleep Singh* (1878) 11 ChD 798, CA.

5 *Fitch v Smalbrook* (1661) T Raym 32; *Pitton v Walter* (1719) 1 Stra 162; *Fisher v Kitchingman* (1742) Willes 367; *Holt v Miers* (1839) 9 C & P 191; *Gillespie v Cumming* (1841) Long & T 181; *Jameson v Leitch* (1842) Milw 683. *Garland v Scoones* (1798) 2 Esp 647 and *Foster v Compton* (1818) 2 Stark 364, in which verdicts were admitted without proof of the judgments, can no longer be considered good law. A verdict was also inadmissible if founded on evidence which would have been inadmissible in the action in which such verdict was intended to be proved: *Stoate v Stoate* (1861) 2 Sw & Tr 223. As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see PARA 1132.

6 See PARA 1178.

7 A finding of adultery in a decree nisi is not res judicata (ie finally determined) so as to prevent its being questioned by the court on an intervention by the Queen's Proctor alleging that the decree nisi was pronounced contrary to the justice of the case eg on false evidence: *Chalmers v Chalmers* [1930] P 154; and see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARAS 353, 357.

8 *Butler v Butler* [1894] P 25, CA (applying *Conradi v Conradi* (1868) LR 1 P & D 514); *Hopkins v Hopkins and Castle* (1933) 78 Sol Jo 64; cf *Waters v Waters* (1848) 2 De G & Sm 591. Cf PARA 1178.

9 *Byrne v Frere* (1828) 2 Mol 157; cf *Re Hampshire Co-operative Milk Co Ltd, Purcell's Case* (1880) 29 WR 170; *Pople v Evans* [1969] 2 Ch 255, [1968] 2 All ER 743.

10 *Magnus v National Bank of Scotland* (1888) 57 LJ Ch 902. Cf the old practice in Chancery of dismissing a bill without prejudice to the plaintiff's right to sue at law: see *Seymour v Nosworthy* (1670) 1 Cas in Ch 155; *Rochester Corp'n v Lee* (1849) 1 Mac & G 467; *Langmead v Maple* (1865) 18 CBNS 255; cf *Collins v Cave* (1858) 27 LJ Ex 146 (bill dismissed for want of equity); *Peters v Tilly* (1886) 11 PD 145 (failure of probate action for want of evidence of contents of will). The acceptance of money paid into court creates no res judicata, and the parties are not precluded from re-opening the matters in dispute, except so far as regards the damages for the particular cause of action in respect of which it is paid in: *Coote v Ford* [1899] 2 Ch 93, CA; and see PARA 1207. The discharge of a jury without finding on an issue submitted to it will not prevent the same issue being litigated again (*Carnegie v Carnegie* (1886) 17 LR Ir 430, CA; *R v Charlesworth* (1861) 1 B & S 460 (prosecution for misdemeanour); and see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1272-1275). The withdrawal of a juror does not even put a legal end to the actual litigation: *Thomas v Exeter Flying Co* (1887) 18 QBD 822. As to trial by judge and jury in civil proceedings see note 5.

11 See CPR 38.7; and PARA 728.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/A. ESTOPPEL BY RECORD/1172. Judgment by consent or by default.

1172. Judgment by consent or by default.

A judgment which would be final if it resulted from judicial decision after a contest is not prevented from being so by the fact that it was obtained by consent¹ or by default² provided the party against whom it is set up was under no disability³; but the efficacy of a judgment so obtained is strictly limited⁴.

Under the previous civil procedure, where the former judgment was a judgment by default, and the plaintiff had served no pleading, the estoppel was limited to what appeared on the face of the judgment itself⁵. On the same principle, a defendant who had consented to judgment before service of any pleading was not estopped as against the plaintiff from subsequently setting up matters which might have constituted a defence, because they had never been in issue⁶; but it was otherwise with a defendant who had consented to judgment after pleading in his defence the matters which he sought to set up in the later proceedings⁷. The extent to which these principles will now apply in civil proceedings where the claimant has served a claim form but no particulars of claim, or the defendant has consented to judgment before service of a defence, is uncertain⁸.

1 *Re South American and Mexican Co, ex p Bank of England* [1895] 1 Ch 37, CA; *Allason v Stark* (1838) 9 Ad & El 255; *Williams v St George's Harbour Co* (1858) 2 De G & J 547; *Bradshaw v McMullan* [1920] 2 IR 412, HL; *Stephens & Co v Allen* (1921) 126 LT 458, PC; *Cohen v Jonesco* [1926] 1 KB 119 (on appeal [1926] 2 KB 1, CA); *Kinch v Walcott* [1929] AC 482, PC; *B (MAL) v B (NE)* [1968] 1 WLR 1109; *Palmer v Durnford Ford (a firm)* [1992] QB 483, [1992] 2 All ER 122; and see *Bowden v Beauchamp* (1740) 2 Atk 81; *Burke v Crosbie* (1811) 1 Ball & B 489.

2 *Huffer v Allen* (1866) LR 2 Exch 15; *Re South Essex Estuary Co, ex p Chorley* (1870) LR 11 Eq 157; and see the cases cited in PARA 1183 note 4. As to the effect of dismissal for want of prosecution see PARA 1171.

3 Where a minor is a party to proceedings before the court, it is the interposition of the court, charged with the duty to watch over his interests, that lends sanctity to a judgment for or against the minor: see *Arabian v Tufnall and Taylor Ltd* [1944] KB 685, [1944] 2 All ER 317. As to the court's jurisdiction to approve compromises on behalf of minors see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARAS 1422-1423.

It has been held that a judgment by consent or by default cannot give validity to a contract which is outside the objects of a corporation (ie which is ultra vires), where the legality of that contract has not been an issue in the case and the lack of capacity of the company depends on facts which have not been disclosed: *Great North-West Central Rly Co v Charlebois* [1899] AC 114, PC; *Re Jon Beauforte (London) Ltd* [1953] Ch 131, [1953] 1 All ER 634 (judgment on contract ultra vires a company not inviolable); *A-G v Dublin Corp'n* (1841) 1 Dr & War 545. The validity of an act done by a company may not, however, now be called into question on the ground of lack of capacity by reason of anything in the company's memorandum: see the Companies Act 1985 s 35(1); and **COMPANIES** vol 14 (2009) PARA 265.

As to the effect of the ultra vires doctrine on the raising of an estoppel by representation see **ESTOPPEL** vol 16(2) (Reissue) PARA 1053; and see **EQUITY** vol 16(2) (Reissue) PARA 774.

4 See *New Brunswick Rly Co v British and French Trust Corp'n Ltd* [1939] AC 1, [1938] 4 All ER 747, HL; and PARAS 1183, 1194.

5 *Irish Land Commission v Ryan* [1900] 2 IR 565, CA. The indorsement on the writ in this case was in fact a special indorsement (ie the statement of claim was indorsed on the writ). Having regard to *Cribb v Freyberger* [1919] WN 22, CA, the principle enunciated in the text must be limited to cases in which the writ was not specially indorsed. See also PARA 1183.

6 *Goucher v Clayton* (1865) 34 LJ Ch 239 (consent to injunction in patent action no estoppel against denying validity and infringement).

- 7 *Thompson v Moore* (1889) 23 LR Ir 599, CA (validity and infringement denied in former proceedings).
- 8 As to the procedure for obtaining default judgments see PARA 506 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/A. ESTOPPEL BY RECORD/1173. Default of pleading; formal admissions.

1173. Default of pleading; formal admissions.

A judgment which would be final if it resulted from judicial decision after a contest is not prevented from being so by the fact that it was obtained as the result of admissions¹, provided the party against whom it is set up was under no disability²; but the efficacy of a judgment so obtained is strictly limited³.

It has been held that a party who has suffered judgment in default of defence is not estopped from pleading in a later claim matters not inconsistent with the material averments in the particulars of claim in the earlier one⁴. Under the former civil procedure, a claimant who replied by admitting a defence was precluded from bringing a fresh claim unless fresh circumstances arose; the matter was *res judicata*⁵ as to everything that might have been controverted at the time he so replied⁶. These principles are now unlikely to apply; but where a party makes an admission in response to a notice to admit facts, that admission may be used against him only in the proceedings in which that notice is served and only by the party who served the notice⁷.

1 See *Boileau v Rutlin* (1848) 2 Exch 665.

2 Where a minor is a party to proceedings before the court, it is the interposition of the court, charged with the duty to watch over his interests, that lends sanctity to a judgment for or against the minor: see *Arabian v Tuftall and Taylor Ltd* [1944] KB 685, [1944] 2 All ER 317. As to the court's jurisdiction to approve compromises on behalf of minors see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARAS 1422-1423.

3 See *New Brunswick Rly Co v British and French Trust Corp Ltd* [1939] AC 1, [1938] 4 All ER 747, HL; and paras 984, 997.

4 *Howlett v Tarte* (1861) 10 CBNS 813. This case turned upon default of pleading, but the general principle laid down by Williams J at 826 has been accepted expressly over and over again: *Hoystead v Taxation Comr* [1926] AC 155, PC. See PARA 1183 note 2. In any case an estoppel cannot be based on averments which are not a necessary part of the record and are neither proved nor admitted: *Irish Land Commission v Ryan* [1900] 2 IR 565, CA.

5 As to the meaning of 'res judicata' see PARA 1154 note 4.

6 *Newington v Levy* (1870) LR 6 CP 180, Ex Ch; cf *Hall v Levy* (1875) LR 10 CP 154; *Sandwich Corp v R* (1847) 10 QB 571, Ex Ch. On an interpleader issue all grounds of claim or defence are open, and therefore a party cannot, after failing at the trial to raise any such ground, raise it in subsequent proceedings: *Re Hilton, ex p March* (1892) 67 LT 594; cf *Williams v Richardson* (1877) 36 LT 505; and see PARA 1175.

7 See CPR 32.18(3); and PARA 777.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/B. CAUSE OF ACTION ESTOPPEL/1174. Meaning of 'cause of action estoppel'.

B. CAUSE OF ACTION ESTOPPEL

1174. Meaning of 'cause of action estoppel'.

It is a fundamental doctrine of all courts that there must be an end of litigation¹. Where res judicata² is pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue³, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact⁴. To decide which questions of law and fact were determined in the earlier judgment the court is entitled to look at the judge's reasons for his decision and his notes of the evidence⁵, and is not restricted to the record⁶; but, as a general rule, the judge's reasons cannot be looked at for the purpose of excluding from the scope of his formal order any matter which, according to the issues raised on the pleadings and the terms of the order itself, is included in it⁷.

Even though the judgment was pleaded by way of estoppel, it is perhaps not strictly correct to regard its determination of legal rights as a question of estoppel. The parties are estopped by the findings of fact involved in the judgment⁸; as respects the determination of questions of law, the true view seems to be that the parties' legal rights are such as they have been determined to be by the judgment of a competent court. The conclusiveness of the determination, however, rests upon the same principles in each case⁹.

Where there is no earlier judgment capable of amounting to res judicata, an attempt in later proceedings to allege facts inconsistent with those found in the previous proceedings may amount to an abuse of process¹⁰. The onus of proving it is an abuse of process lies on the party seeking to rely on the previous judgment¹¹.

Except where the situation pertaining at the hearing of a second application for an adjournment is virtually identical to that pertaining at the first it is totally inappropriate to apply the doctrine of res judicata to such applications, in particular where the previous application was made by a different party to that making the application under consideration¹².

1 See PARA 1154 et seq.

2 As to res judicata see PARAS 1154 note 4, 1168 et seq.

3 As to issue estoppel see PARAS 1169, 1179 et seq.

4 *Collier v Walters* (1873) LR 17 Eq 252; *Badar Bee v Habib Merican Noordin* [1909] AC 615, PC. In *Marriot v Hampton* (1797) 7 Term Rep 269, which rested on the same principle, the plaintiff was non-suited on its appearing in an action for money had and received that the money had been paid under a judgment which had not been set aside.

5 See *Randolph v Tuck* [1962] 1 QB 175, [1961] 1 All ER 814.

6 *Marginson v Blackburn Borough Council* [1939] 2 KB 426, [1939] 1 All ER 273, CA; *Patchett v Sterling Engineering Co Ltd* (1953) 71 RPC 61, CA; revsd on other grounds sub nom *Sterling Engineering Co Ltd v Patchett* [1955] AC 534, [1955] 1 All ER 369, HL; *Re Bullen (No 2)* (1972) 29 DLR (3d) 257 (BC) (the court may have regard to the reasons for the judgment in order to determine the question of law decided in an earlier decision); cf *Carl Zeiss Stiftung v Rayner and Keeler (No 3)* [1970] Ch 506, [1969] 3 All ER 897. Cf PARA 1206.

7 *Patchett v Sterling Engineering Co Ltd* (1953) 71 RPC 61, CA; revsd on other grounds sub nom *Sterling Engineering Co Ltd v Patchett* [1955] AC 534, [1955] 1 All ER 369, HL. If a declaration made in a judgment is unambiguous, regard may not be had to the pleadings in the action or to the history of the case for the purpose of attributing another meaning to the declaration: *Gordon v Gonda* [1955] 2 All ER 762, [1955] 1 WLR 885, CA.

8 The facts must appear from the judgment as delivered to be the ground on which it was based: *Jaeger Co Ltd v Jaeger* (1929) 46 RPC 336, CA; *Clyne v Yardley* [1959] NZLR 617. As to the effect of a finding of adultery not stated in the order of the court see *Lake v Lake* [1955] P 336, [1955] 2 All ER 538, CA; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 830.

9 The doctrine of legal precedent, or *stare decisis*, is discussed elsewhere in this title: see PARA 91 et seq.

10 *Bradford and Bingley Building Society v Seddon (Hancock, t/a Hancocks (a firm), third parties)* [1999] 4 All ER 217, [1999] 1 WLR 1482, CA, applied in *Schellenberg v BBC* [2000] EMLR 296; and see *Time Group v Computer 2000* [2002] EWHC 126 (TCC), (2002) 86 ConLR 47, [2002] All ER (D) 37 (Feb). As to abuse of process see PARAS 1166-1167. As to striking out proceedings for abuse of process see PARAS 252, 520; and as to staying proceedings for abuse of process see PARA 534.

11 See eg *Sweetman v Nathan* [2003] EWCA Civ 1115 at [34], [2003] All ER (D) 441 (Jul) per Shiemann LJ.

12 *Bass Taverns Ltd v Carford Catering Equipment Ltd* [2002] EWCA Civ 671, [2002] All ER (D) 183 (Apr).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/B. CAUSE OF ACTION ESTOPPEL/1175. Doctrine applicable wherever same cause of action determined on the merits.

1175. Doctrine applicable wherever same cause of action determined on the merits.

In all cases where the cause of action is really the same¹ and has been determined on the merits², and not on some ground (such as the non-expiration of the term of credit) which has ceased to operate when the second action or claim is brought, the plea of res judicata³ should succeed. The doctrine applies to all matters which existed at the time of the giving of the judgment and which the party had an opportunity of bringing before the court. If, however, there is matter subsequent which could not be brought before the court at the time, the party is not estopped from raising it⁴.

The doctrine of res judicata does not, however, apply in child care cases, as it is outweighed by public policy considerations relating to the protection of children⁵.

1 See *Hills v Co-operative Wholesale Society Ltd* [1940] 2 KB 435, [1940] 3 All ER 233, CA.

2 'It is often said that the final judgment . . . must be 'on the merits'. The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it had jurisdiction to adjudicate on an issue raised in the cause of action to which the particular set of facts gives rise, and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction': *DSV Silo-und Verwaltungsgesellschaft mbH v Owners of the Sennar, The Sennar* [1985] 2 All ER 104 at 106, [1985] 1 WLR 490 at 494, HL, per Lord Diplock; applied in *Charm Maritime Inc v Minas Xenophon Kyriakou and David John Mathias* [1987] 1 Lloyd's Rep 433, CA; and see *DSV Silo-und Verwaltungsgesellschaft mbH v Owners of the Sennar, The Sennar* [1985] 2 All ER 104 at 110-111, [1985] 1 WLR 490 at 499, HL, per Lord Brandon of Oakbrook. See also *Badar Bee v Habib Merican Noordin* [1909] AC 615, PC; *Livesey v Harding* (1855) 21 Beav 227; *A-G v Rochester Corp* (1833) 6 Sim 273; *Glasgow and South-Western Rly Co v Boyd and Forrest* 1918 SC (HL) 14; *Long v Gowlett* [1923] 2 Ch 177; *Alfred Rowntree & Sons Ltd v Frederick Allen & Sons (Poplar) Ltd* (1935) 41 Com Cas 90; *Matuszczyk v National Coal Board* 1955 SLT 101.

No express finding is necessary provided the point arose as a separate issue for decision and was decided between the parties: *Shoe Machinery Co Ltd v Cutlan* [1896] 1 Ch 667; *Duedu v Yiboe* [1961] 1 WLR 1040, PC; and see PARA 1176. A holding that the court has no jurisdiction to consider a claim is not a determination of the merits of the claim and creates no estoppel: *Ideal General Supply Co Ltd v Edelson and Edelson (t/a Ideal Clothing Co)* [1957] RPC 252; *Tak Ming Co Ltd v Yee Sang Metal Supplies Co* [1973] 1 All ER 569, [1973] 1 WLR 300. A prohibition is not a decision on the merits, and raises no estoppel as regards the cause of action in the prohibited proceeding: *Grundy v Townsend* (1888) 36 WR 531, CA. A settlement reached in the course of an employment tribunal hearing does not amount to a decision of the tribunal giving rise to an estoppel by virtue of the doctrine of res judicata: *Dattani v Trio Supermarkets Ltd* [1998] ICR 872, [1998] IRLR 240, CA; but cf **ESTOPPEL** vol 16(2) (Reissue) PARA 953. As to the effect of want of finality see PARA 1156.

3 As to the meaning of 'res judicata' see PARA 1154 note 4.

4 *Newington v Levy* (1870) LR 6 CP 180, Ex Ch; and see the sequel in *Hall v Levy* (1875) LR 10 CP 154. See also *Earl of Peterborough v Germaine* (1709) 6 Bro Parl Cas 1, HL; *Ord v Ord* [1923] 2 KB 432; *Higginson and Arundel v Pyman* (1926) 43 RPC 291, CA; *Bone v Seale* (1973) 229 Estates Gazette 1469; and see PARA 1176.

5 See eg *K v P (Children Act proceedings: estoppel)* [1995] 2 FCR 457, [1995] 1 FLR 248; and see PARAS 1169, 1178.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/B. CAUSE OF ACTION ESTOPPEL/1176. Effect of previous judgment.

1176. Effect of previous judgment.

Although it is true that estoppel by record must be reciprocal (that is, both parties must be precluded from re-opening matters determined in a prior case), a judgment in favour of a defendant is not always as decisive in his favour on the points in issue as judgment for a claimant would be, despite the fact that it is equally conclusive of the claim brought. Where a claimant recovers judgment, it almost necessarily follows that all the issues raised by the defendant have been determined in the claimant's favour; there must at least have been a decision on the merits. A judgment may, however, have been passed in favour of the defendant on dilatory grounds¹, or on one only of many alternative defences, and circumstances may have arisen entitling the claimant to judgment which were not in existence when the first claim was brought². The burden is on the defendant to show that the judgment relied on was obtained upon grounds or in circumstances which afford him a defence to the subsequent claim³.

1 *Jenkins v Merthyr Tydvil UDC* (1899) 80 LT 600; and see PARA 1175.

2 *National Bolivian Navigation Co v Wilson* (1880) 5 App Cas 176, HL; *Waine v Crocker* (1862) 3 De GF & J 421; *Heath v Weaverham Overseers* [1894] 2 QB 108; *Hall v Levy* (1875) LR 10 CP 154; cf *R v North Eastern Rly Co* (1901) 84 LT 502; *Hitchin v Campbell* (1772) 2 Wm Bl 827 (judgment for a defendant in trover (now wrongful interference with goods: see **TORT** vol 45(2) (Reissue) PARA 542 et seq) on general issue pleaded was held on demurrer no answer to an action for money received for the same goods, since, although it appeared that the goods were the same, it did not appear that the question was the same; at the trial it appeared that the only question was the property in the goods, and it was held that the first action was a bar: *Hitchin v Campbell* (1772) 2 Wm Bl 827); cf *Phillips v Ward* (1863) 2 H & C 717; *Behrens v Sieveking* (1837) 2 My & Cr 602; *Moss v Anglo-Egyptian Navigation Co* (1865) 1 Ch App 108; *R v May* (1880) 5 QBD 382. As to judgment of acquittal in the former Exchequer cf *Cooke v Sholl* (1793) 5 Term Rep 255, citing Buller's Nisi Prius 245.

3 *Isaacs & Sons v Salbstein* [1916] 2 KB 139, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/B. CAUSE OF ACTION ESTOPPEL/1177. Fresh evidence.

1177. Fresh evidence.

The mere discovery of fresh evidence, as distinguished from the development of fresh circumstances¹, on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata². Where this is applicable, the original cause of action is gone and may be restored only by getting rid of the res judicata³; and this must be done by a claim or application, which can only succeed on the same grounds as the former 'bill of review' in the Court of Chancery, namely the discovery of fresh evidence which entirely changes the aspect of the case, and was not and could not by reasonable diligence have been obtained before⁴.

There is some authority for the view that the exception of fresh or special circumstances applies only to issue estoppel; and it has been said that cause of action estoppel binds absolutely⁵.

The above must now be read in the light of the court's duty, in civil proceedings to which the Civil Procedure Rules 1998⁶ apply, to give effect to the overriding objective of dealing with cases justly⁷.

1 Eg a change in the law which indicated that an earlier decision on a point sought to be re-opened in a second action was wrong: *Arnold v National Westminster Bank plc* [1989] Ch 63, [1988] 3 All ER 977; on appeal [1990] Ch 573, [1990] 1 All ER 529, CA; affd [1991] 2 AC 93, [1991] 3 All ER 41, HL. Cf *Barber v Staffordshire County Council* [1996] 2 All ER 748, [1996] ICR 379, CA (applicant unsuccessfully sought to re-open unfair dismissal and redundancy claims two years after original claim, following changes in law brought about by developments in Community law). See also *Heming v Wilton* (1832) 5 C & P 54; *Liverpool Corpn v Chorley Waterworks Co* (1852) 2 De GM & G 852; *Cotter v Earl of Barrymore* (1733) 4 Bro Parl Cas 203, HL; *Hall v Levy* (1875) LR 10 CP 154; *Re Inecto Ltd* (1922) 38 TLR 797; *R v Middlesex Justices, ex p Bond* [1933] 2 KB 1, CA; cf *R v Evenwood and Barony Inhabitants* (1843) 3 QB 370; and distinguish *R v Wick St Lawrence Inhabitants* (1833) 5 B & Ad 526; *Peters v Tilly* (1886) 11 PD 145; and see PARA 1159.

2 As to the meaning of 'res judicata' see PARA 1154 note 4.

3 *Lockyer v Ferryman* (1877) 2 App Cas 519, HL; cf *Dundas v Waddell* (1880) 5 App Cas 249, HL. An order of a bankruptcy court as to amendment of proof made under mistake does not amount to res judicata: *Re Greaves, ex p Whitton* (1880) 43 LT 480.

4 *Phosphate Sewage Co v Molleson* (1879) 4 App Cas 801, HL (applied in *Taylor Walton v David Eric Laing* [2007] EWCA Civ 1146, [2008] BLR 65); *Re May* (1885) 28 ChD 516, CA; *Falcke v Scottish Imperial Insurance Co* (1887) 57 LT 39; *Re Scott and Alvarez's Contract, Scott v Alvarez* [1895] 1 Ch 596, CA; *Tebbutt v Haynes* [1981] 2 All ER 238, CA; *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, [1981] 3 All ER 727, HL; *Arnold v National Westminster Bank plc* [1989] Ch 63, [1988] 3 All ER 977 (on appeal [1990] Ch 573, [1990] 1 All ER 529, CA; affd [1991] 2 AC 93, [1991] 3 All ER 41, HL); *North West Water Ltd v Binnie & Partners (a firm)* [1990] 3 All ER 547, 30 ConLR 136. See also *Cinpres Gas Injection Ltd v Melea Ltd* [2008] EWCA Civ 9, [2008] All ER (D) 165 (Jan).

As to the effect of fraud and collusion in preventing an estoppel by record see PARA 1204. As to the procedure for reviewing the decisions of employment tribunals on the grounds, inter alia, that new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at the time of the hearing, see the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, SI 2004/1861, reg 16, Sch 1 rr 34-36; and **EMPLOYMENT**.

5 *Arnold v National Westminster Bank plc* [1990] Ch 573, [1990] 1 All ER 529, CA (affd [1991] 2 AC 93, [1991] 3 All ER 41, HL), explaining *Re Waring, Westminster Bank Ltd v Awdry* [1942] Ch 426, [1942] 2 All ER 250, CA.

- 6 le the Civil Procedure Rules 1998, SI 1998/3132. As to the application of the CPR see PARA 32.
- 7 As to the overriding objective see CPR 1.1; and PARAS 33-35.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/B. CAUSE OF ACTION ESTOPPEL/1178. Res judicata in matrimonial and family proceedings; in general.

1178. Res judicata in matrimonial and family proceedings; in general.

The applicability of estoppel in matrimonial cases is difficult¹ and the doctrine of res judicata² is now in retreat in matrimonial proceedings³. A petitioner in divorce proceedings whose claim for relief is based on an alleged act by the respondent cannot oblige the court to decide the issue in his favour on the grounds that the respondent is estopped from denying the charge by the finding of some other court, as this would prevent the court from exercising its statutory duty to inquire into the truth of the facts upon which the petition is based and thus be contrary to public policy⁴. However, a party who attempts to bring a claim for relief based on facts that have already been judicially determined adversely to him will be estopped from bringing evidence of those facts before the court⁵, and a party will not be allowed to re-litigate, by way of defence, claims of a positive nature which have previously been decided against him⁶. When the subject matter of the two suits is different, a party will not be estopped from adducing in the second suit evidence which in the first suit was given and accepted (or, it seems, rejected⁷), even though held to be insufficient to support the charge then made⁸. A party to proceedings which involve the incidental assumption of the validity of a marriage will not be allowed in subsequent proceedings to challenge its validity if he has not done so in the earlier proceedings⁹, unless the marriage was null and void from the beginning¹⁰. A decree of divorce granted by a court of competent jurisdiction is unimpeachable after the death of one of the parties even if the decree was obtained by fraud¹¹.

The strict application of issue estoppel is inappropriate in both public and private law proceedings under the Children Act 1989¹².

The statutory provisions relating to recognition of divorces, annulments and legal separations¹³ do not require the recognition of any finding of fault made in any proceedings for divorce, annulment or separation¹⁴. The admissibility in evidence of a previous finding of adultery or paternity is discussed elsewhere in this title¹⁵.

1 *James v James* [1948] 1 All ER 214 at 217 per Lord Merriman P. As to the position regarding res judicata in matrimonial proceedings for maintenance see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

2 As to the meaning of 'res judicata' see PARA 1154 note 4.

3 *Rowe v Rowe* [1980] Fam 47, [1979] 2 All ER 1123, CA (parentage of children; father not estopped in maintenance proceedings from denying parentage on basis of custody order made in undefended divorce proceedings), overruling *Lindsay v Lindsay* [1934] P 162 and *G (SD) v G (HH)* [1970] 3 All ER 844, sub nom *Gower v Gower* [1970] 1 WLR 1556.

4 *Harriman v Harriman* [1909] P 123, CA; *Hudson v Hudson* [1948] P 292, [1948] 1 All ER 773. See also *Harris v Harris* [1952] 1 All ER 401, DC; *Thompson v Thompson* [1957] P 19, [1957] 1 All ER 161, CA; *Holland v Holland* [1961] 1 All ER 226, [1961] 1 WLR 194, CA; *Warren v Warren* [1962] 3 All ER 1031, [1962] 1 WLR 1310; *Laws v Laws* [1963] 3 All ER 398, [1963] 1 WLR 1133, CA; *Thoday v Thoday* [1964] P 181, [1964] 1 All ER 341, CA; *Hudson v Hudson* [1948] P 292, [1948] 1 All ER 773; and see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 830.

5 *Finney v Finney* (1868) LR 1 P & D 483; *Butler v Butler* [1894] P 25, CA; *James v James* [1948] 1 All ER 214; *Bright v Bright* [1954] P 270, [1953] 2 All ER 939. This does not prevent a party repeating in later proceedings a charge which he succeeded in proving in earlier proceedings: *Bernard v Bernard (Sutton cited)* [1958] 3 All ER 475, [1958] 1 WLR 1275. See also *Foster v Foster* [1954] P 67, [1953] 2 All ER 518, DC; *Cooper v Cooper (No 2)* [1955] P 168, [1954] 3 All ER 358, DC; *Dixon v Dixon* [1953] P 103, [1953] 1 All ER 910; *Warren v Warren* [1962] 3 All ER 1031, [1962] 1 WLR 1310.

6 *Sopwith v Sopwith* (1861) 2 Sw & Tr 160; *Hill v Hill* [1954] P 291, [1954] 1 All ER 491; *Hull v Hull* [1960] P 118, [1960] 1 All ER 378 (party in custody proceedings precluded, by express finding in earlier divorce proceedings that he had deserted his wife, from denying desertion and alleging that the wife had deserted him); *Holland v Holland* [1961] 1 All ER 226, [1961] 1 WLR 194, CA; *Field v Field* [1964] P 336, [1964] 2 All ER 81; *Thoday v Thoday* [1964] P 181, [1964] 1 All ER 341, CA; *Porter v Porter* [1971] P 282, [1971] 2 All ER 1037. See also the Civil Evidence Act 1968 s 12 (qualified statutory estoppel in the case of a finding of adultery or paternity in matrimonial proceedings); and PARA 1211.

7 *Winnan v Winnan* [1949] P 174, [1948] 2 All ER 862, CA; *Thompson v Thompson* [1957] P 19, [1957] 1 All ER 161, CA.

8 *Fisher v Fisher* [1960] P 36, [1959] 3 All ER 131, CA; *Holland v Holland* [1961] 1 All ER 226, [1961] 1 WLR 194, CA; *Thoday v Thoday* [1964] P 181, [1964] 1 All ER 341, CA.

9 *Woodland v Woodland (otherwise Belin or Barton)* [1928] P 169; *Tindall v Tindall* [1953] P 63, [1953] 1 All ER 139, CA; cf *W v W* [1952] P 152, [1952] 1 All ER 858, CA; and see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 321 note 2.

10 *Hayward v Hayward (otherwise Prestwood)* [1961] P 152, [1961] 1 All ER 236; and see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 321.

11 *Callaghan v Hanson-Fox* [1992] Fam 1, sub nom *Callaghan v Andrew-Hanson* [1992] 1 All ER 56; cf *Moynihn v Moynihn (Nos 1 and 2)* [1997] 2 FCR 105, [1997] 1 FLR 59 (application by the Queen's Proctor to set aside decree obtained by deliberate and sustained deception); cf *Kemp-Welch v Kemp-Welch and Crymes* [1912] P 82 (where it was held that the court had jurisdiction, on motion by co-respondent, to rescind decree absolute on the ground that it was obtained by fraud).

12 See PARA 1169. Cf *F v F* [1968] 2 All ER 946, sub nom *Frost v Frost* [1968] 1 WLR 1221, CA; *Hull v Hull* [1960] P 118, [1960] 1 All ER 378.

13 In the Family Law Act 1986 Pt II (ss 44-54): see **CHILDREN AND YOUNG PERSONS; MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

14 Family Law Act 1986 s 51(5).

15 See PARA 1211.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/C. ISSUE ESTOPPEL/1179. Issue estoppel; in general.

C. ISSUE ESTOPPEL

1179. Issue estoppel; in general.

Issue estoppel¹ means that a party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty² determined against him³. Even if the objects of the first and second claims or actions are different, the finding on a matter which came directly⁴ in issue in the first claim or action, provided it is embodied in a judicial decision that is final⁵, is conclusive in a second claim or action between the same parties and their privies⁶. Issue estoppel will only arise where it is the same issue which a party is seeking to re-litigate. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law⁷.

There may, however, be an exception to issue estoppel in the special circumstances where there becomes available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, and such further material could not by reasonable diligence have been adduced in those proceedings and relates to facts or a change in the law⁸.

1 See eg *Hoystead v Federal Taxation Comr* (1921) 29 CLR 537, Aust HC (on appeal sub nom *Hoystead v Taxation Comr* [1926] AC 155, PC); *Thoday v Thoday* [1964] P 181, [1964] 1 All ER 341, CA; *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630, [1965] 2 All ER 4, CA; *Mills v Cooper* [1967] 2 QB 459, [1967] 2 All ER 100, DC.

2 An estoppel must be 'certain to every intent': Co Litt 352b. See *Re Koenigsberg, Public Trustee v Koenigsberg* [1949] Ch 348, [1949] 1 All ER 804, CA; *Sanders (otherwise Saunders) v Sanders (otherwise Saunders)* [1952] 2 All ER 767, DC; *Patchett v Sterling Engineering Co Ltd* (1953) 71 RPC 61, CA (revsd on other grounds sub nom *Sterling Engineering Co Ltd v Patchett* [1955] AC 534, [1955] 1 All ER 369, HL); *Re Wright, Blizard v Lockhart* [1954] Ch 347, [1954] 2 All ER 98, CA (an order for an inquiry as to the possibility of executing charitable trusts in a will ordered to be made in a suit for determining the validity of the trusts held not to be a decision in the suit, which was directed by the order to stand over pending the determination of the inquiry; the doctrine of res judicata did not apply so as to preclude argument on the question of what was the natural date to determine the practicability of the trust). See also *Turner v London Transport Executive* [1977] ICR 952, [1977] IRLR 441, CA (no issue estoppel where findings in earlier proceedings were obscure and uncertain).

3 *Outram v Morewood* (1803) 3 East 346 (successive actions for different trespasses to the same close; defendant estopped from alleging the same title as was found against his wife, in whose right he claimed, in the first action; approved in *Jones v Lewis* [1919] 1 KB 328, CA; and in *Hoystead v Taxation Comr* [1926] AC 155, PC); *Hancock v Welsh and Cooper* (1816) 1 Stark 347 (finding of tenancy in action of replevin conclusive in action for rent); *Flitters v Allfrey* (1874) LR 10 CP 29, following *Routledge v Hislop* (1860) 2 E & E 549 (defendant in first action plaintiff in second action); *Re Bank of Hindustan, China, and Japan, Campbell's Case, Hippisley's Case, Alison's Case* (1873) 9 Ch App 1 (liquidator barred by finding in action for calls that respondent was not a shareholder); *Bright v Bright* [1954] P 270, [1953] 2 All ER 939 (allegations in divorce petition alleging desertion same as those raised, or capable of being raised, in earlier petition charging adultery and cruelty which had been dismissed); *Hill v Hill* [1954] P 291, [1954] 1 All ER 491 (allegations in answer pleading just cause for desertion same as those in unsuccessful petition alleging cruelty); *Thoday v Thoday* [1964] P 181, [1964] 1 All ER 341, CA; *McLoughlin v Gordons (Stockport) Ltd* [1978] ICR 561, EAT (second application for equal pay to industrial tribunal (now known as 'employment tribunal')); *Khan v Goleccha International Ltd* [1980] 2 All ER 259, [1980] 1 WLR 1482, CA (admission in first action that transaction fell outside the Moneylenders Act 1927 (repealed); issue could not be re-opened later).

4 le not collaterally or incidentally: see *Spens v IRC*[1970] 3 All ER 295 at 301, [1970] 1 WLR 1173 at 1184 per Megarry J; *Angle v Minister of National Revenue* (1974) 47 DLR (3d) 544, Can SC; and PARA 1191.

5 *Bobolas v Economist Newspaper Ltd*[1987] 3 All ER 121, [1987] 1 WLR 1101, CA (rulings made in trial where jury failed to agree not conclusive of issues in later proceedings), doubting a dictum of Diplock LJ in *Fidelitas Shipping Co Ltd v V/O Exportchleb*[1966] 1 QB 630 at 642, [1965] 2 All ER 4 at 10, CA, and citing *Carl Zeiss Stiftung v Rayner and Keeler (No 2)*[1967] 1 AC 853 at 935, [1966] 2 All ER 536 at 565-566, HL, per Lord Guest and at 947 and at 573 per Lord Upjohn. See also *Egger v Viscount Chelmsford*[1965] 1 QB 248, [1964] 3 All ER 406, CA; and PARA 1156. An issue estoppel can arise from an interlocutory (interim) judgment of a foreign court on a procedural issue where there is an express submission of the procedural or jurisdictional issue to the foreign court, and the specific issue of fact is raised before and decided by the court: *Desert Sun Loan Corp v Hill*[1996] 2 All ER 847, [1996] 11 LS Gaz R 30, CA.

6 *Duchess of Kingston's Case* (1776) 2 Smith LC (13th Edn) 644; *R v Hartington Middle Quarter Inhabitants* (1855) 4 E & B 780 (finding that children settled in locality by reference to father's place of settlement conclusive in later proceedings for determining where mother was settled); *Priestman v Thomas* (1884) 9 PD 210, CA (first action to set aside compromise; second action to revoke probate founded on the same compromise); *Barrs v Jackson* (1845) 1 Ph 582 (first suit for grant of letters of administration; second suit for distribution of assets); *Jewsbury v Mummery*(1872) LR 8 CP 56, Ex Ch (verdict against executor on a plea of *plene administravit* estopped him from any defence open to him under that plea, citing *Ramsden v Jackson* (1737) 1 Atk 292); cf *Dawson v Gregory*(1845) 7 QB 756; *Ennis v Rochford* (1884) 14 LR Ir 285; *Erving v Peters* (1790) 3 Term Rep 685; *Thompson & Sons v Clarke* (1901) 17 TLR 455 (as to failure on plea of *plene administravit* see **EXECUTORS AND ADMINISTRATORS**). See also *Re South American and Mexican Co, ex p Bank of England*[1895] 1 Ch 37, CA; *Doe v Wright* (1839) 10 Ad & El 763 (judgment in ejectment before the Common Law Procedure Act 1852 conclusive in action for mesne profits; distinguish *Harris v Mulkern* (1875) 1 ExD 31, after the Common Law Procedure Act 1852); *Re National Sulphuric Acid Association's Agreement (No 2)* (1966) LR 6 RP 210 (issue in question must be precisely the same as the issue previously decided); *Gipps v Gipps* [1974] 1 NSWLR 259, NSW CA (court's sanction in earlier proceedings of an arrangement between husband and wife that wife should transfer property to husband at an agreed price no bar by virtue of doctrine of issue estoppel to a later claim by wife that her agreement to the arrangement was induced by the husband's fraudulent misrepresentation as to the value of the property, since in the earlier proceedings the court had not considered the way in which the agreement had been reached, and the question of whether it had been induced by fraud had never been considered); *Porter v Secretary of State for Transport*[1996] 3 All ER 693, [1996] 2 EGLR 10, CA (where first action to determine basis of assessment of compensation in respect of compulsorily acquired land and second action to determine compensation for injurious affection to retained land, no issue estoppel). As to the application of the same principle to criminal proceedings see PARA 1181; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1272 et seq. As to privies see eg PARAS 1155 note 5, 1196-1198.

As to the court's power to consolidate proceedings, or to try two or more claims on the same occasion, see CPR 3.1(2)(g), (h); and PARAS 75, 247.

7 *Re Graydon, ex p Official Receiver*[1896] 1 QB 417; *Jones v Lewis*[1919] 1 KB 328, CA.

8 *Arnold v National Westminster Bank plc*[1990] Ch 573, [1990] 1 All ER 529, CA; affd [1991] 2 AC 93, [1991] 3 All ER 41, HL.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/C. ISSUE ESTOPPEL/1180. Scope of the doctrine of issue estoppel.

1180. Scope of the doctrine of issue estoppel.

The conditions for the application of issue estoppel require a final decision on the issue by a court of competent jurisdiction¹ and that:

- 826 (1) the issue raised in both proceedings is the same; and
- 827 (2) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies².

Deciding if the issue is the 'same' in both cases will depend upon whether the court takes a narrow³ or a wide⁴ view of the extent of the issue determined in the earlier case. It is now established that the question whether the raising of an issue in subsequent proceedings amounts to an abuse of process is one to be decided in a broad, merits based way in the light of all the circumstances⁵. Where a matter is held not to fall within the scope of issue estoppel, it may nonetheless be struck out as vexatious or frivolous; to re-litigate a question which in substance has already been determined is an abuse of process⁶. Where issue estoppel does not arise, this does not enable parties in civil proceedings to attack collaterally decisions reached in criminal proceedings by a court of competent jurisdiction⁷.

Where one party has raised an issue which his opponent alleges is barred by issue estoppel, the opponent may either plead the estoppel and leave the matter to be dealt with at the trial or attempt to have the offending plea struck out⁸.

A claimant who has two heads of claim and recovers judgment for one only, full relief not being open to him on the other, is not barred in a subsequent claim as to the latter⁹. Where, however, relief is properly asked of a competent court, and after trial is not noticed in a judgment granting other relief, or, where in a claim brought for several demands there is judgment for one only, the other relief is presumed to have been refused, and its refusal is a bar to a subsequent claim for the same cause¹⁰.

To be distinguished, however, is the rule that, where a claimant, having two inconsistent claims, elects to abandon one and pursues the other, he may not afterwards choose to return to the former and sue on it¹¹.

1 As to jurisdiction see PARA 1170; and as to finality of judgment see PARA 1156.

2 As to privies see eg PARAS 1155 note 5, 1196-1198.

3 *Randolph v Tuck* [1962] 1 QB 175, [1961] 1 All ER 814; *Re Manly's Will Trusts (No 2)* [1976] 1 All ER 673 (construction of will in relation to share of one deceased child not binding to prevent litigation on death of second child; judge perhaps influenced by presence of parties not alive at time of first action and hence not on any view estopped).

4 *Marginson v Blackburn Borough Council* [1939] 2 KB 426, [1939] 1 All ER 273, CA; *Bell v Holmes* [1956] 3 All ER 449, [1956] 1 WLR 1359; *Wood v Luscombe* [1966] 1 QB 169, [1964] 3 All ER 972; *North West Water Ltd v Binnie & Partners (a firm)* [1990] 3 All ER 547, 30 ConLR 136; *Wall v Radford* [1991] 2 All ER 741. See also *Black v Mount and Hancock* [1965] SASR 167; *Craddock's Transport Ltd v Stuart* [1970] NZLR 499, NZ CA; *Crown Estate Comrs v Dorset County Council* [1990] Ch 297, [1990] 1 All ER 19.

5 *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, [2001] 1 All ER 481, HL.

It has been held that no estoppel arises as to matters which were not in issue in the proceedings the record of which is relied upon (see eg *Blackham's Case* (1709) 1 Salk 290; *Collins v Gough* (1785) 7 Bro Parl Cas 94, HL; *Minor Canons of St Paul's v Crickett* (1810) Wight 30 (action for tithes for different years); *Goddard v Goddard and Mentz* [1924] SALR 290, TPD S Af (action in England as to user of trade mark in England not conclusive in action between same parties as to similar user of same trade mark in South Africa); *Spens v IRC* [1970] 3 All ER 295, [1970] 1 WLR 1173 (a court order approving a scheme for the variation of a trust does not estop the Board from claiming tax on a fund unaffected by the scheme in later proceedings); *Re a Bankrupt* [2000] All ER (D) 2340 (previous decision on breach of contract did not estop defendant in bankruptcy proceedings from contending that she was not a partner in the relevant firm)) and it is not sufficient that they were decided by implication (*Brandlyn v Ord* (1738) 1 Atk 571; *Newall v Elliot* (1863) 1 H & C 797). See, however PARA 1191; and see *Humphries v Humphries* [1910] 2 KB 531, CA (an issue as to the existence of an agreement having been affirmed in a former action between the same parties, the defendant could not object that it did not satisfy the requirements of the Law of Property Act 1925 s 53 as to writing, because, although that defence was not pleaded, and therefore could not be relied on in the former action, there was an opportunity of pleading it); see also PARA 1183; and cf *Saunders v Vautier* (1841) Cr & Ph 240; *Vernon v IRC* [1956] 3 All ER 14, [1956] 1 WLR 1169 (Attorney General not estopped from denying that trusts were limited to charitable objects by the fact that he did not oppose a court order sanctioning a scheme setting up those trusts directed by an earlier court order to be limited to charitable purposes). Issue estoppel, as developed in patents and registered design cases, also applies to trade mark cases: *Hormel Foods Corp v Antilles Landscape Investments NV* [2005] EWHC 13 (Ch), [2005] RPC 657 (claimant attacking validity of defendant's mark after being unsuccessful in earlier proceedings). As to the effect in divorce proceedings of a finding of adultery etc in previous matrimonial or family proceedings see PARA 1214; **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 830.

6 *Ashmore v British Coal Corp* [1990] 2 QB 338, [1990] 2 All ER 981, CA (large number of workers alleging discrimination in relation to pay; small group of representative cases selected and heard by industrial tribunal (now known as 'employment tribunal'); on failure of selected cases other workers sought to have their claims litigated; public policy and interests of justice held to render claims abuse of process in absence of fresh evidence which justified re-opening the issue); *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241, [1990] 2 All ER 990, CA (two of three joint tortfeasors unsuccessfully challenged judgment against them in Irish court in further Irish proceedings on ground of fraud; third defendant not entitled to re-open question of fraud in English court); *North West Water Ltd v Binnie & Partners (a firm)* [1990] 3 All ER 547, 30 ConLR 136 (action by victims of explosion against water board, contractors and consultant engineers in which consultant engineers held to be wholly to blame; engineers not allowed to challenge finding of negligence in later action by local authority for damages to property caused by explosion); *Wall v Radford* [1991] 2 All ER 741 (two vehicles collided resulting in injury to passenger in one of vehicles; decision on the respective drivers' liability in an action brought by the passenger was conclusive of the drivers' liability inter se, with the result that they were estopped from re-litigating their liability inter se in a second action).

7 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, [1981] 3 All ER 727, HL (probably an abuse of process case); cf *Re Norris* [2001] UKHL 34, [2001] 3 All ER 961, [2001] 1 WLR 1389 (defendant's wife entitled to challenge restraint order in respect of matrimonial home). A formal caution and a criminal conviction are not sufficiently close to engage the public policy against collateral attacks on the judgment of a court, because of the fundamental distinction that a formal caution has not been brought about by any decision of a court of justice; thus an attack on an admission to a police officer does not involve an attack on a court of co-ordinate jurisdiction: *Abraham v Metropolitan Police Comr* [2001] 1 WLR 1257, [2000] All ER (D) 2201, CA.

8 *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 3)* [1970] Ch 506, [1969] 3 All ER 897. A pleading will be struck out on this ground only if it is plain and obvious that the earlier judgment disposed of the issue: *Silver Standard Mines Ltd v Granby Mining Co Ltd* (1972) 31 DLR (3d) 356, BC CA.

9 *Hadley v Green* (1832) 2 Cr & J 374 (promissory note and money received for value of stone; subsequent action for damages for quarrying the stone), following *Seddon v Tutop* (1796) 6 Term Rep 607; cf *Lord Bagot v Williams* (1824) 3 B & C 235; *Grundy v Townsend* (1888) 36 WR 531, CA (prohibition of action for goods sold no bar to subsequent action on account stated); *Bollard v Spring* (1887) 51 JP 501 (same principle applied in criminal proceedings); see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1272-1275.

10 *Blake v O'Kelly* (1874) IR 9 Eq 54; *Gregory v Molesworth* (1747) 3 Atk 626; and see *Henderson v Henderson* (1843) 3 Hare 100.

11 See **ESTOPPEL** vol 16(2) (Reissue) PARA 962.

UPDATE

1180 Scope of the doctrine of issue estoppel

NOTE 1--For this purpose a consent order is to be treated in the same way as a judgment: *South Somerset DC v Tonstate (Yeovil Leisure) Ltd* [2009] EWHC 3308 (Ch), [2009] All ER (D) 190 (Dec).

NOTE 2--Where the conditions for the application of the doctrine are satisfied, parties cannot subsequently, in the same proceedings, advance arguments or adduce further evidence directed to showing that the issue in question was wrongly determined: *See/e Austria GmbH Co v Tokio Marine Europe Insurance Ltd* [2009] EWHC 255 (TCC), [2009] All ER (D) 41 (Sep).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/C. ISSUE ESTOPPEL/1181. No issue estoppel in criminal proceedings.

1181. No issue estoppel in criminal proceedings.

Issue estoppel does not operate in criminal proceedings¹; but when in the first of two trials an accused has been acquitted, the prosecution in the second trial is normally estopped from challenging the correctness of that verdict². Evidence of acquittals may, however, be admitted as similar fact evidence in criminal proceedings involving similar incidents, provided that the accused is not unfairly prejudiced by its admission³.

1 *DPP v Humphrys* [1977] AC 1, [1976] 2 All ER 497, HL, overruling *R v Hogan* [1974] QB 398, [1974] 2 All ER 142 (where Lawson J had adjudged that issue estoppel did apply in criminal proceedings so as to estop the accused in a murder trial from denying that he had caused the deceased grievous bodily harm with intent when in an earlier trial he had admitted causing such harm with intent but had alleged unsuccessfully that he had done so in self-defence) and disapproving of obiter dicta in *Connelly v DPP* [1964] AC 1254, [1964] 2 All ER 401, HL, that issue estoppel could be applicable on appropriate facts; *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, [1981] 3 All ER 727, HL; *Customs & Excise Comrs v T* (1996) 162 JP 193, [1997] CLY 1107, CA (prosecution not estopped from relying on evidence of a previous acquittal in forfeiture proceedings under the Drug Trafficking Act 1994 s 43(3) (repealed: see now the Proceeds of Crime Act 2002; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 390 et seq)).

To the extent that the law in this area prevents the re-litigation of issues already determined, it relies upon the doctrines of *autrefois acquit* and *autrefois convict*, otherwise known as the rule against 'double jeopardy': see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1272-1275; and see eg *R v Clegg* [2000] NI 305, NI CA. The Criminal Justice Act 2003 has abolished this rule in the case of certain serious offences: see Pt 10 (ss 75-97); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 1937 et seq.

2 *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458, PC; followed in *R v Hay* (1983) 77 Cr App Rep 70, CA. See also *G (an infant) v Coltart* [1967] 1 QB 432, [1967] 1 All ER 271, DC.

3 *R v Z* [2000] 2 AC 483, [2000] 3 All ER 385, HL; applied in *R v Degnan* [2001] 4 LRC 65, NZ CA. As to similar fact evidence see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1503 et seq; and for changes to the common law rules about evidence of the accused's bad character see the Criminal Justice Act 2003 Pt 11 (ss 98-141); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1502 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/C. ISSUE ESTOPPEL/1182. Extent to which issue estoppel applies in public law proceedings.

1182. Extent to which issue estoppel applies in public law proceedings.

Issue estoppel is a doctrine appropriate to proceedings in private law. While in certain circumstances it would be an abuse of process to permit a public authority which had acted in disregard of a declaration or order made in judicial review proceedings to seek to re-open debate about whether its actions were justified, in judicial review there is always a third party who is not present: the wider public or public interest. The wider public or public interest should not be prejudiced by the failure of a public authority to place all the relevant material and arguments before the court on the first occasion, or if that authority reconsiders in the light of the previous decision but arrives at conclusions which do not in every respect mirror the court's conclusion on the first occasion. The extent to which the doctrine of issue estoppel is applicable in judicial review proceedings¹ is therefore doubtful². It has, however, been held that issue estoppel may apply in habeas corpus proceedings³. In planning appeals, although the doctrines of cause of action estoppel and issue estoppel do not apply to decisions of inspectors, a previous inspector's decision on a matter is a material consideration which an inspector is obliged to take into account⁴. It has also been said that the courts should not be used as a means of attempting to reargue points that have already been fully considered at a planning inquiry⁵.

Issue estoppel does not apply in child care cases, because it is outweighed by public policy considerations relating to the protection of children⁶.

1 Ie under CPR Pt 54: see **JUDICIAL REVIEW** vol 61 (2010) PARA 677.

2 *R (on the application of Munjaz) v Mersey Care NHS Trust*, *R (on the application of S) v Airedale NHS Trust* [2003] EWCA Civ 1036 at [79], [2003] All ER (D) 265 (Jul); and see *R v Secretary of State for the Environment, ex p Hackney London Borough Council* [1984] 1 All ER 956, [1984] 1 WLR 592, CA; *R (on the application of Nahar) v Social Security Comrs* [2002] EWCA Civ 859, [2002] All ER (D) 405 (May) (no issue estoppel in proceedings involving decisions of different government departments).

3 *R v Governor of Brixton Prison, ex p Osman* [1992] 1 All ER 108, [1991] 1 WLR 281, DC. See also *Sheikh (Abdul Raheem) v Secretary of State for the Home Department* [2001] Imm AR 219, [2000] All ER (D) 2164, CA (application for habeas corpus which could have been made alongside related previous proceedings amounted to abuse of process).

4 *JS Bloor Sudbury Ltd v First Secretary of State* [2003] All ER (D) 279 (Jul). Cf, however, *Thrasyvoulou v Secretary of State for the Environment* [1988] QB 809, [1988] 2 All ER 781, CA; affd [1990] 2 AC 273, [1990] 1 All ER 65, HL; and as to estoppel in the context of planning law see **ESTOPPEL** vol 16(2) (Reissue) PARA 961.

5 See *Meritgold Ltd v Secretary of State for Transport, Local Government and the Regions* [2003] All ER (D) 147 (Nov) per Sullivan J.

6 See eg *K v P (Children Act proceedings: estoppel)* [1995] 2 FCR 457, [1995] 1 FLR 248; and see PARAS 1169, 1178.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/C. ISSUE ESTOPPEL/1183. Raising issues that could have been raised in earlier proceedings.

1183. Raising issues that could have been raised in earlier proceedings.

Except under special circumstances¹ a party may not in a subsequent proceeding raise a ground of claim or defence which was open to him in the former one². However, estoppel based on a default judgment must be very carefully limited; a defendant is only estopped from setting up in a subsequent claim a defence which was necessarily, and with complete precision, decided by the previous judgment³. The court has inherent jurisdiction to strike out as frivolous and vexatious a claim or defence which has either been already decided in previous proceedings against the party raising it or might have been raised in previous proceedings in which the facts necessary to raise it have been decided against the party desiring to raise them⁴. The above must now be read in the light of the court's duty, in civil proceedings to which the Civil Procedure Rules 1998⁵ apply, to give effect to the overriding objective of dealing with cases justly⁶.

Preliminary findings of fact by the chairman of an employment tribunal have been held not to give rise to issue estoppel in relation to factual details that were not directly in issue at the preliminary hearing⁷.

1 See *The Mekhanik Evgrafov and Ivan Derbenev (No 2)* [1988] 1 Lloyd's Rep 330; *Arnold v National Westminster Bank plc* [1990] Ch 573 at 593, [1990] 1 All ER 529 at 538, CA, per Dillon LJ ('a useful instance of the application of the words 'except under special circumstances' is to be found in the decision of Sheen J in *The Mekhanik Evgrafov (No 2)*') and at 597 and at 541 per Staughton LJ ('all are agreed that in the absence of fraud or collusion there is no escape from the doctrine of res judicata in a case of cause of action estoppel, subject to a possible exception in *The Mekhanik Evgrafov (No 2)* . . . , a most unusual case'); affd [1991] 2 AC 93, [1991] 3 All ER 41, HL. Non-actionable adviser error does not amount to a special circumstance: *Wain v F Sherwood and Sons Transport Ltd* [1998] 25 LS Gaz R 32, [1999] PIQR P159, CA.

2 *Re Hilton, ex p March* (1892) 67 LT 594; *Greenhalgh v Mallard* [1947] 2 All ER 255, CA; *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, PC; *LE Walwin & Partners Ltd v West Sussex County Council* [1975] 3 All ER 604 (landowner who, in quarter sessions proceedings determining that part of his land was subject to a right of way, did not contend that the right was limited, was estopped from arguing the limitation in later proceedings against a different defendant). A claim in debt arising under a contract and a claim for damages for breach of contract are different causes of action: *Lawlor v Gray* [1984] 3 All ER 345. See also *SCF Finance Co Ltd v Masri (No 3) (Masri, garnishee)* [1987] QB 1028, [1987] 1 All ER 194, CA; *Kennecott Utah Copper Corp v Minet Ltd* [2003] EWCA Civ 905, [2004] 1 All ER (Comm) 60, [2003] All ER (D) 41 (Jul) (no challenge or collateral attack in later proceedings to findings of fact in earlier proceedings); and see eg *Ulster Bank Ltd v Fisher & Fisher (a firm)* [1999] NI 68; *Sivanandan v Enfield London Borough Council* [2005] EWCA Civ 10, [2005] All ER (D) 169 (Jan).

As to personal injury claims see *Talbot v Berkshire County Council* [1994] QB 290, [1993] 4 All ER 9, CA, considered in *C (a minor) v Hackney London Borough Council* [1996] 1 All ER 973, [1996] 1 WLR 789, CA (disabled and dependent child of party to earlier proceedings not a party to such proceedings). The rule applies only to matters that could and should have been dealt with on the first occasion: *Barrow v Bankside Members Agency Ltd* [1996] 1 All ER 981, [1996] 1 WLR 257, CA (Lloyd's litigation; individual action (now a 'claim': see PARA 18) brought after judgment in group action). The rule does not prevent a lender from commencing proceedings on a specialty debt when earlier proceedings on a contract debt have been dismissed for want of prosecution: *Securum Finance Ltd v Ashton* [1999] 2 All ER (Comm) 331, (1999) Times, 18 June; affd on different grounds [2001] Ch 291, [2000] All ER (D) 843, CA. See also *Air Canada and Alpha Catering Services v Basra* [2000] IRLR 683, EAT (employee had done all she could to raise her claim in previous proceedings by applying to add further complaint); *Sweetman v Nathan* [2003] EWCA Civ 1115, [2003] All ER (D) 441 (Jul) (allegation of negligence against the defendant in case before the court conceptually entirely separate from finding of fraud on the part of the claimant in earlier proceedings; case could be pleaded and proved without reliance on any part of the fraud assumed to have been committed). The principle of res judicata applies not only to the points that the court was asked to adjudicate on in proceedings but also to every point that the

parties might, with reasonable diligence, have brought forward: *Ezekiel v Royal Bank of Scotland* [2000] All ER (D) 2265. As to the meaning of 'res judicata' see PARA 1154 note 4.

Under the former civil procedure, a defendant to a second action by the same plaintiff was estopped from putting on record a plea which was inconsistent with any traversable allegation in the statement of claim in the former action, but it would seem that he was not estopped from setting up in the second action a plea which confessed and avoided, or matters which might be raised by special plea necessitating proof on the part of the defendant: *Howlett v Tarte* (1861) 10 CBNS 813; *Humphries v Humphries* [1910] 2 KB 531, CA; *Cooke v Rickman* [1911] 2 KB 1125; *Hoystead v Taxation Comr* [1926] AC 155, PC. Accordingly a defendant to a second claim for rent under an agreement was estopped from pleading the Law of Property Act 1925 s 53 (*Humphries v Humphries* [1910] 2 KB 531, CA), or alleging that there was no consideration for the agreement sued upon (*Cooke v Rickman* [1911] 2 KB 1125), those defences not having been pleaded in the first claim. See also *Stirling & Co v North* (1913) 29 TLR 216 (defendant estopped from setting up as a defence at the trial of an action a defect in the writ, which he had not raised on the hearing of a summons); *Kershaw, Leese & Co v Stockport Overseers* [1923] 2 KB 129 (ratepayers estopped from contending, in an action to restrain the rating authority from proceeding by distress to recover rates, that the distress was unlawful for reasons which they might have raised before the magistrates on the application for the issue of the distress warrant); *Mire v Northwestern Mutual Insurance Co (No 2)* (1972) 31 DLR (3d) 746, Alta CA (defendant estopped by summary judgment for part of claim in plaintiff's favour from relying on defence to balance of claim that would never have been a defence to the summary judgment proceedings); *De Vere Hotels and Restaurants Ltd v Culshaw* (1972) 116 Sol Jo 681, CA (defendant in possession action estopped from alleging that his tenancy was protected by the Rent Acts when he had previously applied for a tenancy and participated in proceedings to fix an interim rent, both on the basis that his tenancy was a business tenancy). These authorities must now be read in the light of the new civil procedure introduced by the Civil Procedure Rules 1998, SI 1998/3132 (the 'CPR'): see generally PARA 24 et seq.

3 *New Brunswick Rly Co v British and French Trust Corp Ltd* [1939] AC 1, [1938] 4 All ER 747, HL; *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, [1964] 1 All ER 300, PC (party not estopped by default judgment from pleading money-lending statute as a defence in later proceedings). A summary judgment is not a default judgment for this purpose: *Dsane v Hagan* [1962] Ch 193, [1961] 3 All ER 380. See also *Irish Land Commission v Ryan* [1900] 2 IR 565, CA; *Cox v Dublin City Distillery Co Ltd (No 3)* [1917] 1 IR 203, CA; *Cribb v Freyberger* [1919] WN 22, CA. As to default judgments see generally PARA 506 et seq.

4 *Mackenzie-Kennedy v Air Council* [1927] 2 KB 517, CA; *Jaeger Co Ltd v Jaeger* (1929) 46 RPC 336, CA. As to the position where the causes of action are different see eg *Leggott v Great Northern Rly Co* (1876) 1 QBD 599; and see PARA 1157. As to striking out see generally PARA 520 et seq.

Issue estoppel is a separate doctrine from that of abuse of process; however, the question as to whether a case falls within the exceptions to the doctrine of issue estoppel depends, inter alia, on whether it is likely to amount to an abuse of process to permit a party to re-raise an issue: see *Gregson v Evangelou* [2003] EWHC 322 (QB), [2003] All ER (D) 314 (Jan). See also *Lloyds TSB Bank Ltd v Cooke-Arkwright (a firm)* [2001] All ER (D) 127 (Oct) (even where a judicial finding on a particular issue is not binding on a party to subsequent proceedings as res judicata, because that person has not been a party to the earlier proceedings in which the finding was made, it is still open to the court to withdraw that issue from consideration, either on the ground that re-litigation of the same issue would amount to an abuse of process or on the basis of issue estoppel). Cf *Specialist Group International Ltd v Deakin* [2001] EWCA Civ 777, [2001] All ER (D) 287 (May) (point about bonuses not taken in previous litigation involving loans; no estoppel or abuse of process); *Tanner v Filby* [2003] EWHC 288 (QB), [2003] All ER (D) 279 (Feb) (defendants in defamation claim pleading fair comment and justification; claimant seeking to strike out those defences on the grounds of issue estoppel and/or abuse of process, in that the issues contained in the defences had formed the subject matter of previous small claims proceedings; held that small claims proceedings had not comprised exactly the same parties as defamation proceedings, and although there was a degree of overlap in terms of the raw factual data in both proceedings, there was certainly not a complete match of factual issues; moreover, to raise the small claims proceedings in order to prevent the defendants from criticising the claimant, or from defending themselves in High Court proceedings which concerned their right to free speech, would run contrary to established common law principles and the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)).

5 See the Civil Procedure Rules 1998, SI 1998/3132. As to the application of the CPR see PARA 32.

6 As to the overriding objective see CPR 1.1; and PARAS 33-35.

7 *Affleck v Ferguson, Close v Ferguson* [2001] All ER (D) 307 (May), EAT; and see eg *Panasonic Industrial Europe Ltd v Purdom* [2001] All ER (D) 298 (Feb), EAT (circumstances surrounding earlier directions hearing did not warrant the application of the principles of issue estoppel). Cf *Maycock v Rotherham Reborning Service Ltd* [2002] All ER (D) 423 (Feb), EAT (tribunal deciding preliminary issue; employer not appealing; employer later appealing against decision at substantive hearing; estopped from challenging decision on preliminary issue).

An employee's complaints of race discrimination and victimisation have been dismissed on the basis that they were res judicata and related to issues that had been raised in earlier proceedings that had been struck out: *Murali v Seeley* [2003] All ER (D) 110 (Jul), EAT. As to issue estoppel in employment tribunals see also eg *Hancock v Doncaster Metropolitan Borough Council* [2003] All ER (D) 37 (Mar), EAT; and see PARAS 1179 note 3, 1184.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/D. COURTS AND TRIBUNALS CAPABLE OF CREATING AN ESTOPPEL BY RECORD/1184. Extension of doctrine of estoppel by record.

D. COURTS AND TRIBUNALS CAPABLE OF CREATING AN ESTOPPEL BY RECORD

1184. Extension of doctrine of estoppel by record.

Traditionally, only judgments made by a court of record gave rise to estoppel by record¹. However, the doctrine of estoppel by record, or *res judicata*², has been extended by analogy to the decisions of all tribunals which have jurisdiction, whether by the law of England³, or by the consent of parties⁴, or by the law of the country to whose tribunals the parties have, or may be presumed from their conduct to have, submitted themselves⁵. The estoppel which arises from the decisions of such tribunals was formerly referred to as 'estoppel quasi by record'⁶. The doctrine applies equally in all courts, and it is immaterial in what court the former proceedings were taken, provided only that it was a court of competent jurisdiction⁷, or what form the proceedings took, provided they were really for the same cause⁸. Issue estoppel, as much as cause of action estoppel, is applicable to bind parties following decisions of a court with a limited statutory jurisdiction⁹. Some particular courts and tribunals, and the question of whether they are courts of record for the purpose of creating an estoppel by record, are discussed below¹⁰.

Res judicata has been applied to the dismissal of a petition on the ground of insufficient evidence even though there was, strictly speaking, no record¹¹, and to an order, interim in form, which was meant to be a declaration of the rights of the parties¹². On the same principle a claim was stayed as frivolous and vexatious when the point had been determined by a county court in a manner intended to be final, but not amounting to *res judicata*, because of an interim application¹³.

1 As to courts of record see PARA 1168 note 3. As to estoppel by record see PARA 1168 et seq.

2 As to the meaning of 'res judicata' see PARA 1154 note 4.

3 'The law hath respect, not only to courts of record and judicial proceedings there, but even to all other proceedings where the person who gives judgment or sentence hath judicial authority': *Philips v Bury* (1694) 1 Ld Raym 5; and see the judgment of Lord Holt CJ, 2 Term Rep 346 at 357; cf *R v Grundon* (1775) 1 Cowp 315.

4 To be admissible evidence a decree must be that of a court known to the law of this country, or of competent jurisdiction, or must be founded on a voluntary submission: see *Rogers v Wood* (1831) 2 B & Ad 245. As to the award of an arbitrator see PARA 1188.

5 As to the recognition and enforcement of foreign judgments see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 140 et seq; and as to foreign courts see PARA 1189.

6 As to the origin of this expression in its original formulation 'estoppel quasi of record' see 2 Smith LC (13th Edn) 689. Such an estoppel will be prevented from arising by any of the matters which would prevent estoppel by record, as traditionally defined, from arising: see *Harrison v Southampton Corpn* (1853) 4 De GM & G 137 (fraud); *Harris v Willis* (1855) 15 CB 710 (want of jurisdiction); *Blackham's Case* (1709) 1 Salk 290 (matter not in issue); and the cases cited in PARAS 1006-1007.

7 See PARA 1170. A body may be a court of competent jurisdiction for some purposes and not for others: *The European Gateway*[1987] QB 206, sub nom *The Speedlink Vanguard and The European Gateway*[1986] 3 All ER 554 (court of formal investigation appointed under the Merchant Shipping Act 1894 s 466 (repealed); court with

adjudicative functions in relation to suspension or cancellation of officers' certificates; findings of fact not binding between contending ship-owners).

8 The finding of a county court in an action for wrongful dismissal that the dismissal was justified was conclusive on a summons for wages before justices founded on the same dismissal: *Routledge v Hislop* (1860) 2 E & E 549; cf *Flitters v Allfrey* (1874) LR 10 CP 29; *Eastmure v Laws* (1839) 5 Bing NC 444; *Furness, Withy & Co Ltd v J and E Hall Ltd* (1909) 25 TLR 233 (plaintiff (now known as the 'claimant': see PARA 18), who has recovered in one action for breach of contract the damages which he has had to pay to a third party, cannot bring second action for the costs incurred in defending the third party's action, because they are in fact damages for the cause of action already sued upon; and the fact that they are claimed on a contract of indemnity arising upon an implied request to defend the third party's action makes no difference). A dismissal by justices of a summons for bringing forward a house beyond the building line was a bar to a summons for subsequently continuing the same house beyond the same line (*Kinnis v Graves* (1898) 78 LT 502, DC); but the withdrawal of a summons before justices does not operate as an estoppel (*Davis v Morton* [1913] 2 KB 479, DC; *Land v Land* [1949] P 405, [1949] 2 All ER 218, DC (not following *Hopkins v Hopkins* [1914] P 282); *Owens v Minoprio* [1942] 1 KB 193, [1942] 1 All ER 30, DC). A decision of licensing justices to consider applications for the transfer and renewal of liquor licences, which amounted merely to an exercise of discretion, was not a decision of a court on which estoppel could be founded, and did not estop them from giving a contrary decision on the same facts on a subsequent occasion: *Smith v Shann* [1898] 2 QB 347, DC. A dismissal by magistrates of a complaint against a steward for withholding or misapplying property under what is now the Friendly Societies Act 1974 s 99(2) creates no estoppel barring a claim in contract by the club for payment by the steward of any deficiency in cash or stock: *Beeches Workingmen's Club and Institute Trustees v Scott* [1969] 2 All ER 420, [1969] 1 WLR 550, CA. A county court's finding in judicial separation proceedings is binding on the High Court in later proceedings under the Married Women's Property Act 1882 s 17: *Razelos v Razelos (No 2)* [1970] 1 All ER 386n, sub nom *Razelos v Razelos* [1970] 1 WLR 390.

9 *Crown Estate Comrs v Dorset County Council* [1990] Ch 297, [1990] 1 All ER 19 (statutory jurisdiction of commons commissioner to decide whether road verges registrable as common land involved decision on whether land in question formed part of highway).

10 See PARAS 1185-1189.

11 *Re May* (1885) 28 ChD 516, CA; cf *Jones v Nixon* (1831) 105 ER 359; *Symons v Rees* (1876) 1 Ex D 416. As to the necessity for the record of the court's act to be forthcoming see PARA 1171.

12 *Peareth v Marriott* (1882) 22 ChD 182, CA; cf *Livesey v Harding* (1855) 21 Beav 227; *Re Larard, ex p Yeomans and Heap* (1896) 3 Mans 317, CA; *Badar Bee v Habib Merican Noordin* [1909] AC 615, PC. An order for the carrying over of a fund in court to a separate account does not operate as a judgment or declaration of right in favour of the persons indicated as the owners by the title of that account, and does not operate as res judicata so as to bar conclusively the persons really entitled to the capital of the fund: *Thompson v Thompson* [1923] 2 Ch 205.

13 *Stephenson v Garnett* [1898] 1 QB 677, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/D. COURTS AND TRIBUNALS CAPABLE OF CREATING AN ESTOPPEL BY RECORD/1185. Ecclesiastical courts.

1185. Ecclesiastical courts.

The ecclesiastical courts, other than the court set up by statute for trying presentation cases¹, are not courts of record². Much of the former jurisdiction of the ecclesiastical courts has been transferred to the High Court³, but in those matters in which the ecclesiastical courts retain their jurisdiction their final decrees are conclusive between the parties⁴ and, where they create or affect the status of a party, upon all persons, as being in the nature of judgments in rem⁵.

1 See **ECCLESIASTICAL LAW**.

2 See **COURTS** vol 10 (Reissue) PARA 308 notes 3, 8.

3 See generally **COURTS; ECCLESIASTICAL LAW**.

4 *Kenn's Case* (1606) 7 Co Rep 42b; *R v Grundon* (1775) 1 Cowp 315.

5 See the cases as to sentences of deprivation cited by Lord Holt CJ in *Philips v Bury* (1694) 2 Term Rep 346 at 354.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/D. COURTS AND TRIBUNALS CAPABLE OF CREATING AN ESTOPPEL BY RECORD/1186. Statutory tribunals and courts-martial.

1186. Statutory tribunals and courts-martial.

Certain courts are expressly declared by statute to be courts of record¹. As respects the many other tribunals which have been given jurisdiction by statute in particular matters², it seems that the general principle that the law has respect not only to courts of record and proceedings in those courts but also to all other proceedings where the person who gives judgment has judicial authority³ is applicable. The sentence of a court-martial might in certain circumstances be pleaded by way of estoppel⁴.

As a general rule estoppel by record can apply to decisions of employment tribunals⁵. However, an issue estoppel cannot arise where the later court cannot identify a clear finding in the earlier proceedings on the relevant issue⁶. It has been held that the principle of issue estoppel applies not only where a tribunal has given a decision on issues of fact and law in the previous litigation, but also where a complaint is dismissed by a tribunal following the withdrawal of the application by the applicant⁷; but there is no requirement that the principle is to apply in employment tribunal cases where it is clear, on an examination of the surrounding circumstances, that withdrawal of the application is in substance a discontinuance of the proceedings and not an order dismissing the proceedings⁸.

1 As to such courts see **COURTS** vol 10 (Reissue) PARA 308 note 1.

2 As to such tribunals see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARAS 13, 57 et seq.

3 See PARA 1184 note 3.

4 *Hannaford v Hunn* (1825) 2 C & P 148; and see 2 Smith LC (13th Edn) 699. As to courts-martial generally see **ARMED FORCES**. The position of tribunals administering martial law is different, and in circumstances where a state of war exists and martial law prevails the civil courts have no jurisdiction in relation to acts of the military authorities: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 821.

5 *Munir v Jang Publications Ltd* [1989] ICR 1, [1989] IRLR 224, CA; *O'Laoire v Jackel International Ltd (No 2)* [1991] ICR 718, sub nom *O'Laoire v Jackel International Ltd* [1991] IRLR 170, CA. The principle of issue estoppel applies to employment tribunal cases regardless of whether the person estopped was legally represented or not: *Divine-Bortey v Brent London Borough Council* [1998] ICR 886, [1998] IRLR 525, CA. See also *Hancock v Doncaster Metropolitan Borough Council* [1998] ICR 900, EAT; and cf *Friend v Civil Aviation Authority* [2001] EWCA Civ 1204, [2001] 4 All ER 385, [2002] ICR 525 (the form of estoppel contained in the principle that parties may not advance arguments, claims or defences which could have been put forward for decision on the first occasion must be applied with caution; before a court can find an issue estoppel it must be satisfied that the issue on which a claimant has to succeed is indeed an issue which has been decided on some earlier occasion; that test was not met in the instant case as the tribunal never considered the safety issue when determining the question of whether F had been unfairly dismissed and whether he had contributed to that dismissal, thus there could be no issue estoppel). Employment tribunals are now required to keep written records of their decisions: see the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, SI 2004/1861, reg 16, Sch 1 rr 3(5), 6(5).

6 *Janata Bank v Ahmed* [1981] ICR 791, [1981] IRLR 457, CA.

7 *Barber v Staffordshire County Council* [1996] 2 All ER 748, [1996] ICR 379, CA; applied in *Lennon v Birmingham City Council* [2001] EWCA Civ 435, [2001] IRLR 826, [2001] All ER (D) 421 (Mar); and see *Kirklees Metropolitan Borough Council v Farrell* [2000] ICR 1335, EAT.

8 *Ako v Rothschild Asset Management Ltd* [2002] EWCA Civ 236, [2002] 2 All ER 693, [2002] IRLR 348. See also *Sajid v Sussex Muslim Society* [2001] EWCA Civ 1684, [2002] IRLR 113, [2001] All ER (D) 19 (Oct).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/D. COURTS AND TRIBUNALS CAPABLE OF CREATING AN ESTOPPEL BY RECORD/1187. Domestic tribunals.

1187. Domestic tribunals.

The principle of conclusiveness has been applied to decisions of domestic tribunals¹, whether or not constituted by statute, in a number of cases, of which the following are examples: a sentence of expulsion passed by a college²; of deprivation by a college visitor³; of trustees dismissing a schoolmaster⁴. An order of the Professional Conduct Committee of the General Dental Council that a dentist's name be struck off the register on the ground of professional misconduct⁵ was held to be conclusive as to the fact that the name had been erased from the register⁶, but only prima facie evidence of the grounds on which the order was based⁷.

1 As to domestic tribunals see eg *Abbott v Sullivan* [1952] 1 KB 189, [1952] 1 All ER 226, CA; *Byrne v Kinematograph Renters Society Ltd* [1958] 2 All ER 579, [1958] 1 WLR 762; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 13; **JUDICIAL REVIEW** vol 61 (2010) PARA 640 et seq. As to the status of disciplinary bodies controlling sports see eg *R v Disciplinary Committee of the Jockey Club, Ex p Aga Khan* [1993] 2 All ER 853, [1993] 1 WLR 909, CA. Failure to challenge the procedure at a disciplinary hearing of such a body does not estop a claimant from later complaining that the procedure was unfair: *Jones v Welsh Rugby Union* (1997) Times, 6 March.

2 *R v Graddon* (1775) 1 Cowp 315. The court of the vice-chancellor of a university is a court of record: *Kemp v Neville* (1861) 10 CBNS 523.

3 *Philips v Bury* (1694) 1 Ld Raym 5.

4 *Doe d Davy v Haddon* (1783) 3 Doug KB 310.

5 See under the Dentists Act 1984 s 27: see **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 460 et seq. As to erasure of names from the medical register and other matters relating to fitness to practise medicine see the Medical Act 1983 Pt V (ss 35-44D); and **MEDICAL PROFESSIONS**.

6 *Hill v Clifford, Clifford v Timms, Clifford v Phillips* [1907] 2 Ch 236, CA; affd on other points sub nom *Clifford v Timms, Clifford v Phillips* [1908] AC 12, 15, HL.

7 See PARA 1193 text to notes 2, 3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/D. COURTS AND TRIBUNALS CAPABLE OF CREATING AN ESTOPPEL BY RECORD/1188. Arbitrators.

1188. Arbitrators.

Unless otherwise agreed by the parties, an award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them¹. The fact that the agreement contains a confidentiality clause does not affect this principle². The decision of an arbitrator upon the construction of an agreement which was referred to him for interpretation is conclusive between the parties in a claim for subsequent breaches of the same agreement³; and proceedings on a contract in respect of a claim under it are barred by an award that has dealt with and decided such a claim⁴. Where the submission to arbitration requires the arbitrators to have certain qualifications, a party who takes part in the proceedings in ignorance of the fact that an arbitrator appointed by the other party is not qualified is not estopped from denying the validity of the award⁵, although he is so estopped when it is his own arbitrator who is not qualified⁶. An award creates no estoppel if the arbitrator exceeds his jurisdiction⁷, but an award within the arbitrator's jurisdiction, even though wrong in law, will be binding unless the proper steps have been taken to have it set aside⁸. The award is admissible in evidence in a suit between the parties to it or their privies⁹, but is inadmissible, even as evidence of reputation, as between strangers¹⁰, except as proving acts of ownership¹¹.

1 Arbitration Act 1996 s 58(1); and see *Doe d Morris v Rosser* (1802) 3 East 15; *Comings v Heard* (1869) LR 4 QB 669; *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11, [2003] 1 All ER (Comm) 253; and **ARBITRATION** vol 2 (2008) PARA 1268.

2 *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11, [2003] 1 All ER (Comm) 253.

3 *Gueret v Audouy* (1893) 62 LJQB 633, CA.

4 *Ayscough v Sheed, Thomson & Co* (1924) 93 LJB 924, HL. It is otherwise if the award merely dealt with the question of the arbitrator's jurisdiction (*Pinnock Bros v Lewis and Peat Ltd* [1923] 1 KB 690) as it is not sufficient that the award can be made by inference a decision upon the matter in dispute (see *Newall v Elliot* (1863) 1 H & C 797; *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630, [1965] 2 All ER 4, CA).

A contract on its true construction may provide for a succession of claims as and when disputes between the parties arise: *Purser & Co (Hillingdon) Ltd v Jackson* [1977] QB 166, [1976] 3 All ER 641 (building contract incorporating terms of NHBC scheme), distinguishing *Conquer v Boot* [1928] 2 KB 336, DC.

5 *Jungheim, Hopkins & Co v Foukelmann* [1909] 2 KB 948.

6 *Oakland Metal Co Ltd v D Benaim & Co Ltd* [1953] 2 QB 261, [1953] 2 All ER 650; and see PARA 1170.

7 *Hutcheson v Eaton* (1884) 13 QBD 861, CA; cf *Falkingham v Victorian Rlys Comr* [1900] AC 452, PC. As to form of arbitration awards see **ARBITRATION** vol 2 (2008) PARA 1263.

8 *HE Daniels Ltd v Carmel Exporters and Importers Ltd* [1953] 2 QB 242, [1953] 2 All ER 401.

9 *Thorpe v Eyre* (1834) 1 Ad & El 926. As to privies see eg PARAS 1155 note 5, 1196-1198.

10 *R v Cotton* (1813) 3 Camp 444; *Doe d Smith and Payne v Webber* (1834) 1 Ad & El 119; *Evans v Rees* (1839) 10 Ad & El 151; *Lady Wenman v Mackenzie* (1855) 5 E & B 447. In *Shelling v Farmer* (1725) 1 Stra 646 and *Doe d Chawner v Boutler* (1837) 6 Ad & El 675, awards were admitted in evidence against persons whom the courts regarded as privies, although they appear to have been in fact strangers.

11 *Brew v Haren* (1874) IR 9 CL 29; and see *Brett v Beales* (1829) Mood & M 416.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/D. COURTS AND TRIBUNALS CAPABLE OF CREATING AN ESTOPPEL BY RECORD/1189. Foreign courts and tribunals.

1189. Foreign courts and tribunals.

Judgments of a foreign court may give rise to cause of action or issue estoppel in appropriate cases. A foreign judgment to which the relevant statutory provisions¹ apply, or would have applied if a sum of money had been payable thereunder, is recognised² in any court in the United Kingdom³ as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings⁴. This is the case whether the judgment is registrable or not, and whether, if it is registrable, it is registered or not⁵.

Issue estoppel can also in certain circumstances arise from judgments of foreign courts⁶. It does not, strictly speaking, arise from competition proceedings before the EC Commission in a national case between the same parties; but the English courts must take all reasonable steps to avoid or reduce the risk of drawing conclusions which are inconsistent with decisions of the Commission⁷.

No cause of action estoppel arises from a decision of the Opposition Division of the European Patent Office since the national courts have exclusive jurisdiction over revocation proceedings, and therefore validity is finally decided by those courts⁸.

The recognition and enforcement of decisions of the European Court of Justice and of other international tribunals, and international jurisdiction generally, are discussed elsewhere in this work⁹.

1 The Foreign Judgments (Reciprocal Enforcement) Act 1933 Pt I (ss 1-7): see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 171 et seq. As to the recognition and enforcement of overseas judgments see also the Civil Jurisdiction and Judgments Act 1982; the Merchant Shipping (Liner Conferences) Act 1982; the Civil Jurisdiction and Judgments Act 1991; the Private International Law (Miscellaneous Provisions) Act 1995; EC Council Regulation 44/2001 (OJ L12, 16.01.2001, p 1); the Civil Jurisdiction and Judgments (Authentic Instruments and Court Settlements) Order 2001, SI 2001/3928; the Civil Jurisdiction and Judgments Order 2001, SI 2002/3929; CPR 74.1-74.18; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65 et seq.

2 The subject to the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 8: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 181.

3 As to the meaning of 'United Kingdom' see PARA 221 note 2.

4 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 8(1). A foreign judgment is conclusive under s 8(1) only as regards the matters therein adjudicated on: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, [1975] 1 All ER 810, HL (German decision that claims on bills of exchange were statute-barred reached without considering the merits of the claims; conclusive only of fact that claims were statute-barred in German law and no bar to later proceedings in England, where a different limitation period applied); *Black v Yates* [1992] QB 526, [1991] 4 All ER 722 (plaintiff widow precluded by Spanish judgment from bringing proceedings raising substantially the same claim for damages on her own behalf and as dependant of her late husband; action on behalf of estate could proceed because no claim on its behalf made in Spanish proceedings; and action on behalf of children could proceed because they had not been validly made parties to the Spanish proceedings).

5 See the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 8(1).

6 *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853, [1966] 2 All ER 536, HL; *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 3)* [1970] Ch 506, [1969] 3 All ER 897; *DSV Silo-und Verwaltungsgesellschaft mbH v Owners of the Sennar, The Sennar* [1985] 2 All ER 104, [1985] 1 WLR 490, HL; *Black v Yates* [1992] QB 526, [1991] 4 All ER 722; *Andre & Cie SA v Euro Asian Investment Corp'n* [2001] All ER

(D) 23 (Feb) (decision of Russian court); *CHF Chevreau Haeute Und Felle AG v Conceria Vignola Nobile* [2000] All ER (D) 1841 (decision of Italian court); *The Good Challenger* [2003] EWHC 10 (Comm), [2003] 1 Lloyd's Rep 471, [2003] All ER (D) 335 (Jan) (decision of Romanian courts not conclusive in the circumstances). An issue estoppel can arise from an interlocutory (interim) judgment of a foreign court on a procedural issue where there is an express submission of the procedural or jurisdictional issue to the foreign court, and the specific issue of fact is raised before and decided by the court: *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847, [1996] 11 LS Gaz R 30, CA. As to issue estoppel see PARA 1179 et seq.

For an example of a case where the High Court tried, as a preliminary issue, a question relating to the operation of a foreign doctrine of estoppel see *Celltech Chiroscience Ltd v MedImmune Inc* [2002] EWHC 2167 (Pat), [2002] All ER (D) 411 (Oct) (US doctrine of 'prosecution history estoppel').

7 *Iberian UK Ltd v BPB Industries plc* [1996] 2 CMLR 601, [1997] ICR 164.

8 *Buehler AG v Chronos Richardson Ltd* [1998] 2 All ER 960, [1998] RPC 609.

9 See PARAS 1085 et seq, 1232-1233; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 142 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iii) Res Judicata/E. JUDGMENT RECOVERED/1190. Cause of action merged in the judgment.

E. JUDGMENT RECOVERED

1190. Cause of action merged in the judgment.

The defence of 'judgment recovered', arising as it does out of res judicata¹, has much in common with estoppel by record, although it is not founded upon it. A claimant who has once sued a defendant to judgment cannot, while the judgment stands, though unsatisfied, sue him again for the same cause, not because he is estopped from doing so (although he, as well as the defendant, is estopped from averring anything contrary to the record)², but because the cause of action is merged in the judgment, which creates an obligation of a higher nature³. It is also probably true to say that a person who has once recovered judgment for a sum of money is estopped from averring that he ought to recover any further sum for the same cause of action⁴.

1 As to the meaning of 'res judicata' see PARA 1154 note 4.

2 *Webster v Armstrong* (1885) 54 LJQB 236; *Stewart v Todd*(1846) 9 QB 767, Ex Ch.

3 See *King v Hoare* (1844) 13 M & W 494; *Re Hodgson, Beckett v Ramsdale*(1885) 31 ChD 177, CA; *Florence v Jennings* (1857) 2 CBNS 454; *Stewart v Todd*(1846) 9 QB 767, Ex Ch; *Isaacs & Sons v Salbstein*[1916] 2 KB 139, CA; cf *Savile v Jackson* (1824) 13 Price 715. As to merger of the cause of action in the judgment see further PARA 1157.

4 *Stewart v Todd*(1846) 9 QB 767, Ex Ch; *Hills v Co-operative Wholesale Society Ltd*[1940] 2 KB 435, [1940] 3 All ER 233, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iv) Parties Estopped by Judgment/A. PARTIES ESTOPPED BY JUDGMENT DETERMINING STATUS/1191. Conclusiveness against strangers of findings on which judgment is founded.

(iv) Parties Estopped by Judgment

A. PARTIES ESTOPPED BY JUDGMENT DETERMINING STATUS

1191. Conclusiveness against strangers of findings on which judgment is founded.

The question whether and in what cases the court's findings upon which its determination of a question of status or title, or the disposition of property, have been founded are binding on strangers does not admit of a categorical answer. It is a fundamental rule that a judgment is not conclusive as to anything but the point decided¹, or of any matter which came collaterally in question², or of any matter incidentally cognisable³, or of any matter to be inferred by argument from the judgment⁴, and this applies as well to judgments in rem as to judgments between parties. Accordingly, a judgment of the Admiralty Court in a salvage claim, where salvage services are admitted and money paid into court, concludes nothing more (at least against strangers) than the amount of the award and the existence of a lien for it, and is not conclusive in a claim by the owners of the salvaged vessel against underwriters that the loss was due to sea perils⁵. The difficulty arises in the application of the rule, in determining in each case what was the point decided and what was matter incidentally cognisable, and the opinion of judges seems to have undergone some fluctuations.

It was held that the finding of an ecclesiastical court in a suit for administration that one of the parties was next of kin to the intestate, this finding being necessary for the decision, was conclusive in a suit between the same parties in Chancery for distribution of the intestate's estate⁶. A grant of probate is conclusive as to the validity of the testamentary document, and concludes any question as to the regularity of its execution; therefore, so long as the probate remains unrecalled, no relief can be obtained in equity against a fraud in obtaining the execution of the document⁷. An order for payment into court⁸ of money to meet an incumbrance on land sold does not estop the party who obtained the order from asserting that the incumbrance was, at the date of his application, statute-barred, the question whether or not the incumbrance was one that could be enforced not being material to the order allowing payment into court⁹.

If a judgment in rem is to prevent strangers disputing any finding of fact besides the status or title which the judgment establishes, it is necessary that the finding should be essential to the judgment¹⁰, and ascertainable without ambiguity from the judgment itself¹¹. It is not sufficient to create an estoppel, even between parties, if the finding relied on is discoverable only from a perusal of the judge's reasons¹².

1 *Castrique v Imrie*(1870) LR 4 HL 414; *Re M'Swiney and Hartnett's Contract*[1921] 1 IR 178; *Re Park's Estate, Park v Park*[1954] P 89, [1953] 2 All ER 408; affd on another point [1954] P 112, [1953] 2 All ER 1411, CA.

2 *R v Knaptoft Inhabitants* (1824) 2 B & C 883; *Heptulla Bros v Thakore* [1956] 1 WLR 289, 297, PC.

3 *Sanders (otherwise Saunders) v Sanders (otherwise Saunders)*[1952] 2 All ER 767 at 771, DC (where the statement in the text to this note is cited by Davies J).

4 *Duchess of Kingston's Case* (1776) as reported in 2 Smith LC (13th Edn) 644 at 645; *Re Mountcashell's Estate*[1920] 1 IR 1.

5 *Ballantyne v Mackinnon*[1896] 2 QB 455, CA; and see *Hill v Clifford*, *Clifford v Timms*, *Clifford v Phillips*[1907] 2 Ch 236, CA; on appeal sub nom *Clifford v Timms*, *Clifford v Phillips*[1908] AC 12, 15, HL.

6 *Barrs v Jackson* (1845) 1 Ph 582, reversing the decision of Knight Bruce V-C (reported in (1842) 1 Y & C Ch Cas 585), who, after quoting the well-known passage from *Duchess of Kingston's Case* (1776) 1 East PC 469, 2 Smith LC (13 Edn) 644, said (1 Y & C Ch Cas at 597-598): 'however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and . . . either [party] may again litigate them for any other purpose as to which they may come in question'. His decision was reversed by Lord Lyndhurst LC on the authority of *Bouchier v Taylor* (1776) 4 Bro Parl Cas 708, HL, which proceeded partly at least on the ground (see *Barrs v Jackson* (1845) 1 Ph 582) that the ecclesiastical court was a court of distribution, and of the inconvenience attending the existence of two different findings by two courts of co-ordinate jurisdiction; and although, having regard to Lord Lyndhurst's remarks on *Duchess of Kingston's Case* (1776) 1 East PC 469, 2 Smith LC (13 Edn) 644, it is difficult to resist the conclusion that there was a difference of opinion between him and the vice-chancellor as to what matters were to be regarded as 'incidentally cognisable', and what was 'the point decided', it is said on high authority that the principles laid down by the vice-chancellor are 'untouched by the reversal' (see 2 Smith LC (13th Edn) 694; *R v Hutchings*(1881) 6 QBD 300, CA, per Lord Selborne LC) and his judgment is regarded as a locus classicus on the subject of estoppel by record.

7 *Allen v M'Pherson* (1847) 1 HL Cas 191, followed in *Meluish v Milton*(1876) 3 ChD 27, CA. In the former case the codicil in question had been contested by the plaintiff in the Chancery suit, but in the latter the will appears from the dates (see *Meluish v Milton*(1876) 3 ChD 27, CA) to have been proved in common form.

8 le under the Law of Property Act 1925 s 50: see **SALE OF LAND** vol 42 (Reissue) PARA 268.

9 *Re M'Swiney and Hartnett's Contract*[1921] 1 IR 178.

10 *Concha v Concha*(1886) 11 App Cas 541, HL. It seems that a finding of fact after the matter had been litigated, appearing on the face of a judgment in rem, would be binding between parties, though not essential to the judgment: *Concha v Concha*(1886) 11 App Cas 541, HL.

11 *Hobbs v Henning* (1865) 17 CBNS 791; *Dalgleish v Hodgson* (1831) 7 Bing 495; *R v Hartington Middle Quarter Inhabitants* (1855) 4 E & B 780.

12 *Re Bank of Hindustan, China and Japan, Campbell's Case, Hippisley's Case, Alison's Case*(1873) 9 Ch App 1; *Re Allsop and Joy's Contract* (1889) 61 LT 213; *Jones v Lewis*[1919] 1 KB 328, CA. As to the circumstances in which the judge's reasons may be looked at to restrict the creation of an estoppel by record see PARA 1206 note 5; and as to the consideration of the judge's reasons for his decision to determine what questions of law and fact were determined in previous proceedings for the purposes of a plea of res judicata see PARA 1174. See also *Lake v Lake*[1955] P 336, [1955] 2 All ER 538, CA (possible effect of a finding of adultery, which was not embodied in the order, left undecided in subsequent proceedings between the same parties). As to the conclusiveness of decisions of courts for hearing election petitions see **ELECTIONS AND REFERENDUMS** vol 15(4) (2007 Reissue) PARAS 856, 859, 861, 863.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iv) Parties Estopped by Judgment/A. PARTIES ESTOPPED BY JUDGMENT DETERMINING STATUS/1192. Prize cases.

1192. Prize cases.

Prize cases have been regarded as exceptional to a certain extent¹, and the rule applied in claims against underwriters by owners of vessels condemned as prize has been that the judgment of a foreign prize court condemning a vessel or cargo as enemy property is conclusive evidence not only that the property was condemned, but also that it was not neutral²; but it is otherwise if it can be shown (that is, it seems, from an examination of the sentence)³ that the judgment did not proceed on that ground⁴. Moreover, in the absence of any other cause appearing on the sentence, it must be presumed from the condemnation that it proceeded on the ground that the property was that of the enemy⁵.

Where the circumstances are not such as to give rise to this presumption, as, for example, where the sentence itself suggests some other ground of condemnation, it is not conclusive if there is any ambiguity as to what the ground is. It must not be left in uncertainty whether the ship was condemned on a ground which would be just by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country. In such a case the sentence must be carefully examined to see whether the fact in proof of which it is adduced is clearly and certainly found by the judge whose sentence is relied on⁶. Such a finding of fact in the course of adjudication by a prize court, although receivable as conclusive evidence of the fact, is not regarded as raising an estoppel strictly so called, and is therefore not pleadable as such⁷. Further, to be conclusive, the ground of condemnation must be found in the operative part of the sentence⁸. The recitals may, however, be looked at, if incorporated in the operative part by reference⁹.

1 *Hobbs v Henning* (1865) 17 CBNS 791; *Ballantyne v Mackinnon* [1896] 2 QB 455, CA.

2 *Kindersley v Chase* (1801) 2 Park's Marine Insurance (8th Edn) 743, PC; *Baring v Royal Exchange Assurance Co* (1804) 5 East 99; and see **PRIZE** vol 36(2) (Reissue) PARA 839. As to the conclusiveness of foreign judgments see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 150 et seq.

3 See *Calvert v Bovill* (1798) 7 Term Rep 523; *Dalgleish v Hodgson* (1831) 7 Bing 495; cf *The Annie Johnson* (1921) 91 LJP 64, PC.

4 *Castrique v Imrie* (1870) LR 4 HL 414; *Geyer v Aguilar* (1798) 7 Term Rep 681; *Pollard v Bell* (1800) 8 Term Rep 434; *Baring v Clagett* (1802) 3 Bos & P 201; *Bolton v Gladstone* (1804) 5 East 155; affd (1809) 2 Taunt 85, Ex Ch. As to how the rule came into existence see *Lothian v Henderson* (1803) 3 Bos & P 499 at 545, HL, per Lord Eldon LC.

5 *Saloucci v Woodmass* (1784) 3 Doug KB 345; *Baring v Clagett* (1802) 3 Bos & P 201; *Lothian v Henderson* (1803) 3 Bos & P 499, HL; but see *Dalgleish v Hodgson* (1831) 7 Bing 495; and the cases cited in note 6. This is an exception to the rule that estoppels must be certain to every intent: see Co Litt 352b; and PARA 1179 note 2.

6 *Hobbs v Henning* (1865) 17 CBNS 791 at 824, citing *Dalgleish v Hodgson* (1831) 7 Bing 495; *Bernardi v Motteux* (1781) 2 Doug KB 575; *Calvert v Bovill* (1798) 7 Term Rep 523; *Fisher v Ogle* (1808) 1 Camp 418.

7 *Hobbs v Henning* (1865) 17 CBNS 791.

8 *Christie v Secretan* (1799) 8 Term Rep 192.

9 *Dalgleish v Hodgson* (1831) 7 Bing 495; *Bernardi v Motteux* (1781) 2 Doug KB 575.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iv) Parties Estopped by Judgment/A. PARTIES ESTOPPED BY JUDGMENT DETERMINING STATUS/1193. Certain judgments in rem admissible in evidence.

1193. Certain judgments in rem admissible in evidence.

There are some cases in which judgments in rem¹, although not conclusive in proceedings to which strangers are party, are nevertheless admissible in evidence. Thus it has been held that an order of the Professional Conduct Committee² erasing the name of a dentist from the register on the ground that he had been guilty of misconduct, which was apparently conclusive against all parties as to the dentist's professional status³, could be admitted in proceedings between the dentist and third parties as evidence, though not conclusive, not only as to what the grounds of erasure were, but as to the truth of those grounds⁴.

1 As to judgments in rem see PARA 160 et seq.

2 Ie under the Dentists Act 1984 s 27: see **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 460 et seq.

3 See *Hill v Clifford, Clifford v Timms, Clifford v Phillips* [1907] 2 Ch 236, CA, per Gorell Barnes P; on appeal sub nom *Clifford v Timms, Clifford v Phillips* [1908] AC 12, HL; the Dentists Act 1984 s 27; and **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 465.

4 *Hill v Clifford, Clifford v Timms, Clifford v Phillips* [1907] 2 Ch 236, CA (where Gorell Barnes P expressed doubts on this point); affd sub nom *Clifford v Timms, Clifford v Phillips* [1908] AC 12, 15, HL, without reference to the points dealt with in the Court of Appeal.

Of this nature was the verdict of a jury on the former inquisition in lunacy, which, although it declared the status of the party at the time of taking the inquisition, was not conclusive otherwise than between parties even as to that point of time (*Sergeson v Sealey* (1742) 2 Atk 412), but was admissible as to his mental state at a later period, although liable to be contradicted (*Sergeson v Sealey* (1742) 2 Atk 412; *Faulder v Silk* (1811) 3 Camp 126; *Hill v Clifford, Clifford v Timms, Clifford v Phillips* [1907] 2 Ch 236, CA; on appeal sub nom *Clifford v Timms, Clifford v Phillips* [1908] AC 12, 15, HL, citing *Van Grutten v Foxwell, Foxwell v Van Grutten* [1897] AC 658, HL (not reported on this point)). Inquisitions of lunacy were abolished by the Mental Health Act 1959.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iv) Parties Estopped by Judgment/A. PARTIES ESTOPPED BY JUDGMENT DETERMINING STATUS/1194. Consent judgment in rem.

1194. Consent judgment in rem.

Although a judgment by consent may well create an estoppel between the parties¹, it is at least doubtful whether a judgment in rem obtained by consent of the parties² can ever be conclusive against persons who were not, and do not claim through, the parties to it, except so far as may be necessary to protect the title of a person who purchases the relevant property on the faith of the judgment. It has been stipulated that a judgment by consent cannot effect *res judicata* so as to bind the public or absent parties³.

1 *Bowden v Beauchamp* (1740) 2 Atk 81.

2 It is submitted that a judgment in rem by consent involves to some extent a contradiction in terms, the fact of the consent converting what would, had it resulted from a judicial finding, have been a judgment in rem into a mere judgment between parties. It is on this principle that the court rarely, if ever, makes declarations 'by consent'; the declaration presupposes judicial consideration and decision. As to judgments in rem see PARA 160 et seq.

3 *Jenkins v Robertson* (1867) LR 1 Sc & Div 117, HL (a Scottish case; had the judgment been the result of a contest, it would have determined the question of highway as against the public and been in the nature of a judgment in rem); cf *Ballantyne v Mackinnon* [1896] 2 QB 455, CA; *The Bellcairn* (1885) 10 PD 161, CA.

Thus a judgment by consent establishing a will in solemn form was held not to bind a party who, though served with a citation to see proceedings, had not appeared or been represented at the hearing, so as to prevent him from taking proceedings to revoke probate: *Ritchie v Malcolm* [1902] 2 IR 403; and see PARA 1159. Citations in contentious business have been abolished; but it has been held that, where it is necessary for the court to bind any class of persons, for example, pecuniary legatees, they must all be made defendants or a representation order obtained, or they must be informally notified of the proceedings so that each has an opportunity of being joined as a party: see *Mohan v Broughton* [1900] P 56, CA; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 876. As to the court's power to make a judgment binding on non-parties see now CPR 19.8A; and PARA 231. Contentious probate claims are now governed by CPR Pt 57: see PARA 30; and see generally **EXECUTORS AND ADMINISTRATORS**. As to the circumstances in which a grant of probate may be revoked see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 256 et seq; and as to the procedure see CPR 57.6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iv) Parties Estopped by Judgment/A. PARTIES ESTOPPED BY JUDGMENT DETERMINING STATUS/1195. Conclusiveness in criminal and matrimonial cases.

1195. Conclusiveness in criminal and matrimonial cases.

It seems clear that in criminal cases, at all events, a judgment in rem¹ is, as between strangers or between a party to it and a stranger, conclusive only as to the status or title which it declares or creates² or the disposition which it actually makes, and not as to any matter of fact upon which it may be founded³. A decree absolute in a divorce case concludes the fact of dissolution of the marriage, but nothing further; and it is apprehended that a decree of nullity pronounced by the English court on a marriage celebrated in England or of a foreign court on a marriage celebrated in the country of its jurisdiction, and under the law of that country⁴, between persons domiciled there, is equally conclusive as to the non-existence of the marriage⁵. A mere dismissal of a suit would not have a similar effect⁶.

Any declaration made under the Family Law Act 1986⁷ is binding on Her Majesty and all other persons⁸.

1 As to judgments in rem see PARA 160 et seq.

2 Cf *R v Grundon* (1775) 1 Cowp 315.

3 *Duchess of Kingston's Case* (1776) 2 Smith LC (13th Edn) 644; *R v Buttery and Macnamara* (1818) Russ & Ry 342 (grant of probate not conclusive in favour of accused on indictment for forging a will), not following *R v Vincent* (1721) 1 Stra 481. In regard to the converse case, ie the admissibility in civil cases of criminal convictions, see the Civil Evidence Act 1968 ss 11, 13; PARA 1196 text and note 8; and PARAS 1208-1210.

4 Marriages celebrated in a British consulate are treated as solemnised in England: see *Hay v Northcote* [1900] 2 Ch 262. As to the conclusiveness of foreign judgments see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 150 et seq.

5 This seems to follow from the reasoning of the notes to *Duchess of Kingston's Case* (1776) 2 Smith LC (13th Edn) 644 at 670; and of Blackburn J in *Castrique v Imrie* (1870) LR 4 HL 414 at 428. De Grey CJ (see 2 Smith LC (13th Edn) 647, 650) did not concede so much to the sentences of ecclesiastical courts; those courts, however, had not the power to effect a dissolution of marriage, and he apparently did not regard the sentence of an ecclesiastical court pronouncing against the fact of marriage as final. See the point discussed in 2 Smith LC (13th Edn) 692. For the modern doctrine as to decrees of nullity as distinguished from decrees of divorce and the statutory provisions relating to recognition of foreign decrees see *Ogden v Ogden* [1908] P 46, CA; *Salvesen (or von Lorang) v Austrian Property Administrator* [1927] AC 641, HL; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 162, 251 et seq.

6 *Needham v Bremner* (1866) LR 1 CP 583. In this case the petition was for dissolution, but the same principle would seem to apply to nullity proceedings.

The old cases (eg *R v Matthews* (1797) 5 Price 202n; *A-G v Wakefield* (1797) 5 Price 202n; *A-G v Reynolds* (1804) 5 Price 203n; *A-G v King* (1817) 5 Price 195; and see also the note to *Scott v Shearman* (1775) 2 Wm Bl 977), upon the conclusiveness of a record of condemnation in the Exchequer in subsequent proceedings for penalties under the statute creating the forfeiture as to the grounds of condemnation appearing on the record, form an apparent exception to these propositions. Apart from the fact that an information for penalties for breach of the revenue laws is not, strictly speaking, a criminal proceeding (*R v Hausmann* (1909) 73 JP 516, CCA) they may perhaps be explained by the fact that the parties were in substance the same, the defendant on the one hand, and on the other the Queen, prosecuting in her own name or in that of her Attorney General.

7 Ie under the Family Law Act 1986 Pt III (ss 55-62) (declarations of status): see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 121 et seq.

8 Family Law Act 1986 s 58(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iv) Parties Estopped by Judgment/B. PARTIES ESTOPPED BY JUDGMENT DETERMINING RIGHTS/1196. Parties and privies.

B. PARTIES ESTOPPED BY JUDGMENT DETERMINING RIGHTS

1196. Parties and privies.

A judgment in personam or between parties¹ raises an estoppel only against the parties² to the proceedings in which it is given and their privies³, for example those claiming or deriving title under them⁴. As against all other persons it does not prejudice the persons before the court⁵, and with certain exceptions⁶, although conclusive of the fact that the judgment was obtained and of its terms⁷, is not admissible evidence of the facts established by it⁸.

Privies are of three classes:

- 828 (1) privies in blood, for example, ancestor and heir⁹;
- 829 (2) privies in law, for example (formerly) tenant by the curtesy or in dower¹⁰, and others that came in by act in law¹¹, for example testator and executor, intestate and administrator¹², bankrupt and trustee in bankruptcy¹³;
- 830 (3) privies in estate or interest, for example testator and devisee¹⁴, vendor and purchaser¹⁵, landlord and tenant¹⁶, a husband and his wife claiming under his title and a wife and a husband claiming under hers¹⁷, successive incumbents of the same benefice¹⁸, assignor and assignee of a bond¹⁹, and the employee of a corporation defending a claim of trespass at the cost of his employers and justifying under their title and the corporation itself²⁰.

A judgment of ouster against a corporator would be conclusive evidence against another deriving title under him, for example by his vote²¹.

It is not easy to detect from the authorities what amounts to a sufficient interest²². The question seems to be determined by an examination of the factual identity of interests of the parties and the fairness of binding them by a decision in which they were not represented²³.

1 As to the meaning of 'judgment in personam or between parties' see PARA 1163.

2 1 Eq Cas Abr 163; Co Litt 352; *Ingram v Gillen* (1910) 44 ILT 103; *Bradshaw v McMullan*[1920] 2 IR 412, HL; *Fernando v Gunatillaka*[1921] 2 AC 357, PC; *Ellerman Lines Ltd v Read* (1927) 44 TLR 7 (on appeal [1928] 2 KB 144, CA); *Freshwater v Bulmer Rayon Co Ltd*[1933] Ch 162, CA; affd sub nom *Bulmer Rayon Co Ltd v Freshwater*[1933] AC 661, HL; *Re Sassoon, IRC v Raphael*[1933] Ch 858, CA; affd on another point sub nom *IRC v Raphael*[1935] AC 96, HL. As to the position of co-defendants see PARA 1202; as to the effect of foreign judgments in personam see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 150 et seq; and as to the effect of judgments in probate claims see PARA 1159 note 7; and **EXECUTORS AND ADMINISTRATORS**.

3 There is a dearth of English authority as to who are privies so as to be bound by res judicata: see *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*[1967] 1 AC 853 at 936, [1966] 2 All ER 536 at 566, HL, per Lord Guest.

4 *Borough v Whichcote* (1732) 3 Bro Parl Cas 595 (privy to a decree which was 100 years old); *Gray v Lewis, Parker v Lewis*(1873) 8 Ch App 1035; *Outram v Morewood* (1803) 3 East 346; *Strutt v Bovingdon* (1803) 5 Esp 56; *Richards v Johnston* (1859) 4 H & N 660, citing Com Dig, Estoppel (C); *Jones v Lewis*[1919] 1 KB 328, CA; *Hunt v WH Cook Ltd* (1922) 66 Sol Jo 557; *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)*[1967] 1 AC 853, [1966] 2 All ER 536, HL. A third party will not be a privy of a party to proceedings if the existence of that relationship between them depends on whether the decision goes in favour of the party to the proceedings or

against him: *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 3)*[1970] Ch 506 at 541, [1969] 3 All ER 897 at 912 per Buckley J.

5 The maxim '*res inter alios acta alteri nocere non debet*' ('acts or transactions between third parties or strangers ought not to prejudice persons before the court') applies: see *Pyke v Crouch* (1969) 1 Ld Raym 730; *Kinnersley v Orpe* (1780) 2 Doug KB 517; *Christy v Tancred* (1842) 9 M & W 438; *Spencer v Williams*(1871) LR 2 P & D 230; *Jenkyn v Jenkyn* (1856) 5 WR 43; *Lord Muskerry v Skeffington*(1868) LR 3 HL 144; *Anderson v Collinson*[1901] 2 KB 107; *Re Mountcashell's Estate*[1920] 1 IR 1; *Fernando v Gunatillaka*[1921] 2 AC 357, PC.

6 As to the cases in which judgment between parties is admissible in evidence against strangers see the Civil Evidence Act 1968 ss 11-13 (reversing, except in relation to foreign convictions, the rule in *Hollington v F Hewthorn & Co Ltd*[1943] KB 587, [1943] 2 All ER 35, CA); and note 8. As to judgments operating as estoppels or evidence see PARA 1168 et seq.

7 *Reed v Jackson* (1801) 1 East 355.

8 See the Civil Evidence Act 1968 s 11 (convictions admissible), s 12 (findings of adultery in any matrimonial proceedings and of paternity in relevant proceedings before any court in England and Wales or Northern Ireland or in affiliation proceedings before any court in the United Kingdom admissible) and s 13 (conclusiveness of convictions for the purposes of defamation claims); and PARAS 1208-1211. Where seamen convicted and imprisoned for refusing to go to sea brought an action for wages, it was held that the conviction did not operate as an estoppel between them and the owners so as to defeat their claim: *Caine v Palace Steam Shipping Co*[1907] 1 KB 670, CA (affd on another point sub nom *Palace Shipping Co Ltd v Caine*[1907] AC 386, HL); and see also *Wilson v Bennett* (1903) 6 F 269. A divorce court will treat as conclusive its own previous finding of the adultery of a party to an earlier suit who was also party to a later one, although the issue was raised in each suit by one who was not a party to the other (by a co-respondent in the first and by the Queen's Proctor in the second): *Conradi v Conradi, Worrall and Way*(1868) LR 1 P & D 514.

The former rule, on this and other grounds, that the plaintiff in a civil action (now a 'claimant' in a civil 'claim': see PARA 18) arising out of the same facts as those involved in a prosecution could not adduce evidence of the conviction of the defendant or his privy to establish those facts has been altered by statute: see the Civil Evidence Act 1968 ss 11, 13; and PARAS 1208-1209.

9 Co Litt 352a, b; *Conner v Browne* (1784) 1 Ridg Parl Rep 139; *Dundas v Waddell*(1880) 5 App Cas 249, HL; *Weeks v Birch* (1893) 69 LT 759. While the Inheritance Act 1833 s 2 altered the mode of tracing the descent of particular property, it did not affect the question of privity in blood: *Weeks v Birch* (1893) 69 LT 759. Descent to the heir was abolished, subject to certain savings, by the Administration of Estates Act 1925 ss 45(1)(a), 51(2), in the case of deaths after 1925: see **REAL PROPERTY** vol 39(2) (Reissue) PARA 96. As to the old rules see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 638 et seq.

10 As to the abolition of tenancy by the curtesy and estate in dower, and the circumstances in which curtesy may still arise, see the Administration of Estates Act 1925 ss 45, 51(2); and **REAL PROPERTY** vol 39(2) (Reissue) PARA 157 et seq.

11 Co Litt 352a, b.

12 *R v Hebden* (1738) Andr 388; *Ennis v Rochford* (1884) 14 LR Ir 285.

13 *Jones v Yates* (1829) 9 B & C 532; *Edmands v Best* (1862) 7 LT 279; *Harris v Truman*(1882) 9 QBD 264, CA. As to the position of a trustee in bankruptcy see PARA 1200.

14 *Dalton v Fitzgerald*[1897] 2 Ch 86, CA. The purchaser for value from a devisee with the legal estate is not affected by an equitable interest created by the devisor, of which the purchaser had no notice: *Clemow v Geach* (1870) 40 LJ Ch 44.

15 1 Eq Cas Abr 164; *Board v Board*(1873) LR 9 QB 48; *Sumner v Schofield* (1880) 43 LT 763; *Doe d Gaisford v Stone* (1846) 3 CB 176 (mortgagor and purchaser of equity of redemption).

16 Co Litt 352a, b.

17 *Doe d Leeming v Skirrow* (1837) 7 Ad & El 157; *Whittaker v Jackson* (1864) 2 H & C 926; *Outram v Morewood* (1803) 3 East 346.

18 *Borough v Whichcote* (1732) 3 Bro Parl Cas 595; *Dundas v Waddell*(1880) 5 App Cas 249, HL (ministers of Scots Church). It was held that the incumbent was privy to the patron under whom he claimed (*Magrath v Reichel* (1887) 57 LT 850, DC), on the authority of Bro Abr, Quare Impedit, pl 66 (*R v W de L* (1364) YB 38 Edw 3 fo 31). The decision was affirmed by the Court of Appeal, which, however, apparently differed from the divisional court on this point (see 14 App Cas at 667), and in the House of Lords, but without discussing this question (*Reichel v Magrath*(1889) 14 App Cas 665, HL).

19 *Horton v Westminster Improvement Comrs*(1852) 7 Exch 780.

20 *Re Walton-cum-Trimley Manor, ex p Tomline* (1873) 28 LT 12; cf *Hancock v Welsh and Cooper* (1816) 1 Stark 347 (privity between bailiff and landlord under whom he justified).

21 *R v York Corpn* (1792) 5 Term Rep 66, differing from *R v Grimes* (1770) 5 Burr 2598, as to the conclusiveness of the verdict.

22 *House of Spring Gardens Ltd v Waite*[1991] 1 QB 241, [1990] 2 All ER 990, CA.

23 *Gleeson v J Wippell & Co Ltd*[1977] 3 All ER 54, [1977] 1 WLR 510; *House of Spring Gardens Ltd v Waite*[1991] 1 QB 241, [1990] 2 All ER 990, CA. See also *Nana Ofori Atta II v Nana Abu Bonsra II*[1958] AC 95, [1957] 3 All ER 559, PC; *Re Langton's Estate*[1964] P 163, sub nom *Re Langton, Langton v Lloyd's Bank Ltd*[1964] 1 All ER 749, CA. As to quasi-privity see PARA 1201.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iv) Parties Estopped by Judgment/B. PARTIES ESTOPPED BY JUDGMENT DETERMINING RIGHTS/1197. Similar interest not privity.

1197. Similar interest not privity.

To establish the relation of party and privity, not only must the two persons have a similar interest in the property to which the estoppel related, but also the privity must derive title from the party¹. Thus a tenant admitted by the landlord upon a surrender by the former tenant was not estopped from denying the truth of a recital in the former tenant's deed to the effect that he was seised for life, for his estate came not from the former tenant but from the landlord². As neither a sheriff nor an execution creditor is privity to the debtor, neither of them is bound by an estoppel which prevents the debtor from denying the title of a third person who has in fact no property in the goods³.

So strictly is this rule applied that the determination in Chancery proceedings as to who are a deceased's next of kin is not binding on persons claiming to be entitled to a grant of letters of administration in respect of an independent right arising upon the renunciation of the next of kin, even though they trace their kinship through one of the parties to the former suit⁴. The successive possession of a similar interest is, however, evidence of privity of estate. Thus the fact that a sole claimant was in possession of an estate when the former cause of action accrued, and that he and his co-claimant were so at the time of the later cause of action, is prima facie evidence that the later claimants are privity in estate to the former claimant⁵.

1 *Liverpool and North Wales Steamship Co Ltd v Mersey Trading Co Ltd* [1909] 1 Ch 209, CA.

2 *Doe d Marchant v Errington* (1839) 6 Bing NC 79; cf *Lock v Norborne* (1687) 3 Mod Rep 141 (verdict against one only of several defendants; no evidence against the others).

3 *Richards v Johnston* (1859) 4 H & N 660, citing *Heane v Rogers* (1829) 9 B & C 577; followed in *Richards v Jenkins* (1887) 18 QBD 451, CA; and see PARA 1348. Cf *Heugh v Chamberlain* (1877) 25 WR 742 (one who after assignment of a patent becomes the assignor's partner is not privity to the estoppel arising out of the assignment); *Tighe v Tighe* (1877) 11 IR 203 (no privity between administrator appointed in colony and administrator appointed at home of deceased having assets in both places).

4 *Spencer v Williams* (1871) LR 2 P & D 230, more fully and more correctly reported sub nom *Spencer v Spencer* 40 LJP & M 45; cf *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co* [1894] 1 Ch 578.

5 *Blakemore v Glamorganshire Canal Co* (1835) 2 Cr M & R 133; *R v Blakemore* (1852) 2 Den 410 (conviction of former owner and occupier, liable by reason of his tenure for non-repair of highway). The cases cited in this note refer to 'plaintiffs'; but a plaintiff is now known as a 'claimant': see PARA 18.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iv) Parties Estopped by Judgment/B. PARTIES ESTOPPED BY JUDGMENT DETERMINING RIGHTS/1198. Privy's title must be derived subsequent to proceedings.

1198. Privy's title must be derived subsequent to proceedings.

In order that a judgment may be conclusive against a person as privy in estate to a party litigant it is necessary to show, apart from his taking with a notice of a pending action¹, that he derives title under the latter by act or operation of law subsequent to the recovery of the judgment², or at least to the beginning of the proceedings, and that the judgment was one affecting the property to which title is derived. Purchasers of land are not estopped by proceedings begun after the purchase³; and a judgment obtained against the mortgagor of land after completion of the mortgage, setting aside his purchase of the land on the ground of fraud, is not even evidence against the mortgagee who was not a party to the proceedings⁴.

1 See **LAND CHARGES**.

2 *Re De Burgho's Estate* [1896] 1 IR 274; and see *Doe d Foster v Earl of Derby* (1834) 1 Ad & El 783, cited in *Hodson v Walker* (1872) LR 7 Exch 55; *Pople v Evans* [1969] 2 Ch 255, [1968] 2 All ER 743. A person claiming title is privy to the interests of those through whom he claims that title for the purposes of the operation of the doctrine of estoppel per rem judicatam, but only if the title claimed was acquired after the date of the judgment: *Powell v Wiltshire* [2004] EWCA Civ 534, [2005] QB 117, [2004] 3 All ER 235.

3 *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co* [1894] 1 Ch 578; cf *The Thyatira* (1883) 8 PD 155 (indorsee of bill of lading not affected by proceedings begun after indorsement); *Gaunt v Wainman* (1836) 3 Bing NC 69 (widow not estopped in action of dower by recital in her husband's deed); *Lady Wenman v Mackenzie* (1855) 5 E & B 447 (landlord and tenant); but it is otherwise where the tenant proceeds by direction and authority of his landlord (*Kinnersley v Orpe* (1780) 2 Doug KB 517); cf *Mowatt v Castle Steel and Iron Works Co* (1886) 34 ChD 58, CA (estoppel by representation).

4 *Natal Land and Colonization Co v Good and Bowes* (1868) LR 2 PC 121; cf *Morret v Westerne* (1710) 2 Vern 663; *Simpson v Pickering* (1834) 1 Cr M & R 527; *Doe d Lord Downe v Thompson* (1847) 9 QB 1037 (estoppel by lease on mortgagor did not bind mortgagee).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iv) Parties Estopped by Judgment/B. PARTIES ESTOPPED BY JUDGMENT DETERMINING RIGHTS/1199. Party must sue or defend in same right.

1199. Party must sue or defend in same right.

It is necessary to an estoppel by record that the parties to the litigation or their privies should have claimed or defended in the same right in the former proceedings as they represent in the later ones¹. The determination of the issues in a claim by a personal representative for damage sustained by the relatives of the deceased from his death by accident raises no estoppel in a subsequent claim by the same claimant for damage caused to the deceased's estate by the same accident, because the claimant sues in two different rights, and in effect the parties in the two claims are different².

It has been held that a patentee whose patent was, in a claim by himself for infringement, held invalid for want of novelty was not in subsequent proceedings by the defendant as petitioner for the revocation of the same patent precluded from again alleging the novelty of the patent, because the petition was on behalf of the public, and the former defendant was therefore appearing in a different right³.

1 *Robinson's Case* (1603) 5 Co Rep 23b; *Huggins v York-Buildings Co* (1740) 2 Atk 44; *Rattenbury v Fenton* (1833) Coop temp Brough 60; *Bainbrigge v Baddeley* (1847) 2 Ph 705; *Hacking v Lee* (1860) 9 WR 70; *Bennett v Gamgee* (1877) 46 LJB 204, CA (trustee in bankruptcy, after electing not to continue debtor's action, not barred from bringing his own); *Metters v Brown* (1863) 1 H & C 686 (principle applied to estoppel by deed), citing Com Dig, Estoppel (C). It does not matter in what character they are summoned provided they have been parties in their own right: *Beardsley v Beardsley* [1899] 1 QB 746; following *Emberley v Trevanion* (1860) 4 Sw & Tr 197. See also *Skyparks Group plc v Marks* [2001] EWCA Civ 319, [2001] All ER (D) 102 (Mar). As to privies see eg PARAS 1155 note 5, 1196-1198.

2 *Leggott v Great Northern Rly Co* (1876) 1 QBD 599; *Daly v Dublin, Wicklow and Wexford Rly Co* (1892) 30 LR Ir 514, CA; *Marginson v Blackburn Borough Council* [1939] 2 KB 426, [1939] 1 All ER 273, CA. In *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241 at 252, [1990] 2 All ER 990 at 998, CA, Stuart-Smith LJ wished to reserve his opinion as to whether on the facts of *Marginson v Blackburn Borough Council* [1939] 2 KB 426, [1939] 1 All ER 273, CA, the plaintiff's claim might not have been struck out as an abuse of process.

3 *Re Deeley's Patent* [1895] 1 Ch 687, CA; revsd on other points sub nom *Deeley v Perkes* [1896] AC 496, HL; cf *Poulton v Adjustable Cover and Boiler Block Co* [1908] 2 Ch 430, CA. It is thought that the situation described in the text to this note would now be unlikely to arise as the defendant's petition for revocation would be dealt with on a counterclaim in the same proceedings. As to counterclaims see CPR Pt 20; and PARA 618 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iv) Parties Estopped by Judgment/B. PARTIES ESTOPPED BY JUDGMENT DETERMINING RIGHTS/1200. Position of trustee in bankruptcy and liquidator.

1200. Position of trustee in bankruptcy and liquidator.

In getting in assets for the estate of a bankrupt or an insolvent company a trustee in bankruptcy or liquidator, as the case may be, is not in any different position from any other assignor. He stands in the shoes of the person from whom he obtained the claim and estoppels operate against him in the normal way¹.

In dealing with the distribution of the assets, after they have been got in, the trustee or liquidator cannot, however, be bound by estoppel so as to prevent his exercising his statutory duty².

1 *Re Exchange Securities & Commodities Ltd (in liquidation), Re Exchange Securities Financial Services Ltd (in liquidation)* [1988] Ch 46, [1987] 2 All ER 272; and see *Harris v Truman* (1881) 7 QBD 340 (on appeal (1882) 9 QBD 264, CA); *Bloomenthal v Ford* [1897] AC 156, HL.

2 *Re Exchange Securities & Commodities Ltd (in liquidation), Re Exchange Securities Financial Services Ltd (in liquidation)* [1988] Ch 46, [1987] 2 All ER 272; and see *Re Van Laun, ex p Chatterton* [1907] 2 KB 23, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iv) Parties Estopped by Judgment/B. PARTIES ESTOPPED BY JUDGMENT DETERMINING RIGHTS/1201. Quasi-privity.

1201. Quasi-privity.

In certain cases, although there is in strictness no privity between a party to a judgment and the person against whom it is set up, the relations between them are such that the latter is not allowed to dispute it¹. There is no privity of estate between the parties to a contract of indemnity² or between a surety and the principal debtor or his trustee in bankruptcy³, but a person who has covenanted to indemnify another against liabilities and claims in respect of them is, as between himself and the party indemnified, estopped from disputing the judgment in a claim against the party indemnified which has been defended with the covenantor's knowledge and approval, not because the covenantor is a privy, but because that is the true meaning of the contract⁴. Where, however, indemnity is claimed independently of contract against trustees who have committed a breach of trust, they are not estopped by a judgment obtained by third parties against the claimants from saying that no damage has arisen from the breach⁵.

Even though trustees and their beneficiaries are different parties, and neither derive their title from the other⁶, equity will not allow the same question to be litigated between a person and the beneficiaries and afterwards between the same person and the trustees⁷; and in ordinary cases a judgment in a claim against trustees or executors who are sued in a representative capacity⁸ is binding upon the beneficiaries where the trustees or executors in fact represented their beneficiaries⁹. It is otherwise, however, where the beneficiaries have solid ground for impeaching a transaction between fraudulent trustees or executors and the claimant. In such a case, where the beneficiaries have not had an opportunity of intervening, they are not precluded from establishing their rights by a judgment against the trustees or executors in a claim in which the trustees or executors have not served a defence, or have served a defence which admitted the claimants' claim¹⁰.

1 As to the extent to which members of a class are bound by judgment against others suing or being sued in a representative capacity see CPR 19.7A(2); and PARA 225. See also **COMPANIES** vol 14 (2009) PARA 303. As to privies see eg PARAS 1155 note 5, 1196-1198.

2 *King v Norman* (1847) 4 CB 884.

3 *Pritchard v Hitchcock* (1843) 6 Man & G 151 (surety not estopped by judgment between the debtor's trustee and the creditor that the debtor's discharge of the debt was a fraudulent preference).

4 *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co* [1894] 1 Ch 578; and see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1091. As to privies see eg PARAS 1155 note 5, 1196-1198. There is no estoppel between the indemnifying parties and the claimant in the claim, even though they have assisted in the action and paid the costs: *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co* [1894] 1 Ch 578; *Pople v Evans* [1969] 2 Ch 255, [1968] 2 All ER 743.

5 *Gray v Lewis, Parker v Lewis* (1873) 8 Ch App 1035.

6 See *Keate v Phillips* (1881) 18 ChD 560.

7 *Re Defries, Norton v Levy* (1883) 48 LT 703; cf *Farquharson v Seton* (1828) 5 Russ 45 (second incumbrancer and mortgagor). There is, however, no trust relationship between an undisclosed principal and his agent vis-à-vis a third party and accordingly the dismissal of an action by the agent of an undisclosed principal is no defence to a fresh action by the undisclosed principal himself: *Pople v Evans* [1969] 2 Ch 255, [1968] 2 All ER 743.

8 le under CPR 19.7A(1): see PARA 225.

9 *Hamond v Walker* (1857) 3 Jur NS 686; *Cox v Dublin City Distillery Co Ltd (No 3)* [1917] 1 IR 203, CA; *Re De Leeuw, Jakens v Central Advance and Discount Corp Ltd* [1922] 2 Ch 540. See **TRUSTS**.

10 *Re De Leeuw, Jakens v Central Advance and Discount Corp Ltd* [1922] 2 Ch 540. As to a judgment against trustees for debenture holders binding the debenture holders see *Cox v Dublin City Distillery (No 2)* [1915] 1 IR 345, CA; *Cox v Dublin City Distillery Co Ltd (No 3)* [1917] 1 IR 203, CA; and **COMPANIES** vol 15 (2009) PARA 1382.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(iv) Parties Estopped by Judgment/B. PARTIES ESTOPPED BY JUDGMENT DETERMINING RIGHTS/1202. Issue estoppel as between co-defendants.

1202. Issue estoppel as between co-defendants.

A line of older authorities suggests that issue estoppel may operate as between co-defendants, provided that the following conditions are satisfied:

- 831 (1) there must be a conflict of interest between the defendants concerned;
- 832 (2) it must be necessary to decide this conflict in order to give the claimant the relief he claims; and
- 833 (3) the question between the defendants must have been finally decided¹.

However, it has recently been pointed out that the authorities concerned were all property disputes, in which judgments had been given determining property claims as between claimants and a number of defendants who were in contention among themselves; and the extent to which they may now apply in other circumstances is doubtful².

The question of issue estoppel between joint defendants was also considered in a case where victims of an explosion sued a water company and the contractors and consulting engineers employed by them, alleging that the explosion had been caused by the negligence of each of the defendants. None of the defendants served a contribution notice on any other defendant, or made any allegation against another defendant, or sought an apportionment of such negligence as might be found. The Court of Appeal held that the explosion had been caused solely by the negligence of the consulting engineers. The water company sued the consulting engineers for damages for their negligence and it was held, on a preliminary issue, that issue estoppel applied, and precluded the consulting engineers from denying their negligence³.

In negligence cases, particularly where traffic accidents are concerned, questions of issue estoppel between co-defendants may be complicated by the fact that different defendants may owe different duties of care to different persons⁴.

1 *Cottingham v Earl of Shrewsbury* (1843) 3 Hare 627; *Munni Bibi v Tiroloki Nath* (1931) LR 58 Ind App 158, PC; cf *Lock v Norborne* (1687) 3 Mod Rep 141.

2 See *Sweetman v Nathan* [2002] EWHC 2458 (QB) at [49], [2002] All ER (D) 330 (Nov) per Stanley Burnton J; revsd without affecting this point [2003] EWCA Civ 1115, [2003] All ER (D) 441 (Jul).

3 See *North West Water Ltd v Binnie & Partners (a firm)* [1990] 3 All ER 547, 30 ConLR 136, where Drake J reviewed both the English authorities, and Australian and New Zealand cases, from which it was clear that there had been two views as to the scope of issue estoppel between defendants in negligence cases, and conflicting decisions at first instance.

4 See *Sweetman v Nathan* [2002] EWHC 2458 (QB) at [51], [2002] All ER (D) 330 (Nov) per Stanley Burnton J (revsd without affecting this point [2003] EWCA Civ 1115, [2003] All ER (D) 441 (Jul)), citing as an example *Randolph v Tuck* [1962] 1 QB 175, [1961] 1 All ER 814. For an example of a case where drivers were prevented from re-litigating see *Wall v Radford* [1991] 2 All ER 741 (two vehicles collided resulting in injury to passenger in one of vehicles; decision on the respective drivers' liability in an action brought by the passenger was conclusive of the drivers' liability inter se, with the result that they were estopped from re-litigating their liability inter se in a second action). An 'action' is now known as a 'claim': see PARA 18.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(v) Matters Preventing Existence of Estoppel/1203. Old maxim that estoppels are odious.

(v) Matters Preventing Existence of Estoppel

1203. Old maxim that estoppels are odious.

Estoppels, being frequently at least opposed to the admission of evidence of the truth, have always been jealously regarded by the courts, and this practice found expression in the old maxim that 'estoppels are odious'¹. Although this maxim hardly expresses the modern view², particularly with regard to estoppel by representation³, the doctrine of estoppel by record is not to be extended beyond what there is authority for⁴. Fraud or collusion will prevent the existence of such an estoppel⁵.

1 See eg *Baxendale v Bennett*(1878) 3 QBD 525 at 529, CA, per Bramwell LJ.

2 'The doctrine of estoppel is a sensible and useful doctrine; it prevents the court being troubled by having to decide the same matter again that has already been decided, otherwise than by way of appeal': *Re Manly's Will Trusts (No 2)*[1976] 1 All ER 673 at 676 per Walton J. 'All estoppels are not odious but must be applied so as to work justice and not injustice': *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*[1967] 1 AC 853 at 947, [1966] 2 All ER 536 at 573, HL, per Lord Upjohn. 'The doctrine of estoppel is one of the most flexible and useful in the armoury of the law': *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd*[1982] QB 84 at 122, [1981] 3 All ER 577 at 584, CA, per Lord Denning MR.

3 'A principle which courts of law have most usefully adopted': *Cave v Mills* (1862) 7 H & N 913 at 927, 928; cf *Ashpitel v Bryan* (1863) 3 B & S 474 (affd (1864) 5 B & S 723). See *Howard v Hudson* (1853) 2 E & B 1 at 10 per Lord Campbell CJ ('this conclusion shuts out the truth and is odious'). Crompton J in *Howard v Hudson* (1853) 2 E & B 1 at 13 differs on this point, and adds, 'in many cases I think it extremely equitable'. See also *Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd*[1947] AC 46 at 55, PC per Lord Wright ('in more modern times the law of estoppel has developed and has become recognised as a beneficial branch of law'); *New Brunswick Rly Co v British and French Trust Corp Ltd*[1939] AC 1, [1938] 4 All ER 747, HL. As to estoppel by representation see **ESTOPPEL** vol 16(2) (Reissue) PARA 1052 et seq.

4 *Howlett v Tarte* (1861) 10 CBNS 813.

5 See PARA 1204.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(v) Matters Preventing Existence of Estoppel/1204. Judgment obtained by fraud.

1204. Judgment obtained by fraud.

Fraud is an extrinsic, collateral act which vitiates the most solemn proceedings of courts of justice¹. A judgment obtained by fraud or collusion, even, it seems, a judgment of the House of Lords², may normally be treated as a nullity³. An exception to the generality of these propositions should probably be made where a purchaser has acquired title to property in good faith and for value upon the faith of a judgment in rem⁴. Apart from this they may be accepted without qualification in favour of persons who were not party to the judgment, whether it was in rem⁵ or in personam⁶. On this principle the recovery of penalties, which it is not intended to enforce, in a friendly claim instituted in order to prevent hostile claims, is no bar to a second claim by another party for penalties for the same offence⁷.

In order to avoid being estopped by it, a party to a judgment obtained by fraud should generally apply to have it set aside⁸.

Where in the case of a judgment of a competent foreign court a party has applied unsuccessfully in that jurisdiction to have the first judgment set aside on the ground of fraud, he is estopped in the English courts from raising again the issue of fraud⁹.

1 *Duchess of Kingston's Case* (1776) 2 Smith LC (13th Edn) 644 at 651 per De Grey CJ. Lord Coke said it avoids all judicial acts: *Duchess of Kingston's Case* (1776) 2 Smith LC (13th Edn) 644 at 651. Cf *Smith v East Elloe RDC* [1956] AC 736, [1956] 1 All ER 855, HL (proceedings to challenge a compulsory purchase order on the ground of fraud excluded by statutory time limit).

2 *Earl of Bandon v Becher* (1835) 3 Cl & Fin 479, HL, approving the argument of Wedderburn S-G in *Duchess of Kingston's Case* (1776) 2 Smith LC (13th Edn) 644. As to the exceptional circumstances in which a judgment of the House of Lords may be set aside on the ground that there is a real danger or reasonable apprehension or suspicion of bias see *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, [1999] 1 All ER 577, HL; and PARA 95. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

3 *Shedden v Patrick* (1854) 1 Macq 535, HL; cf *Boswell v Coaks (No 2)* (1894) 86 LT 365n, HL. Lord St Leonards inclined to the opinion that an application should be made to the House itself: *Shedden v Patrick* (1854) 1 Macq 535 at 627. Where the respondent, owing to fraud, was not represented at the hearing of an appeal before the Privy Council, leave was granted on petition to set aside the judgment and consequent Order in Council and to restore the appeal: *Ram Narayan Singh v Adhindra Nath Mukerji* [1917] AC 100, PC.

A decree of divorce granted by a court of competent jurisdiction is, however, unimpeachable after the death of one of the parties even if the decree was obtained by fraud: see *Callaghan v Hanson-Fox* [1992] Fam 1, sub nom *Callaghan v Andrew-Hanson* [1992] 1 All ER 56; and PARA 1178 text and note 11.

4 See *Castrique v Imrie* (1870) LR 4 HL 414; see also *The Belcairn* (1885) 10 PD 161, CA; *Re Eyton, Bartlett v Charles* (1890) 45 ChD 458; *Smith v Surridge* (1801) 4 Esp 25 (sentence of foreign prize court pronounced without jurisdiction, but acquiesced in). As to the conclusiveness of foreign judgments see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 150 et seq.

5 See the examples given by De Grey CJ, of letters of administration fraudulently obtained and fraudulently revoked: *Duchess of Kingston's Case* (1776) 2 Smith LC (13th Edn) 644 at 652; *Harrison v Southampton Corp'n* (1853) 4 De GM & G 137 (decree of nullity of ecclesiastical court disregarded, because obtained by fraud and collusion, on the question of the legitimacy of the issue of the same marriage being raised 50 years later). In *Perry v Meddowcroft* (1846) 10 Beav 122 it was said that to make out such a case of fraud, collusion and concert between the parties must be established; and see *Meddowcroft v Huguenin* (1844) 4 Moo PCC 386. These cases were before the Matrimonial Causes Act 1873 s 1 (repealed: see now the Matrimonial Causes Act

1973 ss 1(5) (prospectively repealed), 15, whereby a decree of nullity is required to be a decree nisi in the first instance), but this does not seem to affect the principle.

6 *Earl of Bandon v Becher* (1835) 3 Cl & Fin 479, HL (action by remainderman not party to former proceedings). As to foreign judgments in personam obtained by fraud see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 151.

7 *Chalchman v Wright* (1606) Noy 118; *Girdlestone v Brighton Aquarium Co* (1879) 4 ExD 107, CA. The defence here was not estoppel, but, in substance, autrefois convict.

8 See eg *Jonesco v Beard* [1930] AC 298, HL. As to setting aside judgments obtained by fraud see PARA 1143.

9 *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241, [1990] 2 All ER 990, CA.

UPDATE

1204 Judgment obtained by fraud

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(vi) Procedural Matters/1205. Who may plead estoppel.

(vi) Procedural Matters

1205. Who may plead estoppel.

The question of who may take advantage of an estoppel is in general governed by the rule that estoppels ought to be mutual¹.

The only persons who may take advantage of an estoppel by record are those who, had the decision been the other way, would have been bound by it, that is to say, in case of a judgment in personam or between parties, the parties and their privies². It is not enough that the person against whom the estoppel is set up was party or privy to the judgment relied on; each party to the later proceeding must have been party or privy to the earlier one³. It follows that the only persons who may take advantage of an estoppel are those who claim or defend in the later proceeding in the same right as they, or those to whom they are privy, claimed or defended in the earlier⁴. The above principles are, however, qualified by specific statutory provisions that a finding in earlier proceedings is to be admissible, and in certain circumstances conclusive, evidence in later proceedings⁵.

A party having defeated one claimant to property by a plea of res judicata may not allege title in that claimant for the purpose of defeating other claimants in the proceedings⁶.

1 See **ESTOPPEL** vol 16(2) (Reissue) PARA 1012.

2 As to the meaning of 'judgment in personam or between parties' see PARA 1163. As to privies see eg PARAS 1155 note 5, 1196-1198.

3 See eg *Kennecott Utah Copper Corp v Minet Ltd* [2003] EWCA Civ 905, [2003] All ER (D) 41 (Jul) (third defendant not a party to previous proceedings and no findings made in those proceedings on matters on which claimants relied in support of their claim against third defendant in second proceedings; no issue estoppel); *Lee v Iceland Frozen Foods plc* [2001] All ER (D) 397 (Mar), EAT (issue as to whether changes to contract of employment accepted by employees unsuccessfully argued by one employee before employment tribunal; different employee not estopped from raising the point before a different tribunal); *Shedden v A-G* (1860) 30 LJP & A 217 (suit for a declaration of legitimacy to which the Attorney General was a necessary party, and in which other parties were cited, held not to be barred by a judgment of the Scottish court against the petitioner on proceedings between the petitioner and the cited parties in which the same question of legitimacy was in issue, because the Attorney General was not a party to the earlier proceedings); *Petrie v Nuttall* (1856) 11 Exch 569 (conviction of obstructing highway could not be pleaded as estoppel by third party in action by former defendant for trespass; as to mutuality see *Petrie v Nuttall* (1856) 11 Exch 569); cf *Horton v Westminster Improvement Comrs* (1852) 7 Exch 780; see also *Gaunt v Wainman* (1836) 3 Bing NC 69 (widow may not take advantage of estoppel by deed of her husband's tenant where she herself would not have been estopped); *Callow v Jenkinson* (1851) 6 Exch 666 (judgment against defendant sued jointly with others not conclusive in subsequent proceedings between same plaintiff and defendant alone); *Le Clerc v Greene* (1873) IR 7 Eq 371; Co Litt 352a, b. As to privies see eg PARAS 1155 note 5, 1196-1198.

4 *Re Deeley's Patent* [1895] 1 Ch 687, CA; revsd without affecting the point referred to [1896] AC 496, HL. Letters patent, which are matters of record, probably create, as to matters of fact stated in them, an estoppel between the grantee and the Crown, but they create none between the grantee and anyone else, for the latter is neither party nor privy to them: *Cropper v Smith* (1884) 26 ChD 700, CA; affd, without giving reasons, sub nom *Smith v Cropper* (1885) 10 App Cas 249, HL.

5 See PARA 1196 text and notes 6, 8.

6 *Re Savoy Estate Ltd, Remnant v Savoy Estate Ltd* [1949] Ch 622, [1949] 2 All ER 286, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(vi) Procedural Matters/1206. Evidence admissible to show matter in issue.

1206. Evidence admissible to show matter in issue.

In order to ascertain what was in issue between the parties in the earlier proceedings the judgment itself must, of course, be looked at¹; and, where there have been pleadings, these should also be examined², being in fact part of the record. The same principle applies where an issue has been directed by the court. In short, whatever goes to make up the record must be looked at³; and no evidence is in that case admissible to contradict the record⁴ or to show that more was in issue than appears upon it⁵. Where, after trial in a court where there are no pleadings, the record of the court is relied upon, oral evidence is, however, admissible to show what facts were in issue and determined as the basis of the judgment, and such a determination is conclusive between the same parties⁶.

The above must now be read in the light of the court's duty, in civil proceedings to which the Civil Procedure Rules 1998⁷ apply, to give effect to the overriding objective of dealing with cases justly⁸ and of its general power to control the evidence⁹.

1 *Huffer v Allen* (1866) LR 2 Exch 15; *Shoe Machinery Co v Cutlan* [1896] 1 Ch 667; *Irish Land Commission v Ryan* [1900] 2 IR 565, CA. One must also look at the verdict, if any, on which the judgment was founded: *Want v Moss* (1894) 70 LT 178, PC.

2 *Houstoun v Marquis of Sligo* (1885) 29 ChD 448; on appeal 29 ChD 457, CA; *Re South American and Mexican Co, ex p Bank of England* [1895] 1 Ch 37, CA; *Cribb v Freyberger* [1919] WN 22, CA (indorsement on specially indorsed writ); but, where the court has made an ambiguous declaration, the pleadings may not be looked at for the purpose of attributing another meaning to the declaration (*Gordon v Gonda* [1955] 2 All ER 762, [1955] 1 WLR 885, CA). The parties' pleadings are now contained in the statements of case: see PARA 584 et seq.

3 *Robinson v Duleep Singh* (1878) 11 ChD 798, CA (where, the question being as to the effect of a verdict on an issue directed out of Chancery under the old practice, it was laid down that in order to ascertain what had been determined not only the jury's finding but also the decree, the pleadings and the order directing the issues must be looked at). As to when the judge's reasons for his decision may be looked at see PARA 1174; and cf the cases cited in note 5.

4 *Whittaker v Jackson* (1864) 2 H & C 926; *Keane v O'Brien* (1871) IR 5 CL 531 (attempt to add that verdict was by consent).

5 *Sintzenick v Lucas* (1793) 1 Esp 43. As a general rule the judge's reasons cannot be looked at for the purpose of discovering the grounds of his decision (*Re Bank of Hindustan, China and Japan, Campbell's Case, Hippisley's Case, Alison's Case* (1873) 9 Ch App 1); but to this rule there are exceptions, as where the judge tries a claim separately from a counterclaim and, in dismissing the claim, expressly states that he leaves open for consideration some particular fact or facts on the counterclaim (*Patchett v Sterling Engineering Co Ltd* (1953) 71 RPC 61, CA; revsd on other grounds sub nom *Sterling Engineering Co Ltd v Patchett* [1955] AC 534, [1955] 1 All ER 369, HL). Cf *Re Allsop and Joy's Contract* (1889) 61 LT 213 (looking at the registrar's book to see what was done at a trial in the Chancery Division); *Jones v Lewis* [1919] 1 KB 328, CA; and see note 3. As to the modern procedure for trying a counterclaim see CPR Pt 20; and PARA 618 et seq.

6 *Flitters v Allfrey* (1874) LR 10 CP 29, following *Routledge v Hislop* (1860) 2 E & E 549; but see *Irish Land Commission v Ryan* [1900] 2 IR 565 at 580, CA, per Holmes LJ.

7 In the Civil Procedure Rules 1998, SI 1998/3132. As to the application of the CPR see PARA 32.

8 As to the overriding objective see CPR 1.1; and PARAS 33-35.

9 See CPR 32.1; and PARA 791.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(vi) Procedural Matters/1207. Payment into and out of court.

1207. Payment into and out of court.

Where money has been paid into court in satisfaction of a particular cause of action¹ and taken out by the claimant, and judgment has been signed for his costs, it seems that the defendant is not estopped from denying material averments in the particulars of claim² although the claimant will be estopped from denying the sufficiency of the amount³; and the same result would seem to follow where the claimant, having taken out the money, merely abandons the proceedings and no judgment is signed. Where a sum is paid into court generally in satisfaction of several causes of action⁴ and the claimant takes out the money and abandons the claim, he is not estopped from proceedings for a particular item unless it appears on inquiry that the sum paid into court included that item⁵.

Where a party to a claim takes out of court money paid into court and thereby apparently elects to pursue one of two alternative remedies, but in fact acts under a mistaken interpretation of the pleadings, the court has jurisdiction to relieve him against the consequences of his mistake if he applies quickly and it is just so to do⁶.

¹ A defendant may make an offer under CPR Pt 36 limited to part of the claim: see CPR 36.2(2)(d); and PARA 730. As to a defendant's offer to settle see PARA 729 et seq. It is submitted that, where payment in is accompanied by an admission of liability, the defendant will be estopped from denying material averments in the particulars of claim.

² He is not estopped from setting up other matters which might have constituted a defence (*Rigge v Burbidge* (1846) 15 M & W 598), nor when liability is denied on payment in (*Coote v Ford* [1899] 2 Ch 93, CA). In *Stephens & Co v Allen* (1921) 91 LJPC 32, in answer to a general claim for a large sum of money due in respect of professional services, a defence was served under which a much smaller sum was paid into court in satisfaction of the entire claim. It was held that the plaintiff was not estopped, by having accepted the sum in such satisfaction, from raising, in an action against him for damages for negligence in the performance of his duties, the plea that he was not guilty of any negligence. A 'plaintiff' is now known as a 'claimant' and an 'action' as a 'claim': see PARA 18.

³ See *Sanders v Hamilton* (1907) 96 LT 679 (plaintiff, who had by mistake claimed too little and taken it out of court when paid in by the defendant, an amendment to increase the claim being disallowed, and judgment thereupon entered for the defendant, was barred from bringing an action for the alleged balance); cf *Haddow v Morton* [1894] 1 QB 565, CA.

⁴ An offer of payment into court under CPR Pt 36 must inter alia (1) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and (2) state whether it takes into account any counterclaim: CPR 36.2(2)(d), (e). See further PARA 730.

⁵ *Holland v Clark* (1842) 1 Y & C Ch Cas 151; cf *Lord Bagot v Williams* (1824) 3 B & C 235 (judgment by default and subsequent action for further sum). As to payment into and out of court generally see PARA 729 et seq.

⁶ *S Kaprow & Co Ltd v Maclelland & Co Ltd* [1948] 1 KB 618, [1948] 1 All ER 264, CA. As to taking out money paid into court see PARA 743; and as to the court's power to grant relief in cases of mistake see **EQUITY** vol 16(2) (Reissue) PARAS 681-686.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(vii) Previous Convictions/1208. Convictions as evidence in civil proceedings.

(vii) Previous Convictions

1208. Convictions as evidence in civil proceedings.

In any civil proceedings¹ the fact that a person has been convicted of an offence by or before any court² in the United Kingdom³ or by a court-martial⁴ there or elsewhere is admissible in evidence⁵ for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings⁶. No conviction other than a subsisting one⁷ is admissible in evidence by virtue of these provisions⁸.

In any civil proceedings in which by virtue of these provisions a person is proved to have been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere, he must be taken to have committed that offence unless the contrary is proved⁹. Without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, are admissible in evidence for that purpose¹⁰.

In relation to foreign convictions, the rule¹¹ that a previous criminal conviction is inadmissible in subsequent civil proceedings continues to have effect despite the above provisions¹².

1 'Civil proceedings' includes, in addition to civil proceedings in any of the ordinary courts of law, civil proceedings before any other tribunal, being proceedings in relation to which the strict rules of evidence apply, and an arbitration or reference, whether under an enactment or not, but does not include civil proceedings in relation to which the strict rules of evidence do not apply: Civil Evidence Act 1968 s 18(1).

2 'Court' does not include a court-martial, and, in relation to an arbitration or reference, means the arbitrator or umpire and, in relation to proceedings before a tribunal (not being one of the ordinary courts of law), means the tribunal: Civil Evidence Act 1968 s 18(2). Proceedings before a police disciplinary tribunal are not proceedings before a court for the purposes of s 11 (see the text and notes 3-10): see *Thorpe v Chief Constable of Greater Manchester Police* [1989] 2 All ER 827, [1989] 1 WLR 665, CA. As from a day to be appointed, the reference to a court-martial is replaced by a reference to a service court: Civil Evidence Act 1968 s 18(2) (prospectively amended by the Armed Forces Act 2006 s 378(1), Sch 16 para 53(a)). 'Service court' means the Court Martial, the Summary Appeal Court, the Service Civilian Court, the Court Martial Appeal Court or the Supreme Court on an appeal brought from the Court Martial Appeal Court: Civil Evidence Act 1968 s 18(2A) (added, as from a day to be appointed, by the Armed Forces Act 2006 Sch 16 para 53(b)). At the date at which this title states the law, no day had been appointed for these purposes. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

3 As to the meaning of 'United Kingdom' see PARA 221 note 2.

4 For these purposes, 'court-martial' means a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 and in relation to a court-martial 'conviction' means a finding of guilty which is, or falls to be treated as, the finding of the court, and 'convicted' is to be construed accordingly: Civil Evidence Act 1968 s 11(6) (amended by the Armed Forces Act 1996 ss 5, 35(2), Sch 1 Pt IV para 100, Sch 7 Pt II; and by the Armed Forces Act 2001 s 38, Sch 7 Pt 1; repealed, as from a day to be appointed, by the Armed Forces Act 2006 Sch 16 para 51(1), (5)).

5 le subject to the Civil Evidence Act 1968 s 11(3): s 11(1). Nothing in s 11 prejudices the operation of s 13 (see PARA 1209) or any other enactment whereby a conviction or a finding of fact in any criminal proceedings is for the purposes of any other proceedings made conclusive evidence of any fact: s 11(3). Any reference in the Civil Evidence Act 1968 to any other enactment is a reference thereto as amended, and includes a reference thereto as applied, by or under any other enactment: s 18(3).

6 Civil Evidence Act 1968 s 11(1). As from a day to be appointed, for the words 'by a court-martial there or elsewhere' there are substituted the words 'of a service offence (anywhere)': Civil Evidence Act 1968 s 11(1) (prospectively amended by the Armed Forces Act 2006 Sch 16 para 51(2)). 'Service offence' has the same meaning as in the Armed Forces Act 2006, and 'conviction' includes anything that under s 376(1), (2) of that Act is to be treated as a conviction, and 'convicted' is to be read accordingly (see **ARMED FORCES**): Civil Evidence Act 1968 s 18(7) (prospectively added by the Armed Forces Act 2006 Sch 16 para 51(5)). At the date at which this title states the law, no day had been appointed for these purposes.

7 'Subsisting' is not defined for these purposes, but it includes a conviction which is being appealed against: *Re Raphael, Raphael v D'Antin* [1973] 3 All ER 19 at 22, [1973] 1 WLR 998 at 1001-1002, where it was said that Parliament cannot have intended that civil proceedings should be finally disposed of in reliance on a conviction which was subsequently liable to be quashed, and that it probably assumed that where possible injustice might otherwise result the hearing of the civil action (now known as a 'claim': see PARA 18) would always be adjourned until after the determination of the criminal appeal. As to when convictions are spent and no longer admissible in evidence see PARA 1210.

8 Civil Evidence Act 1968 s 11(1).

9 Civil Evidence Act 1968 s 11(2)(a). As from a day to be appointed, for the words 'by a court-martial there or elsewhere' there are substituted the words 'of a service offence': Civil Evidence Act 1968 s 11(2) (prospectively amended by the Armed Forces Act 2006 Sch 16 para 51(3)). At the date at which this title states the law, no such day had been appointed.

The Civil Evidence Act 1968 s 11 permits a person convicted of an offence, who is the defendant in subsequent civil proceedings, to call evidence tending to show that he was wrongly convicted: *J v Oyston* [1999] 1 WLR 694, 143 Sol Jo LB 47. The words 'unless the contrary is proved' in the Civil Evidence Act 1968 s 11(2) provide the clearest possible mandate to a defendant in a road traffic accident case to attack his earlier conviction, provided he has some good cause for so doing and can discharge the burden of proof to a civil standard; where these conditions are satisfied a defendant's attempt to re-litigate the issue is not an abuse of process: *McCauley v Hope (Carryl, third party)* [1999] 1 WLR 1977, [1998] All ER (D) 696, CA. The effect of admitting in evidence a conviction in civil proceedings is to shift the legal burden of proof from the party who would otherwise have to prove the offence to make good his claim to the party who had been convicted who must prove, on the balance of probabilities, that he was innocent and who, unless he discharges that burden, must be treated for all relevant purposes as having committed the offence of which he was convicted; but in determining whether the party convicted has discharged that burden of proof it is not the function of the judge to consider what view he himself might have taken of the criminal trial had he sat on it as juryman or judge: *JW Stupple v Royal Insurance Co Ltd* [1971] 1 QB 50, [1970] 3 All ER 230, CA. See also *Taylor v Taylor* [1970] 2 All ER 609, [1970] 1 WLR 1148; *Wauchope v Mordecai* [1970] 1 All ER 417, [1970] 1 WLR 317, CA. As to the burden and standard of proof see PARAS 769-775.

10 Civil Evidence Act 1968 s 11(2)(b). Where in any civil proceedings the contents of any document are admissible in evidence by virtue of s 11(2), a copy of that document, or of the material part thereof, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document is admissible in evidence and is to be taken to be a true copy of that document or part unless the contrary is shown: s 11(4).

It has been held that the transcript of a summing up is not directly admissible under s 11(2)(b), since the express references to certain specific types of material do not include transcripts of summing up. Such transcripts may only be put in evidence for the purposes specified in s 11(2)(b) if they are admissible under the general law of evidence or as admissible hearsay under the Civil Evidence Act 1995 (see PARA 808 et seq): see *Brinks Ltd v Abu-Saleh (No 2)* [1995] 4 All ER 74, [1995] 1 WLR 1487.

Nothing in any of the following enactments, ie: (1) the Powers of Criminal Courts (Sentencing) Act 2000 s 14 (under which a conviction leading to discharge is to be disregarded except as therein mentioned); (2) the Criminal Justice (Scotland) Act 1949 s 9 (which makes similar provision in respect of convictions on indictment in Scotland); and (3) the Probation Act (Northern Ireland) 1950 s 8 or any corresponding enactment of the Parliament of Northern Ireland for the time being in force, affects the operation of the Civil Evidence Act 1968 s 11; and for those purposes any order made by a court of summary jurisdiction in Scotland under the Criminal Justice (Scotland) Act 1949 s 1 or s 2 is to be treated as a conviction: Civil Evidence Act 1968 s 11(5) (amended by the Criminal Justice Act 1991 ss 100, 101(2), Sch 11 para 5, Sch 13; and by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 36; modified by the Northern Ireland Act 1998 Sch 12 paras 1-11). As from a day to be appointed, reference to the Armed Forces Act 2006 s 187 (which makes similar provision in respect of service convictions) is added: Civil Evidence Act 1968 s 11(5)(aa) (prospectively added by the Armed

Forces Act 2006 Sch 16 para 51(4)). At the date at which this title states the law, no such day had been appointed.

11 le the rule in *Hollington v F Hewthorn & Co Ltd*[1943] KB 587, [1943] 2 All ER 35, CA.

12 *Union Carbide Corp v Naturin Ltd* [1987] FSR 538, CA. Cf *Arab Monetary Fund v Hashim (No 2)*[1990] 1 All ER 673, DC (where references in an affidavit to previous criminal proceedings formed part of the narrative of the plaintiff's case and enabled the plaintiff to make full and frank disclosure, there was no justification for striking the references out; a 'plaintiff' is now known as a 'claimant': see PARA 18).

UPDATE

1208 Convictions as evidence in civil proceedings

NOTE 2--Constitutional Reform Act 2005 s 59 in force 1 October 2009: SI 2009/1604.
Appointed day for amendment of the Civil Evidence Act 1968 s 18 by the Armed Forces Act 2006 Sch 16 para 53 is 31 October 2009: SI 2009/1167.

NOTES 6, 9, 10--Appointed day for amendment of the Civil Evidence Act 1968 s 11 by the Armed Forces Act 2006 Sch 16 para 51 is 31 October 2009: SI 2009/1167.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(vii) Previous Convictions/1209. Conclusiveness of convictions for purposes of defamation claims.

1209. Conclusiveness of convictions for purposes of defamation claims.

In a claim for libel or slander in which the question whether the claimant¹ did or did not commit a criminal offence is relevant to an issue arising in the claim, proof that at the time when that issue falls to be determined, he stands convicted of that offence² is conclusive evidence³ that he committed that offence and his conviction of it is admissible in evidence accordingly⁴.

In any such claim in which by virtue of these provisions the claimant⁵ is proved to have been convicted of an offence, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which he was convicted, are, without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, admissible in evidence for the purpose of identifying those facts⁶.

1 In the case of a claim for libel or slander in which there is more than one claimant, the references in the text to the claimant are to be construed as references to any of the claimants and proof that any of the claimants stands convicted of an offence is conclusive evidence that he committed that offence so far as that fact is relevant to any issue arising in relation to his cause of action or that of any other claimant: Civil Evidence Act 1968 s 13(2A) (s 13(1), (2) amended, and s 13(2A) added, by the Defamation Act 1996 s 12(1)). The statutory language used is 'action', 'plaintiff' and 'plaintiffs', but actions are now known as claims and plaintiffs as claimants: see PARA 18.

2 For these purposes a person is to be taken to stand convicted of an offence if but only if there subsists against him a conviction of that offence by or before a court in the United Kingdom or by a court-martial there or elsewhere: Civil Evidence Act 1968 s 13(3). See also note 1. As from a day to be appointed, for the words 'by a court-martial there or elsewhere' there are substituted the words '(in the case of a service offence) a conviction (anywhere) of that service offence': Civil Evidence Act 1968 s 13(3) (prospectively amended by the Armed Forces Act 2006 s 378(1), Sch 16 para 52(a)). At the date at which this title states the law, no such day had been appointed. As to the meaning of 'court' see PARA 1208 note 2; as to the meaning of 'court-martial' see PARA 1208 note 4 (definition applied by the Civil Evidence Act 1968 s 13(4)); and as to the meaning of 'service offence' see PARA 1208 note 6 (definition applied by the Civil Evidence Act 1968 s 13(4) (amended, as from a day to be appointed, by the Armed Forces Act 2006 Sch 16 para 52(b); at the date at which this title states the law, no such day had been appointed)). As to spent convictions see PARA 1210. As to the meaning of 'United Kingdom' see PARA 221 note 2.

3 As to the effect of this provision see *Levene v Roxhan* [1970] 3 All ER 683, [1970] 1 WLR 1322, CA. Where the criminal guilt of some person other than the claimant or claimants is in issue in a libel or slander claim, a rebuttable presumption of guilt under the Civil Evidence Act 1968 s 11 applies: see PARA 1208.

4 Civil Evidence Act 1968 s 13(1) (as amended: see note 1).

5 See note 1.

6 Civil Evidence Act 1968 s 13(2) (as amended: see note 1). Section 11(4) (admissibility of copies: see PARA 1208) applies for these purposes, but as if the reference therein to s 11(2) were a reference to s 13(2): s 13(4). Section 11(5) (see PARA 1208 note 10) also applies for these purposes: s 13(4). Transitional provision was made by s 13(5).

UPDATE

1209 Conclusiveness of convictions for purposes of defamation claims

NOTE 2--Appointed day for amendment of the Civil Evidence Act 1968 s 13(3), (4) by the Armed Forces Act 2006 Sch 16 para 52 is 31 October 2009: SI 2009/1167.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(vii) Previous Convictions/1210. Restrictions on evidence of certain convictions.

1210. Restrictions on evidence of certain convictions.

Subject to certain exceptions¹, no evidence is admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Great Britain to prove that a rehabilitated person² has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction³. Furthermore, in any such proceedings, a person may not be asked, and if asked is not required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary to them⁴. If, however, at any stage in any proceedings before a judicial authority in Great Britain⁵ the authority is satisfied, in the light of any considerations which appear to it to be relevant (including any evidence which has been or may thereafter be put before it), that justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions or to circumstances ancillary thereto, that authority may admit or, as the case may be, require the evidence in question notwithstanding the above provisions and may determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions⁶.

¹ See the Rehabilitation of Offenders Act 1974 s 7; the text and notes 5-6; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 660.

² I.e. a person rehabilitated for the purpose of the Rehabilitation of Offenders Act 1974: see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 660 et seq.

³ See the Rehabilitation of Offenders Act 1974 s 4(1)(a); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 660.

⁴ See the Rehabilitation of Offenders Act 1974 s 4(1)(b); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 660.

⁵ I.e. not being proceedings to which, by virtue of any of the Rehabilitation of Offenders Act 1974 s 7(2)(a)-(e) or of any order for the time being in force under s 7(4), s 4(1) has no application, or proceedings to which s 8 (defamation claims: see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 101) applies: s 7(3).

⁶ Rehabilitation of Offenders Act 1974 s 7(3); and see eg *Thomas v Metropolitan Police Comr* [1997] QB 813, [1997] 1 All ER 747, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(viii) Previous Findings of Adultery and Paternity/1211. Findings of adultery and paternity as evidence in civil proceedings.

(viii) Previous Findings of Adultery and Paternity

1211. Findings of adultery and paternity as evidence in civil proceedings.

In any civil proceedings¹, the fact that a person has been found guilty of adultery in any matrimonial proceedings² and the fact that a person has been found to be the father of a child in relevant proceedings³ before any court⁴ in England and Wales or Northern Ireland or has been adjudged to be the father of a child in affiliation proceedings⁵ before any court in the United Kingdom⁶ is admissible in evidence⁷ for the purpose of proving, where to do so is relevant to any issue in those civil proceedings, that he committed the adultery to which the finding relates or, as the case may be, is (or was) the father of that child⁸. This applies whether or not he offered any defence to the allegation of adultery or paternity and whether or not he is a party to the civil proceedings; but no finding or adjudication other than a subsisting one⁹ is admissible in evidence by virtue of these provisions¹⁰.

In any civil proceedings in which by virtue of these provisions a person is proved to have been found guilty of adultery or to have been found or adjudged to be the father of a child as mentioned above, he must be taken to have committed the adultery to which the finding relates or, as the case may be, to be (or have been) the father of that child, unless the contrary is proved¹¹. Without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the finding or adjudication was based, the contents of any document which was before the court, or which contains any pronouncement of the court, in the other proceedings in question are admissible in evidence for that purpose¹².

1 As to the meaning of 'civil proceedings' see PARA 1208 note 1.

2 For these purposes, 'matrimonial proceedings' means any matrimonial cause in the High Court or a county court in England and Wales or in the High Court in Northern Ireland, any consistorial action in Scotland, or any appeal arising out of any such cause or action: Civil Evidence Act 1968 s 12(5). 'Consistorial action' does not include an action of aliment only between husband and wife raised in the Court of Session or an action of interim aliment raised in the sheriff court: s 12(5).

3 For these purposes, 'relevant proceedings' means (1) proceedings on a complaint under the National Assistance Act 1948 s 42 (see **SOCIAL SERVICES AND COMMUNITY CARE** vol 44(2) (Reissue) PARA 1040) or the Social Security Act 1986 s 26 (repealed: see now the Social Security Administration Act 1992 s 105; and **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 397); (2) proceedings under the Children Act 1989; (3) proceedings which would have been relevant proceedings for the purposes of the Civil Evidence Act 1968 s 12 in the form in which it was in force before the passing of the Children Act 1989 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 99); (4) proceedings which are relevant proceedings as defined in the Civil Evidence Act (Northern Ireland) 1971 s 85: Civil Evidence Act 1968 s 12(5) (definition added by the Family Law Reform Act 1987 s 29(1), (4); substituted by the Courts and Legal Services Act 1990 s 116, Sch 16 para 2; and amended by the Child Support Act 1991 s 27(5); the Child Support, Pensions and Social Security Act 2000 s 85, Sch 9 Pt IX; and by SI 1995/756).

4 As to the meaning of 'court' see PARA 1208 note 2.

5 'Affiliation proceedings' means, in relation to Scotland, any action of affiliation and aliment: Civil Evidence Act 1968 s 12(5). Affiliation proceedings in England and Wales were abolished by the Family Law Reform Act 1987 s 17.

6 As to the meaning of 'United Kingdom' see PARA 221 note 2.

7 le subject to the Civil Evidence Act 1968 s 12(3): s 12(1). Nothing in s 12 prejudices the operation of any enactment whereby a finding of fact in any matrimonial or affiliation proceedings is for the purposes of any other proceedings made conclusive evidence of any fact: s 12(3).

8 Civil Evidence Act 1968 s 12(1) (s 12(1), (2) amended by the Family Law Reform Act 1987 s 29(1)-(3); the Civil Evidence Act 1968 s 12(1) also amended by SI 1995/756).

9 'Subsisting' is not defined for these purposes: cf PARA 1208 note 7.

10 Civil Evidence Act 1968 s 12(1).

11 Civil Evidence Act 1968 s 12(2)(a) (as amended: see note 8). As to the burden of disproving adultery see *Sutton v Sutton*[1969] 3 All ER 1348, [1970] 1 WLR 183; *Practice Direction*[1969] 2 All ER 873, [1969] 1 WLR 1192.

12 Civil Evidence Act 1968 s 12(2)(b) (as amended: see note 8). Section 11(4) (admissibility of copies: see PARA 1208) applies for these purposes, but as if the reference therein to s 11(2) were a reference to s 12(2): s 12(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(ix) Other Findings/1212. Judgment against one of two jointly or alternatively liable.

(ix) Other Findings

1212. Judgment against one of two jointly or alternatively liable.

At common law, if one of the two joint contractors was omitted from an action (now known as a 'claim'), even though the plaintiff (now known as the 'claimant')¹ was unaware of his existence, a judgment obtained in that action was a bar at common law to a subsequent action against the joint contractor who was omitted². By statute, however, judgment recovered against any person liable in respect of any debt or damage³ is no bar to a claim, or to the continuance of a claim, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage⁴. A consent order regularly obtained, and not objectionable on its merits, cannot be set aside by consent of the parties so as to prejudice a third person in whose favour it is a bar⁵. In proceedings against a company for rescission of a contract on the grounds of fraudulent misrepresentation by its agent and damages against the agent, a judgment against the company for rescission of the contract is no bar to judgment against the agent for damages⁶.

Where there are separate causes of action against different defendants for the same damage, a judgment against one of them in a foreign court which has been satisfied is not necessarily a bar to proceedings against the other for the same damnum in the English courts⁷.

1 See PARA 18.

2 *Hoare v Niblett*[1891] 1 QB 781, DC. A plaintiff was similarly barred if he omitted from the action a joint debtor of whom he was aware: *Morris v Wentworth-Stanley* [1999] QB 1004, [1999] 2 WLR 470, CA.

3 A person is liable in respect of any damage for this purpose if the person who suffered it, or anyone representing his estate or dependants, is entitled to recover compensation from him in respect of that damage, whether the legal basis of his liability is tort, breach of contract, breach of trust or otherwise: Civil Liability (Contribution) Act 1978 s 6(1).

4 See the Civil Liability (Contribution) Act 1978 s 3. However, if more than one claim is brought against the persons liable the plaintiff will be entitled to costs only in the first unless the court is of opinion that there was reasonable ground for bringing more than one claim: see s 4.

5 *Hammond v Schofield*[1891] 1 QB 453, DC.

6 *Goldrei, Foucard & Son v Sinclair and Russian Chamber of Commerce in London*[1918] 1 KB 180, CA.

7 *Kohnke v Karger*[1951] 2 KB 670, [1951] 2 All ER 179 (measure of damages different in foreign court from that in English courts and the award in the foreign court did not fully satisfy the claim for damages assessed according to the measure in English courts); and see **CONFLICT OF LAWS**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(ix) Other Findings/1213. Finding that claimant's Convention rights infringed.

1213. Finding that claimant's Convention rights infringed.

Where a claim is for a remedy under the Human Rights Act 1998¹ in respect of a judicial act which is alleged to have infringed the claimant's² article 5 Convention rights³ and the claim is based on a finding by a court or tribunal that the claimant's Convention rights have been infringed, the court hearing the claim⁴ may proceed on the basis of the finding of that other court or tribunal that there has been an infringement but it is not required to do so⁵. The court may reach its own conclusion in the light of that finding and of the evidence heard by that other court or tribunal⁶.

1 le under the Human Rights Act 1998 s 7: see **JUDICIAL REVIEW** vol 61 (2010) PARA 651; **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

2 As to the meaning of 'claimant' see PARA 18.

3 le the claimant's rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) art 5 (right to liberty and security) as given direct effect in domestic law by the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 5: see **JUDICIAL REVIEW** vol 61 (2010) PARA 651; **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. See also PARA 1235 (where the United Kingdom government's exercise of the right to derogate from Sch 1 Pt I art 5 is noted).

4 As to courts having jurisdiction to hear such claims see PARA 116.

5 CPR 33.9(1), (2)(a).

6 CPR 33.9(2)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(2) FINALITY OF JUDGMENTS AND OF LITIGATION/(ix) Other Findings/1214. Evidential effect in divorce proceedings of certain orders made in matrimonial and family proceedings.

1214. Evidential effect in divorce proceedings of certain orders made in matrimonial and family proceedings.

On any petition for divorce, if the petitioner or respondent has at any time been granted a decree of judicial separation or an order under, or having effect as if made under, the Matrimonial Proceedings (Magistrates' Courts) Act 1960¹ (now repealed) or the Domestic Proceedings and Magistrates' Courts Act 1978² or any corresponding enactments in force in Northern Ireland, the Isle of Man or any of the Channel Islands, on the same or substantially the same facts as those proved in support of the petition for divorce, the court may treat the decree of judicial separation or order as sufficient proof of the adultery, desertion or other fact by reference to which it was granted, but must not grant a decree of divorce without receiving evidence from the petitioner³. Although evidence of the findings of the court in the previous proceedings is admissible in the proceedings for the divorce, the court hearing the divorce proceedings is not bound to accept the earlier judgment as conclusive and no doctrine of estoppel operates to abrogate the duty of the court to inquire into the truth of the petition⁴.

1 Ie the Matrimonial Proceedings (Magistrates' Courts) Act 1960 (repealed).

2 Ie the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35): see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

3 See the Matrimonial Causes Act 1973 s 4(1), (2) (prospectively repealed); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 830.

4 See eg *Hudson v Hudson* [1948] P 292, [1948] 1 All ER 773; and see further **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 830.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(3) ORDERS RELATING TO THE SALE, MORTGAGE, PARTITION OR EXCHANGE OF LAND/1215. Court's powers to order sale etc of land and delivery up of possession.

(3) ORDERS RELATING TO THE SALE, MORTGAGE, PARTITION OR EXCHANGE OF LAND

1215. Court's powers to order sale etc of land and delivery up of possession.

Part 40 of the Civil Procedure Rules contains provisions¹ relating to the court's² power to order the sale, mortgage, partition or exchange of land³.

In any proceedings relating to land, the court may order the land, or part of it, to be sold⁴, mortgaged⁵ exchanged⁶ or partitioned⁷. Where the court has made such an order, it may order any party to deliver up to the purchaser or any other person either possession of the land⁸, receipt of rents or profits relating to the land⁹ or both possession and receipt of such rents or profits¹⁰.

Where land subject to any incumbrance¹¹ is sold or exchanged any party to the sale or exchange may apply to the court for a direction¹² that such incumbrances be discharged¹³. The directions a court may give on such an application include a direction for the payment into court of a sum of money that the court considers sufficient to meet the value of the incumbrance and further costs, expenses and interest that may become due on or in respect of the incumbrance¹⁴. Where a payment into court has been made in accordance with such a direction, the court may declare the land to be freed from the incumbrance and make any order it considers appropriate for giving effect to an order made under the provisions set out above¹⁵ or relating to the money in court and the income from it¹⁶.

1 le CPR 40.15-CPR 40-17: see the text and notes 2-10.

2 As to the meaning of 'court' see PARA 22.

3 CPR 40.15(1)(a). For these purposes, 'land' includes any interest in, or right over, land: CPR 40.15(2).

4 CPR 40.16(a). Where the court has made an order under CPR 40.16 it may give any other directions it considers appropriate for giving effect to the order. In particular the court may give directions (1) appointing a party or other person to conduct the sale; (2) for obtaining evidence of the value of the land; (3) as to the manner of sale; (4) settling the particulars and conditions of the sale; (5) fixing a minimum or reserve price; (6) as to the fees and expenses to be allowed to an auctioneer or estate agent; (7) for the purchase money to be paid either into court, to trustees or to any other person; (8) for the result of a sale to be certified; (9) under CPR 40.18 (reference to conveyancing counsel: see PARA 1216): *Practice Direction--1. Court's Powers in Relation to Land. 2. Conveyancing Counsel of the Court* PD 40D para 2. Where the court has made an order under CPR 40.16 for land to be sold and a party wishes to bid for the land, he should apply to the court for permission to do so: para 3.1. Such an application must be made before the sale takes place: para 3.2. If the court gives permission to all the parties to bid, it may appoint an independent person to conduct the sale: para 3.3. For these purposes, 'bid' includes submitting a tender or other offer to buy: para 3.4.

If the court has directed either that the purchase money to be paid into court or that the result of the sale be certified, the result of the sale must be certified by the person having conduct of the sale: para 4.1. Unless the court directs otherwise, the certificate must give details of (a) the amount of the purchase price; (b) the amount of the fees and expenses payable to any auctioneer or estate agent; (c) the amount of any other expenses of the sale; (d) the net amount received in respect of the sale; and it must be verified by a statement of truth: para 4.2. If the proceedings are being dealt with in the Royal Courts of Justice, the certificate must be filed in Chancery Chambers and if they are being dealt with anywhere else, it must be filed in the court where the proceedings are being dealt with: see para 4.3. Where the court has ordered the sale of land under CPR 40.16, auctioneer's and estate agent's charges may, unless the court orders otherwise, include commission, fees for valuation of the land, charges for advertising the land and other expenses and disbursements but not charges

for surveys (which require the authorisation of the court): see *Practice Direction--1. Court's Powers in Relation to Land. 2. Conveyancing Counsel of the Court* PD 40D para 5.1. If the total amount of the auctioneer's and estate agent's charges so authorised does not exceed 2.5% of the sale price and does not exceed the rate of commission that that agent would normally charge on a sole agency basis, the charges may, unless the court orders otherwise and subject as follows, be met by deduction of the amount of the charges from the proceeds of sale without the need for any further authorisation from the court: para 5.2. If, however, (i) a charge made by an auctioneer or estate agent (whether in respect of fees or expenses or both) is not so authorised; (ii) the total amount of the charges so authorised exceeds the limits set out in para 5.2; (iii) the land is sold in lots or by valuation; or (iv) the sale is of investment property, business property or farm property, an application must be made to the court for approval of the fees and expenses to be allowed: para 5.3. Such an application may be made by any party or, if he is not a party, by the person having conduct of the sale, and may be made either before or after the sale has taken place: para 5.4. As to statements of truth see CPR Pt 22; and PARA 613 et seq; and as to Chancery Chambers see PARA 53.

5 CPR 40.16(b); and see note 4.

6 CPR 40.16(c); and see note 4.

7 CPR 40.16(d); and see note 4. See further **SALE OF LAND** vol 42 (Reissue) PARA 133 et seq.

8 CPR 40.17(a).

9 CPR 40.17(b).

10 CPR 40.17(c).

11 For these purposes, 'incumbrance' includes a legal or equitable mortgage and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum: Law of Property Act 1925 s 205(1) (vii) (definition applied by virtue of *Practice Direction--1. Court's Powers in Relation to Land. 2. Conveyancing Counsel of the Court* PD 40D para 1.1).

12 Ie a direction under the Law of Property Act 1925 s 50: see **SALE OF LAND** vol 42 (Reissue) PARA 268.

13 *Practice Direction--1. Court's Powers in Relation to Land. 2. Conveyancing Counsel of the Court* PD 40D para 1.2. Such application must, if made in existing proceedings, be made in accordance with CPR Pt 23 (see PARA 303 et seq) and otherwise must be made by claim form under CPR Pt 8 (the alternative procedure for claims: see PARA 127 et seq): *Practice Direction--1. Court's Powers in Relation to Land. 2. Conveyancing Counsel of the Court* PD 40D para 1.5.

14 *Practice Direction--1. Court's Powers in Relation to Land. 2. Conveyancing Counsel of the Court* PD 40D para 1.3. As to the calculation of the amounts mentioned in the text see the Law of Property Act 1925 s 50(1); and **SALE OF LAND** vol 42 (Reissue) PARA 268.

15 Ie an order made under CPR 40.16: see the text and notes 4-7.

16 *Practice Direction--1. Court's Powers in Relation to Land. 2. Conveyancing Counsel of the Court* PD 40D para 1.4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(3) ORDERS RELATING TO THE SALE, MORTGAGE, PARTITION OR EXCHANGE OF LAND/1216. Reference to conveyancing counsel.

1216. Reference to conveyancing counsel.

Part 40 of the Civil Procedure Rules contains provisions¹ relating to conveyancing counsel². The appointment of such counsel is discussed elsewhere in this work³.

The court⁴ may direct conveyancing counsel to investigate and prepare a report on the title of any land⁵ or to draft any document⁶ and may take the report on title into account when it decides the issue in question⁷.

Any party to the proceedings may object to the report on title prepared by conveyancing counsel⁸. The objection must be made by application notice stating the matters the applicant objects to and the reason for the objection⁹.

Where there is an objection, the issue will be referred to a judge¹⁰ for determination¹¹.

1 le CPR 40.18, CPR 40.19: see the text and notes 2-11.

2 CPR 40.15(1)(b).

3 See **SALE OF LAND** vol 42 (Reissue) PARA 136.

4 As to the meaning of 'court' see PARA 22.

5 As to the meaning of 'land' for these purposes see PARA 1215 note 3.

6 CPR 40.18(1). Notice of every such reference must be given to the chief Chancery master: *Practice Direction--1. Court's Powers in Relation to Land. 2. Conveyancing Counsel of the Court* PD 40D para 6.3. When the court refers a matter under CPR 40.18, the court may specify a particular conveyancing counsel: para 6.1. If the court does not specify a particular conveyancing counsel, references will be distributed among conveyancing counsel in accordance with arrangements made by the chief Chancery master: para 6.2. The court will send a copy of the order, together with all other necessary documents, to conveyancing counsel and such a court order so sent to conveyancing counsel is sufficient authority for him to prepare his report or draft the document: paras 6.4, 6.5.

Where the court refers any matter to the conveyancing counsel of the court the fees payable to counsel in respect of the work done or to be done will be assessed by the court in accordance with CPR 44.3: *Practice Direction about Costs PD 43-48* para 8.8(1). An appeal from a decision of the court in respect of the fees of such counsel will be dealt with under the general rules as to appeals set out in CPR Pt 52 (see PARA 1658 et seq); and if the appeal is against the decision of an authorised court officer, it will be dealt with in accordance with CPR 47.20-CPR 47.23: *Practice Direction about Costs PD 43-48* para 8.8(2). See further *The Civil Court Practice*. As to costs generally see also PARA 1729 et seq.

7 CPR 40.18(2).

8 CPR 40.19(1).

9 *Practice Direction--1. Court's Powers in Relation to Land. 2. Conveyancing Counsel of the Court* PD 40D para 6.6. As to making applications see CPR Pt 23; and PARA 303 et seq.

10 As to the meaning of 'judge' see PARA 49.

11 CPR 40.19(2). See further **SALE OF LAND** vol 42 (Reissue) PARA 136.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(4) ORDERS FOR THE AWARD OF PROVISIONAL DAMAGES/1217. Order for an award of provisional damages.

(4) ORDERS FOR THE AWARD OF PROVISIONAL DAMAGES

1217. Order for an award of provisional damages.

The court¹ may make an order for an award of provisional damages² if the particulars of claim³ include a claim for provisional damages and the court is satisfied that the relevant statutory provision⁴ applies⁵.

When giving judgment at trial the judge⁶ will:

- 834 (1) specify the disease or type of deterioration, or diseases or types of deterioration, which for the purpose of the award of immediate damages it has been assumed will not occur and which will entitle the claimant⁷ to further damages if it occurs or they occur at a future date⁸;
- 835 (2) give an award of immediate damages⁹;
- 836 (3) specify the period or periods¹⁰ within which an application for further damages may be made in respect of each disease or type of deterioration¹¹; and
- 837 (4) direct what documents are to be filed and preserved as the case file¹² in support of any application for further damages¹³.

An order for an award of provisional damages must specify the disease or type of deterioration in respect of which an application may be made at a future date and the period within which such an application may be made¹⁴. Such an order may be made in respect of more than one disease or type of deterioration and may, in respect of each disease or type of deterioration, specify a different period within which a subsequent application may be made¹⁵.

The claimant may make more than one application to extend the specified period within which an application may be made at a future date¹⁶.

Causation of any further damages within the scope of the order is to be determined when any application for further damages is made¹⁷.

Where a claim includes claims arising under the Fatal Accidents Act 1976, and the Law Reform (Miscellaneous Provisions) Act 1934 and a single sum of money is ordered or agreed to be paid in satisfaction of the claims, the court will apportion the money between the different claims¹⁸. Where, in an action in which a claim under the Fatal Accidents Act 1976 is made by or on behalf of more than one person, a single sum of money is ordered or agreed to be paid in satisfaction of the claim, the court will apportion it between the persons entitled to it¹⁹. Unless it has already been apportioned by the court, a jury or agreement between the parties, the court will apportion money under the provisions above when it gives directions as to money recovered by or on behalf of a child or protected party²⁰ or in other cases on application²¹ by one of the parties²².

1 As to the meaning of 'court' see PARA 22.

2 'Award of provisional damages' means an award of damages for personal injuries under which damages are assessed on the assumption referred to in the Supreme Court Act 1981 s 32A or the County Courts Act 1984 s 51 that the injured person will not develop the disease or suffer the deterioration and that the injured person is entitled to apply for further damages at a future date if he develops the disease or suffers the deterioration:

CPR 41.1(2). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. See further **DAMAGES** vol 12(1) (Reissue) PARA 930. As to the meaning of 'damages for personal injuries' see PARA 37 note 3.

3 As to the details to be set out in the particulars of claim see CPR 16.4(1)(d); and PARA 587.

4 Ie either the Supreme Court Act 1981 s 32A or the County Courts Act 1984 s 51: see **DAMAGES** vol 12(1) (Reissue) PARA 930.

5 CPR 41.2.

6 As to the meaning of 'judge' see PARA 49.

7 As to the meaning of 'claimant' see PARA 18.

8 *Practice Direction--Provisional Damages* PD 41 para 2.1(1).

9 *Practice Direction--Provisional Damages* PD 41 para 2.1(2).

10 A period so specified may be expressed as being for the duration of the life of the claimant: *Practice Direction--Provisional Damages* PD 41 para 2.3.

11 *Practice Direction--Provisional Damages* PD 41 para 2.1(3). On an application to extend the periods referred to in the text a current medical report should be filed: para 3.5. As to the meaning of 'filing' see PARA 1832 note 8.

12 The documents to be preserved as the case file (the 'case file documents') referred to in the text will be set out in a schedule to the judgment as entered: *Practice Direction--Provisional Damages* PD 41 para 2.4. As to preservation of the case file see further PARA 1218.

13 *Practice Direction--Provisional Damages* PD 41 para 2.1(4). As to applications for further damages see PARA 1219.

14 CPR 41.2(2)(a), (b). A form for a provisional damages judgment is set out in *Practice Direction--Provisional Damages* PD 41, Annex: para 2.6.

15 CPR 41.2(2)(c).

16 CPR 41.2(3); and see *Practice Direction--Provisional Damages* PD 41 para 2.2. A current medical report must be filed on such an application: see note 11.

17 *Practice Direction--Provisional Damages* PD 41 para 2.5.

18 CPR 41.3A(1).

19 CPR 41.3A(2).

20 Ie under CPR 21.11 (see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1424; **MENTAL HEALTH** vol 30(2) (Reissue) PARA 639). As to the meaning of 'child' see PARA 222 note 3; and as to the meaning of 'protected party' see PARA 222 note 1.

21 Ie in accordance with CPR Pt 23: see PARA 303 et seq.

22 CPR 41.3A(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(4) ORDERS FOR THE AWARD OF PROVISIONAL DAMAGES/1218. Preserving the case file.

1218. Preserving the case file.

The case file documents¹ must be preserved until the expiry of the period or periods specified in the order awarding provisional damages² or of any extension of them³. The case file documents will normally include the judgment as entered, the statements of case⁴, a transcript of the judge's⁵ oral judgment, all medical reports relied on and a transcript of any parts of the claimant's⁶ own evidence which the judge considers necessary⁷.

The associate or court clerk will ensure that the case file documents are provided by the parties where necessary and filed⁸ on the court file⁹. He will indorse the court file to the effect that it contains the case file documents and with the period during which the case file documents must be preserved, and will preserve the case file documents in the court office where the proceedings took place¹⁰.

Any subsequent order (1) extending the period within which an application for further damages may be made¹¹; or (2) of the Court of Appeal discharging or varying the provisions of the original judgment or of any such subsequent order, will become one of the case file documents and must be preserved accordingly and any variation of the period within which an application for further damages may be made must be indorsed on the court file containing the case file documents¹².

Legal representatives¹³ have a duty to preserve their own case file¹⁴.

1 As to the meaning of 'case file documents' see PARA 1217 note 12.

2 As to the specified periods see PARA 1217; and as to the meaning of 'award of provisional damages' see PARA 1217 note 2.

3 See *Practice Direction--Provisional Damages* PD 41 para 3.1.

4 As to statements of case see PARA 584 et seq.

5 As to the meaning of 'judge' see PARA 49.

6 As to the meaning of 'claimant' see PARA 18.

7 *Practice Direction--Provisional Damages* PD 41 para 3.2.

8 As to the meaning of 'filing' see PARA 1832 note 8.

9 *Practice Direction--Provisional Damages* PD 41 para 3.3(1).

10 *Practice Direction--Provisional Damages* PD 41 para 3.3(2), (3).

11 A current medical report must be filed on an application to extend such period: see PARA 1217 note 11.

12 *Practice Direction--Provisional Damages* PD 41 para 3.4.

13 As to the meaning of 'legal representative' see PARA 1833 note 13.

14 *Practice Direction--Provisional Damages* PD 41 para 3.6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(4) ORDERS FOR THE AWARD OF PROVISIONAL DAMAGES/1219. Application for further damages.

1219. Application for further damages.

The claimant¹ may not make an application for further damages after the end of the period specified in the judgment making an award of provisional damages² or of such period as extended by the court³. Only one application for further damages may be made in respect of each disease or type of deterioration specified in the award of provisional damages⁴.

The claimant must give at least 28 days' written notice to the defendant⁵ of his intention to apply for further damages⁶. If the claimant knows that the defendant is insured in respect of the claim and the identity of the defendant's insurers, he must also give at least 28 days' written notice to the insurers⁷.

Within 21 days after the end of the 28-day notice period, the claimant must apply for directions⁸.

1 As to the meaning of 'claimant' see PARA 18.

2 I.e. the period specified in CPR 41.2(2): see PARA 1217. As to the meaning of 'award of provisional damages' see PARA 1217 note 2.

3 CPR 41.3(1). As to the court's power to extend this period on application see PARA 1217. As to the meaning of 'court' see PARA 22.

4 CPR 41.3(2).

5 As to the meaning of 'defendant' see PARA 18.

6 CPR 41.3(3).

7 CPR 41.3(4).

8 CPR 41.3(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(4) ORDERS FOR THE AWARD OF PROVISIONAL DAMAGES/1220. Consent orders for provisional damages.

1220. Consent orders for provisional damages.

An application to give effect to a consent order for provisional damages¹ must be made in accordance with Part 23 of the Civil Procedure Rules². If the claimant³ is a child⁴ or protected party⁵ the approval of the court⁶ must also be sought and the application for approval will normally be dealt with at a hearing⁷.

The order should be in the form of a consent judgment⁸ and should contain:

- 838 (1) details specifying the disease or type of deterioration, or diseases or types of deterioration, which for the purpose of the award of immediate damages it has been assumed will not occur and which will entitle the claimant to further damages if it occurs or they occur at a future date⁹;
- 839 (2) an award of immediate damages¹⁰;
- 840 (3) details specifying the period or periods within which an application for further damages may be made in respect of each disease or type of deterioration¹¹;
- 841 (4) a direction as to the documents to be preserved as the case file documents¹², which will normally be the consent judgment, any statements of case¹³, an agreed statement of facts and any agreed medical report or reports¹⁴.

The claimant or his legal representative¹⁵ must lodge the case file documents in the court office where the proceedings are taking place for inclusion in the court file¹⁶.

1 As to provisional damages see PARA 1217 note 2; and **DAMAGES** vol 12(1) (Reissue) PARA 930.

2 *Practice Direction--Provisional Damages* PD 41 para 4.1. As to CPR Pt 23 see PARA 303 et seq.

3 As to the meaning of 'claimant' see PARA 18.

4 As to the meaning of 'child' see PARA 222 note 3.

5 As to the meaning of 'protected party' see PARA 222 note 1.

6 As to the meaning of 'court' see PARA 22.

7 *Practice Direction--Provisional Damages* PD 41 para 4.1.

8 As to consent judgments generally see CPR 40.6; and PARA 1141.

9 *Practice Direction--Provisional Damages* PD 41 para 2.1(1) (applied by para 4.2(1)).

10 *Practice Direction--Provisional Damages* PD 41 para 2.1(2) (as applied: see note 9).

11 *Practice Direction--Provisional Damages* PD 41 para 2.1(3) (as applied: see note 9).

12 The case file documents must be preserved as in *Practice Direction--Provisional Damages* PD 41 para 3.3(3) (see PARA 1218): para 4.3.

13 As to statements of case see PARA 584 et seq.

14 *Practice Direction--Provisional Damages* PD 41 para 4.2(2).

15 As to the meaning of 'legal representative' see PARA 1833 note 13.

16 *Practice Direction--Provisional Damages* PD 41 para 4.3. The court file must be indorsed as in para 3.3(2) (see PARA 1218): para 4.3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(4) ORDERS FOR THE AWARD OF PROVISIONAL DAMAGES/1221. Award of provisional damages where default judgment would otherwise have been available.

1221. Award of provisional damages where default judgment would otherwise have been available.

Where a defendant¹ fails to file an acknowledgment of service² and fails to file a defence³ within the time specified for doing so, the claimant⁴ may not enter judgment in default⁵ unless he abandons his claim for provisional damages⁶. Instead, he must make an application⁷ for directions⁸.

The master or district judge will normally direct the following issues to be decided: (1) whether the claim is an appropriate one for an award of provisional damages and if so, on what terms; and (2) the amount of immediate damages⁹.

If the judge¹⁰ makes an award of provisional damages, the provisions relating to preservation of the case file¹¹ apply¹².

1 As to the meaning of 'defendant' see PARA 18.

2 Ie in accordance with CPR Pt 10: see PARAS 184, 186.

3 Ie in accordance with CPR Pt 15: see PARA 199 et seq.

4 As to the meaning of 'claimant' see PARA 18.

5 As to default judgment see PARA 506 et seq.

6 *Practice Direction--Provisional Damages* PD 41 para 5.1. As to provisional damages see PARA 1217 note 2; and **DAMAGES** vol 12(1) (Reissue) PARA 930.

7 Ie in accordance with CPR Pt 23: see PARA 303 et seq.

8 *Practice Direction--Provisional Damages* PD 41 para 5.1.

9 *Practice Direction--Provisional Damages* PD 41 para 5.2.

10 As to the meaning of 'judge' see PARA 49.

11 Ie *Practice Direction--Provisional Damages* PD 41 para 3: see PARA 1218.

12 *Practice Direction--Provisional Damages* PD 41 para 5.3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/22. JUDGMENTS AND ORDERS/(4) ORDERS FOR THE AWARD OF PROVISIONAL DAMAGES/1222. Orders for periodical payments under the Damages Act 1996.

1222. Orders for periodical payments under the Damages Act 1996.

Provision has been made¹ concerning the exercise of the court's powers² to order that all or part of an award of damages³ in respect of personal injury is to take the form of periodical payments⁴. In a claim for damages for personal injury, each party in its statement of case may state whether it considers periodical payments or a lump sum is the more appropriate form for all or part of an award of damages and where such statement is given must provide relevant particulars of the circumstances which are relied on⁵.

The court must consider and indicate to the parties as soon as practicable whether periodical payments or a lump sum is likely to be the more appropriate form for all or part of an award of damages⁶. Where the court awards damages in the form of periodical payments, the order must specify (1) the annual amount awarded, how each payment is to be made during the year and at what intervals⁷; (2) the amount awarded for future loss of earnings and other income, and care and medical costs and other recurring or capital costs⁸; (3) that the claimant's annual future pecuniary losses, as assessed by the court, are to be paid for the duration of the claimant's life, or such other period as the court orders⁹; and (4) that the amount of the payments is to vary annually by reference to the retail prices index, unless the court orders otherwise¹⁰. Where the court orders that any part of the award is to continue after the claimant's death, for the benefit of the claimant's dependants, the order must also specify the relevant amount and duration of the payments and how each payment is to be made during the year and at what intervals¹¹.

An order for periodical payments must specify that the payments must be funded in accordance with the relevant statutory provision¹², unless the court orders an alternative method of funding¹³. Where the court¹⁴ is satisfied that special circumstances make an assignment or charge of periodical payments necessary, it must, in deciding whether or not to approve the assignment or charge, also have regard to the factors set out in the practice direction¹⁵.

1 See CPR 41.4-41.10.

2 I.e powers under the Damages Act 1996 s 2(1): see **DAMAGES** vol 12(1) (Reissue) PARA 931.

3 'Damages' means damages for future pecuniary loss: CPR 41.4(2)(b).

4 CPR 41.4(1). 'Periodical payments' means periodical payments under the Damages Act 1996 s 2(1): CPR 41.4(1)(c).

5 CPR 41.5(1). Where such a statement is not given, the court may order a party to make such a statement: CPR 41.5(2). Where the court considers that a statement of case contains insufficient particulars under CPR 41.5(1), the court may order a party to provide such further particulars as it considers appropriate: CPR 41.5(3).

6 CPR 41.6. When considering its indication as to whether periodical payments or a lump sum is likely to be the more appropriate form for all or part of an award of damages under CPR 41.6, or whether to make an order under the Damages Act 1996 s 2(1)(a), the court must have regard to all the circumstances of the case and in particular the form of award which best meets the claimant's needs, having regard to the factors set out in the practice direction: CPR 41.7. Those factors include (1) the scale of the annual payments taking into account any deduction for contributory negligence; (2) the form of award preferred by the claimant including (a) the reasons for the claimant's preference; and (b) the nature of any financial advice received by the claimant when considering the form of award; and (3) the form of award preferred by the defendant including the reasons for

the defendant's preference: *Practice Direction--Periodical Payments under the Damages Act 1996* PD 41B para 1.

7 CPR 41.8(1)(a).

8 CPR 41.8(1)(b). Where an amount so awarded is to increase or decrease on a certain date, the order must also specify the date on which the increase or decrease will take effect, and the amount of the increase or decrease at current value: CPR 41.8(3). Examples of circumstances which might lead the court to order an increase or decrease under CPR 41.8(3) are where the court determines that (1) the claimant's condition will change leading to an increase or reduction in his need to incur care, medical or other recurring or capital costs; (2) gratuitous carers will no longer continue to provide care; (3) the claimant's educational circumstances will change; (4) the claimant would have received a promotional increase in pay; (5) the claimant will cease earning: *Practice Direction--Periodical Payments under the Damages Act 1996* PD 41B para 2.2.

Where damages for substantial capital purchases are awarded, the order must also specify (a) the amount of the payments at current value; (b) when the payments are to be made; and (c) that the amount of the payments are to be adjusted by reference to the retail prices index, unless the court orders otherwise under the Damages Act 1996 s 2(9): CPR 41.8(4). See *Flora v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103, [2006] All ER (D) 426 (Jul).

9 CPR 41.8(1)(c).

10 *le* under the Damages Act 1996 s 2(9): CPR 41.8(1)(d).

11 CPR 41.8(2). An order may be made under CPR 41.8(2) where a dependant would have had a claim under the Fatal Accidents Act 1976 s 1 if the claimant had died at the time of the accident: *Practice Direction--Periodical Payments under the Damages Act 1996* PD 41B para 2.1.

12 *le* in accordance with the Damages Act 1996 s 2(4).

13 CPR 41.9(1). Before ordering an alternative method of funding, the court must be satisfied that the continuity of payment under the order is reasonably secure, and the criteria set out in the practice direction are met: CPR 41.9(2). Such an order must specify the alternative method of funding: CPR 41.9(3). The relevant criteria are (1) that a method of funding provided for under the Damages Act 1996 s 2(4) is not possible or there are good reasons to justify an alternative method of funding; (2) that the proposed method of funding can be maintained for the duration of the award or for the proposed duration of the method of funding; and (3) that the proposed method of funding will meet the level of payment ordered by the court: *Practice Direction--Periodical Payments under the Damages Act 1996* PD 41B para 3.

14 *le* under the Damages Act 1996 s 2(6)(a).

15 CPR 41.10. The relevant factors include (1) whether the capitalised value of the assignment or charge represents value for money; (2) whether the assignment or charge is in the claimant's best interests, taking into account whether these interests can be met in some other way; and (3) how the claimant will be financially supported following the assignment or charge: *Practice Direction--Periodical Payments under the Damages Act 1996* PD 41B para 4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(i) Necessity for Enforcement/1223. Judgments not requiring enforcement.

23. ENFORCEMENT OF JUDGMENTS AND ORDERS

(1) INTRODUCTION

(i) Necessity for Enforcement

1223. Judgments not requiring enforcement.

Many judgments and orders given or made in civil proceedings¹ do not require to be enforced because the judgment or order itself is all that the party obtaining it requires. Thus, a judgment which determines status² does not call for specific enforcement. It not only declares the status of the particular person or thing adjudicated upon but renders it such as it is declared. A decree of divorce dissolves the marriage and makes the parties single persons³; an adjudication in bankruptcy not only declares the debtor a bankrupt, but clothes him and his trustee with the consequences of that status⁴; a sentence in a prize court not only decrees the vessel to be prize, but vests her in the captor⁵. Such a judgment does not order recovery or payment of money, delivery or transfer of property, or any specific act or abstinence which may be subject to any of the various methods of enforcement⁶. Similarly, an order appointing new trustees which also vests the trust property in them requires no further step to be taken⁷. A declaratory judgment is complete in itself, since the relief is the declaration⁸.

1 As to judgments and orders given or made in criminal proceedings see **SENTENCING**; and as to the distinction between civil proceedings and criminal proceedings see **COURTS** vol 10 (Reissue) PARA 310; and PARA 2.

2 See PARAS 1163-1164.

3 See **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

4 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**.

5 See **PRIZE**.

6 As to the various methods of enforcement see PARAS 1224, 1244 et seq.

7 See **TRUSTS** vol 48 (2007 Reissue) PARA 865 et seq. Certain forms of property, eg where title is registered, may, however, involve further steps, such as alteration of the register.

8 As to declaratory judgments see PARA 1145; and see generally **JUDICIAL REVIEW** vol 61 (2010) PARA 690.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(i) Necessity for Enforcement/1224. Judgments requiring enforcement.

1224. Judgments requiring enforcement.

The majority of judgments and orders given or made in civil proceedings¹ require one or more of the parties to do or abstain from doing some act, and, if such a judgment is not obeyed, some further legal process is required to ensure compliance². The following methods of enforcement are discussed in this title: execution against goods³, the enforcement of possession orders⁴, sequestration⁵, third party debt orders⁶, the attachment of earnings to secure payment of a judgment debt⁷, charging orders⁸, stop orders and stop notices⁹, the appointment of a receiver by way of equitable execution¹⁰, the enforcement of certain fines¹¹ and committal for non-payment of judgment debts¹². Orders for specific performance are discussed elsewhere in this work¹³. In addition to the various methods of enforcement which are discussed in this title, a judgment creditor may seek to recover payment of his judgment debt, or part of it, by bankruptcy¹⁴ or winding-up¹⁵ proceedings. In certain cases it may be necessary to bring further proceedings founded on a previous judgment¹⁶. The right to sue on a judgment becomes statute-barred after six years from the date on which the judgment became enforceable¹⁷, and no arrears of interest in respect of any judgment debt are recoverable after six years from the date on which the interest became due¹⁸.

If a judgment or order is set aside¹⁹, any enforcement of the judgment or order ceases to have effect unless the court otherwise orders²⁰.

1 As to judgments and orders given or made in criminal proceedings see **SENTENCING**; and as to the distinction between civil proceedings and criminal proceedings see **COURTS** vol 10 (Reissue) PARA 310; PARA 2.

2 As to the enforcement of consent judgments see *Green v Rozen* [1955] 2 All ER 797, [1955] 1 WLR 741; and as to consent judgments generally see PARA 1141.

3 See PARA 1265 et seq.

4 See PARAS 1267, 1292, 1308-1309.

5 See PARAS 1269, 1380 et seq.

6 See PARA 1411 et seq.

7 See PARA 1431 et seq. As to the attachment of earnings to secure payments under a maintenance order see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 627 et seq; as to the attachment of earnings to secure payments under a county court administration order see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 894-895; as to the attachment of earnings in respect of council tax liability see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 324 et seq; and as to attachment of earnings orders made by magistrates' courts generally see **MAGISTRATES** vol 29(2) (Reissue) PARA 837 et seq.

8 See PARA 1467 et seq.

9 See PARA 1486 et seq.

10 See PARA 1497 et seq.

11 See PARAS 1512-1513.

12 See PARA 1515 et seq.

13 See generally **SPECIFIC PERFORMANCE**. As to the power of the High Court to order the execution of a conveyance, contract or other document or the indorsement of a negotiable instrument see the Supreme Court Act 1981 s 39; and PARA 1137. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. For examples of the use of this power see *Astro Exito Navegacion SA v Southland Enterprise Co Ltd (No 2) (Chase Manhattan Bank NA intervening)*, *The Messiniaki Tolmi* [1983] 2 AC 787, [1983] 2 All ER 725, HL (decided under earlier legislation); and see also *Mountney v Treharne* [2002] EWCA Civ 1174, [2002] 3 FCR 97.

14 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**.

15 See **COMPANY AND PARTNERSHIP INSOLVENCY**.

16 As to claims founded on a previous judgment or order see PARAS 1233-1234.

17 See the Limitation Act 1980 s 24(1); and **LIMITATION PERIODS** vol 68 (2008) PARA 1010.

18 See the Limitation Act 1980 s 24(2); *Ezekiel v Orakpo* [2003] Ch 135, [1997] 1 WLR 340, CA; and **LIMITATION PERIODS** vol 68 (2008) PARA 1010. As to interest on judgment debts see PARA 1149.

19 As to the meaning of 'set aside' see PARA 197 note 6.

20 CPR 70.6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/A. APPLICATION OF THE CIVIL PROCEDURE RULES/1225. Application of Parts 70 to 73 of the Civil Procedure Rules.

(ii) General Rules about Enforcement

A. APPLICATION OF THE CIVIL PROCEDURE RULES

1225. Application of Parts 70 to 73 of the Civil Procedure Rules.

Part 70 of the Civil Procedure Rules ('CPR') contains general rules about enforcement of judgments and orders¹. Rules about specific methods of enforcement are contained in Parts 71 to 73 of the CPR, in the preserved and amended Rules of the Supreme Court ('RSC') Orders 45 to 47 and 52 set out in Schedule 1 to the CPR and in the preserved and amended County Court Rules ('CCR') Orders 25 to 29 set out in Schedule 2 to the CPR².

Parts 70 to 73 of the CPR do not apply to any of the following enforcement proceedings which were issued before 25 March 2002³:

- 842 (1) an application for an order for oral examination (now known as an order to obtain information from a judgment debtor)⁴;
- 843 (2) an application for a garnishee order (now known as a third party debt order)⁵;
- 844 (3) an application by a judgment creditor for an order for the payment to him of money standing in court to the credit of a judgment debtor⁶;
- 845 (4) an application for a charging order⁷;
- 846 (5) a claim for the enforcement of a charging order by sale of the property charged⁸; and
- 847 (6) an application for a stop order⁹.

The rules of court in force immediately before 25 March 2002 apply to those proceedings as if those rules had not been amended or revoked¹⁰. Amendments to the relevant rules set out in the Schedules which were consequent on the coming into force of Parts 70 to 73 of the CPR are effective from the same date¹¹.

1 CPR 70.1(1). See further PARA 1226 et seq. As to the general application of the CPR see PARA 32.

2 CPR 70.1(1) note. See further PARA 1247 et seq. As to the Schedules to the CPR see PARA 30 text and note 20. Although the CPR contains rules common to most civil proceedings in the courts exercising civil jurisdiction in England and Wales (see PARAS 24-32), there continue to be significant differences in terminology and procedure with regard to enforcement of High Court and county court judgments and orders, as reflected in the separate sets of rules contained in the Schedules; eg the High Court issues writs of execution and county courts issue warrants of execution (see PARA 1265 et seq).

3 Ie the date when CPR Pts 70-73 came into force: Civil Procedure (Amendment No 4) Rules 2001, SI 2001/2792, r 1(c).

4 As to orders to obtain information from a judgment debtor see PARA 1251 et seq.

5 As to third party debt orders see PARA 1411 et seq.

6 As to such applications see PARA 1427.

7 As to charging orders see PARA 1467 et seq.

- 8 As to the enforcement of a charging order by sale see PARA 1482.
- 9 Civil Procedure (Amendment No 4) Rules 2001, SI 2001/2792, r 24(1), (2).
- 10 Civil Procedure (Amendment No 4) Rules 2001, SI 2001/2792, r 24(1). As to stop orders see PARA 1486 et seq.
- 11 Civil Procedure (Amendment No 4) Rules 2001, SI 2001/2792, r 1(c).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/B. JURISDICTION/1226. Meaning of 'judgment or order'.

B. JURISDICTION

1226. Meaning of 'judgment or order'.

In Parts 70 to 73 of the Civil Procedure Rules¹, 'judgment or order' includes an award which the court² has registered for enforcement³, ordered to be enforced or given permission to enforce as if it were a judgment or order of the court⁴.

For the same purposes, 'judgment or order for the payment of money' includes a judgment or order for the payment of costs⁵ but does not include a judgment or order for the payment of money into court⁶.

1 As to the application of CPR Pts 70-73 see PARA 1225; and as to their provisions see the text and notes 2-6; and PARA 1228 et seq.

2 As to the meaning of 'court' see PARA 22.

3 See PARAS 1231-1233.

4 CPR 70.1(2)(c). In relation to such an award, 'the court which made the judgment or order' means the court which registered the award or made such an order: CPR 70.1(2)(c).

5 As to the enforcement of costs orders see further PARA 1227 text and note 8.

6 CPR 70.1(2)(d). As to payments into court under a court order see PARAS 742-744.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/B. JURISDICTION/1227. High Court and county court jurisdiction in certain enforcement proceedings.

1227. High Court and county court jurisdiction in certain enforcement proceedings.

A judgment or order of a county court for the payment of a sum of money in proceedings arising out of an agreement regulated by the Consumer Credit Act 1974 is to be enforced only in a county court¹. Subject to that, a judgment or order of a county court for the payment of a sum of money which it is sought to enforce wholly or partially by execution against goods² is to be enforced only in the High Court where the sum which it is sought to enforce is £5,000 or more and only in a county court where the sum which it is sought to enforce is less than £600³. In any other case it may be enforced in either the High Court or a county court⁴.

A judgment or order of a county court for possession of land made in a possession claim against trespassers⁵ may be enforced in the High Court or a county court⁶.

Proceedings for the recovery of certain road traffic penalties must be taken in Northampton County Court⁷.

Proceedings for enforcement of default costs certificates, interim costs certificates and final costs certificates may not be issued in the Supreme Court Costs Office⁸.

1 High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 8(1A) (added by SI 1995/205). As to agreements regulated by the Consumer Credit Act 1974 see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 79.

2 As to execution see PARA 1265 et seq.

3 High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 8(1)(a), (b) (art 8(1) amended by SI 1993/1407; SI 1995/205; and SI 1999/1014).

4 High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 8(1)(c). Where an enactment provides that a sum of money is to be or may be recoverable as if it were payable under a county court order and the recovery of the sum is sought wholly or partially by execution against goods, payment of that sum is to be enforced in accordance with art 8(1)(a)-(c); however, art 8(1)(b) does not apply to the enforcement of money recoverable under the Employment Tribunals Act 1996 s 15(1) or a compromises sum which is recoverable under s 19A(3) (see **EMPLOYMENT**): High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 8(2), (3) (added by SI 2009/577).

5 For these purposes, 'a possession claim against trespassers' has the same meaning as in CPR Pt 55 (ie a claim for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land but does not include a claim against a tenant or sub-tenant whether his tenancy has been terminated or not: CPR 55.1(b)): High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 8B(2) (art 8B added by SI 2001/2685).

6 High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 8B(1) (as added: see note 5). As to the enforcement of claims against trespassers under CPR Pt 55 see further PARAS 1267, 1275, 1292, 1293; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 660 et seq; **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1129 et seq.

7 See CPR 75.2; *Practice Direction--Traffic Enforcement* PD 75 para 2.1; the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 8A (added by SI 1993/1407; and amended by SI 1996/3141; SI 2001/1387; SI 2009/577); and **COURTS** vol 10 (Reissue) PARA 713.

8 See PARAS 1789, 1796-1797. As to the issue of enforcement proceedings see PARA 1273 et seq. As to the Supreme Court Costs Office see **COURTS** vol 10 (Reissue) PARA 642. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

UPDATE

1227 High Court and county court jurisdiction in certain enforcement proceedings

NOTE 8--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/B. JURISDICTION/1228. Transfer of proceedings for enforcement.

1228. Transfer of proceedings for enforcement.

A judgment creditor¹ wishing to enforce a High Court judgment or order² in a county court must apply to the High Court for an order transferring the proceedings to that county court³. A practice direction may make provisions about the transfer of proceedings for enforcement⁴. The relevant practice direction provides that if a judgment creditor wishes to enforce a High Court judgment or order in a county court, he must file⁵ the following documents in the county court with his application notice or request for enforcement:

- 848 (1) a copy of the judgment or order;
- 849 (2) a certificate verifying the amount due under the judgment or order;
- 850 (3) if a writ of execution⁶ has previously been issued in the High Court to enforce the judgment or order, a copy of the enforcement officer's return to the writ⁷; and
- 851 (4) a copy of the order transferring the proceedings to the county court⁸.

Where proceedings for the enforcement of any judgment or order of the High Court are transferred to a county court⁹, the judgment or order may be enforced as if it were a judgment or order of a county court and it is to be treated as a judgment or order of that court for all purposes¹⁰. However, the powers of any court to set aside, correct, vary or quash a judgment or order of the High Court, and the enactments relating to appeals from such a judgment or order, continue to apply; and the powers of any court to set aside, correct, vary or quash a judgment or order of a county court, and the enactments relating to appeals from such a judgment or order, do not apply¹¹.

If a judgment creditor is required by a rule or practice direction to enforce a judgment or order of one county court in a different county court, he must first make a request in writing to the court in which the case is proceeding to transfer the proceedings to that other court¹². On receipt of such a request, a court officer¹³ will transfer the proceedings to the other court unless a judge orders otherwise¹⁴. The court¹⁵ will give notice of the transfer to all the parties¹⁶. When the proceedings have been transferred, the parties must take any further steps in the proceedings in the court to which they have been transferred, unless a rule or practice direction provides otherwise¹⁷.

Where the judgment creditor makes a request for a certificate of judgment¹⁸ for the purpose of enforcing the judgment or order of a county court in the High Court:

- 852 (a) by execution against goods¹⁹; or
- 853 (b) where the judgment or order to be enforced is an order for possession of land made in a possession claim against trespassers²⁰,

the grant of a certificate by the court takes effect as an order to transfer the proceedings to the High Court and the transfer has effect on the grant of that certificate²¹. On the transfer of proceedings in accordance with this provision, the court must give notice to the debtor or the person against whom the possession order was made that the proceedings have been transferred and must make an entry of that fact in the records of the court²². In a case where a request for a certificate of judgment is made²³ for the purpose of enforcing a judgment or order in the High Court and any of the specified proceedings are pending, the request for the

certificate must not be dealt with until those proceedings are determined²⁴. The specified proceedings are:

- 854 (i) an application for a variation in the date or rate of payment of money due under a judgment or order²⁵;
- 855 (ii) an application by a party who did not attend trial to restore proceedings, or any part of proceedings, which have been struck out or to set aside a judgment or order²⁶ or an application to set aside or vary a default judgment²⁷;
- 856 (iii) a request for an administration order²⁸; or
- 857 (iv) an application²⁹ for a stay of execution³⁰.

Where proceedings for the enforcement of any judgment or order of a county court are transferred to the High Court by order of the county court³¹, the judgment or order may be enforced as if it were a judgment or order of the High Court and it is to be treated as a judgment or order of that court for all purposes³². However, the powers of any court to set aside, correct, vary or quash a judgment or order of a county court, and the enactments relating to appeals from such a judgment or order, continue to apply and the powers of any court to set aside, correct, vary or quash a judgment or order of the High Court, and the enactments relating to appeals from such a judgment or order, do not apply³³.

1 As to the meaning of 'judgment creditor' see PARA 1236.

2 As to the meaning of 'judgment or order' see PARA 1226.

3 CPR 70.3(1). As to the transfer of proceedings from the High Court to a county court see generally the County Courts Act 1984 s 40; the text and notes 9-11; and PARA 69.

4 CPR 70.3(2).

5 As to the meaning of 'filing' see PARA 1832 note 8

6 As to writs of execution see PARA 1265 et seq.

7 As to the return to the writ see PARA 1282.

8 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 3.

9 le under the County Courts Act 1984 s 40: see PARA 69.

10 County Courts Act 1984 s 40(6) (s 40 substituted by the Courts and Legal Services Act 1990 s 2(1)).

11 County Courts Act 1984 s 40(7) (as substituted: see note 10).

12 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 2.1. As to the transfer of proceedings between county courts see generally CPR 30.2(1)-(3); and PARA 68.

13 As to the meaning of 'court officer' see PARA 49 note 3.

14 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 2.2. As to the meaning of 'judge' see PARA 49.

15 As to the meaning of 'court' see PARA 22.

16 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 2.3. As to the parties to enforcement proceedings see PARA 1236 et seq.

17 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 2.4. CPR Pt 52 and its practice direction provide to which court or judge an appeal against the judgment or order, or an application for permission to appeal, must be made: *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 2.4 note. As to appeals see generally PARA 1657 et seq.

18 le under CPR Sch 2 CCR Ord 22 r 8(1): see PARA 1233 note 11.

19 As to execution against goods see PARA 1265 et seq.

20 As to the meaning of 'possession claim against trespassers' see PARA 1227 note 5.

21 CPR Sch 2 CCR Ord 25 r 13(1). As to the transfer of proceedings from a county court to the High Court see generally the County Courts Act 1984 ss 41, 42; and PARA 69.

22 CPR Sch 2 CCR Ord 25 r 13(2).

23 See note 18.

24 CPR Sch 2 CCR Ord 25 r 13(3).

25 Where a county court judgment or order has been given or made for the payment of money, the person entitled to the benefit of the judgment or order or, as the case may be, the person liable to make the payment (referred to as the 'judgment creditor' and the 'debtor' respectively) may apply in accordance with the following provisions for a variation in the date or rate of payment: CPR Sch 2 CCR Ord 22 r 10(1). The judgment creditor may apply in writing, without notice being served on any other party, for an order that the money, if payable in one sum, be paid at a later date than that by which it is due or by instalments or, if the money is already payable by instalments, that it be paid by the same or smaller instalments, and the court officer may make an order accordingly unless no payment has been made under the judgment or order for six years before the date of the application in which case he must refer the application to the district judge: CPR Sch 2 CCR Ord 22 r 10(2). The judgment creditor may apply to the district judge on notice for an order that the money, if payable in one sum, be paid at an earlier date than that by which it is due or, if the money is payable by instalments, that it be paid in one sum or by larger instalments, and any such application must be made in writing stating the proposed terms and the grounds on which it is made: CPR Sch 2 CCR Ord 22 r 10(3). Where an application is so made, the proceedings must be automatically transferred to the debtor's home court if the judgment or order was not given or made in that court; and the court officer must fix a day for the hearing of the application before the district judge and give to the judgment creditor and the debtor not less than eight days' notice of the day so fixed, and at the hearing the district judge may make such order as seems just: CPR Sch 2 CCR Ord 22 r 10(4). The debtor may apply for an order that the money, if payable in one sum, be paid at a later date than that by which it is due or by instalments or, if the money is already payable by instalments, that it be paid by smaller instalments, and any such application must be in the appropriate form stating the proposed terms, the grounds on which it is made and including a signed statement of the debtor's means: CPR Sch 2 CCR Ord 22 r 10(5). Where such an application is made the court officer must (1) send the judgment creditor a copy of the debtor's application (and statement of means); and (2) require the judgment creditor to notify the court in writing, within 14 days of service of notification upon him, giving his reasons for any objection he may have to the granting of the application: CPR Sch 2 CCR Ord 22 r 10(6). If the judgment creditor does not notify the court of any objection within the time stated, the court officer must make an order in the terms applied for: CPR Sch 2 CCR Ord 22 r 10(7). Upon receipt of a notice from the judgment creditor under r 10(6), the court officer may determine the date and rate of payment and make an order accordingly: CPR Sch 2 CCR Ord 22 r 10(8). Any party affected by an order made under r 10(8) may, within 14 days of service of the order on him and giving his reasons, apply on notice for the order to be reconsidered and, where such an application is made: (a) the proceedings must be automatically transferred to the debtor's home court if the judgment or order was not given or made in that court; and (b) the court officer must fix a day for the hearing of the application before the district judge and give to the judgment creditor and the debtor not less than eight days' notice of the day so fixed: CPR Sch 2 CCR Ord 22 r 10(9). On hearing such an application, the district judge may confirm the order or set it aside and make such new order as he thinks fit and the order so made must be entered in the records of the court: CPR Sch 2 CCR Ord 22 r 10(10). Any order made under any of the provisions set out in this note may be varied from time to time by a subsequent order made under any of those provisions: CPR Sch 2 CCR Ord 22 r 10(11). As to the satisfaction of county court judgments and orders for the payment of money see generally the County Courts Act 1984 s 71; and PARA 1229.

As to the meaning of 'defendant's home court' see PARA 58 note 16; and as to the meaning of 'defendant' see PARA 18.

26 Ie an application under CPR 39.3(3): see PARA 1129.

27 Ie an application under CPR 13.4: see PARAS 516-518.

28 As to county court administration orders see the County Courts Act 1984 Pt VI (ss 112-117); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 893 et seq.

29 Ie under the County Courts Act 1984 s 88: see PARA 1363.

30 CPR Sch 2 CCR Ord 25 r 13(3)(a)-(d).

31 Ie under the County Courts Act 1984 s 42: see the text and notes 32-33; and PARA 69.

- 32 County Courts Act 1984 s 42(5) (s 42 substituted by the Courts and Legal Services Act 1990 s 2(3)).
- 33 County Courts Act 1984 s 42(6) (as substituted: see note 32).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/B. JURISDICTION/1229. Satisfaction of county court judgments and orders for payment of money.

1229. Satisfaction of county court judgments and orders for payment of money.

Where a judgment is given or an order is made by a county court under which a sum of money of any amount is payable, whether by way of satisfaction of the claim or counterclaim in the proceedings or by way of costs or otherwise, the court may, as it thinks fit, order the money to be paid either in one sum, whether forthwith or within such period as the court may fix, or by such instalments payable at such times as the court may fix¹. If at any time it appears to the satisfaction of the court that any party to any proceedings is unable from any cause to pay any sum recovered against him (whether by way of satisfaction of the claim or counterclaim in the proceedings or by way of costs or otherwise) or any instalment of such a sum, the court may, in its discretion, suspend or stay any judgment or order given or made in the proceedings for such time and on such terms as the court thinks fit, and so from time to time until it appears that the cause of the inability has ceased².

1 County Courts Act 1984 s 71(1). As to payment by instalments see also *Practice Direction--Judgments and Orders* PD 40B para 12; and PARA 1137.

2 County Courts Act 1984 s 71(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/B. JURISDICTION/1230. Set-off in cases of cross judgments in county courts and High Court.

1230. Set-off in cases of cross judgments in county courts and High Court.

Where one person has obtained a judgment or order in a county court against another person, and that other person has obtained a judgment or order against the first-mentioned person in the same or in another county court or in the High Court, either such person may, in accordance with rules of court, give notice in writing to the court or the several courts as the case may be, and may apply to the court or any of the said courts in accordance with rules of court for leave to set off any sums, including costs, payable under the several judgments or orders¹. The district judge of the court to which the application is made and the district judge of any other court to which notice is given must forthwith stay execution on any judgment or order in his court to which the application relates and any money paid into court under the judgment or order must be retained until the application has been disposed of². Upon any such application, the set-off may be allowed in accordance with the practice for the time being in force in the High Court as to the allowance of set-off and in particular in relation to any solicitor's lien for costs³.

Where the cross judgments or orders have not been obtained in the same court, a copy of the order made on any such application must be sent by the officer of the court to which the application is made to the officer of the other court⁴.

1 County Courts Act 1984 s 72(1). The application must be made as follows: (1) where the judgments or orders have been obtained in the same county court, the application may be made to that court on the day when the last judgment or order is obtained, if both parties are present, and in any other case must be made on notice; (2) where the judgments or orders have been obtained in different county courts, the application may be made to either of them on notice, and notice must be given to the other court: CPR Sch 2 CCR Ord 22 r 11(1)-(3). See *Revenue and Customs Comrs v Xicom Systems Ltd* [2008] EWHC 1945 (Ch), [2008] STC 3492, [2008] All ER (D) 39 (Aug) (leave for set-off by Commissioners for Revenue and Customs).

2 CPR Sch 2 CCR Ord 22 r 11(4).

3 County Courts Act 1984 s 72(2). The application may be heard and determined by the court and any order giving permission must direct how any money paid into court is to be dealt with: CPR Sch 2 CCR Ord 22 r 11(5).

4 County Courts Act 1984 s 72(3). Where the judgments or orders have been obtained in different courts, the court in which an order giving permission is made must send a copy of the order to the other court, which must deal with any money paid into that court in accordance with the order: CPR Sch 2 CCR Ord 22 r 11(6). The court officer or, as the case may be, each of the court officers affected must enter satisfaction in the records of his court for any sums ordered to be set off, and execution or other process for the enforcement of any judgment or order not wholly satisfied will issue only for the balance remaining payable: CPR Sch 2 CCR Ord 22 r 11(7). Where an order is made by the High Court giving permission to set off sums payable under several judgments and orders obtained respectively in the High Court and a county court, the court officer of the county court must, on receipt of a copy of the order, proceed in accordance with r 11(7): CPR Sch 2 CCR Ord 22 r 11(8). As to the meaning of 'court officer' see PARA 49 note 3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/B. JURISDICTION/1231. Enforcement of decisions of bodies other than the High Court and county courts and compromises enforceable by enactment.

1231. Enforcement of decisions of bodies other than the High Court and county courts and compromises enforceable by enactment.

If an enactment provides that a decision or compromise is enforceable or a sum of money is recoverable if a court so orders, an application for such an order must be made as follows¹. The application must be made to the court for the district where the person against whom the order is sought resides or carries on business, unless the court otherwise orders². Where a compromise requires a person to whom a sum of money is payable under the compromise to do anything in addition to discontinuing or not starting proceedings (a 'conditional compromise') an application must be made on notice³, but otherwise the application may be made without notice⁴. The application notice must be in the form and contain the information required by the relevant practice direction⁵, and a copy of the decision or compromise must be filed with the application notice⁶. An application other than in relation to a conditional compromise may be dealt with by a court officer⁷ without a hearing⁸. Where an application relates to a conditional compromise, the respondent may oppose it by filing a response within 14 days of service of the application notice and if the respondent: (1) does not file a response within the time allowed, the court will make the order; (2) files a response within the time allowed, the court will make such order as seems appropriate⁹.

Otherwise, a party may enforce the decision or compromise by applying for a specific method of enforcement¹⁰, and must: (a) file with the court a copy of the decision or compromise being enforced; and (b) provide the court with the information required by the relevant practice direction¹¹.

If an enactment provides that a decision or compromise may be enforced in the same manner as an order of the High Court if it is registered, any application to the High Court for registration must be made in accordance with the relevant practice direction¹².

1 CPR 70.5(3). CPR 70.5 applies where an enactment provides that either a decision of a court, tribunal, body or person other than the High Court or a county court, or a compromise, may be enforced as if it were a court order or that any sum of money payable under that decision or compromise may be recoverable as if payable under a court order: CPR 70.5(1). However, CPR 70.5 does not apply to: (1) any judgment to which CPR Pt 74 applies; (2) arbitration awards; (3) any order to which CPR Sch 1 RSC Ord 115 applies; or (4) proceedings to which CPR Pt 75 applies: CPR 70.5(2). CPR Pt 74 provides for registration in the High Court for the purpose of enforcement of judgments from other jurisdictions and European Community judgments; and CPR Sch 1 RSC Ord 115 provides for registration in the High Court for the purposes of enforcement of certain orders made in connection with criminal proceedings and investigations. See further PARAS 1232-1233. CPR Pt 75 deals with traffic enforcement: see **ROAD TRAFFIC**. As to arbitration awards see **ARBITRATION**.

For examples of Acts providing for enforcement in the county court see: (a) the Allotments Act 1922 s 6(1) (recovery of compensation: see **AGRICULTURAL LAND** vol 1 (2008) PARA 574); (b) the Agricultural Holdings Act 1986 s 85(1) (recovery of any sum agreed or ordered to be paid for compensation, costs or otherwise: see **AGRICULTURAL LAND** vol 1 (2008) PARA 474); (c) the Agriculture (Miscellaneous Provisions) Act 1954 s 5 (recovery of costs awarded by the Agricultural Land Tribunal: see **AGRICULTURAL LAND** vol 1 (2008) PARA 672); (d) the Faculty Jurisdiction Measure 1964 s 11 (recovery of costs and expenses consequent upon any proceeding for a faculty: see **ECCLESIASTICAL LAW**); (e) the Commons Registration Act 1965 s 17(4) (prospectively repealed) (recovery of costs awarded by a Commons Commissioner: see **COMMONS** vol 13 (2009) PARA 540); (f) the Pension Schemes Act 1993 s 151(5)(a) (enforcement of determinations or directions of the Pensions Ombudsman: see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 676); (g) the Employment Tribunals Act 1996 s 15(1) (recovery of sums awarded in pursuance of decisions of employment tribunals: see **EMPLOYMENT** vol 41 (2009) PARA 1449); (h) the Social Security Administration Act 1992 s 71(10)(a) (recovery of overpayments of social

security benefits: see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 388). As to enforcement in the High Court or a county court of fines, costs or compensation ordered by a magistrates' court see the Magistrates' Courts Act 1980 s 87; and **MAGISTRATES** vol 29(2) (Reissue) PARA 869. As to enforcement of fines, costs or compensation ordered by other criminal courts see the Administration of Justice Act 1970 s 41, Sch 9; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2100; **SENTENCING** vol 92 (2010) PARA 380.

As to the meaning of 'court' see PARA 22.

2 CPR 70.5(4)(b).

3 CPR 70.5(4A).

4 CPR 70.5(4)(a).

5 CPR 70.5(5). See further *Practice Direction--Enforcement of Judgments and Orders* PD 70.

6 CPR 70.5(6). As to the meaning of 'filing' see PARA 1832 note 8.

7 As to the meaning of 'court officer' see PARA 49 note 3.

8 CPR 70.5(7).

9 CPR 70.5(7A).

10 le under CPR Pts 71-73, CPR Sch 1 RSC Ords 45-47, 52, CPR Sch 2 CCR Ords 25-29.

11 CPR 70.5(2A). See further *Practice Direction--Enforcement of Judgments and Orders* PD 70.

12 CPR 70.5(8). See further *Practice Direction--Enforcement of Judgments and Orders* PD 70.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/B. JURISDICTION/1232. Enforcement of European Community judgments etc.

1232. Enforcement of European Community judgments etc.

European Community judgments¹ and Euratom inspection orders² are enforceable in England and Wales by virtue of the relevant treaties and by Order in Council³.

Upon application to the High Court by the person entitled to enforce it, the High Court must forthwith register any Community judgment to which the Secretary of State has appended an order for enforcement⁴ or any Euratom inspection order⁵.

An application to the High Court for the registration of a Community judgment⁶ may be made without notice⁷. The application must be supported by written evidence exhibiting (1) the Community judgment and the order for its enforcement, or an authenticated copy; and (2) where the judgment is not in English, a translation of it into English either certified by a notary public or other qualified person or accompanied by written evidence confirming that the translation is accurate⁸. Where the application is for registration of a Community judgment which is a money judgment, the evidence must state:

- 858 (a) the name of the judgment creditor and his address for service⁹ within the jurisdiction;
- 859 (b) the name of the judgment debtor and his address or place of business, if known;
- 860 (c) the amount in respect of which the judgment is unsatisfied; and
- 861 (d) that the European Court ('ECJ')¹⁰ has not suspended enforcement of the judgment¹¹.

A copy of the order granting permission to register a Community judgment (the 'registration order') must be served on every person against whom the judgment was given¹². The registration order must state the name and address for service of the person who applied for registration, and must exhibit a copy of the registered Community judgment and a copy of the order for its enforcement¹³. In the case of a Community judgment which is a money judgment, the registration order must also state the right of the judgment debtor to apply within 28 days for the variation or cancellation of the registration¹⁴. An application to vary or cancel the registration of a Community judgment which is a money judgment on the ground that at the date of registration the judgment had been partly or wholly satisfied must be made within 28 days of the date on which the registration order was served on the judgment debtor¹⁵ and must be supported by written evidence¹⁶. No steps may be taken to enforce a Community judgment which is a money judgment before the end of that 28-day period or, where an application is made for its variation or cancellation as described above, until the application has been determined¹⁷.

For the purposes of execution¹⁸ a registered Community judgment is of the same force and effect as if the judgment had been a High Court judgment given or made on the date of registration, and proceedings may be taken on it, and any sum payable under it carries interest, accordingly¹⁹.

The provisions set out above²⁰ which apply to the registration of a Community judgment also apply to the registration of a Euratom inspection order²¹ but with the necessary modifications²². An application to give effect to a Euratom inspection order may be made on written evidence²³.

Where the matter is urgent it may be made without notice²⁴ and otherwise it may be made by claim form²⁵. Upon registration of a Euratom inspection order the High Court may make such order as it thinks fit against any person for the purpose of ensuring that effect is given to the registered order²⁶.

Enforcement of a Community judgment may be suspended only by a decision of the ECJ²⁷. Where the ECJ has made an order that the enforcement of a registered Community judgment should be suspended, an application for the registration of that order in the High Court, which may be made without notice²⁸, is made by filing²⁹ a copy of the order in the Central Office of the Supreme Court³⁰. The order must then be registered forthwith, whereupon it is of the same effect as if it had been a High Court order made on the date of its registration staying the execution of the judgment for the same period and on the same conditions as are stated in the ECJ order, and no steps may be taken to enforce the judgment while the order remains in force³¹.

1 'Community judgment' means any decision, judgment or order which is enforceable under or in accordance with the relevant provisions of the EC Treaty, the Euratom Treaty, the ECSC Treaty, EC Council Regulation 40/94 (OJ L11, 14.01.1994, p 1) (regulation of 20 December 1993 on the Community trade mark) or EC Council Regulation 6/2002 (OJ L3, 5.1.2002, p 1) art 71 (regulation of 12 December 2001 on Community designs): see the European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 2(1) (amended by SI 1998/1259; and SI 2003/3204). See further note 6.

2 'Euratom inspection order' means an order made by or in the exercise of the functions of the President of the European Court or by the Commission of the European Communities under the relevant provision of the Euratom Treaty: see the European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 2(1).

3 See the European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, arts 3, 4, 6. The order was made under the European Communities Act 1972 s 2(2).

4 'Order for enforcement' means an order by or under the authority of the Secretary of State that the judgment to which it is appended is to be registered for enforcement in the United Kingdom: European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 2(1); and see CPR 74.19(d). As to the meaning of 'United Kingdom' see PARA 221 note 2.

5 European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 3(1). Where it appears that a judgment for the payment of money has been partly satisfied at the date of the application, the judgment must be registered only in respect of the balance: art 3(4). Where, after the date of registration of a Community judgment under which a sum of money is payable, it is shown that at that date the judgment had been partly or wholly satisfied, the registration must be varied or cancelled accordingly with effect from that date: art 3(5).

6 'Community judgment' means any judgment, decision or order which is enforceable under (1) the EC Treaty art 244 or art 256; (2) the Euratom Treaty art 18, art 159 or art 164; (3) the ECSC Treaty art 44 or art 92; (4) EC Council Regulation 40/94 (OJ L11, 14.01.1994, p 1) art 82; (5) EC Council Regulation 6/2002 (OJ L3, 5.1.2002, p 1) art 71: CPR 74.19(a).

7 CPR 74.20.

8 CPR 74.21(1)(a), (b).

9 As to the meaning of 'service' see PARA 138 note 2. As to service see generally PARA 138 et seq; and as to acknowledgment of service see PARAS 184-186.

10 'European Court' means the Court of Justice of the European Communities: CPR 74.19(c).

11 CPR 74.21(2). As to suspension of the judgment see the text and notes 27-31.

12 CPR 74.22(1).

13 CPR 74.22(2).

14 CPR 74.22(3); and see the European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 3(5).

- 15 CPR 74.23(1).
- 16 CPR 74.23(2).
- 17 CPR 74.24.
- 18 As to execution see PARA 1265 et seq.
- 19 European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 4. As to interest on judgment debts see PARA 1149.
- 20 Ie CPR 74.20, 74.21 and 74.22(1), (2): see the text and notes 6-13.
- 21 'Euratom inspection order' means an order made by the President of the European Court, or a decision of the Commission of the European Communities, under the Euratom Treaty art 81: CPR 74.19(b).
- 22 CPR 74.26(1).
- 23 CPR 74.26(2).
- 24 CPR 74.26(2)(a).
- 25 CPR 74.26(2)(b).
- 26 European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 6.
- 27 See PARA 1232.
- 28 CPR 74.25(2).
- 29 As to the meaning of 'filing' see PARA 1832 note 8.
- 30 CPR 74.25(1). As to the Central Office of the Supreme Court see **COURTS** vol 10 (Reissue) PARA 641. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.
- 31 European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 5.

UPDATE

1232 Enforcement of European Community judgments etc

NOTES 1, 6--Regulation 40/94 replaced: EC Council Regulation 207/2009 (OJ L78, 24.3.2009, p 1); references to the repealed regulation should be construed as references to Regulation 207/2009 and read in accordance with the correlation table in Annex II: art 166.

TEXT AND NOTES 29, 30--CPR 74.25(1) amended: SI 2009/2092.

NOTE 30--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/B. JURISDICTION/1233. Reciprocal enforcement of judgments.

1233. Reciprocal enforcement of judgments.

Provision is made for the reciprocal enforcement of judgments in member states of the European Union and for the reciprocal enforcement of Commonwealth and certain foreign judgments¹. These provisions are considered in detail elsewhere in this work².

1 See the Administration of Justice Act 1920 Pt II (ss 9-14); the Foreign Judgments (Reciprocal Enforcement) Act 1933; the Civil Jurisdiction and Judgments Act 1982; the Merchant Shipping (Liner Conferences) Act 1982; the Civil Jurisdiction and Judgments Act 1991; the Private International Law (Miscellaneous Provisions) Act 1995; EC Council Regulation 44/2001 (OJ L12, 16.01.2001, p 1) (which applies to all member states except Denmark); the Civil Jurisdiction and Judgments (Authentic Instruments and Court Settlements) Order 2001, SI 2001/3928; the Civil Jurisdiction and Judgments Order 2001, SI 2002/3929; and CPR 74.1-74.18.

2 See **CONFLICT OF LAWS**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/B. JURISDICTION/1234. Claim on an order.

1234. Claim on an order.

An order to pay a definite sum of money may be enforced by a claim in the same manner as a judgment¹, but if the amount ordered to be paid can be obtained by execution it is an abuse of the process of the court to proceed by claim, and the claimant runs the risk of having his claim stayed and having to pay all the costs occasioned by its being brought².

An undertaking to the court to pay money to another party does not have the same effect as an order to pay; it does not confer any personal right or remedy on any other party unless the circumstances in which it was given were such that a collateral obligation to a party was created³.

Where it is desired to enforce by bankruptcy notice an order which is not a final order, a claim must be brought upon the order⁴.

1 See *Philpott v Lehain* (1876) 35 LT 855; *Re Boyd, ex p McDermott* [1895] 1 QB 611, CA (order for payment of costs); *Seldon v Wilde* [1910] 2 KB 9; affd [1911] 1 KB 701, CA (action (now known as a 'claim': see PARA 18) in King's Bench Division on order for payment of costs in Chancery Division by solicitor of proceedings for attachment for not delivering his bill of costs); *Norton v Gregory* (1895) 73 LT 10, CA (order in probate matter for payment of costs).

2 *Pritchett v English and Colonial Syndicate* [1899] 2 QB 428, CA (action on garnishee order against company for purposes of winding-up proceedings); *Godfrey v George* [1896] 1 QB 48, CA (order for payment by solicitor of costs of application to strike him off the roll).

3 *Re Hudson, Hudson v Hudson* [1966] Ch 209, [1966] 1 All ER 110.

4 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/B. JURISDICTION/1235. Jurisdiction must be exercised in accordance with Convention rights.

1235. Jurisdiction must be exercised in accordance with Convention rights.

Under the Human Rights Act 1998, it is unlawful for a court or tribunal to act in a way which is incompatible with a Convention right¹. The following Convention rights are particularly relevant in the context of the enforcement of judgments and orders:

- 862 (1) everyone has the right to liberty and security of person; no one is to be deprived of his liberty save in the permitted cases which include the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law² and in accordance with a procedure prescribed by law³;
- 863 (2) everyone who is deprived of his liberty by arrest or detention is entitled to take proceedings by which the lawfulness of his detention is to be decided speedily by a court and his release ordered if the detention is not lawful⁴;
- 864 (3) in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law⁵;
- 865 (4) everyone charged with a criminal offence must be presumed innocent until proved guilty according to law⁶ and has certain minimum rights⁷;
- 866 (5) everyone has the right to respect for his private and family life, his home and his correspondence⁸; there must be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society for, inter alia, the protection of the rights and freedoms of others⁹;
- 867 (6) every natural or legal person is entitled to the peaceful enjoyment of his possessions and no one must be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law¹⁰.

The rights set out in heads (1), (2) and (3) above normally come into play when the judgment or order is made rather than on its enforcement¹¹ but are particularly relevant in the context of imprisonment for contempt of court where a person has disobeyed a judgment or order¹². Further, it is now settled law that both imprisonment for contempt and imprisonment under the Debtors Act 1869 fall under head (4) above so that the standard of proof required is proof beyond reasonable doubt¹³. The rights under head (5) above may be particularly relevant in the context of enforcement proceedings (including possession proceedings) affecting the family home but have also been considered in the context of committal¹⁴ while the rights set out under head (6) above may be relevant both in the context of execution against a debtor's property¹⁵ and in the context of undue delay in executing a possession order¹⁶.

1 See the Human Rights Act 1998 s 6(1), (3)(a); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to Convention rights see s 1(3), Sch 1. See also **COURTS** vol 10 (Reissue) PARA 316.

2 Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) art 5(1)(b), now incorporated into domestic law by the Human Rights Act 1998 Sch 1 Pt I art 5(1)(b); but see note 3.

3 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 5(1), now incorporated into domestic law by the Human Rights Act 1998 Sch 1 Pt I art 5(1).

4 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 5(4); Human Rights Act 1998 Sch 1 Pt I art 5(4).

5 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(1); Human Rights Act 1998 Sch 1 Pt I art 6(1). As to hearings which must in the first instance be listed by the court as hearings in private under CPR 39.2(3)(c) see *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39A para 1.5; and PARA 6 note 8.

6 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(2); Human Rights Act 1998 Sch 1 Pt I art 6(2).

7 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(3); Human Rights Act 1998 Sch 1 Pt I art 6(3).

8 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 8(1); Human Rights Act 1998 Sch 1 Pt I art 8(1). For these purposes, a home is not limited to a property that is lawfully occupied or a home that is lawfully established. Rather, 'home' is an autonomous concept that does not depend on the introduction of domestic legal concepts. Whilst it is clearly inherent in the definition of a home that an individual has to be in actual residence, whether an individual has a legitimate proprietary or contractual interest in the property forms no part of the test: *Harrow London Borough Council v Qazi* [2001] EWCA Civ 1834, [2002] HLR 276, [2001] All ER (D) 16 (Dec).

9 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 8(2); Human Rights Act 1998 Sch 1 Pt I art 8(2).

10 Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Protocol I art 1; Human Rights Act 1998 Sch 1 Pt II art 1. These provisions do not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties: Sch 1 Pt II art 1. As to the recovery of taxes etc by means of an attachment of earnings order see PARA 1433; and as to committal under the Debtors Act 1869 s 5 in respect of a judgment debt relating to such taxes etc see PARA 1515 et seq.

11 See eg *Southwark London Borough Council v St Brice* [2001] EWCA Civ 1138, [2002] 1 WLR 1537, sub nom *St Brice v Southwark London Borough Council* [2001] All ER (D) 209 (Jul) (possession proceedings: such proceedings fall within the scope of the Human Rights Act 1998 Sch 1 Pt I art 6 so that the tenant is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal; however, although a breach of art 6 might arise in relation to the enforcement of a judgment, which has to be regarded as part of the trial, that does not mean that enforcement involves a separate determination of civil rights and obligations which necessitate a further hearing; the right to possession is determined in compliance with art 6 when the order for possession is made and the issue of the warrant of possession is simply a step which has to be taken to give effect to the order for possession. Such a step does not alter the legal status of the tenant or make any decision of any kind in relation to his rights). As to warrants of possession see PARA 1292.

12 As to imprisonment for contempt see PARAS 1249, 1514 et seq; and see generally **CONTEMPT OF COURT**.

13 See PARA 1514.

14 Proceedings for the recovery of possession by a landlord of the home of a tenant may not infringe the Human Rights Act 1998 Sch 1 Pt I art 8, and the differences in the security of tenure accorded to tenants, or to those occupying caravan sites under licence, may not infringe the occupiers' rights under Sch 1 Pt I art 8 or art 14 (prohibition on discrimination): see *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, [2001] 4 All ER 604; *Southwark London Borough Council v St Brice* [2001] EWCA Civ 1138, [2002] 1 WLR 1537, sub nom *St Brice v Southwark London Borough Council* [2001] All ER (D) 209 (Jul); *Sheffield City Council v Smart* [2002] EWCA Civ 04, [2002] HLR 639, [2002] All ER (D) 226 (Jan); *R (on the application of McLellan) v Bracknell Forest Borough Council, Reigate and Banstead Borough Council v Benfield* [2001] EWCA Civ 1510, [2002] QB 1129, [2002] 1 All ER 899; *Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2002] All ER (D) 56 (Mar); *Isaacs v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 1014 (Admin), [2002] All ER (D) 460 (May). See further **LANDLORD AND TENANT**.

In the context of insolvency legislation, it has been held that there must be a balancing exercise between the rights of the bankrupt and the rights of the creditors; that balancing exercise is to be found in the Insolvency Act 1986 s 335A which provides that where an application is made for the sale of a property after the end of the period of one year from the date when it first vested in the trustee, then unless the circumstances of the case are exceptional, the court is to assume that the interests of the creditors outweigh all other considerations; an

order for sale in such circumstances was not a breach of the bankrupt's or his daughter's human rights: see *Karia v Franses* [2001] All ER (D) 161 (Nov). See further **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**.

In the context of committal by a magistrates' court, it has been held that committal of a single mother for non-payment of instalments due on various fines and compensation orders was a disproportionate interference with her children's right to family life under the Human Rights Act 1998 Sch 1 Pt I art 8: see *R (on the application of Stokes) v Gwent Magistrates' Court* [2001] EWHC Admin 569, [2001] All ER (D) 125 (Jul). See further **MAGISTRATES**.

15 As to levying execution against goods see PARA 1310 et seq.

16 See PARA 1309 text and note 16.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/C. PARTIES TO ENFORCEMENT/1236. Meaning of 'judgment creditor' and 'judgment debtor'.

C. PARTIES TO ENFORCEMENT

1236. Meaning of 'judgment creditor' and 'judgment debtor'.

For the purposes of Parts 70 to 73 of the Civil Procedure Rules ('CPR')¹, 'judgment creditor' means a person who has obtained or is entitled to enforce a judgment or order² and 'judgment debtor' means a person against whom a judgment or order was given or made³. The like meaning is given to these terms for the purposes of Orders 25 to 29 of the preserved and amended County Court Rules ('CCR')⁴ contained in Schedule 2 to the CPR⁵.

1 Ie CPR Pts 70-73.

2 As to the meaning of 'judgment or order' see PARA 1226.

3 CPR 70.1(2)(a), (b).

4 Ie CPR Sch 2 CCR Ords 25-29.

5 See CPR Sch 2 CCR Ord 25 r 1. As to the description of parties see CPR Sch 2 CCR Ord 25 r 6; and PARA 1283 note 11.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/C. PARTIES TO ENFORCEMENT/1237. Enforcement by or against a non-party.

1237. Enforcement by or against a non-party.

If a judgment or order¹ is given or made in favour of or against a person who is not a party to proceedings², it may be enforced by or against that person by the same methods as if he were a party³.

1 As to the meaning of 'judgment or order' see PARA 1226.

2 As to parties to proceedings see generally PARA 207 et seq.

3 CPR 70.4. As to methods of enforcement see PARA 1244 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/C. PARTIES TO ENFORCEMENT/1238. Enforcement against companies and other incorporated bodies.

1238. Enforcement against companies and other incorporated bodies.

Speaking generally, judgments and orders for the payment of money or for the giving of possession of land against incorporated bodies, whether public or private, are enforced in the same manner as against individuals¹, and their real or personal property may be taken in execution².

In the case of wilful disobedience to a judgment or order against a corporation, its property is liable to sequestration³ and its directors or officers and their property are liable to committal and sequestration respectively⁴. In certain circumstances a liquidator may bring proceedings against shareholders to the extent of unpaid share capital⁵, but except in these cases no execution can be issued against a member under a judgment or order against the company⁶. A judgment or order against a company may also entitle the judgment creditor to bring a winding-up petition⁷. Where a company is wound up an execution creditor may not retain the benefit of his execution unless it was completed before the winding up⁸. Execution issued after the commencement of a winding up is void⁹.

1 Although the CPR do not expressly so provide, the Interpretation Act 1978 applies to their interpretation: see s 23; and **STATUTES** vol 44(1) (Reissue) PARA 1522. 'Person' includes any body of persons corporate or unincorporate: Interpretation Act 1978 Sch 1, Sch 2 para 4(1).

2 *Worral Waterworks Co v Lloyd* (1866) LR 1 CP 719; *Marine and General Mutual Life Assurance Society v Feltwell Fen Second District Drainage Board* [1945] KB 394. As to execution see PARA 1265 et seq.

3 See CPR Sch 1 RSC Ord 45 r 5(1)(b)(i); and PARA 1249.

4 CPR Sch 1 RSC Ord 45 r 5(1)(b)(ii), (iii): see PARA 1249.

5 See **COMPANIES** vol 14 (2009) PARA 310. In a winding up where a contributory or other person from whom money is due to a company has been ordered to pay the amount into the Bank of England to the account of the liquidator instead of to the liquidator, and it is desired to enforce the order by a writ of fieri facias, the liquidator must obtain an order for the payment to himself of the sum in question: see *Re Leeds Banking Co* (1866) 1 Ch App 150; and see the Insolvency Act 1986 s 151; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 677.

6 This is because there is no privity between the judgment creditor and the individual shareholder.

7 As to winding up see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 1 et seq.

8 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 882. As to the enforcement officer's duty to retain the proceeds of execution for 14 days and subsequently if he has notice of a meeting to propose winding up or of a winding-up petition see PARA 1354.

9 See the Insolvency Act 1986 s 128(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 888.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/C. PARTIES TO ENFORCEMENT/1239. Enforcement by or against the Crown.

1239. Enforcement by or against the Crown.

An order¹ in favour of the Crown in any civil proceedings to which the Crown² is a party³ may be enforced in the same manner as between subjects⁴ and not otherwise⁵.

Arrest and imprisonment for debt were abolished in 1947 in regard to sums of money payable and debts due to the Crown as for debts due to subjects⁶, but the power of the county courts to commit in respect of default in the payment of certain judgment debts due to the Crown was preserved⁷.

The Civil Procedure Rules and their practice directions now apply to civil proceedings by or against the Crown⁸ and to other civil proceedings to which the Crown is a party⁹ unless a rule, a practice direction or any other enactment provides otherwise¹⁰. None of the ordinary rules about enforcement¹¹ applies in respect of any order against the Crown¹². A special procedure is prescribed for the enforcement of such orders¹³. Where in any civil proceedings by or against the Crown, or in any proceedings in the Administrative Court or in connection with an arbitration to which the Crown is a party, an order (including an order for costs) is made in favour of any person against the Crown or against a government department or an officer of the Crown as such¹⁴, the court officer will on the application of that person at any time after the expiration of 21 days from the order issue a certificate in the prescribed¹⁵ form¹⁶ containing particulars of the judgment¹⁷. A copy of the certificate may then be served by the applicant on the person named on the record as the solicitor or the person acting as solicitor for the Crown or for the department or officer¹⁸. If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate must state the amount so payable and the appropriate government department must, unless payment is ordered to be suspended pending an appeal or otherwise¹⁹, pay to the person entitled or his solicitor the amount appearing to be due to him together with interest, if any²⁰.

Apart from what has been stated above, no execution or attachment or process in the nature thereof can be issued against the Crown²¹, and no person is individually liable under any order for payment by the Crown, or any government department or any officer of the Crown as such, of any such money or costs²². Similarly, the normal procedures for third party debt orders²³, the appointment of a sequestrator²⁴ or the appointment of a receiver²⁵ are not available for debts due from the Crown²⁶; but alternative procedures are available²⁷.

1 'Order' includes judgment, decree, rule, award or declaration: Crown Proceedings Act 1947 s 38(2).

2 The Crown Proceedings Act 1947 does not apply to proceedings by or against Her Majesty in her private capacity or in right of her Duchy of Lancaster or by or against the Duke of Cornwall: see **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 103.

3 In the Crown Proceedings Act 1947 Pt III (ss 24-27) (judgments and execution) and Pt IV (ss 28-40) (miscellaneous and supplemental matters), references to civil proceedings to which the Crown is a party or to civil proceedings by or against the Crown are to be construed as including a reference to civil proceedings to which the Attorney General or any government department or any officer of the Crown as such is a party (s 38(4)), although the Crown is not deemed to be a party to any proceedings by reason only that they are brought by the Attorney General upon the relation of some other person (s 38(4) proviso). As to the meaning of 'civil proceedings by or against the Crown' see generally **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 103.

4 In general, enactments and rules relating to stay of execution apply to proceedings by or against the Crown in the same manner as to proceedings between subjects: see the Crown Proceedings Act 1947 s 22; and **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 137. As to methods of enforcement see generally PARA 1244 et seq; and as to stay of execution see PARA 1357 et seq.

5 Crown Proceedings Act 1947 s 26(1). This does not affect the procedure available before the commencement of the Crown Proceedings Act 1947 for enforcing an order made in favour of the Crown for the recovery of any fine or penalty, or for the forfeiture or condemnation of any goods, or the forfeiture of any ship or share of a ship (see **SHIPPING AND MARITIME LAW**): s 26(3).

6 See the Debtors Act 1869 s 4; the Crown Proceedings Act 1947 s 26(2); and **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 485.

7 See the Crown Proceedings Act 1947 s 26(2); the Debtors Act 1869 s 5; the Administration of Justice Act 1970 s 11, Sch 4; and PARA 1515 et seq.

8 'Civil proceedings by the Crown' means the civil proceedings described in the Crown Proceedings Act 1947 s 23(1), but excluding the proceedings described in s 23(3); and 'civil proceedings against the Crown' means the civil proceedings described in s 23(2), but excluding the proceedings described in s 23(3): CPR 66.1(2)(a)-(c). See **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARAS 103, 116.

9 'Civil proceedings to which the Crown is a party' has the same meaning as it has for the purposes of Crown Proceedings Act 1947 Pts III, IV by virtue of s 38(4) (see note 3): CPR 66.1(2)(d).

10 CPR 66.2.

11 Ie nothing in CPR Pts 69-73, CPR Sch 1 RSC Ords 45-47, 52 and CPR Sch 2 CCR Ords 25-29: see PARA 1226 et seq, PARA 1244 et seq.

12 CPR 66.6(1). For these purposes, 'order against the Crown' means any judgment or order against the Crown, a government department, or an officer of the Crown as such, made (1) in civil proceedings by or against the Crown; (2) in proceedings in the Administrative Court; (3) in connection with an arbitration to which the Crown is a party; or (4) in other civil proceedings to which the Crown is a party: CPR 66.6(2). See also *Franklin v R (No 2)* [1974] QB 205, [1973] 3 All ER 861, CA.

13 See the Crown Proceedings Act 1947 s 25(1).

14 See the Crown Proceedings Act 1947 s 25(1). 'Officer of the Crown' includes any servant of Her Majesty and this includes a minister and a member of the Scottish Executive: s 38(2) (amended by the Scotland Act 1998 s 125, Sch 8 para 7(2)(c)).

15 Ie prescribed by rules of court: see the Crown Proceedings Act 1947 s 38(2) (amended by SI 2005/2712).

16 See *Practice Direction--Forms* PD 4 para 1.3, Table 2 Forms PF95, PF96.

17 Crown Proceedings Act 1947 s 25(1). If the order provides for payment of costs to be assessed the certificate is not to be issued until after assessment, but the court may direct that a separate certificate be issued for costs: s 25(1). An application under s 25(1) for a separate certificate of costs payable to the applicant may be made without notice: CPR 55.6(3).

18 Crown Proceedings Act 1947 s 25(2).

19 See the Crown Proceedings Act 1947 s 25(3) proviso.

20 Crown Proceedings Act 1947 s 25(3). While a claimant is unlawfully at large following the revocation of his licence, the court will exercise its discretion to suspend the payment of damages for any post-tariff detention: *R (on the application of Satpal Ram) v Secretary of State for the Home Department* [2004] EWHC 1 (QB), [2004] PIQR P454.

21 See note 20.

22 Crown Proceedings Act 1947 s 25(4).

23 Ie under CPR Pt 72: see PARA 1411 et seq.

24 Ie under CPR Sch 1 RSC Ord 45: see PARAS 1249, 1380 et seq.

25 Ie under CPR Pt 69: see PARA 1497 et seq; and **RECEIVERS**.

26 See CPR 66.7(1).

27 See the Crown Proceedings Act 1947 s 27; CPR 66.7(3)-(7); and PARA 1428.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/C. PARTIES TO ENFORCEMENT/1240. Enforcement against personal representatives.

1240. Enforcement against personal representatives.

A money judgment in respect of goods of a testator or intestate¹ which come into the hands of the personal representative after the date of the judgment can, in the first instance, only be enforced by the issue of execution² against those goods of the deceased³. If the relevant enforcement officer indorses the writ with a statement that there are no goods available to satisfy the execution⁴, the claimant may bring proceedings against the personal representative alleging that he has mismanaged the deceased's estate⁵; if the claimant is successful he will obtain a judgment which can be enforced against the personal representative's own property⁶. A judgment against the personal representative who has not pleaded that he has fully administered the estate, or fully administered it except for certain assets⁷, amounts to an admission of assets⁸, and, if such a judgment is followed by a return that there are no goods available to satisfy the execution, there is in relation to the claim which formed the subject matter of the judgment a rebuttable presumption that the personal representative has mismanaged the deceased's estate⁹.

¹ As to judgments against personal representatives see generally **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 829 et seq.

² As to execution see PARA 1265 et seq.

³ In relation to costs, however, the judgment is normally enforceable against the goods of the testator and if there are none, against the personal representative's own goods: see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 830.

⁴ See PARA 1282. There was an old practice, now obsolete, whereby a sheriff could make a return of *devastavit* (mismanagement) if he was satisfied that the personal representatives had wasted the estate, and the plaintiff could then issue execution against the goods of the personal representatives ('*de bonis propriis*'): see *Rock v Leighton* (1700) 1 Salk 310; *Wheatley v Lane* (1669) 1 Saund 216a; *Leonard v Simpson* (1835) 2 Bing NC 176; *Batchelar v Evans* [1939] Ch 1007, [1939] 3 All ER 606.

⁵ See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 792 et seq.

⁶ See *Lacons v Warmoll* [1907] 2 KB 350, CA, and the cases cited in note 4.

⁷ See further **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) 828.

⁸ See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 831.

⁹ See note (8) to *Wheatley v Lane* (1669) 1 Saund 216a; *Leonard v Simpson* (1835) 2 Bing NC 176; *Dawson v Gregory* (1845) 7 QB 756; *Batchelar v Evans* [1939] Ch 1007, [1939] 3 All ER 606, where the presumption was rebutted by an order for administration made after the judgment and before the issue of the writ. The admission and the presumption do not extend to costs unascertained at the date of the judgment, or to claims arising after the judgment: *Marsden v Regan* [1954] 1 All ER 475, [1954] 1 WLR 423, CA. As to admission of assets see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 836-839.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/C. PARTIES TO ENFORCEMENT/1241. Enforcement against members of reserve and auxiliary forces etc.

1241. Enforcement against members of reserve and auxiliary forces etc.

Where a person liable to satisfy the judgment or order, or to pay the rent or another debt, or to perform the obligation, in question is for the time being performing a period of relevant service¹, or was performing such a period of relevant service while an application was made to the appropriate court² for leave to exercise a right or remedy mentioned below³, and in certain other circumstances⁴, no person is entitled⁵ except with the leave of the appropriate court:

- 868 (1) to proceed to execution on, or otherwise to the enforcement of, a judgment or order of any court other than a county court⁶ for the payment or recovery of a sum of money⁷;
- 869 (2) to proceed to exercise any remedy which is available to him by way of the levying of distress, the taking of possession of any property, the appointment of a receiver of any property, re-entry upon land, the realisation of a security or the forfeiture of a deposit⁸;
- 870 (3) to institute proceedings for foreclosure or for sale in lieu of foreclosure, or for the recovery of possession of mortgaged property, or to take any step in any such proceedings instituted before the relevant date⁹;
- 871 (4) to proceed to execution on, or otherwise to the enforcement of, a judgment or order of any court¹⁰ for the recovery of possession of land in default of payment of rent or for the delivery of any property other than mortgaged property by reason of a default in the payment of money¹¹.

These statutory restrictions are subject to a number of exceptions¹².

The procedure for making an application for enforcement under these provisions, and the effect of failure to observe the restrictions set out above, are discussed in detail elsewhere in this work¹³.

1 For these purposes, 'relevant service' means service after 15 July 1951 of a description specified in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Sch 1: s 64(1). See also the Army Act 1992 s 2; and see further **ARMED FORCES**.

2 Ie under the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 2: see the text and notes 5-12; and **ARMED FORCES**.

3 See heads (1)-(4) in the text.

4 Ie where (1) the appropriate court by order so directs, on the application of the person liable to satisfy the judgment etc and on being satisfied that he is unable immediately to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question by reason of circumstances directly or indirectly attributable to his or someone else's performing or having performed a period of relevant service; or (2) the person so liable has made to the appropriate court an application for an order under this provision and the application has not been disposed of, or not having made such an application has given to the proper person written notice of his intention to do so: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 3(1)(c).

5 Ie subject to the provisions of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Pt I (ss 1-13): see the text and notes 1-4, 6-12; and **ARMED FORCES**.

6 le whenever the judgment or order was given or made: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 2(1).

7 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 ss 2(1), 3(1).

8 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 ss 2(2)(a), 3(1). As from a day to be appointed, using the procedure in the Tribunals, Courts and Enforcement Act 2007 Sch 12 (taking control of goods: see PARA 1386 et seq) is also included: see the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 2(2)(a) (amended, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13 para 24). At the date at which this title states the law, no such day had been appointed.

9 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 ss 2(2)(b), 3(1).

10 le whenever the judgment or order was given or made: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 2(3).

11 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 ss 2(3), 3(1).

12 Nothing in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 2(1) (see head (1) in the text) applies to (1) a judgment for the recovery of damages for tort; (2) a judgment or order for the recovery of a debt which has become due by virtue of a contract made after the relevant date; (3) a judgment or order under which no sum of money is recoverable otherwise than in respect of costs; (4) an order for alimony, maintenance or other payment made under the Matrimonial Causes Act 1973 ss 21-33 or made, or having effect as if made, under the Children Act 1989 Sch 1; (5) an order made in criminal proceedings, or an order made in proceedings for the recovery of a penalty in respect of a contravention of, or failure to comply with, any provisions of an Act; or to the enforcement of any other judgment or order by judgment summons (see PARA 1515 et seq): Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 2(1) proviso (amended by the Children Act 1989 s 108(5), (6), Sch 13 para 12, Sch 14 para 1). 'Relevant date' means the date on which the service man or woman began to perform the period of relevant service: see the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 ss 3(10), 6(1); and see further **ARMED FORCES**.

Section 2(2) (see heads (2)-(3) in the text) does not apply to any remedy or proceedings available in consequence of default in the payment of a debt arising by virtue of a contract made after the relevant date or the performance of an obligation so arising; and nothing in s 2(2) affects (a) a power of sale of a mortgagee of land or an interest in land who is in possession of the mortgaged property at the relevant date, or who before that date has appointed a receiver who at that date is in possession, or in receipt of the rents and profits, of the mortgaged property; or (b) a power of sale of a mortgagee in possession of property other than land or some interest in land, where the power of sale has arisen and notice of the intended sale has been given before the relevant date; or (c) a right or power of a pawnbroker to deal with a pledge; or (d) any right or power of a person to sell goods in his custody as a bailee, being a right or power arising by reason of default in the payment of a debt; or (e) the institution or prosecution of proceedings for the appointment by the court of a receiver of any property: s 2(2) proviso.

Nothing in s 2(3) (see head (4) in the text) applies to a judgment given or order made in proceedings for the enforcement of a contract made after the relevant date: s 2(3) proviso.

13 See **ARMED FORCES**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/C. PARTIES TO ENFORCEMENT/1242. Other special cases.

1242. Other special cases.

Subject to certain limited exceptions, the normal enforcement procedures do not apply against a foreign sovereign or a person subject to diplomatic immunity¹, unless the privilege has been waived².

If judgment is obtained against a defendant under a mental disability, a stay of execution may be granted³ to enable an application to be made by the receiver of the income to the Court of Protection for leave to pay the amount of the judgment debt out of the patient's estate⁴. When a charging order is obtained⁵ against the property of a mentally disordered person, the court has no power to make an order providing that the amount to be charged shall be determined by a judge of the Court of Protection, for the judgment creditor is entitled to an unconditional order⁶. Mental incapacity is no bar to being made bankrupt⁷.

All property belonging to a trade union, other than a special register body⁸, must be vested in trustees in trust for it; and a judgment, order or award made in proceedings of any description brought against a trade union is enforceable, by way of execution⁹, punishment for contempt¹⁰ or otherwise, against any property held in trust for it to the same extent and in the same manner as if it were a body corporate¹¹.

1 See generally **INTERNATIONAL RELATIONS LAW**.

2 See **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 283.

3 *Burt v Blackburn* (1887) 3 TLR 356, CA.

4 *Ames v Parkinson* (1847) 2 Ph 388.

5 Ie under the Charging Orders Act 1979: see PARA 1467 et seq.

6 See *Horne v Pountain* (1889) 23 QBD 264; but see note 3.

7 See **MENTAL HEALTH** vol 30(2) (Reissue) PARA 700.

8 As to special register bodies see **EMPLOYMENT** vol 40 (2009) PARA 854.

9 As to execution see PARA 1265 et seq.

10 As to committal for contempt see PARAS 1249, 1514 et seq; and **CONTEMPT OF COURT**.

11 See **EMPLOYMENT** vol 40 (2009) PARA 874. The union, not the individual members, is the beneficial owner of the property: *Taff Vale Rly Co v Amalgamated Society of Railway Servants* [1901] AC 426, HL; *Cotter v National Union of Seamen* [1929] 2 Ch 58, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(ii) General Rules about Enforcement/C. PARTIES TO ENFORCEMENT/1243. Devolution of rights and liabilities.

1243. Devolution of rights and liabilities.

The rights and liabilities of the judgment creditor or judgment debtor (except a merely personal liability) may, by reason of alienation, bankruptcy or death, devolve upon some other person¹, who may then issue, or be the subject of, an enforcement process². Where, following a change in the parties entitled or liable to execution, enforcement is sought by means of a writ or warrant of execution, the permission of the court is required³. In such circumstances enforcement by the appointment of a receiver by way of equitable execution is unavailable⁴, as is enforcement by a charging order⁵, unless an order for the substitution of the parties is made under Part 19 of the Civil Procedure Rules⁶.

1 It is not necessary for the trustee in bankruptcy of a judgment creditor to be made a party before leave will be given to him to issue execution: *Re Bagley* [1911] 1 KB 317, CA, overruling on that point *Re Clements, ex p Clements* [1901] 1 KB 260. For the general effect on enforcement of the bankruptcy of the judgment debtor see PARA 1355; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 678 et seq. As to execution see PARA 1265 et seq.

2 In such cases leave must be obtained: see PARAS 1274, 1285.

3 See PARAS 1274, 1285.

4 See *Norburn v Norburn* [1894] 1 QB 448, DC; *Re Shephard, Atkins v Shephard* (1889) 43 ChD 131, CA. As to equitable execution see PARA 1497 et seq. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

5 See *Stewart v Rhodes* [1900] 1 Ch 386, CA.

6 Under CPR Pt 19, the court may order a new party to be substituted for an existing one if (1) the existing party's interest or liability has passed to the new party; and (2) it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings: see CPR 19.2(4); and PARA 213.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(iii) Methods of Enforcement; in general/1244. Judgment creditor's choice of enforcement method.

(iii) Methods of Enforcement; in general

1244. Judgment creditor's choice of enforcement method.

A judgment creditor¹ may, except where an enactment, rule or practice direction provides otherwise, use any method of enforcement which is available and use more than one method of enforcement, either at the same time or one after another². The relevant practice direction sets out methods of enforcing judgments or orders for the payment of money³.

Certain enforcement methods require the filing of a formal request; these are implemented administratively and as of right⁴. Other methods require the permission of the court⁵.

1 As to the meaning of 'judgment creditor' see PARA 1236.

2 CPR 70.2(2).

3 CPR 70.2(1). See PARA 1245.

4 Eg the general procedure for issuing a writ of execution, which involves the filing of a praecipe: see PARA 1273. As to the meaning of 'filing' see PARA 1832 note 8.

5 Eg permission is required for the issue of a writ of execution in certain cases: see PARA 1274.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(iii) Methods of Enforcement; in general/1245. Methods of enforcing money judgments.

1245. Methods of enforcing money judgments.

A judgment creditor¹ may enforce a judgment or order for the payment of money² by any of the following methods:

- 872 (1) a writ of fieri facias³ or warrant of execution⁴;
- 873 (2) a third party debt order⁵;
- 874 (3) a charging order⁶, stop order⁷ or stop notice⁸;
- 875 (4) in a county court, an attachment of earnings order⁹;
- 876 (5) the appointment of a receiver¹⁰.

In addition the court¹¹ may make the following orders against a judgment debtor¹²:

- 877 (a) an order of committal¹³, but only if permitted by a rule¹⁴ and by the Debtors Acts 1869 and 1878¹⁵; and
- 878 (b) in the High Court, a writ of sequestration¹⁶, but only if permitted by the relevant rule¹⁷.

The enforcement of a judgment or order may be affected by the enactments relating to insolvency¹⁸ and county court administration orders¹⁹.

A freezing order (formerly known as a 'Mareva injunction') may be granted at any stage in the proceedings, including after judgment, where there is a risk that assets may be dissipated, since the purpose of such an order is to ensure that the orders of the court are effectively enforced²⁰.

1 As to the meaning of 'judgment creditor' see PARA 1236.

2 As to the meaning of 'judgment or order' and 'judgment or order for the payment of money' see PARA 1226. Judgment may be entered in a foreign currency, in which case the order will be for payment in the foreign currency or in the sterling equivalent at the time of payment: see *Practice Direction--Judgments and Orders* PD 40B para 10; and PARA 1137. A charging order may also be expressed in foreign currency: see *Carnegie v Giessen* [2005] EWCA Civ 191, [2005] 1 WLR 2510. As to the time for complying with a judgment or order for the payment of money (which is normally within 14 days) see PARA 1150.

3 As to writs of fieri facias see PARAS 1266, 1273 et seq.

4 As to warrants of execution see PARA 1283 et seq.

5 As to third party debt orders see PARA 1411 et seq.

6 As to charging orders see PARA 1467 et seq.

7 As to stop orders see PARA 1486 et seq.

8 As to stop notices see PARA 1492 et seq.

9 As to attachment of earnings orders see PARA 1431 et seq. In the High Court, attachment of earnings is available only to secure payments under a maintenance order: see the Attachment of Earnings Act 1971 s 1(1); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 628. Attachment of earnings orders may also be made by magistrates' courts: see **MAGISTRATES** vol 29(2) (Reissue) PARA 837 et seq.

10 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 1.1. As to receivers see PARA 1497 et seq; and **RECEIVERS**.

11 As to the meaning of 'court' see PARA 22.

12 As to the meaning of 'judgment debtor' see PARA 1236.

13 As to orders of committal see PARAS 1249, 1514 et seq; and **CONTEMPT OF COURT**.

14 See CPR Sch 1 RSC Ord 45 r 5; CPR Sch 2 CCR Ord 28; and PARAS 1249, 1514 et seq.

15 See PARA 1514.

16 As to sequestration see PARAS 1249, 1269, 1380 et seq.

17 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 1.2. See CPR Sch 1 RSC Ord 45 r 5; and PARA 1249.

18 As to individual and corporate insolvency see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**.

19 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 1.3. As to county court administration orders see the County Courts Act 1984 Pt VI (ss 112-117); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 893 et seq.

20 See eg *C Inc plc v L* [2001] 2 All ER (Comm) 446 (claimant obtaining freezing order after summary judgment); and see further PARAS 316, 396 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(iii) Methods of Enforcement; in general/1246. Payment of debt after issue of enforcement proceedings.

1246. Payment of debt after issue of enforcement proceedings.

If a judgment debt or part of it is paid after the judgment creditor¹ has issued any application or request to enforce it but before:

- 879 (1) any writ or warrant has been executed²; or
- 880 (2) in any other case, the date fixed for the hearing of the application,

the judgment creditor must immediately notify the court³ in writing unless he has applied to the High Court for a writ of execution⁴, in which case he must instead immediately notify the relevant enforcement officer in writing⁵.

1 As to the meaning of 'judgment creditor' see PARA 1236.

2 As to writs and warrants and their execution see PARA 1265 et seq.

3 As to the meaning of 'court' see PARA 22.

4 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 7.1. As to application for a writ of execution see PARA 1273.

5 *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 7.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(iii) Methods of Enforcement; in general/1247. Enforcement of judgment for possession of land.

1247. Enforcement of judgment for possession of land.

In the High Court, a judgment or order¹ for the giving of possession of land may be enforced² by one or more of the following means: (1) writ of possession³; (2) in certain cases⁴, an order of committal⁵ or a writ of sequestration⁶.

In county courts, a judgment or order for the recovery of land is enforceable by warrant of possession⁷. It may also be enforced by an order of committal in certain circumstances⁸.

Special provision is made with regard to the enforcement of possession claims against trespassers⁹.

1 As to the meaning of 'judgment or order' see PARA 1226.

2 Ie subject to the provisions of CPR Sch 1 RSC Ord 45: CPR Sch 1 RSC Ord 45 r 3(1).

3 As to writs of possession see PARA 1267.

4 Ie where CPR Sch 1 RSC Ord 45 r 5 applies: see PARA 1249.

5 As to orders of committal see PARA 1514.

6 CPR Sch 1 RSC Ord 45 r 3(1). As to sequestration see PARAS 1249, 1269, 1380 et seq.

7 CPR Sch 2 CCR Ord 26 r 17(1). As to warrants of possession see PARA 1292.

8 Nothing in CPR Sch 2 CCR Ord 26 r 17 prejudices any power to enforce a judgment or order for the recovery of land by an order of committal: CPR Sch 2 CCR Ord 26 r 18. Every order for possession does not, however, routinely have a penal notice attached; the normal way to enforce a possession order is by requesting and obtaining the issue of a warrant of possession and if the last resort of a contempt application appears necessary it is normally more appropriate for this to be based primarily on the defendant's obstruction of the bailiff when executing the warrant: see *Bell v Tuohy* [2002] EWCA Civ 423, [2002] 3 All ER 975, [2002] All ER (D) 449 (Mar).

9 See CPR Pt 55; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 660 et seq; **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1129 et seq. As to the meaning of 'possession claim against trespassers' see PARA 1227 note 5.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(iii) Methods of Enforcement; in general/1248. Enforcement of judgment for delivery of goods.

1248. Enforcement of judgment for delivery of goods.

In the High Court, a judgment or order¹ for the delivery of any goods which does not give a person against whom the judgment is given or order made the alternative of paying the assessed value of the goods may be enforced² by one or more of the following means: (1) writ of delivery³ to recover the goods without alternative provision for recovery of their assessed value (a 'writ of specific delivery')⁴; (2) in certain cases⁵, an order of committal⁶ or writ of sequestration⁷. A judgment or order for the delivery of any goods or payment of their assessed value may be enforced⁸ by one or more of the following means: (a) writ of delivery to recover the goods or their assessed value; (b) by order of the court⁹, writ of specific delivery; (c) in certain cases¹⁰, writ of sequestration¹¹.

A judgment or order for the payment of the assessed value of any goods may be enforced by the same means as any other judgment or order for the payment of money¹².

In county courts, except where an Act or rule of court provides otherwise, a judgment or order for the delivery of any goods is enforceable by warrant of delivery¹³. If the judgment or order does not give the person against whom it was given or made the alternative of paying the value of the goods, it may be enforced by a warrant of specific delivery, that is to say, a warrant to recover the goods without alternative provision for recovery of their value¹⁴. If the judgment or order is for the delivery of the goods or payment of their value, it may be enforced by a warrant of delivery to recover the goods or their value¹⁵. Nothing in these provisions prejudices any power to enforce a judgment or order for the delivery of goods by an order of committal¹⁶.

1 As to the meaning of 'judgment or order' see PARA 1226.

2 Ie subject to the provisions of CPR Sch 1 RSC Ord 45: CPR Sch 1 RSC Ord 45 r 4(1).

3 As to writs of delivery see PARA 1268.

4 CPR Sch 1 RSC Ord 45 r 4(1)(a).

5 Ie where CPR Sch 1 RSC Ord 45 r 5 applies: see PARA 1249.

6 CPR Sch 1 RSC Ord 45 r 4(1)(b). As to orders of committal see PARA 1249.

7 CPR Sch 1 RSC Ord 45 r 4(1)(c). As to writs of sequestration see PARA 1269.

8 See note 2.

9 An application for such an order must be made in accordance with CPR Pt 23 (see PARA 303 et seq), which must be served on the defendant against whom the judgment or order sought to be enforced was given or made: CPR Sch 1 RSC Ord 45 r 4(2). As to the meaning of 'court' see PARA 22; as to the meaning of 'service' see PARA 138 note 2; and as to the meaning of 'defendant' see PARA 18.

10 See note 5.

11 CPR Sch 1 RSC Ord 45 r 4(2). A writ of specific delivery, and a writ of delivery to recover any goods or their assessed value, may include provision for enforcing the payment of any money adjudged or ordered to be paid by the judgment or order which is to be enforced by the writ: CPR Sch 1 RSC Ord 45 r 4(3).

12 CPR Sch 1 RSC Ord 45 r 4(4).

- 13 CPR Sch 2 CCR Ord 26 r 16(1). As to warrants of delivery see PARA 1291.
- 14 CPR Sch 2 CCR Ord 26 r 16(2).
- 15 CPR Sch 2 CCR Ord 26 r 16(3).
- 16 CPR Sch 2 CCR Ord 26 r 18. See further PARAS 1249, 1514 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(iii) Methods of Enforcement; in general/1249. Enforcement of judgment to do or abstain from doing any act.

1249. Enforcement of judgment to do or abstain from doing any act.

In the High Court, where (1) a person required by a judgment or order¹ to do an act within a time specified in the judgment or order² refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under a court order or by the written agreement of the parties³; or (2) a person disobeys a judgment or order requiring him to abstain from doing an act, then the judgment or order may be enforced⁴ by one or more of the following means: (a) with the permission of the court⁵, a writ of sequestration⁶ against the property of that person; (b) where that person is a body corporate, a writ of sequestration against the property of any director or other officer of the body, but only with the permission of the court; (c) subject to the provisions of the Debtors Acts 1869 and 1878⁷, an order of committal⁸ against that person or, where that person is a body corporate, against any such officer⁹.

Where under any judgment or order requiring the delivery of any goods the person liable to execution¹⁰ has the alternative of paying the assessed value of the goods, the judgment or order is not enforceable by order of committal under the above provisions but the court may, on the application of the person entitled to enforce the judgment or order, make an order requiring the first mentioned person to deliver the goods to the applicant within a time specified in the order, and that order may be so enforced¹¹.

An order¹² is not to be enforced¹³ under these provisions unless a copy of the order has been served personally¹⁴ on the person required to do or abstain from doing the act in question and, in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act¹⁵. Further, an order requiring a body corporate to do or abstain from doing an act is not to be enforced¹⁶ as mentioned in head (b) or head (c) above unless a copy of the order has also been served personally on the officer against whose property permission is sought to issue a writ of sequestration or against whom an order of committal is sought and, in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body was required to do the act¹⁷. There must be prominently displayed on the front of the copy of an order served under these provisions a warning to the person on whom the copy is served that disobedience to the order would be a contempt of court punishable by imprisonment, or (in the case of an order requiring a body corporate to do or abstain from doing an act) punishable by sequestration of the assets of the body corporate and by imprisonment of any individual responsible¹⁸. With the copy of an order required to be served under these provisions, being an order requiring a person to do an act, there must also be served a copy of any order or agreement¹⁹ extending or abridging the time for doing the act²⁰. The court may dispense with service of a copy of an order under these provisions if it thinks it just to do so²¹.

An order requiring a person to abstain from doing an act may be enforced²² notwithstanding that service of a copy of the order has not been effected²³ if the court is satisfied that pending such service, the person against whom or against whose property it is sought to enforce the order has had notice of it either by being present when the order was made or by being notified of the terms of the order, whether by telephone, telegram or otherwise²⁴.

If a mandatory order²⁵, an injunction²⁶ or a judgment or order for the specific performance of a contract²⁷ is not complied with, then, without prejudice to its powers to nominate a person to execute a document or indorse a negotiable instrument²⁸ and its powers to punish the

disobedient party for contempt²⁹, the court may direct that the act required to be done may, so far as practicable, be done by the party by whom the order or judgment was obtained or some other person appointed by the court, at the cost of the disobedient party, and upon the act being done the expenses incurred may be ascertained in such manner as the court may direct and execution may issue against the disobedient party for the amount so ascertained and for costs³⁰.

In county courts, where a person required by a judgment or order to do an act refuses or neglects to do it within the time fixed by the judgment or order or any subsequent order, or where a person disobeys a judgment or order requiring him to abstain from doing an act, then, subject to the Debtors Acts 1869 and 1878³¹ and to the provisions of the relevant rules³², the judgment or order may be enforced, by order of the judge, by a committal order against that person or, if that person is a body corporate, against any director or other officer of the body³³.

1 As to the meaning of 'judgment or order' see PARA 1226. See also note 2.

2 Notwithstanding that a judgment or order requiring a person to do an act specifies a time within which the act is to be done, the court has power to make an order requiring the act to be done within another time, being such time after service of that order, or such other time, as may be specified therein: CPR Sch 1 RSC Ord 45 r 6(1). Where a judgment or order requiring a person to do an act does not specify a time within which the act is to be done, the court has power subsequently to make an order requiring the act to be done within such time after service of that order, or such other time, as may be specified therein: CPR Sch 1 RSC Ord 45 r 6(2). An application for an order under this provision must be made in accordance with CPR Pt 23 (see PARA 303 et seq) and the application notice must be served on the person required to do the act in question: CPR Sch 1 RSC Ord 45 r 6(3). Where a judgment or order requires a person to do an act within a time therein specified and an order is subsequently made under CPR Sch 1 RSC Ord 45 r 6 requiring the act to be done within some other time, references in CPR Sch 1 RSC Ord 45 r 5(1) (see the text and notes 1, 3-9) to a judgment or order are to be construed as references to the order made under CPR Sch 1 RSC Ord 45 r 6: CPR Sch 1 RSC Ord 45 r 5(2). As to the meaning of 'service' see PARA 138 note 2.

3 Ie under CPR 2.11: see PARA 248.

4 Ie subject to the provisions of CPR Sch 1 RSC Ord 45: CPR Sch 1 RSC Ord 45 r 5(1)(b).

5 As to the meaning of 'court' see PARA 22.

6 As to writs of sequestration see PARA 1269.

7 See PARA 1514.

8 As to orders of committal see PARA 1514 et seq; and **CONTEMPT OF COURT**.

9 CPR Sch 1 RSC Ord 45 r 5(1).

10 As to execution see PARA 1265 et seq.

11 CPR Sch 1 RSC Ord 45 r 5(3).

12 For these purposes, references to an order are to be construed as including references to a judgment: CPR Sch 1 RSC Ord 45 r 7(1).

13 Ie subject to CPR Sch 1 RSC Ord 45 r 7(6), (7): see the text and notes 21-24.

14 As to personal service see PARA 142.

15 CPR Sch 1 RSC Ord 45 r 7(2).

16 See note 13.

17 CPR Sch 1 RSC Ord 45 r 7(3).

18 CPR Sch 1 RSC Ord 45 r 7(4). It is for the person who has created a copy of the order for service to put the penal notice on it in order to comply with r 7(4): *Anglo-Eastern Trust v Kermanshahchi* [2002] All ER (D) 296 (Oct).

19 See note 3.

20 CPR Sch 1 RSC Ord 45 r 7(5). Where the first-mentioned order was made under CPR Sch 1 RSC Ord 45 r 5(3) or r 6, a copy of the previous order requiring the act to be done must also be served: CPR Sch 1 RSC Ord 45 r 7(5).

21 CPR Sch 1 RSC Ord 45 r 7(7).

22 *Ie* under CPR Sch 1 RSC Ord 45 r 5: see the text and notes 1-11.

23 *Ie* in accordance with CPR Sch 1 RSC Ord 45 r 7: see the text and notes 12-21.

24 CPR Sch 1 RSC Ord 45 r 7(6).

25 *Ie* including an order of mandamus (now known as a mandatory order): CPR Sch 1 RSC Ord 45 r 8. As to mandatory orders see generally **JUDICIAL REVIEW** vol 61 (2010) PARA 703 et seq.

26 As to injunctions see CPR Pt 25; and PARA 315 et seq. As to freezing orders (formerly known as 'Mareva injunctions') as a form of judgment relief see PARA 1245 text and note 20; and PARAS 316, 396 et seq.

27 See generally **SPECIFIC PERFORMANCE**.

28 *Ie* the court's powers under the Supreme Court Act 1981 s 39: see PARA 1224 note 13; and PARA 1137. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

29 See generally **CONTEMPT OF COURT**.

30 CPR Sch 1 RSC Ord 45 r 8. The procedure has been used eg to enforce rectification of a company's register: see **COMPANIES** vol 14 (2009) PARA 355. It is not available where the complaint is for breach of an undertaking; in such a case an order must first be obtained to carry out the undertaking: *Mortimer v Wilson* (1885) 33 WR 927. As to costs generally see also PARA 1729 et seq.

31 See PARA 1514 et seq.

32 *Ie* subject to CPR Sch 2 CCR Ord 29: see note 33; and **CONTEMPT OF COURT**.

33 CPR Sch 2 CCR Ord 29 r 1(1). Subject to CPR Sch 2 CCR Ord 29 r 1(6), (7), a judgment or order is not to be enforced under r 1(1) unless (1) a copy of the judgment or order has been served personally on the person required to do or abstain from doing the act in question and also, where that person is a body corporate, on the director or other officer of the body against whom a committal order is sought; and (2) in the case of a judgment or order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act and was accompanied by a copy of any order, made between the date of the judgment or order and the date of service, fixing that time: CPR Sch 2 CCR Ord 29 r 1(2). Where a judgment or order enforceable by committal order under r 1(1) has been given or made, the court officer must, if the judgment or order is in the nature of an injunction, at the time when the judgment or order is drawn up, and in any other case on the request of the judgment creditor, issue a copy of the judgment or order, indorsed with or incorporating a notice as to the consequences of disobedience, for service in accordance with r 1(2); CPR Sch 2 CCR Ord 29 r 1(3). Without prejudice to its powers under CPR Pt 6 (see PARA 138 et seq), the court may dispense with service of a copy of a judgment or order under CPR Sch 2 CCR Ord 29 r 1(2) if the court thinks it just to do so: CPR Sch 2 CCR Ord 29 r 1(7). Further, a judgment or order requiring a person to abstain from doing an act may be enforced under r 1(1) notwithstanding that service of a copy of the judgment or order has not been effected in accordance with r 1(2) if the judge is satisfied that, pending such service, the person against whom it is sought to enforce the judgment or order has had notice of the judgment or order either (a) by being present when the judgment or order was given or made; or (b) by being notified of the terms of the judgment or order whether by telephone, fax, e-mail or otherwise: CPR Sch 2 CCR Ord 29 r 1(6). A warrant of committal may not, without further order of the court, be enforced more than two years after the date on which the warrant is issued: CPR Sch 2 CCR Ord 29 r 1(5A). As to the procedure for committal see further PARA 1515 et seq; and see generally **CONTEMPT OF COURT**.

UPDATE

1249 Enforcement of judgment to do or abstain from doing any act

NOTE 2--A failure to specify the time renders the order unenforceable: *R (on the application of Bates) v Chief Constable of Avon and Somerset Constabulary* (2009) Times, 21 July, DC.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(iii) Methods of Enforcement; in general/1250. Registration of writs and orders affecting land.

1250. Registration of writs and orders affecting land.

A writ or order affecting land¹, and issued for the purpose of enforcing a judgment², should be registered³ or, if the title to the land is registered, should be protected by a notice or restriction in the register⁴. In general, failure to register as a land charge renders the writ or order void against a purchaser, including a mortgagee, of the land for valuable consideration⁵. A purchaser in good faith and for valuable consideration who acquires title under a registered disposition is not, in general, concerned with any writ or order which is not protected by a notice or restriction⁶.

These provisions are considered in detail elsewhere in this work⁷.

1 As to registration regarding an order appointing a receiver or sequestrator see PARA 1507.

2 'Judgment' includes any order or decree having the effect of a judgment: Land Charges Act 1972 s 17(1); and see the Land Registration Act 2002 s 87(1). Recognisances on behalf of the Crown or otherwise and obligations in favour of the Crown do not operate as a charge on land until a writ or order for the purpose of enforcing them is registered: Law of Property Act 1925 s 195(4); Land Charges Act 1972 s 6(1)(a). As to proceedings by the Crown see **CROWN PROCEEDINGS AND CROWN PRACTICE**.

3 See under the Land Charges Act 1972: see s 6(1); and **LAND CHARGES**. No writ or order affecting an interest under a trust of land may, however, be so registered: see s 6(1A) (added by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 12(3)).

4 See the Land Registration Act 2002 s 87; and **LAND CHARGES** vol 26 (2004 Reissue) PARA 605; **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 1019-1020. The Land Charges Act 1972 will not apply: see s 14(1) (amended by the Land Registration Act 2002 s 133, Sch 11 para 10(1), (2)).

5 See the Land Charges Act 1972 s 6(4); and **LAND CHARGES**.

6 See the Land Registration Act 2002 s 29; and **LAND REGISTRATION**. There are qualifications in cases of fraud or where the title is acquired by a trustee in bankruptcy.

7 See **LAND CHARGES**; **LAND REGISTRATION**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(iv) Orders to Obtain Information from Judgment Debtors/1251. In general.

(iv) Orders to Obtain Information from Judgment Debtors

1251. In general.

Part 71 of the Civil Procedure Rules¹ contains rules which provide for a judgment debtor² to be required to attend court³ to provide information, for the purpose of enabling a judgment creditor⁴ to enforce a judgment or order⁵ against him⁶. Such orders were previously known as orders for the examination of judgment debtors⁷.

1 As to the application of CPR Pt 71 see PARA 1225.

2 As to the meaning of 'judgment debtor' see PARA 1236.

3 As to the meaning of 'court' see PARA 22.

4 As to the meaning of 'judgment creditor' see PARA 1236.

5 As to the meaning of 'judgment or order' see PARA 1226.

6 CPR 71.1. See PARA 1252 et seq.

7 See PARA 1225.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(iv) Orders to Obtain Information from Judgment Debtors/1252. Order to attend court.

1252. Order to attend court.

A judgment creditor¹ may apply for an order requiring a judgment debtor² or, if a judgment debtor is a company or other corporation, an officer of that body, to attend court to provide information about the judgment debtor's means or any other matter about which information is needed to enforce a judgment or order³. Such an application, which must be made by filing⁴ an application notice in the prescribed form⁵, may be made without notice⁶ and must be issued in the court which made the judgment or order which it is sought to enforce, except that if the proceedings have since been transferred to a different court, it must be issued in that court⁷.

The application notice must be in the form and contain the information required by the relevant practice direction⁸. It must:

- 881 (1) state the name and address of the judgment debtor;
- 882 (2) identify the judgment or order which the judgment creditor is seeking to enforce;
- 883 (3) if the application is to enforce a judgment or order for the payment of money⁹, state the amount presently owed by the judgment debtor under the judgment or order;
- 884 (4) if the judgment debtor is a company or other corporation, state the name and address of the officer of that body whom the judgment creditor wishes to be ordered to attend court and his position in the company;
- 885 (5) if the judgment creditor wishes the questioning to be conducted before a judge¹⁰, state this and give his reasons;
- 886 (6) if the judgment creditor wishes the judgment debtor (or other person to be questioned) to be ordered to produce specific documents at court, identify those documents; and
- 887 (7) if the application is to enforce a judgment or order which is not for the payment of money, identify the matters about which the judgment creditor wishes the judgment debtor (or officer of the judgment debtor) to be questioned¹¹.

The application may be dealt with by a court officer¹² without a hearing¹³. In any appropriate case, however, the court officer considering the application notice may refer it to a judge¹⁴ and the officer will refer it to a judge for consideration if the judgment creditor requests the judgment debtor (or officer of the judgment debtor) to be questioned before a judge¹⁵.

If the application notice complies with the requirements set out above, an order to attend court will be issued¹⁶. The order will provide for the judgment debtor (or other person to be questioned) to attend the county court for the district in which he resides or carries on business, unless a judge decides otherwise¹⁷. Such an order will contain a notice in the following terms: 'You must obey this order. If you do not, you may be sent to prison for contempt of court.'¹⁸

A person served¹⁹ with an order issued under these provisions must attend court at the time and place specified in the order²⁰. When he does so, he must produce at court documents in his control which are described in the order²¹ and must answer on oath such questions as the court may require²².

1 As to the meaning of 'judgment creditor' see PARA 1236.

2 As to the meaning of 'judgment debtor' see PARA 1236.

3 CPR 71.2(1). As to the meaning of 'judgment or order' see PARA 1226. There is no jurisdiction to make such an order against an international organisation with the power, but not the status, of a body corporate; however, under the Supreme Court Act 1981 s 37(1) (see PARA 347) an injunction may be granted against such an organisation requiring it to disclose its assets: *Maclaine Watson & Co Ltd v International Tin Council (No 2)* [1989] Ch 286, [1988] 3 All ER 257, CA. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2. The fact that the court has jurisdiction to permit service on individuals out of the jurisdiction seeking their joinder to an action for the purpose of being required to pay costs does not mean that it has jurisdiction to permit service on them of an order requiring their attendance before an English court on pain of imprisonment: *Vitol SA v Capri Marine Ltd* [2008] EWHC 378 (Comm), [2008] All ER (D) 437 (Feb). 'Officer' means an officer at the time the order under CPR 71.2 is made: *Vitol SA v Capri Marine Ltd* [2008] EWHC 378 (Comm), [2008] All ER (D) 437 (Feb). An order under CPR Pt 71 can either be served out of the jurisdiction without permission or, where permission to serve the original claim form out of the jurisdiction is required, with the permission of the court: *Masri v Consolidated Contractors International Co SAL* [2008] EWCA Civ 876, [2009] 1 Lloyd's Rep 42, [2008] All ER (D) 359 (Jul).

4 As to the meaning of 'filing' see PARA 1832 note 8.

5 *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 1.1. The application notice must be filed in Practice Form N316 if the application is to question an individual judgment debtor, or N316A if the application is to question an officer of a company or other corporation: *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 1.1. See *Practice Direction--Forms* PD 4 para 3, Table 1; and see *The Civil Court Practice*. As to the use of the forms listed in Table 1 see PARA 14.

6 CPR 71.2(2)(a).

7 CPR 71.2(2)(b). As to the transfer of proceedings see PARA 1228; and PARA 66 et seq.

8 CPR 71.2(3); and see note 5.

9 As to the meaning of 'judgment or order for the payment of money' see PARA 1226.

10 As to the meaning of 'judge' see PARA 49.

11 *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 1.2.

12 As to the meaning of 'court officer' see PARA 49 note 3.

13 CPR 71.2(4).

14 *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 1.3(1); and see CPR 3.2; and PARA 250.

15 *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 1.3(2).

16 CPR 71.2(5).

17 *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 2.1. The order will provide for questioning to take place before a judge only if the judge considering the request decides that there are compelling reasons to make such an order: para 2.2.

18 CPR 71.2(7). As to the consequences of non-compliance with the order see PARA 1257. As to imprisonment for contempt see PARA 1514; and see generally **CONTEMPT OF COURT**.

19 As to the meaning of 'service' see PARA 138 note 2. As to service of the order see PARA 1253.

20 CPR 71.2(6)(a).

21 CPR 71.2(6)(b).

22 CPR 71.2(6)(c).

UPDATE

1252 Order to attend court

NOTE 3--*Masri*, cited, reversed: [2009] UKHL 43, [2010] 1 AC 90, [2009] 4 All ER 847.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(iv) Orders to Obtain Information from Judgment Debtors/1253. Service of the order.

1253. Service of the order.

An order to attend court¹ must, unless the court² otherwise orders, be served³ personally⁴ on the person ordered to attend court not less than 14 days before the hearing⁵. Service of an order to attend court for questioning must be carried out by the judgment creditor⁶ or someone acting on his behalf, a High Court enforcement officer or a county bailiff⁷.

If the order is to be served by the judgment creditor, he must inform the court not less than seven days before the date of the hearing if he has been unable to serve it⁸.

1 As to orders to attend court see PARA 1252.

2 As to the meaning of 'court' see PARA 22.

3 As to the meaning of 'service' see PARA 138 note 2.

4 As to personal service see PARA 142.

5 CPR 71.3(1).

6 As to the meaning of 'judgment creditor' see PARA 1236.

7 *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 3. As to litigants in person see **COURTS** vol 10 (Reissue) PARAS 331-332, 1126; and as to county court bailiffs see PARA 1259; and **COURTS** vol 10 (Reissue) PARA 726; **SHERIFFS**.

8 CPR 71.3(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(iv) Orders to Obtain Information from Judgment Debtors/1254. Travelling expenses.

1254. Travelling expenses.

A person ordered to attend court¹ may, within seven days of being served² with the order, ask the judgment creditor³ to pay him a sum reasonably sufficient to cover his travelling expenses to and from court⁴. The judgment creditor must pay such a sum if requested⁵.

- 1 As to orders to attend court see PARA 1252.
- 2 As to the meaning of 'service' see PARA 138 note 2.
- 3 As to the meaning of 'judgment creditor' see PARA 1236.
- 4 CPR 71.4(1).
- 5 CPR 71.4(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(iv) Orders to Obtain Information from Judgment Debtors/1255. Judgment creditor's affidavit.

1255. Judgment creditor's affidavit.

The judgment creditor¹ must file² an affidavit³ or affidavits by the person who served⁴ the order, unless it was served by the court⁵, giving details of how and when it was served⁶ and stating:

- 888 (1) either that the person ordered to attend court has not requested payment of his travelling expenses⁷ or that the judgment creditor has paid a sum in accordance with such a request⁸; and
889 (2) how much of the judgment debt remains unpaid⁹.

The judgment creditor must either file the affidavit or affidavits not less than two days before the hearing or produce it or them at the hearing¹⁰.

1 As to the meaning of 'judgment creditor' see PARA 1236.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 As to the meaning of 'affidavit' see PARA 540 note 5.

4 As to the meaning of 'service' see PARA 138 note 2.

5 As to service of the order, and the circumstances in which it will be served by the court, see PARA 1253. As to the meaning of 'court' see PARA 22.

6 CPR 71.5(1)(a).

7 CPR 71.5(1)(b)(i). As to payment of travelling expenses see PARA 1254.

8 CPR 71.5(1)(b)(ii).

9 CPR 71.5(1)(c).

10 CPR 71.5(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(iv) Orders to Obtain Information from Judgment Debtors/1256. Conduct of the hearing.

1256. Conduct of the hearing.

The person ordered to attend court¹ will be questioned on oath². The questioning will be carried out by a court officer³ unless the court⁴ has ordered that the hearing is to be before a judge⁵.

The court officer will ask a standard series of questions⁶. The judgment creditor⁷ or his representative may either attend court and ask questions himself⁸ or request the court officer to ask additional questions, by attaching a list of proposed additional questions to his application notice⁹. The court officer will make a written record of the evidence given, unless the proceedings are tape recorded¹⁰. At the end of the questioning, he will read the record of evidence to the person being questioned and ask him to sign it¹¹ and if the person refuses to sign it, note that refusal on the record of evidence¹².

Where the hearing takes place before a judge, the judgment creditor must attend¹³. The questioning will be conducted by the judgment creditor or his representative¹⁴, and the standard questions will not be used¹⁵. The proceedings will be tape recorded and the court will not make a written record of the evidence¹⁶.

If the hearing is adjourned¹⁷, the court will give directions as to the manner in which notice of the new hearing is to be served¹⁸ on the judgment debtor¹⁹.

1 As to orders to attend court see PARA 1252.

2 CPR 71.6(1). As to the conduct of civil hearings see generally PARA 6. As to the administration of oaths and affirmations see PARA 1021 et seq.

3 As to the meaning of 'court officer' see PARA 49 note 3.

4 As to the meaning of 'court' see PARA 22.

5 CPR 71.6(2). As to the circumstances in which the court will order a hearing before a judge see PARA 1252 note 17; and as to the meaning of 'judge' see PARA 49.

6 *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 4.1. The standard questions are set out in the forms in *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 Appendices A, B. The form in Appendix A will be used if the person being questioned is the judgment debtor, and the form in Appendix B will be used if the person is an officer of a company or other corporation: para 4.1. As to the meaning of 'judgment debtor' see PARA 1236.

7 As to the meaning of 'judgment creditor' see PARA 1236.

8 CPR 71.6(3)(a); *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 4.2(1).

9 *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 4.2(2). As to the application notice see PARA 1252.

10 *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 4.3(1).

11 *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 4.3(2).

12 *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 4.3(3).

13 CPR 71.6(3)(b).

14 CPR 71.6(3)(b); *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 5.1.

15 *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 5.1. The judgment debtor must answer questions relating to assets outside the jurisdiction: *Interpool Ltd v Galani* [1988] QB 738, [1987] 2 All ER 981, CA. See also *Reilly v Fryer* [1988] NLJR 134, CA; *Babanaft International Co SA v Bassatne* [1988] NLJR 134 (on appeal [1990] Ch 13, [1989] 1 All ER 433, CA); *Gidrxslme Shipping Co Ltd v Tantomar Transportes Maritimos Lda* [1994] 4 All ER 507, [1995] 1 WLR 299 (order to disclose world-wide assets made in support of enforcement of arbitration awards). As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

16 *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 5.2.

17 As to the court's general discretion to adjourn civil hearings see CPR 3.1(2)(b); and PARA 247.

18 As to the meaning of 'service' see PARA 138 note 2.

19 CPR 71.7.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(iv) Orders to Obtain Information from Judgment Debtors/1257. Failure to comply with order.

1257. Failure to comply with order.

If a person against whom an order to attend court has been made¹ fails to attend court, refuses at the hearing to take the oath² or to answer any question or otherwise fails to comply with the order, the court³ will refer the matter to a High Court judge⁴ or circuit judge⁵. The judge⁶ or court officer⁷ referring the matter must certify in writing the respect in which the judgment debtor⁸ failed to comply with the order⁹.

The High Court judge or circuit judge to whom the matter is referred may¹⁰ make a committal order¹¹ against the person¹²; but such an order may not be made unless the judgment creditor¹³ has complied with the rules relating to the payment of travelling expenses¹⁴ and the filing of an affidavit¹⁵ or affidavits¹⁶.

If a committal order is made, the judge will direct that the order is to be suspended provided that the person attends court at a time and place specified in the order¹⁷ and complies with all the terms of that order and the original order¹⁸. If the person fails to comply with any term on which the committal order is suspended¹⁹, he must be brought before a judge²⁰ to consider whether the committal order should be discharged²¹. At the hearing the judge will discharge the committal order unless he is satisfied beyond reasonable doubt²² that the judgment debtor has failed to comply with the original order to attend court and the terms on which the committal order was suspended and that both orders have been duly served²³ on the judgment debtor²⁴. If the judge decides that the committal order should not be discharged, a warrant of committal²⁵ must be issued immediately²⁶.

1 Ie an order under CPR 71.2: see PARA 1252.

2 Ie or to affirm: see PARA 1023.

3 As to the meaning of 'court' see PARA 22.

4 As to High Court judges see **COURTS** vol 10 (Reissue) PARAS 515, 602, 619.

5 CPR 71.8(1). As to circuit judges see **COURTS** vol 10 (Reissue) PARA 522.

6 As to the meaning of 'judge' see PARA 49.

7 As to the meaning of 'court officer' see PARA 49 note 3.

8 As to the meaning of 'judgment debtor' see PARA 1236.

9 *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 6.

10 Ie subject to CPR 71.8(3), (4): see the text and notes 11-21.

11 As to committal orders see further PARA 1514; and see generally **CONTEMPT OF COURT**.

12 CPR 71.8(2). The power to order committal is a power to be exercised with great care: see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 465. Note that while the order must be made by a High Court judge or circuit judge (see the text and notes 4-12), the decision not to discharge the order may be made by a master or district judge (see note 20); cf the position with regard to pre-trial and interim remedies, where a High Court master or district judge may not make orders or grant interim remedies relating to the liberty of the subject (see *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 3.1(a); and PARA 50). As to the

power of county court district judges to order committal see generally PARA 1514; *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 8.3; and PARA 62.

13 As to the meaning of 'judgment creditor' see PARA 1236.

14 Ie CPR 71.4: see PARA 1254.

15 Ie CPR 71.5: see PARA 1255.

16 CPR 71.8(3).

17 The appointment specified will be (1) before a judge, if the original order under CPR 71.2 was to attend before a judge or the judge making the suspended committal order so directs; and (2) otherwise, before a court officer: *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 7.1.

18 CPR 71.8(4)(a). CPR 71.3 and *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 3 (service of order: see PARA 1253), and CPR 71.5(1)(a), (2) (affidavit of service: see PARA 1255), apply with the necessary changes to a suspended committal order as they do to an order to attend court: *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 7.2. As to the meaning of 'service' see PARA 138 note 2.

19 If the judgment debtor fails to attend court at the time and place specified in the suspended committal order and it appears to the judge or court officer that the judgment debtor has been duly served with the order, the judge or court officer will certify in writing the debtor's failure to attend: *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 8.1. If the judgment debtor fails to comply with any other term on which the committal order was suspended, the judge or court officer will certify in writing the non-compliance and set out details of it: para 8.2.

20 A warrant to bring the judgment debtor before a judge may be issued on the basis of a certificate under *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 8.1 or para 8.2 (see note 19): para 8.3. The hearing under CPR 71.8(4)(b) may take place before a master or district judge: *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 8.4. Wherever a master or district judge has jurisdiction, he may refer the matter to a judge instead of dealing with it himself: *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B para 1.2.

21 CPR 71.8(4)(b).

22 The standard of proof normally applicable in criminal, rather than in civil, proceedings applies in order to comply with the fair trial provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) art 6 (now incorporated into domestic law by the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 6) because of the possibility that the judgment creditor may lose his liberty: see PARAS 775, 1235; and see generally **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 501.

23 See note 18.

24 *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 8.5. Judges must be cautious before making a committal order against a judgment debtor who is prevented from attending an oral examination owing to an order of a court in a foreign jurisdiction: *Islamic Investment Co of the Gulf (Bahamas) Ltd v Symphony Gems NV* [2008] EWCA Civ 389, [2008] All ER (D) 141 (Mar).

25 As to warrants of committal see PARA 1522; and **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 518.

26 *Practice Direction--Orders to Obtain Information from Judgment Debtors* PD 71 para 8.6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(v) Enforcement Agents; in general/1258. Enforcement officers and district judges.

(v) Enforcement Agents; in general

1258. Enforcement officers and district judges.

The functions of enforcement officers¹ in relation to enforcement of High Court judgments and orders, which are concerned solely with the execution of writs of execution² and warrants³, are discussed in detail below and elsewhere where relevant in this work. The relevant officer⁴ has in relation to writs directed to⁵, and warrants issued to⁶, one or more enforcement officers the duties, powers, rights, privileges and liabilities that a sheriff of a county would have had at common law if the writ had been directed to him or the warrant had been issued to him and the district in which it is to be executed had been within his county⁷. Any rule of law requiring a writ of execution issued from the High Court to be directed to a sheriff has been abolished⁸.

In relation to county courts, every district judge⁹ is responsible for the acts and defaults of himself and of the bailiffs appointed to assist him¹⁰ in like manner as the sheriff of any county in England and Wales is responsible for the acts and defaults of himself and his officers¹¹. In the County Courts Act 1984 'bailiff', unless (as in this paragraph) the context otherwise requires, includes a district judge¹².

At one time every county court had a high bailiff whose duties were, by himself or by the bailiffs appointed to assist him, to serve all process and execute all warrants issued out of the court, except where otherwise specially provided. No appointment has been made to this office since 1924 and no further appointments may now be made¹³. References to a high bailiff in any enactment, Order in Council, order, rule, regulation or any document must be construed as references to a district judge¹⁴.

A district judge, where he neglects to levy execution, is liable to a claim for damages at common law in the same manner as a enforcement officer is liable¹⁵.

1 An enforcement officer is an individual who is authorised to act as such by the Lord Chancellor or a person acting on his behalf: Courts Act 2003 s 99(1), Sch 7 para 2(1). England and Wales are to be divided into districts for the purposes of Sch 7: Sch 7 para 1(1). The districts are to be those specified in regulations made under Sch 7 para 12: Sch 7 para 1(2). The Lord Chancellor or a person acting on his behalf must assign at least one enforcement officer to each district: Sch 7 para 2(2). The Lord Chancellor or a person acting on his behalf may assign an enforcement officer to more than one district, and change any assignment of an enforcement officer so that he is assigned to a different district or to different districts: Sch 7 para 2(3). As to regulations made under Sch 7 para 12 see the High Court Enforcement Officers Regulations 2004, SI 2004/400 (amended by SI 2004/673).

2 As to writs of execution see PARA 1265 et seq; and **SHERIFFS** vol 42 (Reissue) PARA 1132 et seq.

3 As to warrants see PARA 1259; and **SHERIFFS** vol 42 (Reissue) PARA 1137.

4 'Relevant officer' means (1) in relation to a writ (a) if the writ is directed to a single enforcement officer under the Courts Act 2003 Sch 7 para 3(1)(a) or (c), that officer; (b) if the writ is directed to two or more enforcement officers collectively under Sch 7 para 3(1)(b), the officer to whom, in accordance with approved arrangements, the execution of the writ is allocated; (2) in relation to a warrant (a) if the warrant is issued to a single enforcement officer in accordance with Sch 7 para 3A(2)(a) or (b), that officer; (b) if the warrant is issued to two or more enforcement officers collectively in accordance with Sch 7 para 3A(2)(a), the officer to whom, in accordance with approved arrangements, the execution of the warrant is allocated: Sch 7 para 4(3) (substituted by the Tribunals, Courts and Enforcement Act 2007 s 140(1), (3), (6)). 'Approved arrangements' means

arrangements approved by the Lord Chancellor or a person acting on his behalf: Courts Act 2003 Sch 7 para 4(5).

5 le under the Courts Act 2003 Sch 7 para 3: Sch 7 para 4(1).

6 le under the Lands Clauses Consolidation Act 1845 s 91(1) (proceedings in case of refusal to deliver possession of lands) or the Compulsory Purchase Act 1965 s 13(1) (refusal to give possession to acquiring authority): Courts Act 2003 Sch 7 paras 3A(1)(a), (b), 4(1) (Sch 7 para 3A added and Sch 7 para 4(1) amended by the Tribunals, Courts and Enforcement Act 2007 s 140(1)-(4)).

7 Courts Act 2003 Sch 7 para 4(1), (2), (2A) (Sch 7 para 4(1) as amended (see note 5); Sch 7 para 4(2A) added by the Tribunals, Courts and Enforcement Act 2007 s 140(5)). These provisions apply to a person acting under the authority of the relevant officer as they apply to the relevant officer: Courts Act 2003 Sch 7 para 4(4) (substituted by the Tribunals, Courts and Enforcement Act 2007 s 140(7)). As from a day to be appointed, the Courts Act 2003 Sch 7 para 4 is subject to the Tribunals, Courts and Enforcement Act 2007 Sch 12 in the case of a writ conferring power to use the procedure in that Schedule (see PARA 1386 et seq): Courts Act 2003 Sch 7 para 4(1A) (added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13 paras 148, 151(1), (2); at the date at which this title states the law, no such day had been appointed).

8 Courts Act 2003 s 99(2).

9 As to county court district judges see **COURTS** vol 10 (Reissue) PARAS 728-731.

10 As to bailiffs see PARAS 1259, 1340.

11 See the County Courts Act 1984 s 123 (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3); repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 78, Sch 23 Pt 3; at the date at which this title states the law, no such day had been appointed); and **COURTS** vol 10 (Reissue) PARA 731.

12 County Courts Act 1984 s 147(1) (definition amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3); and repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 Sch 13 para 82, Sch 23 Pt 3; at the date at which this title states the law, no such day had been appointed).

13 See **COURTS** vol 10 (Reissue) PARA 727.

14 See the County Courts Act 1984 s 148(2), Sch 3 para 7 (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3)); and **COURTS** vol 10 (Reissue) PARA 727.

15 See *Watson v White*[1896] 2 QB 9; *Domine v Grimsdall*[1937] 2 All ER 119; and **COURTS** vol 10 (Reissue) PARA 735. As to the statutory liability of a district judge who neglects to levy execution see PARA 1259; as to the liability of enforcement officers see **SHERIFFS** vol 42 (Reissue) PARA 1146 et seq; and as to the protection of enforcement officers, district judges and other officers from liability in certain circumstances see PARA 1349.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(v) Enforcement Agents; in general/1259. Tipstaffs, bailiffs etc.

1259. Tipstaffs, bailiffs etc.

In the High Court, an order of committal¹ is executed by the tipstaff of the court under a warrant issued in pursuance of the order². Although the enforcement officer to whom a writ of execution³ is addressed is responsible for its enforcement⁴, it is actually executed by officers called bailiffs, whose authority is a warrant addressed to them by name by the enforcement officer⁵. The form of the warrant usually follows that of the writ, but a variance between the writ and the warrant does not render the enforcement officer liable for an illegal execution since, in any proceedings against him, he would and could only justify under the writ⁶. The warrant is usually addressed to the 'bound bailiffs' who have made a declaration under the Sheriffs Act 1887 and are bound to the enforcement officer in an obligation with sureties for the due execution of their office, and are his regular officers but, at the request of the judgment creditor, the warrant may be addressed to any other person, who will then be called a 'special bailiff', and for whose acts and defaults the judgment creditor, and not the enforcement officer, will be liable⁷.

In county courts, warrants are executed by bailiffs⁸ or other court officers⁹.

Where a county court bailiff employed to levy any execution against goods¹⁰ loses, by neglect, connivance or omission, the opportunity of levying the execution, any party aggrieved thereby may complain to the judge¹¹ of that court¹². On any such complaint the judge, if the neglect, connivance or omission is proved to his satisfaction, must order the bailiff to pay the damages sustained by the complainant, not exceeding in any case the sum for which the execution issued¹³.

1 As to orders of committal see PARAS 1249, 1514; and see generally **CONTEMPT OF COURT**.

2 See **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 518.

3 As to writs of execution see PARA 1265 et seq.

4 See PARA 1258.

5 As to the appointment, jurisdiction, rights and liabilities of enforcement officers see **SHERIFFS**.

6 *Rose v Tomblinson* (1834) 3 Dowl 49.

7 The bailiff himself, however, whether bound or special, may be personally responsible for any irregularity: *Futcher v Hinder* (1858) 3 H & N 757. If the writ is addressed to the coroner, and the warrant addressed to the enforcement officer's bound bailiff, the latter is the coroner's officer and not the enforcement officer's: *Sarjeant v Cowan* (1833) 1 Cr & M 491. As to when the coroner acts in place of the enforcement officer see **CORONERS** vol 9(2) (2006 Reissue) PARA 941.

8 As to the meaning of 'bailiff' for the purposes of the County Courts Act 1984 see PARA 1258. As to the functions of bailiffs in relation to execution against goods see PARA 1302 et seq.

9 As to county court officers see generally **COURTS** vol 10 (Reissue) PARA 732 et seq.

10 As to levying execution against goods see PARA 1315 et seq.

11 As to the meaning of 'judge' for these purposes see PARA 1335 note 3.

12 See the County Courts Act 1984 s 124(1); and **COURTS** vol 10 (Reissue) PARA 735. Where such a complaint is made, the court officer must issue a summons which must be served on the alleged offender personally not less than eight days before the return day appointed in the summons: CPR Sch 2 CCR Ord 34 r 1(b).

13 See the County Courts Act 1984 s 124(2); and **COURTS** vol 10 (Reissue) PARA 735.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(v) Enforcement Agents; in general/1260. Other enforcement agents.

1260. Other enforcement agents.

Enforcement agents, including certificated bailiffs, may be employed by local authorities, government departments, landlords and other public and private sector bodies which are frequently judgment creditors in the civil courts or undertake distress for rent procedures¹. Private sector enforcement agents who are recovering debts owed to the public sector perform the vast majority of enforcement work². There are a number of professional associations which uphold standards and regulate the conduct of such agents³. The Association of Civil Enforcement Agencies⁴ and the Certificated Bailiffs Association⁵ operate non-statutory complaints and disciplinary procedures. The Lord Chancellor's Department recommends that enforcement agents should join an appropriate organisation relevant to their sphere of activity⁶.

1 As to certificated bailiffs see **DISTRESS** vol 13 (2007 Reissue) PARA 994 et seq. As to distress for rent see generally **DISTRESS** vol 13 (2007 Reissue) PARA 905 et seq.

2 'Enforcement' in this context means the lawful process of warrant or writ of execution, distraint and levying on goods: *National Standards for Enforcement Agents* (May 2002, LCD), 'Terms used'.

3 I.e (1) the Association of Civil Enforcement Agencies, 513 Bradford Road, Batley, West Yorkshire WF17 8LL (www.acea.org.uk); (2) the Enforcement Services Association (Certificated Bailiffs Association), Park House, 10 Park Street, Bristol, BS1 5HX (www.ensas.org.uk); (3) the Institute of Revenues, Rating and Valuation, 41 Doughty Street, London WC1N 2LF (www.irrv.net); (4) the Sheriffs' Officers' Association, Ashfield House, Illingworth Street, Ossett, West Yorkshire WF5 8AL; (5) the Under Sheriffs' Association, 20-21 Took's Court, London EC4A 1LB; and (6) the Local Authority Civil Enforcement Forum, Brighton and Hove City Council, Priory House, PO Box 2929, Brighton BN1 1PS (www.lacef.org.uk).

4 At the date at which this title states the law, information about the complaints and disciplinary procedures of the Association of Civil Enforcement Agencies was available at www.acea.org.uk.

5 At the date at which this title states the law, information about the complaints and disciplinary procedures of the Certificated Bailiffs Association was available at www.bailiffs.org.uk.

6 *National Standards for Enforcement Agents* (May 2002, LCD), 'Introduction'. As to the national standards and their advisory status see PARA 1261.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(v) Enforcement Agents; in general/1261. The National Standards for Enforcement Agents.

1261. The National Standards for Enforcement Agents.

In May 2002 the Lord Chancellor's Department ('LCD', now the Ministry of Justice) produced the National Standards for Enforcement Agents with the aim of building on and improving existing good practice and raising the level of professionalism across the whole sector¹. The guidance is not legally binding and does not replace local agreements, existing agency codes of practice or legislation²; rather it sets out what the LCD, those in the industry and some major users regard as minimum standards³.

The specific guidance set out in the National Standards is referred to below⁴.

1 *National Standards for Enforcement Agents* (May 2002, LCD), 'Introduction'. At the date at which this title states the law, the National Standards were available at www.dca.gov.uk.

2 In March 1998 the Lord Chancellor announced a review of the enforcement system. The remit of the review was broadened on 6 March 2001 to look at structures for, and regulation of, civil enforcement agents generally, not just those within the High Court and county courts. In July 2001 a Green Paper *Towards Effective Enforcement* was issued by the LCD and on 8 May 2002 the consultation report for the Green Paper was published. The accompanying press release stated that the majority of the proposals in the Green Paper required primary legislation and that the LCD intended to produce a White Paper early in 2003: see LCD Press Notice 158/02.

3 *National Standards for Enforcement Agents* (May 2002, LCD), 'Introduction'.

4 See PARAS 1262-1264, 1302 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(v) Enforcement Agents; in general/1262. Statutory or financial requirements for enforcement agencies.

1262. Statutory or financial requirements for enforcement agencies.

The National Standards for Enforcement Agents require enforcement agencies¹:

- 890 (1) to ensure that audited accounts are available on request, where it is appropriate that these are kept, having an annual audit of the agency's accounts by independent accountants undertaken at least once a year for businesses where this is appropriate²;
- 891 (2) to comply with the relevant statutory obligations³;
- 892 (3) to maintain a separate account for moneys due to the creditor⁴ and to keep accurate books and accounts and make these available to establish moneys owed to the creditor while keeping a complete record of all financial transactions in whatever capacity undertaken⁵;
- 893 (4) to maintain suitable and comprehensive insurance cover for both professional indemnity and other risks including employer's liability and public liability⁶.

1 For these purposes, 'enforcement agency' means the business that employs enforcement agents, unless specifically indicated where different arrangements exist, and includes those public sector organisations that have in-house enforcement agents; and 'enforcement agent' means someone who is responsible for the enforcement of court orders against goods (warrants of distress and execution) or the person (arrest warrants) and includes those employed in the public and private sector, bailiffs, sheriffs' officers and distrainers: *National Standards for Enforcement Agents* (May 2002, LCD), 'Terms Used'. As to the national standards and their advisory status see PARA 1261. As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285. As to distress for rent see generally **DISTRESS** vol 13 (2007 Reissue) PARA 905 et seq.

2 *National Standards for Enforcement Agents* (May 2002, LCD), 'Statutory or Financial Requirements for Enforcement Agencies'. Separate provisions regarding financial accounting may apply to public sector organisations who directly employ their own enforcement agents: *National Standards for Enforcement Agents* (May 2002, LCD), endnote 1. As to local authority accounting procedures see **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 628 et seq; and as to court funds see PARA 1548 et seq.

3 *National Standards for Enforcement Agents* (May 2002, LCD), 'Statutory or Financial Requirements for Enforcement Agencies'. The statutory obligations referred to are eg those regarding companies legislation, value added tax, the Inland Revenue, data protection and health and safety: see generally **COMPANIES**; **CONFIDENCE AND DATA PROTECTION**; **HEALTH AND SAFETY AT WORK**; **INCOME TAXATION**; **VALUE ADDED TAX**. See also note 2.

4 For these purposes, where standards identify some responsibilities for creditors, 'creditor' includes a local authority, major or frequent judgment creditors in the civil courts (including government departments and magistrates' courts' committees to whom financial penalties are paid (to the Consolidated Fund)) and landlords seeking distress for rent procedures: *National Standards for Enforcement Agents* (May 2002, LCD), 'Terms used'.

5 *National Standards for Enforcement Agents* (May 2002, LCD), 'Statutory or Financial Requirements for Enforcement Agencies'. See also note 2.

6 *National Standards for Enforcement Agents* (May 2002, LCD), 'Statutory or Financial Requirements for Enforcement Agencies'. Insurance requirements must actively be revisited each year to the satisfaction of the client and to ensure adequate and appropriate arrangements are in place: *National Standards for Enforcement Agents* (May 2002, LCD), 'Statutory or Financial Requirements for Enforcement Agencies'. Separate provisions regarding insurance may apply to public sector organisations who directly employ their own enforcement agents: *National Standards for Enforcement Agents* (May 2002, LCD), endnote 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(v) Enforcement Agents; in general/1263. Training and certification.

1263. Training and certification.

The National Standards for Enforcement Agents require enforcement agencies¹ to ensure:

- 894 (1) that all agents², employees and contractors are provided with appropriate training to ensure that they understand and are able to act, at all times, within the bounds of the relevant legislation³;
- 895 (2) that all employees, contractors and agents will at all times act within the scope of current legislation⁴ and have an appropriate knowledge and understanding of it and will be aware of any statutory obligations and provide relevant training⁵;
- 896 (3) that in relation to distress for rent⁶, the legislation restricting the enforcement⁷ activity to certificated bailiffs⁸ is complied with⁹.

1 As to the meaning of 'enforcement agency' see PARA 1262 note 1.

2 As to the meaning of 'enforcement agent' see PARA 1262 note 1.

3 *National Standards for Enforcement Agents* (May 2002, LCD), 'Training and Certification'. This training must be provided at the commencement of employment and at intervals afterwards to ensure that the agent's knowledge is kept up to date. Professional training/assessment must be to an appropriate standard, eg to that of the NVQ for Civil Enforcement Officers, or membership of the Sheriffs' Officers' Association: *National Standards for Enforcement Agents* (May 2002, LCD), 'Training and Certification'. As to the national standards and their advisory status see PARA 1261. As to the Sheriffs' Officers' Association see PARA 1260 note 3.

4 Ie the legislation regarding companies, value added tax, Revenue and Customs, data protection and health and safety: see generally **COMPANIES; CONFIDENCE AND DATA PROTECTION; HEALTH AND SAFETY AT WORK; INCOME TAXATION; VALUE ADDED TAX**.

5 *National Standards for Enforcement Agents* (May 2002, LCD), 'Training and Certification'.

6 As to distress for rent see generally **DISTRESS** vol 13 (2007 Reissue) PARA 905 et seq.

7 As to the meaning of 'enforcement' for these purposes see PARA 1260 note 2.

8 Ie the Distress for Rent Rules 1988, SI 1988/2050: see **DISTRESS** vol 13 (2007 Reissue) PARA 994 et seq.

9 See note 5.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(1) INTRODUCTION/(v) Enforcement Agents; in general/1264. Complaints and discipline.

1264. Complaints and discipline.

The National Standards for Enforcement Agents require enforcement agencies¹:

897 (1) to operate complaints and disciplinary procedures with which agents² must be fully conversant³;

898 (2) to have a complaints procedure which is set out in plain English, has a main point of contact, sets time limits for dealing with complaints and includes an independent appeal process where appropriate, as well as maintaining a register to record all complaints⁴.

1 As to the meaning of 'enforcement agency' see PARA 1262 note 1.

2 As to the meaning of 'enforcement agent' see PARA 1262 note 1.

3 *National Standards for Enforcement Agents* (May 2002, LCD), 'Complaints/Discipline'. As to the national standards and their advisory status see PARA 1261.

4 *National Standards for Enforcement Agents* (May 2002, LCD), 'Complaints/Discipline'. Enforcement agencies and agents are encouraged to make use of the complaints and disciplinary procedures of professional associations such as the Association of Civil Enforcement Agencies or the Certificated Bailiffs Association: *National Standards for Enforcement Agents* (May 2002, LCD), 'Complaints/Discipline'. As to such associations see PARA 1260. As to certificated bailiffs see **DISTRESS** vol 13 (2007 Reissue) PARA 994 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(A) Forms of Writ/1265. Meaning of 'writ of execution'.

(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES

(i) Writs and Warrants

A. HIGH COURT WRITS OF EXECUTION ETC

(A) FORMS OF WRIT

1265. Meaning of 'writ of execution'.

For the purposes of the rules relating to writs of execution¹, unless the context otherwise requires, 'writ of execution' includes a writ of fieri facias², a writ of possession³, a writ of delivery⁴, a writ of sequestration⁵ and any further writ in aid of any of the above-mentioned writs⁶.

Writs of restitution⁷ and writs of assistance⁸, which are now rarely used in practice, are writs in aid of execution.

¹ See for the purposes of CPR Sch 1 RSC Ord 46: see PARA 1273 et seq. As to when execution is available to a judgment creditor see PARA 1245.

² As to writs of fieri facias see PARA 1266.

³ As to writs of possession see PARA 1267.

⁴ As to writs of delivery see PARA 1268.

⁵ As to writs of sequestration see PARA 1269.

⁶ CPR Sch 1 RSC Ord 46 r 1.

⁷ See PARA 1270.

⁸ See PARA 1271.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(A) Forms of Writ/1266. Writs of fieri facias.

1266. Writs of fieri facias.

A writ of fieri facias¹ (commonly known as 'fi fa') must be in such of the prescribed forms² as is appropriate in the particular case³. The writ is addressed to a named enforcement officer or to the enforcement officers assigned to a particular district⁴. The standard form of the writ informs the enforcement officer that a judgment or order has been made by the court as detailed in the schedule to the writ and commands him to seize in execution the goods, chattels and other property of the defendant authorised by law⁵ and to raise therefrom the sums detailed in the schedule to the writ, together with the fees and charges to which he is entitled⁶ and immediately after execution to pay those sums and interest to the appropriate person⁷. The writ also commands the enforcement officer to indorse on the writ immediately after execution a statement of the manner in which he has executed it and to send a copy of the statement to the claimant or defendant⁸. The writ is issued by the Central Office or a district registry of the High Court⁹.

As from a day to be appointed, writs of fieri facias (except writs of fieri facias de bonis ecclesiasticis) are to be renamed writs of control¹⁰.

1 As to the issue of writs of fieri facias see PARA 1273 et seq.

2 *Ie Practice Direction--Forms* PD 4 para 4, Table 2, Forms 53-63: see *The Civil Court Practice*. As to the use of the forms listed in Table 2 see PARA 14.

3 CPR Sch 1 RSC Ord 45 r 12(1). The forms of writ are as follows: Form 53 (writ of fieri facias); Form 54 (writ of fieri facias on order for costs: see PARA 1277); Form 56 (writ of fieri facias after levy of part); Form 57 (writ of fieri facias against personal representatives; as to enforcement against personal representatives see PARA 1240); Form 58 (writ of fieri facias de bonis ecclesiasticis (ie against ecclesiastical goods): see PARA 1272); Form 62 (writ of fieri facias to enforce a Northern Irish or Scottish judgment; as to reciprocal enforcement of judgments see PARA 1233; and see generally **CONFLICT OF LAWS**); and Form 63 (writ of fieri facias to enforce a foreign registered judgment; as to registration of foreign judgments see **CONFLICT OF LAWS**).

4 As to enforcement officers see PARA 1258; and as to the assignment of enforcement officers to districts see PARA 1258 note 1. In CPR Sch 1 RSC Ords 45-47, 'enforcement officer' means an individual who is authorised to act as an enforcement officer under the Courts Act 2003: CPR Sch 1 RSC Ord 45 r 1A(a).

5 As to seizure of goods in execution see PARA 1315 et seq.

6 As to the expenses of execution see PARAS 1368-1373. Where a judgment or order is for less than £600 and does not entitle the claimant to costs against the person against whom the writ of fieri facias to enforce the judgment or order is issued, the writ may not authorise the enforcement officer to whom it is directed to levy any fees, poundage or other costs of execution: CPR Sch 1 RSC Ord 47 r 4. As to the meaning of 'claimant' see PARA 18.

7 See *Practice Direction--Forms* PD 4 para 4, Table 2, Form 53. Payment will be made to the judgment creditor with any balance being paid to the defendant.

8 See note 8. As to returns to the writ see PARA 1282.

9 See note 8. As to the Central Office and district registries see **COURTS** vol 10 (Reissue) PARAS 641, 646.

10 Tribunals, Courts and Enforcement Act 2007 s 62(4)(a) (in force as from a day to be appointed; at the date at which this title states the law, no such day had been appointed). See further PARA 1386.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(A) Forms of Writ/1267. Writs of possession.

1267. Writs of possession.

A writ of possession¹ must be in one of the prescribed forms², whichever is appropriate³. The writ is addressed to a named enforcement officer or to the enforcement officers assigned to a particular district⁴. The writ, and any further writ in aid of the writ, may include provision for enforcing the payment of any money adjudged or ordered to be paid by the judgment or order which is to be enforced by the writ⁵.

The standard form of the writ informs the enforcement officer that a judgment or order has been made that the defendant⁶ is to give the claimant⁷ possession of the land detailed in the first schedule to the writ and commands him to enter the land and cause the claimant to have possession of it, and also to seize in execution the goods, chattels and other property of the defendant authorised by law⁸ and to raise therefrom the sums detailed in the second schedule to the writ, together with the fees and charges to which the enforcement officer is entitled⁹ and immediately after execution to pay those sums and interest to the appropriate person¹⁰. The writ also commands the enforcement officer to indorse on the writ immediately after execution a statement of the manner in which he has executed it and to send a copy of the statement to the claimant or defendant¹¹.

The form of writ to be used in summary proceedings for the possession of land¹² is in similar terms except that the instruction to seize goods, chattels and other property in execution only applies where there is an order for costs against a named defendant (which may not be the case in a claim against trespassers)¹³.

Writs of possession are issued by the Central Office or a district registry of the High Court¹⁴.

1 As to possession proceedings see PARA 1247; and see generally **CRIMINAL LAW, EVIDENCE AND PROCEDURE** (proceedings against trespassers); **LANDLORD AND TENANT** (other possession proceedings).

2 See *Practice Direction--Forms* PD 4 para 4, Table 2, Form 66 or Form 66A: see *The Civil Court Practice*. As to the use of the forms listed in Table 2 see PARA 14.

3 CPR Sch 1 RSC Ord 45 r 12(3).

4 See *Practice Direction--Forms* PD 4 para 4, Table 2, Forms 66, 66A. As to the meaning of 'enforcement officer' see PARA 1266 note 4; and see PARA 1258. As to the assignment of enforcement officers to districts see PARA 1258 note 1.

5 CPR Sch 1 RSC Ord 45 rr 1(4), 3(4).

6 As to the meaning of 'defendant' see PARA 18.

7 As to the meaning of 'claimant' see PARA 18.

8 As to seizure of goods in execution see PARA 1315 et seq.

9 As to costs of execution see PARAS 1368-1373.

10 See *Practice Direction--Forms* PD 4 para 4, Table 2, Form 66. Payment will be made to the judgment creditor with any balance being paid to the defendant.

11 See note 10. As to the return to the writ see PARA 1282.

12 le under CPR Pt 55: see generally **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 660 et seq;
LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 1129 et seq.

13 See *Practice Direction--Forms* PD 4 para 4, Table 2, Form 66A.

14 See notes 10, 13. As to the Central Office and district registries see **COURTS** vol 10 (Reissue) PARAS 641,
646.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(A) Forms of Writ/1268. Writs of delivery.

1268. Writs of delivery.

A writ of delivery¹ must be in one of the prescribed forms², whichever is appropriate³. The writ is addressed to a named enforcement officer or to the enforcement officers assigned to a particular district⁴. A writ of specific delivery⁵, a writ of delivery to recover any goods or their assessed value⁶, and any further writ in aid of the writ, may include provision for enforcing the payment of any money adjudged or ordered to be paid by the judgment or order which is to be enforced by the writ⁷.

A writ of specific delivery informs the enforcement officer that a judgment or order has been made for specific delivery of the goods detailed in the first schedule to the writ and for interest, damages and costs as set out in the second schedule, and commands him to cause the goods detailed in the first schedule to be delivered to the claimant⁸ and to seize in execution the goods, chattels and other property of the defendant⁹ authorised by law¹⁰ and to raise from them the sums detailed in the second schedule together with fees and charges to which the enforcement officer is entitled¹¹ and immediately after execution to pay those sums and interest to the appropriate person¹². The writ also commands the enforcement officer to indorse on the writ immediately after execution a statement of the manner in which he has executed it and to send a copy of the statement to the claimant or defendant¹³.

A writ of delivery to recover any goods or their assessed value informs the enforcement officer that a judgment or order has been made for specific delivery of the goods detailed in the first schedule to the writ, or for the payment of their assessed value as set out in the second schedule, and for interest, damages and costs as set out in the second schedule, and commands him to cause the goods so detailed to be delivered to the claimant or, if he is unable to obtain those goods, to seize in execution the goods, chattels and other property of the defendant authorised by law and raise from them the assessed value of the goods so detailed¹⁴. In any event he is commanded to seize in execution the goods, chattels and other property of the defendant authorised by law and raise from them the remaining sums detailed in the second schedule together with fees and charges to which the enforcement officer is entitled, and immediately after execution to pay those sums and interest to the appropriate person¹⁵. He must also make a return to the writ as described above¹⁶.

Writs of delivery are issued by the Central Office or a district registry of the High Court¹⁷.

1 As to enforcement by delivery see PARA 1248.

2 *le Practice Direction--Forms* PD 4 para 4, Table 2, Form 64 or Form 65: see *The Civil Court Practice*. As to the use of the forms listed in Table 2 see PARA 14.

3 CPR Sch 1 RSC Ord 45 r 12(2).

4 See *Practice Direction--Forms* PD 4 para 4, Table 2, Forms 64, 65. As to the meaning of 'enforcement officer' see PARA 1266 note 4; and see PARA 1258. As to the assignment of enforcement officers to districts see PARA 1258 note 1.

5 As to the meaning of 'writ of specific delivery' see CPR Sch 1 RSC Ord 45 r 4(1)(a); and PARA 1248.

6 See CPR Sch 1 RSC Ord 45 r 4(2); and PARA 1248.

7 CPR Sch 1 RSC Ord 45 rr 1(4), 4(3).

- 8 As to the meaning of 'claimant' see PARA 18.
- 9 As to the meaning of 'defendant' see PARA 18.
- 10 As to seizure of goods in execution see PARA 1315 et seq.
- 11 As to the costs and expenses of execution see PARAS 1368-1373.
- 12 See *Practice Direction--Forms* PD 4 para 4, Table 2, Form 64. Payment will be made to the judgment creditor with any balance being paid to the defendant.
- 13 See note 13. As to the return to the writ see PARA 1282.
- 14 See *Practice Direction--Forms* PD 4 para 4, Table 2, Form 65.
- 15 See note 15.
- 16 See the text to note 12; and note 14.
- 17 See notes 12, 14. As to the Central Office and district registries see **COURTS** vol 10 (Reissue) PARAS 641, 646.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(A) Forms of Writ/1269. Writs of sequestration.

1269. Writs of sequestration.

A writ of sequestration¹ must be in the prescribed form². The writ is addressed to no fewer than four named commissioners³, stating that the defendant⁴ is in contempt of court for failing to comply with a specified court order⁵ and that the claimant⁶ has been given permission to issue the writ⁷. The commissioners, or any two or three of them, are authorised and commanded to enter upon and take possession of all the real and personal estate of the defendant, to collect, receive and take into their hands the rents and profits of his real estate and all his personal estate, and to keep the same under sequestration in their hands until the defendant complies with the relevant order and clears his contempt and the court makes other order to the contrary⁸.

The writ is issued by the claimant or his agent⁹.

1 As to sequestration see PARA 1249, PARAS 1380-1385; and see generally **CONTEMPT OF COURT**. As to sequestration against a company see **COMPANIES** vol 14 (2009) PARA 310.

2 CPR Sch 1 RSC Ord 45 r 12(4). For the prescribed form see *Practice Direction--Forms* PD 4 para 4, Table 2, Form 67; and see *The Civil Court Practice*. As to the use of the forms listed in Table 2 see PARA 14.

3 ie sequestrators: see **CONTEMPT OF COURT**.

4 As to the meaning of 'defendant' see PARA 18.

5 As to the enforcement of a judgment to do or abstain from doing any act see PARA 1249.

6 As to the meaning of 'claimant' see PARA 18.

7 See *Practice Direction--Forms* PD 4 para 4, Table 2, Form 67. As to permission to issue the writ see PARA 1274.

8 See note 7.

9 See note 7. Cf the writs discussed in PARAS 1266-1268, which are issued out of the relevant court office.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(A) Forms of Writ/1270. Writs of restitution.

1270. Writs of restitution.

A writ of restitution, which is a writ in aid of execution¹, may be issued by order of the court² where the defendant or a third party wrongly resumes or takes possession of land³ after entry by the enforcement officer under a writ of possession⁴. The writ is addressed to a named enforcement officer⁵ or to the enforcement officers assigned to a particular district and commands him to enter the land and cause the claimant⁶ to have restitution of the land⁷. The enforcement officer is also commanded to indorse on the writ immediately after execution a statement of the manner in which he has executed it and to send a copy of the statement to the claimant⁸.

Writs of restitution are issued by the Central Office or a district registry of the High Court⁹.

1 See PARA 1265.

2 See CPR Sch 1 RSC Ord 46 r 3; and PARA 1274.

3 The writ may be used to recover land from occupants who were not party to the original proceedings for possession, provided that there is a plain and sufficient nexus between the order for possession and the need to effect further recovery of the same land: *Wiltshire County Council v Frazer* [1986] 1 All ER 65, [1986] 1 WLR 109.

4 For the prescribed form see *Practice Direction--Forms* PD 4 para 4, Table 2, Form 68; and see *The Civil Court Practice*. As to the use of the forms listed in Table 2 see PARA 14.

5 See *Practice Direction--Forms* PD 4 para 4, Table 2, Form 68. As to the meaning of 'enforcement officer' see PARA 1266 note 4; and see PARA 1258. As to the assignment of enforcement officers to districts see PARA 1258 note 1.

6 As to the meaning of 'claimant' see PARA 18.

7 See *Practice Direction--Forms* PD 4 para 4, Table 2, Form 68.

8 See note 7. As to the return to the writ see PARA 1282.

9 See note 7. As to the Central Office and district registries see **COURTS** vol 10 (Reissue) PARAS 641, 646.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(A) Forms of Writ/1271. Writs of assistance.

1271. Writs of assistance.

A writ of assistance, which is a writ in aid of execution¹, may be issued by order of the court² where a defendant³ has been ordered to give possession of land or goods to the claimant⁴ but the defendant and other persons have retained possession of the land or goods in contempt of the court order⁵. The writ is addressed to a named enforcement officer or to the enforcement officers assigned to a particular district⁶. The enforcement officer is commanded either (1) to enter the land and eject the defendant, his tenants, servants and accomplices, each and every of them, from the land and every part of it and put the claimant and his assigns into full, peaceable and quiet possession of it; or (2) to put the claimant and his assigns into full peaceable and quiet possession of the goods; and (3) to defend and keep him and his assigns in such peaceable and quiet possession, when and as often as any interruption of it is at any time effected, according to the intent of the relevant court orders⁷.

Writs of assistance are issued by the Central Office or a district registry of the High Court⁸.

1 See PARA 1265.

2 See CPR Sch 1 RSC Ord 46 r 3; and PARA 1274.

3 As to the meaning of 'defendant' see PARA 18.

4 As to the meaning of 'claimant' see PARA 18.

5 For the prescribed form see *Practice Direction--Forms* PD 4 para 4, Table 2, Form 69; and see *The Civil Court Practice*. As to the use of the forms listed in Table 2 see PARA 14.

6 See *Practice Direction--Forms* PD 4 para 4, Table 2, Form 69. As to the meaning of 'enforcement officer' see PARA 1266 note 4; and see PARA 1258. As to the assignment of enforcement officers to districts see PARA 1258 note 1.

7 See *Practice Direction--Forms* PD 4 para 4, Table 2, Form 69. For some examples of cases where writs of assistance have been issued see *Wyman v Knight* (1888) 39 ChD 165; *Re Taylor, Taylor v Rawson* [1913] WN 212. See also *Cazet de la Borde v Othon* (1874) 23 WR 110 (chattel locked up in a house); *Re Klingelhoefer's Will Trusts* (1955) Times, 19 March (deeds in safe).

8 See *Practice Direction--Forms* PD 4 para 4, Table 2, Form 69. As to the Central Office and district registries see **COURTS** vol 10 (Reissue) PARAS 641, 646.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(A) Forms of Writ/1272. Writs of fieri facias de bonis ecclesiasticis or sequestrari de bonis ecclesiasticis.

1272. Writs of fieri facias de bonis ecclesiasticis or sequestrari de bonis ecclesiasticis.

Special forms of writs of fieri facias or of sequestration may be issued in circumstances where the person liable to execution is the incumbent of a Church of England benefice. These writs are discussed elsewhere in this title¹. They may be regarded as writs in aid of execution² since they may only be issued on the return of a writ of fieri facias³.

1 See PARA 1278; and see further **ECCLESIASTICAL LAW**.

2 See PARA 1265.

3 See CPR Sch 1 RSC Ord 47 r 5(1). However, unlike the issue of other writs in aid of execution (see PARAS 1270, 1271, 1274), the court's permission does not appear to be required for their issue.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(B) Issue of Writ/1273. Issue of writ of execution; general procedure.

(B) ISSUE OF WRIT

1273. Issue of writ of execution; general procedure.

Issue of a writ of execution¹ takes place on its being sealed² by a court officer³ of the appropriate office⁴.

Before such a writ is issued, a praecipe⁵ for its issue must be filed⁶. The praecipe must be signed by or on behalf of the solicitor of the person entitled to execution⁷ or, if that person is acting in person, by him⁸.

No such writ may be sealed unless at the time of the tender of it for sealing:

- 899 (1) the person tendering it produces:
 - 19 33. (a) the judgment or order⁹ on which the writ is to issue, or an office copy of it;
 - 34. (b) where the writ may not issue without the permission of the court¹⁰, the order granting such permission or evidence of the granting of it;
 - 35. (c) where judgment on failure to acknowledge service¹¹ has been entered against a state¹², evidence that the state has been duly served¹³ and that the judgment has taken effect¹⁴; and
- 20 900 (2) the court officer authorised to seal it is satisfied that the period, if any, specified in the judgment or order for the payment of any money or the doing of any other act under it has expired¹⁵.

Every writ of execution must bear the date of the day on which it is issued¹⁶.

1 As to the meaning of 'writ of execution' see PARA 1265.

2 As to the meaning of 'seal' see PARA 81 note 2.

3 As to the meaning of 'court officer' see PARA 49 note 3.

4 CPR Sch 1 RSC Ord 46 r 6(1). For these purposes, 'appropriate office' means (1) where the proceedings in which execution is to issue are in a district registry, that registry; (2) where the proceedings are in the Principal Registry of the Family Division, that registry; (3) where the proceedings are Admiralty proceedings or commercial proceedings which are not in a district registry, the Admiralty and Commercial Registry; (4) where the proceedings are in the Chancery Division, Chancery Chambers; and (5) in any other case, the Central Office of the Supreme Court: CPR Sch 1 RSC Ord 46 r 6(6). As to district registries see **COURTS** vol 10 (Reissue) PARA 646; as to the Principal Registry of the Family Division see **COURTS** vol 10 (Reissue) PARA 644; and as to the Admiralty and Commercial Registry and the Central Office see **COURTS** vol 10 (Reissue) PARA 641. As to Chancery Chambers see PARA 53. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

5 For the forms of praecipe see *Practice Direction--Forms* PD 4 para 4, Table 2, Practice Form ('PF') 86 (praecipe for writ of fieri facias); PF 87 (praecipe for writ of sequestration); PF 88 (praecipe for writ of possession); PF 89 (praecipe for writ of possession and fieri facias combined); and PF 90 (praecipe for writ of delivery); and see *The Civil Court Practice*. As to the use of the forms listed in Table 2 see PARA 14.

- 6 CPR Sch 1 RSC Ord 46 r 6(2). As to the meaning of 'filing' see PARA 1832 note 8.
- 7 As to the persons entitled to execution see PARA 1236 et seq.
- 8 CPR Sch 1 RSC Ord 46 r 6(3).
- 9 As to the meaning of 'judgment or order' see PARA 1226.
- 10 As to when permission is required see PARA 1274.
- 11 As to judgment on failure to acknowledge service see PARAS 186, 506 et seq. As to the meaning of 'service' see PARA 138 note 2.
- 12 Is a state as defined in the State Immunity Act 1978 s 14: see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 245.
- 13 Is in accordance with CPR 40.10: see PARA 1142.
- 14 CPR Sch 1 RSC Ord 46 r 6(4)(a).
- 15 CPR Sch 1 RSC Ord 46 r 6(4)(b).
- 16 CPR Sch 1 RSC Ord 46 r 6(5).

UPDATE

1273 Issue of writ of execution; general procedure

NOTE 4--Appointed day is 1 October 2009: SI 2009/1604. CPR Sch 1 RSC Ord 46 r 6(6) amended: SI 2009/2092.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(B) Issue of Writ/1274. Cases where the court's permission is required for issue of the writ.

1274. Cases where the court's permission is required for issue of the writ.

A writ of execution¹ in aid of any other writ of execution² must not issue without the permission of the court³.

A writ of execution to enforce a judgment or order⁴ may not issue without the permission of the court in the following cases, that is to say:

- 901 (1) where six years or more have elapsed since the date of the judgment or order⁵;
- 902 (2) where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgment or order⁶;
- 903 (3) where the judgment or order is against the assets of a deceased person coming to the hands of his executors or administrators after the date of the judgment or order, and it is sought to issue execution against such assets⁷;
- 904 (4) where under the judgment or order any person is entitled to a remedy subject to the fulfilment of any condition which it is alleged has been fulfilled⁸;
- 905 (5) where any goods sought to be seized under a writ of execution are in the hands of a receiver appointed by the court or a sequestrator⁹.

A writ of possession¹⁰ to enforce a judgment or order for the giving of possession of any land must not be issued without the permission of the court except where the judgment or order was given or made in proceedings by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage¹¹, being proceedings in which there is a claim for:

- 906 (a) payment of money secured by the mortgage;
- 907 (b) sale of the mortgaged property;
- 908 (c) foreclosure;
- 909 (d) delivery of possession (whether before or after foreclosure or without foreclosure) to the mortgagee by the mortgagor or by any person who is alleged to be in possession of the property;
- 910 (e) redemption;
- 911 (f) reconveyance of the land or its release from the security; or
- 912 (g) delivery of possession by the mortgagee¹².

Except in relation to an order for possession in a possession claim against trespassers under Part 55 of the Civil Procedure Rules ('CPR')¹³, such permission must not be granted unless it is shown:

- 913 (i) that every person in actual possession of the whole or any part of the land has received such notice of the proceedings as appears to the court sufficient to enable him to apply to the court for any relief to which he may be entitled; and
- 914 (ii) if the operation of the judgment or order is suspended under the provision of the Landlord and Tenant Act 1954 giving relief for a tenant where the landlord is proceeding to enforce covenants¹⁴, that the applicant has not received notice in

writing from the tenant that he desires that the order is not to have effect except if and in so far as it provides for the payment of costs and that the tenancy is thereafter to have effect, and that Part I of that Act¹⁵ is to have effect in relation to it, as if it had been granted for a term expiring at the expiration of seven months from the making of the order¹⁶.

In the case of a possession order in a possession claim against trespassers under Part 55 of the CPR, no writ of possession to enforce such an order must be issued after the expiry of three months from the date of the order without the permission of the court¹⁷.

The issue of a writ of sequestration¹⁸ requires the permission of the court¹⁹.

1 As to the meaning of 'writ of execution' see PARA 1265.

2 As to writs in aid of execution see PARAS 1270-1272.

3 CPR Sch 1 RSC Ord 46 r 3. As to the meaning of 'court' see PARA 22. As to application for permission see PARA 1275.

4 As to the meaning of 'judgment or order' see PARA 1226.

5 CPR Sch 1 RSC Ord 46 r 2(1)(a). When exercising its discretion to permit the issue of execution after the expiry of six years under this rule, the court will not, in general, extend time beyond the six years save where it is demonstrably just to do so. The burden of demonstrating that rests on the judgment creditor: see *Duer v Frazer* [2001] 1 All ER 249, [2001] 1 WLR 919, applied in *Patel v Singh* [2002] EWHC 1816 (Ch), [2002] All ER (D) 453 (Jul). Cf CPR Sch 2 CCR Ord 26 r 5(1)(a): see PARA 1285 head (1) in the text. As to limitation periods see generally **LIMITATION PERIODS**. Where execution of a judgment is permitted after the expiry of six years from the date of judgment, the recovery of interest on the judgment debt is limited to six years' interest: see *Lowsley v Forbes (t/a LE Design Services)* [1999] 1 AC 329, [1998] 3 All ER 897, HL. As to interest on judgment debts see PARA 1149.

6 CPR Sch 1 RSC Ord 46 r 2(1)(b). Cf CPR Sch 2 CCR Ord 26 r 5(1)(b): see PARA 1285 head (2) in the text. As to parties entitled to or liable to execution see PARA 1236 et seq.

7 CPR Sch 1 RSC Ord 46 r 2(1)(c). Cf CPR Sch 2 CCR Ord 26 r 5(1)(c): see PARA 1285 head (3) in the text. As to execution against executors or administrators see PARA 1240.

8 CPR Sch 1 RSC Ord 46 r 2(1)(d).

9 CPR Sch 1 RSC Ord 46 r 2(1)(e). Cf CPR Sch 2 CCR Ord 26 r 5(1)(d): see PARA 1285 head (4) in the text. As to receivers see PARA 1497 et seq; and **RECEIVERS**; and as to sequestrators see PARA 1380 et seq; and **CONTEMPT OF COURT**. CPR Sch 1 RSC Ord 46 r 2(1) is without prejudice to the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 2 (see PARA 1241; and **ARMED FORCES**), or any other enactment or rule by virtue of which a person is required to obtain the permission of the court for the issue of a writ of execution or to proceed to execution on or otherwise to the enforcement of a judgment or order: CPR Sch 1 RSC Ord 46 r 2(2).

10 As to writs of possession see PARA 1267.

11 For these purposes, 'mortgage' includes a legal or equitable mortgage and a legal or equitable charge, and reference to a mortgagor, a mortgagee and mortgaged land is to be interpreted accordingly: CPR Sch 1 RSC Ord 45 r 3(2A). See generally **MORTGAGE**.

12 CPR Sch 1 RSC Ord 45 r 3(2).

13 See CPR Sch 1 RSC Ord 113 r 7(1). As to the meaning of 'possession claim against trespassers' see PARA 1227 note 5.

14 Ie suspended by the Landlord and Tenant Act 1954 s 16(2): see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1233.

15 Ie the Landlord and Tenant Act 1954 Pt I (ss 1-22): see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1196 et seq.

16 CPR Sch 1 RSC Ord 45 r 3(3). The notice referred to in the text is a notice that the tenant desires that the provisions of the Landlord and Tenant Act 1954 s 16(2)(a), (b) are to have effect. As to such notice see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1233.

17 CPR Sch 1 RSC Ord 113 r 7(1).

18 As to writs of sequestration see PARA 1269.

19 See *Practice Direction--Enforcement of Judgments and Orders* PD 70 para 1.2(2); and PARA 1245; CPR Sch 1 RSC Ord 45 rr 4, 5; and PARAS 1248-1249; RSC Ord 46 r 5; and PARA 1275.

UPDATE

1274 Cases where the court's permission is required for issue of the writ

NOTE 5--The court would permit enforcement after the expiry of six years from the date of judgment where the claimant has been active in seeking enforcement, but his attempts have been thwarted by his inability to locate the defendant's assets:

Westacre Investments Inc v Yugoimport SDPR [2008] EWHC 801 (Comm), [2009] 1 All ER (Comm) 780.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(B) Issue of Writ/1275. Application for permission to issue writ.

1275. Application for permission to issue writ.

An application for permission¹ to issue a writ of execution² may be made in accordance with Part 23 of the Civil Procedure Rules ('CPR')³ but, except in the case of an application to issue a writ of sequestration⁴, the application notice need not be served⁵ on the respondent unless the court directs⁶. In the case of an application for permission to issue a writ of possession to enforce an order for possession in a possession claim against trespassers⁷, the application may be made without notice being served on any other party unless the court otherwise directs⁸.

Particular provision is made with regard to applications for writs of sequestration⁹. With regard to other applications for writs of execution, such an application must be supported by a witness statement or affidavit¹⁰:

- 915 (1) identifying the judgment or order¹¹ to which the application relates and, if the judgment or order is for the payment of money¹², stating the amount originally due thereunder and the amount due thereunder at the date the application notice is filed¹³;
- 916 (2) stating, where six years or more have elapsed since the judgment or order¹⁴, the reasons for the delay in enforcing the judgment or order¹⁵;
- 917 (3) stating, where any change has taken place in the parties entitled or liable to execution¹⁶, the change which has taken place in such parties since the date of the judgment or order¹⁷;
- 918 (4) stating, where the judgment or order is against the assets of a deceased person coming to the hands of his executors or administrators after the date of the judgment or order and it is sought to issue execution against such assets¹⁸, or where under the judgment or order any person is entitled to a remedy subject to the fulfilment of any condition which it is alleged has been fulfilled¹⁹, that a demand to satisfy the judgment or order was made on the person liable to satisfy it and that he has refused or failed to do so²⁰;
- 919 (5) giving such other information as is necessary to satisfy the court that the applicant is entitled to proceed to execution on the judgment or order in question and that the person against whom it is sought to issue execution is liable to execution on it²¹.

The court hearing such application may grant permission in accordance with the application or may order that any issue or question, a decision on which is necessary to determine the rights of the parties, be tried in any manner in which any question of fact or law arising in proceedings may be tried and, in either case, may impose such terms as to costs or otherwise as it thinks just²².

Notwithstanding anything set out above²³, an application for permission to issue a writ of sequestration must be made in accordance with Part 23 of the CPR and be heard by a judge²⁴. The application notice, stating the grounds of the application and accompanied by a copy of the witness statement or affidavit in support of the application, must be served personally²⁵ on the person against whose property it is sought to issue the writ²⁶; but the court may dispense with such service if it thinks it just to do so²⁷. The judge hearing an application for permission to

issue a writ of sequestration may sit in private in any case in which, if the application were for an order of committal²⁸, he would be entitled²⁹ to do so but, except in such a case, the application must be heard in public³⁰.

- 1 As to the cases in which permission is required see PARA 1274.
- 2 As to the meaning of 'writ of execution' see PARA 1265.
- 3 Ie CPR Pt 23: see PARA 303 et seq.
- 4 As to writs of sequestration see PARA 1269; and as to the procedure on such an application see the text and notes 23-30.
- 5 As to the meaning of 'service' see PARA 138 note 2.
- 6 CPR Sch 1 RSC Ord 46 r 4(1). As to the meaning of 'court' see PARA 22.
- 7 Ie under CPR Pt 55: see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 660 et seq; **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1129 et seq. As to the meaning of 'possession claim against trespassers' see PARA 1227 note 5.
- 8 CPR Sch 1 RSC Ord 113 r 7(1).
- 9 See the text and notes 23-30.
- 10 As to witness statements and affidavits see PARA 981 et seq.
- 11 As to the meaning of 'judgment or order' see PARA 1226.
- 12 As to the meaning of 'judgment or order for the payment of money' see PARA 1226.
- 13 CPR Sch 1 RSC Ord 46 r 4(2)(a). As to the meaning of 'filing' see PARA 1832 note 8.
- 14 Ie where the case falls within CPR Sch 1 RSC Ord 46 r 2(1)(a): see PARA 1274 head (1) in the text.
- 15 CPR Sch 1 RSC Ord 46 r 4(2)(b).
- 16 Ie where the case falls within CPR Sch 1 RSC Ord 46 r 2(1)(b): see PARA 1274 head (2) in the text.
- 17 CPR Sch 1 RSC Ord 46 r 4(2)(c).
- 18 Ie where the case falls within CPR Sch 1 RSC Ord 46 r 2(1)(c): see PARA 1274 head (3) in the text.
- 19 Ie where the case falls within CPR Sch 1 RSC Ord 46 r 2(1)(d): see PARA 1274 head (4) in the text.
- 20 CPR Sch 1 RSC Ord 46 r 4(2)(d).
- 21 CPR Sch 1 RSC Ord 46 r 4(2)(e).
- 22 CPR Sch 1 RSC Ord 46 r 4(3). As to the trial of questions arising in proceedings see generally PARA 6.
- 23 Ie anything in CPR Sch 1 RSC Ord 46 r 4: see the text and notes 1-6, 9-22.
- 24 CPR Sch 1 RSC Ord 46 r 5(1). As to the meaning of 'judge' see PARA 49.
- 25 As to personal service see PARA 142.
- 26 CPR Sch 1 RSC Ord 46 r 5(2).
- 27 CPR Sch 1 RSC Ord 46 r 5(3).
- 28 As to orders of committal see PARAS 1249, 1514; and **CONTEMPT OF COURT**.
- 29 Ie by virtue of CPR Sch 1 RSC Ord 52 r 6: see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 500.
- 30 CPR Sch 1 RSC Ord 46 r 5(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(B) Issue of Writ/1276. Duration of permission.

1276. Duration of permission.

Where the court¹ grants permission² for the issue of a writ of execution³ and the writ is not issued within one year after the date of the order granting such permission, the order ceases to have effect; but this is without prejudice to the making of a fresh order⁴.

1 As to the meaning of 'court' see PARA 22.

2 Ie whether under CPR Sch 1 RSC Ord 46 r 2 (see PARA 1274) or otherwise: CPR Sch 1 RSC Ord 46 r 2(3). As to the cases in which permission is required see PARA 1274; and as to applications for permission and the hearing of applications see PARA 1275.

3 As to the meaning of 'writ of execution' see PARA 1265.

4 CPR Sch 1 RSC Ord 46 r 2(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(B) Issue of Writ/1277. Separate writs to enforce payment of costs etc.

1277. Separate writs to enforce payment of costs etc.

Where only the payment of money, together with costs to be assessed in accordance with the detailed assessment procedure¹, is adjudged or ordered, then if when the money becomes payable under the judgment or order² the costs have not been assessed, the party entitled to enforce³ that judgment or order may issue a writ of fieri facias⁴ to enforce payment of the sum (other than for costs) adjudged or ordered and, not less than eight days after the issue of that writ, he may issue a second writ to enforce payment of the assessed costs⁵.

A party entitled to enforce a judgment or order for the delivery of possession of any property other than money may, if he so elects, issue a separate writ of fieri facias to enforce payment of any damages or costs awarded to him by that judgment or order⁶.

1 le under CPR Pt 47: see PARA 1779 et seq.

2 As to the meaning of 'judgment or order' see PARA 1226.

3 As to the parties entitled to enforcement see PARA 1236 et seq.

4 As to writs of fieri facias see PARA 1266.

5 CPR Sch 1 RSC Ord 47 r 3(1).

6 CPR Sch 1 RSC Ord 47 r 3(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(B) Issue of Writ/1278. Issue of writ of fieri facias de bonis ecclesiasticis or sequestrari de bonis ecclesiasticis.

1278. Issue of writ of fieri facias de bonis ecclesiasticis or sequestrari de bonis ecclesiasticis.

Where it appears upon the return of any writ of fieri facias¹ that the person against whom the writ was issued has no goods or chattels in the county of the sheriffs² to whom the writ was directed or the district of the relevant enforcement officer³ but that he is the incumbent of a benefice named in the return, then, after the writ and return have been filed⁴, the party by whom the writ of fieri facias was issued may issue a writ of fieri facias de bonis ecclesiasticis or a writ of sequestrari de bonis ecclesiasticis directed to the bishop of the diocese within which that benefice is⁵. Any such writ must be delivered to the bishop to be executed by him⁶. The bishop is commanded by the writ either to levy execution on the defendant's ecclesiastical property in the diocese⁷, or to enter the rectory or vicarage and parish church, sequester them and hold them in possession until sufficient income has accrued to satisfy the judgment and costs of execution⁸. Only such fees for the execution of any such writ are to be taken by or allowed to the bishop or any diocesan officer as are for the time being authorised by or under any enactment, including any measure of the General Synod⁹.

The bishop is also commanded to indorse on the relevant writ immediately after execution a statement of the manner in which he has executed it and to send a copy of the statement to the claimant¹⁰.

1 As to writs of fieri facias see PARAS 1266, 1279 et seq; and as to the return to the writ see PARA 1282.

2 As to enforcement officers see PARA 1258.

3 In CPR Sch 1 RSC Ords 45-47, 'relevant enforcement officer' means (1) in relation to a writ of execution which is directed to an single enforcement officer, that officer; (2) in relation to a writ of execution which is directed to two or more enforcement officers, the officer to whom the writ is allocated: CPR Sch 1 RSC Ord 45 r 1A(b). As to the meaning of 'enforcement officer' see PARA 1266 note 4. As to the allocation of enforcement officers to districts see PARA 1258 note 1.

4 As to the meaning of 'filing' see PARA 1832 note 8.

5 CPR Sch 1 RSC Ord 47 r 5(1). For the prescribed forms of writ see *Practice Direction--Forms* PD 4 para 4, Table 2, Forms 58, 59; and see *The Civil Court Practice*. As to the use of the forms listed in Table 2 see PARA 14.

6 CPR Sch 1 RSC Ord 47 r 5(2). In executing the writ the bishop is said to be in the nature of an ecclesiastical sheriff: *Walwyn v Awberry* (1677) 1 Mod Rep 258. Thus, the bishop is liable for a false return: *Pickard v Paiton* (1666) 1 Sid 276. In ecclesiastical executions the priorities of writs date from the publications in the parish: *Legassick v Bishop of Exeter* (1782) 1 Crompton's Practice 351.

7 See *Practice Direction--Forms* PD 4 para 4, Table 2, Form 58 (writ of fieri facias de bonis ecclesiasticis).

8 See *Practice Direction--Forms* PD 4 para 4, Table 2, Form 59 (writ of sequestrari de bonis ecclesiasticis). The incumbent whose benefice is sequestered loses all enjoyment and control of the glebe lands: see *Powell v Hibbert* (1850) 15 QB 129. He cannot sue a tenant for an occupation rent: *Powell v Hibbert* (1850) 15 QB 129. No retention for future repairs may be made: *Dean v Lempriere* (1857) 5 WR 560. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

9 CPR Sch 1 RSC Ord 47 r 5(3).

10 See *Practice Direction--Forms* PD 4 para 4, Table 2, Forms 58, 59.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(C) Duration and Renewal of Writ/1279. Duration of writ.

(C) DURATION AND RENEWAL OF WRIT

1279. Duration of writ.

For the purpose of execution¹, a writ of execution² is valid in the first instance for 12 months beginning with the date of its issue³.

The duration of an order for permission for its issue⁴ is discussed elsewhere in this title⁵.

1 As to levying execution see PARA 1315 et seq.

2 As to the meaning of 'writ of execution' see PARA 1265.

3 CPR Sch 1 RSC Ord 46 r 8(1). As to the procedure for issue see PARA 1273.

4 As to when permission is required see PARA 1274; and as to applications for permission see PARA 1275.

5 See PARA 1276.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(C) Duration and Renewal of Writ/1280. Renewal of writ.

1280. Renewal of writ.

Where a writ of execution¹ has not been wholly executed² the court³ may by order extend the validity of the writ from time to time for a period of 12 months at any one time beginning with the day on which the order is made, if an application for extension is made to the court before the day next following that on which the writ would otherwise expire or such later day, if any, as the court may allow⁴.

Before a writ the validity of which had been extended under the above provision is executed either the writ must be sealed⁵ with the seal of the office out of which it was issued showing the date on which the order extending its validity was made or the applicant for the order must serve a notice in the prescribed form⁶ sealed in the same manner, on the sheriff⁷ to whom the writ is directed or the relevant enforcement officer⁸ informing him of the making of the order and the date of it⁹. The production of a writ of execution, or of such a notice, purporting in either case to be sealed in such manner, is evidence that the validity of that writ, or, as the case may be, of the writ referred to in that notice, has been extended under the above provision¹⁰.

The priority of a writ, the validity of which has been extended under these provisions, is to be determined by reference to the date on which it was originally delivered to the enforcement officer¹¹.

1 As to the meaning of 'writ of execution' see PARA 1265.

2 As to levying execution see PARA 1315 et seq.

3 As to the meaning of 'court' see PARA 22.

4 CPR Sch 1 RSC Ord 46 r 8(2).

5 As to the meaning of 'seal' see PARA 81 note 2.

6 For the prescribed form see *Practice Direction--Forms* PD 4 para 4, Table 2, Form 71; and see *The Civil Court Practice*. As to the use of the forms listed in Table 2 see PARA 14.

7 As to enforcement officers see PARA 1258; and **SHERIFFS**.

8 As to the meaning of 'relevant enforcement officer' see PARA 1278 note 3.

9 CPR Sch 1 RSC Ord 46 r 8(3).

10 CPR Sch 1 RSC Ord 46 r 8(5).

11 CPR Sch 1 RSC Ord 46 r 8(4).

UPDATE

1280 Renewal of writ

NOTE 2--Whole execution means the completion of the process for enforcing or giving effect to an order of the court, such as seizing property, rather than the whole process of enforcement in the sense of making payment or giving possession to the claimant: *H v N* [2009] EWHC 640 (Fam), [2009] 1 WLR 2335, [2009] All ER (D) 53 (Apr).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(C) Duration and Renewal of Writ/1281. Extension of writ's validity where interpleader summons issued.

1281. Extension of writ's validity where interpleader summons issued.

If, during the validity of a writ of execution¹, an interpleader summons² is issued in relation to an execution under that writ, the validity of the writ must be extended until the expiry of 12 months from the conclusion of the interpleader proceedings³.

1 As to the meaning of 'writ of execution' see PARA 1265.

2 As to interpleader in the High Court see PARA 1350; and PARA 1587 et seq.

3 CPR Sch 1 RSC Ord 46 r 8(6).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/A. HIGH COURT WRITS OF EXECUTION ETC/(D) Return to Writ/1282. Return to writ of execution.

(D) RETURN TO WRIT

1282. Return to writ of execution.

Any party¹ at whose instance or against whom a writ of execution² was issued³ may serve⁴ a notice on the sheriff⁵ to whom the writ was directed or the relevant enforcement officer requiring him, within such time as may be specified in the notice, to indorse on the writ a statement of the manner in which he has executed it and to send to that party a copy of the statement⁶. If a sheriff or enforcement officer on whom such a notice is served fails to comply with it the party by whom it was served may apply to the court for an order directing the sheriff or enforcement officer to comply with the notice⁷.

Where the enforcement officer indorses the writ with a statement that he has complied with the writ and holds money being the whole or a part of the money to be levied, the sum returned thereby as made is recoverable from the enforcement officer by the judgment creditor; and where no return has been made, the amount in fact levied is so recoverable⁸. A claim lies for the amount levied or returned as levied, as for money had and received⁹; or an application may be made to the court for an order that the enforcement officer pay over the money¹⁰. The enforcement officer is estopped from denying, after such a return, the receipt of the money¹¹, or from pleading a subsequent loss or rescue of the goods¹², but he is not precluded from showing that goods returned as those of the debtor were in fact those of another person¹³, or that the debtor's title has been defeated subsequently¹⁴, or that the execution has been defeated by the insolvency of the debtor¹⁵.

A false statement in a return will give the judgment creditor a right of action against the enforcement officer for a false return if it causes damage to the creditor, but not otherwise¹⁶.

1 As to parties to enforcement see PARA 1236 et seq.

2 As to the meaning of 'writ of execution' see PARA 1265. Note, however, that since a notice under the provisions set out in the text is addressed to the enforcement officer (see the text to notes 4-5), a writ of sequestration, which is addressed to the sequestrators, does not fall within those provisions. As to writs of sequestration see PARAS 1269, 1313, 1380 et seq.

3 As to the procedure for issuing writs of execution see PARA 1273 et seq.

4 As to the meaning of 'service' see PARA 138 note 2.

5 As to enforcement officers see PARA 1258; and **SHERIFFS**.

6 CPR Sch 1 RSC Ord 46 r 9(1). As to the execution of writs see PARA 1302 et seq.

There are three ordinary forms of return specially applicable to the writ of fieri facias: (1) fieri feci; (2) nulla bona; (3) 'the goods and chattels seized remain in my hands unsold for want of buyers'. The return of fieri feci is applicable when the enforcement officer has seized and sold goods sufficient in value to satisfy the amount to be levied under the fieri facias. It states that the enforcement officer has caused to be made the sum by the indorsement of the writ directed to be levied. Where the goods seized have realised insufficient to discharge the whole sum due, the return of fieri feci as to part will be combined with one of the other forms. The return of nulla bona is applicable when there are no goods of the judgment debtor in the enforcement officer's bailiwick, the proceeds of which are available to satisfy the writ: *Milner v Rawlings* (1867) LR 2 Exch 249. Thus the return is good to a writ delivered with the intention of defrauding creditors, whether there are goods available or not:

Shattock v Carden(1851) 6 Exch 725. It is therefore a good return if there are no goods at all, or if the proceeds of such goods as have been sold have not proved more than sufficient to satisfy the costs of the levy (*Dennis v Whetham*(1874) LR 9 QB 345), and any claims prior to those of the writ, such as other prior writs (*Dennis v Whetham*(1874) LR 9 QB 345), executions on behalf of the Crown (*Grove v Aldridge* (1832) 9 Bing 428), or landlord's claims under the Landlord and Tenant Act 1709 s 1 (see PARA 1352) (see *Wintle v Freeman* (1841) 1 Gal & Dav 93; *Heeman v Evans* (1841) 3 Man & G 398). It states that the judgment debtor has no goods or chattels whereof the sum directed to be levied, or any part thereof, can be made. The return that 'the goods and chattels seized remain in my hands unsold for want of buyers' is applicable not only to the case in which no bid is made for the goods (*Barnard v Leigh* (1815) 1 Stark 43), but also when no offer is made of a sum reasonably approaching their value. If the enforcement officer sells the goods at an excessively low price he will be liable at the suit of the judgment creditor for damages: *Keightley v Birch* (1814) 3 Camp 521. The value of the goods, estimated by the enforcement officer, should be stated in the return: *Barton v Gill* (1843) 1 Dow & L 593; *Wintle v Lord Chetwynd* (1839) 7 Dowl 554. The omission to state the value is a mere irregularity and does not make the return a nullity: *Chambers v Coleman* (1841) 9 Dowl 588. The effect of the return of value is to bind the enforcement officer as to that value in case the goods are lost or rescued from him: *Clerk v Withers* (1704) 2 Ld Raym 1072.

Other forms of return are sometimes applicable. Thus, where the execution is stayed by order (*Cleghorn v Des Anes* (1819) 3 Moore CP 83), or by direction of the judgment creditor's solicitor (*Levi v Abbott*(1849) 4 Exch 588), or where the judgment debtor is the incumbent of a benefice and has no goods or chattels in the county (see CPR Sch 1 RSC Ord 47 r 5; and PARAS 1278), these facts should be stated in the return. The return must not fail to state whether the debtor has goods within the county or bailiwick; thus a return to the effect that the debtor's house is barricaded so that the enforcement officer cannot ascertain whether he has goods or not is not a good return, and will be set aside: *Munk v Cass* (1841) 9 Dowl 332; applied in *Re a Debtor (No 340 of 1992)*, *ex p the Debtor v First Commercial Bank plc*[1996] 2 All ER 211, [1995] 15 LS Gaz R 40, CA. When the writ to which a return has to be made is one of several writs, the enforcement officer should return specifically whether he has seized under the writ, and the form applicable to such a return is, after a recital of all the writs delivered, that he has seized 'by virtue of the said several writs, and according to the priority thereof': *Chambers v Colman* (1841) 9 Dowl 588, explaining *Wintle v Lord Chetwynd* (1839) 7 Dowl 554. When several writs of fieri facias are delivered simultaneously, the form of return is doubtful: *Ashworth v Earl of Uxbridge* (1842) 2 Dowl NS 377. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

7 CPR Sch 1 RSC Ord 46 r 9(2).

8 *Perkinson v Gilford* (1639) Cro Car 539.

9 *Longdill v Jones* (1816) 1 Stark 345. A demand before action is not necessary (*Dale v Birch* (1813) 3 Camp 347), except as affecting the court's discretion as to costs (*Jefferies v Sheppard* (1820) 3 B & Ald 696).

10 *Stockdale v Hansard* (1840) 3 Per & Dav 330. Being an officer of the court, the enforcement officer may be ordered to pay interest: *R v Villers* (1823) 11 Price 575. It is no defence to a claim for such money that the enforcement officer has been ordered to retain the money by the House of Commons: *Stockdale v Hansard* (1840) 3 Per & Dav 330. As to the liability of an enforcement officer or any person acting under his authority to punishment for contempt of court see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 449; **SHERIFFS** vol 42 (Reissue) PARA 1151; and as to the procedure on committal see CPR Sch 1 RSC Ord 52; and **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 493 et seq.

11 *Field v Smith* (1837) 5 Dowl 735.

12 *Mildmay v Smith* (1671) 2 Saund 343; *Clerk v Withers* (1704) 2 Ld Raym 1072 at 1075, per Holt CJ.

13 *Stimson v Farnham*(1871) LR 7 QB 175 at 178 per Cockburn CJ, dissenting from a dictum of Lord Campbell in *Remmett v Lawrence*(1850) 15 QB 1004 at 1010.

14 *Standish v Ross*(1849) 3 Exch 527; *Brydges v Walford* (1817) 6 M & S 42; but see *Field v Smith* (1837) 5 Dowl 735.

15 See eg *Standish v Ross*(1849) 3 Exch 527; *Brydges v Walford* (1817) 6 M & S 42; *Clutterbuck v Jones* (1812) 15 East 78; and see PARAS 1354-1355.

16 See *Brasyer v Maclean*(1875) LR 6 PC 398; *Wylie v Birch*(1843) 4 QB 566; *Stimson v Farnham*(1871) LR 7 QB 175; *Hobson v Thellusson*(1867) LR 2 QB 642; *Dennis v Whetham*(1874) LR 9 QB 345; see also *Levy v Hale* (1859) 29 LJCP 127.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/B. COUNTY COURT WARRANTS OF EXECUTION, DELIVERY AND POSSESSION/(A) Warrants of Execution/1283. Procedure for issuing warrants of execution; in general.

B. COUNTY COURT WARRANTS OF EXECUTION, DELIVERY AND POSSESSION

(A) WARRANTS OF EXECUTION

1283. Procedure for issuing warrants of execution; in general.

Subject to the prescribed monetary limits¹, any sum of money payable under a judgment or order of a county court² may be recovered, in case of default or failure of payment, forthwith or at the time or times and in the manner thereby directed, by execution against the goods of the party³ against whom the judgment or order was obtained⁴. A judgment creditor⁵ desiring a warrant of execution to be issued must file⁶ a request in that behalf⁷ certifying (1) the amount remaining due under the judgment or order; and (2) where the order made is for payment of a sum of money by instalments⁸, that the whole or part of any instalment due remains unpaid and the amount for which the warrant is to be issued⁹.

The court officer¹⁰, on the application of the party prosecuting any such judgment or order, must issue a warrant of execution¹¹ in the nature of a writ of fieri facias¹² whereby the district judge¹³ is empowered to levy or cause to be levied by distress and sale of the goods, wherever they may be found within the district of the court, the money payable under the judgment or order and the costs of the execution¹⁴. The precise time of the making of the application to the court to issue such a warrant must be entered by the court officer in the record prescribed for the purpose¹⁵ and on the warrant¹⁶.

In or upon every warrant of execution issued from a county court against the goods of any person, the district judge must cause to be inserted or indorsed the total amount to be levied, inclusive of the fee for issuing the warrant but exclusive of the fees for its execution¹⁷.

It is the duty of every constable¹⁸ within the court's jurisdiction to assist in the execution of every such warrant¹⁹.

1 le subject to the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 8: see PARA 1227.

2 In the County Courts Act 1984, 'court' and 'county court' mean a court held for a district under that Act: s 147(1). As to county court districts see **COURTS** vol 10 (Reissue) PARAS 707-708.

3 As to parties liable to execution see PARA 1236 et seq. As to the description of parties see note 11.

4 County Courts Act 1984 s 85(1) (amended by SI 1991/724). As from a day to be appointed, the money may be recovered instead under a warrant under the County Courts Act 1984 s 85(2): s 85(1) (amended, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13, paras 68, 69(1), (2)). At the date at which this title states the law, no such day had been appointed.

5 As to the meaning of 'judgment creditor' see PARA 1236.

6 As to the meaning of 'filing' see PARA 1832 note 8.

7 For the prescribed form of request see *Practice Direction--Forms* PD 4 para 5, Table 3, Form N323; and see *The Civil Court Practice*. As to the use of the forms listed in Table 3 see PARA 14.

8 As to execution of orders for payment by instalments see PARA 1284.

9 CPR Sch 2 CCR Ord 26 r 1(1).

10 As to the meaning of 'court officer' see PARA 49 note 3.

11 For the prescribed form see *Practice Direction--Forms* PD 4 para 5, Table 3, Form N42. Where the name or address of the judgment creditor or the debtor as given in the request for the issue of a warrant of execution or delivery, judgment summons or warrant of committal differs from his name or address in the judgment or order sought to be enforced and the judgment creditor satisfies the court officer that the name or address as given in the request is applicable to the person concerned, the judgment creditor or the debtor, as the case may be, must be described in the warrant or judgment summons as 'CD of [name and address as given in the request] suing [or sued] as AD of [name and address in the judgment or order]': CPR Sch 2 CCR Ord 25 r 6. As to the meaning of 'debtor' see PARA 1236.

As from a day to be appointed, warrants of execution are renamed warrants of control: Tribunals, Courts and Enforcement Act 2007 s 62(4)(b) (not yet in force). At the date at which this title states the law, no day had been appointed for bringing this provision into force.

12 As to writs of fieri facias see PARA 1266.

13 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

14 County Courts Act 1984 s 85(2) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3); modified by CPR Sch 2 CCR Ord 26 r 1(1A)(a) (which provides that the court officer is to discharge the function of issuing a warrant of execution)).

As from a day to be appointed, the County Courts Act 1984 s 85(2) is amended by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 67, Sch 13 para 69(3), to the effect that the registrar, on the application of the party prosecuting any such judgment or order, must issue a warrant of control whereby any person authorised by or on behalf of the Lord Chancellor is empowered to use the procedure in the Tribunals, Courts and Enforcement Act 2007 Sch 12 (taking control of goods: see PARA 1386 et seq) to recover the money payable under the judgment or order. By the County Courts Act 1984 s 85(2A) (added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 Sch 13 para 69(4)), the person to whom such a warrant must be directed is to be determined in accordance with arrangements made by a person authorised by or on behalf of the Lord Chancellor. At the date at which this title states the law, no such day had been appointed.

15 le in the record prescribed for the purpose under the County Courts Act 1984 s 12: see **COURTS** vol 10 (Reissue) PARA 729. As to the district judge's responsibility for recording and giving information about warrants and orders see PARAS 1299, 1301.

16 County Courts Act 1984 s 85(3) (modified by CPR Sch 2 CCR Ord 26 r 1(1A)(b) (which provides that the court officer is to discharge the functions mentioned in the text to this note); repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 para 69(5), Sch 23 Pt 3; at the date at which this title states the law, no such day had been appointed).

17 County Courts Act 1984 s 87(1) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3)). As from a day to be appointed, the County Courts Act 1984 s 87(1) is amended by the Tribunals, Courts and Enforcement Act 2007 Sch 13 para 71(1), (2), substituting 'warrant of control' for 'warrant of execution' and the 'amount to be recovered' for the 'amount to be levied'. At the date at which this title states the law, no such day had been appointed. As to county court fees see PARA 87; and see *The Civil Court Practice*.

18 'Constable' means any person holding the office of constable: see **POLICE** vol 36(1) (2007 Reissue) PARA 101 et seq.

19 County Courts Act 1984 s 85(4). As to the execution of warrants see PARA 1302 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/B. COUNTY COURT WARRANTS OF EXECUTION, DELIVERY AND POSSESSION/(A) Warrants of Execution/1284. Issue of warrant of execution where order is for payment of money by instalments.

1284. Issue of warrant of execution where order is for payment of money by instalments.

Where a county court has made an order for payment of any sum of money by instalments, execution on the order must not be issued until after default in payment of some instalment according to the order¹. Rules of court may prescribe the cases in which execution is to issue if there is any such default and limit the amounts for which and the times at which execution may issue². Except so far as may be otherwise provided by rules of court made for those purposes, execution or successive executions may issue if there is any such default for the whole of the above-mentioned sum of money and costs then remaining unpaid or for such part as the court may order either at the time of the original order or at any subsequent time; but except so far as may be otherwise provided by such rules, no execution may issue unless at the time when it issues the whole or some part of an instalment which has already become due remains unpaid³.

The relevant rules provide that where the court⁴ has made an order for payment of a sum of money by instalments and default has been made in payment of such an instalment, a warrant of execution may be issued for the whole of that sum of money and costs then remaining unpaid or⁵ for such part as the judgment creditor⁶ may request, not being in the latter case less than £50 or the amount of one monthly instalment or, as the case may be, four weekly instalments, whichever is the greater⁷. However, in any such case no warrant must be issued unless at the time when it is issued (1) the whole or part of an instalment which has already become due remains unpaid; and (2) any warrant previously issued for part of the above-mentioned sum of money and costs has expired or has been satisfied or abandoned⁸.

Where a warrant is issued for the whole or part of the above-mentioned sum of money and costs, the court officer⁹ must, unless the district judge¹⁰ responsible for execution of the warrant directs otherwise, send a warning notice to the person against whom the warrant is issued and, where such a notice is sent, the warrant must not be levied until seven days thereafter¹¹.

1 County Courts Act 1984 s 86(1). As from a day to be appointed, the County Courts Act 1984 s 86(1) is amended by the Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13 paras 68, 70(1), (2), substituting 'a warrant of control to recover any of that sum' for 'execution on the order'. At the date at which this title states the law, no such day had been appointed.

2 County Courts Act 1984 s 86(2) (s 86(2), (3) amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(1), (2)). As from a day to be appointed, the County Courts Act 1984 s 86(2) is amended by the Tribunals, Courts and Enforcement Act 2007 Sch 13 para 70(3), to the effect that rules of court may prescribe the cases in which a warrant of control is to be issued if there is any such default and limit the amounts for which and the times at which a warrant of control may be issued. At the date at which this title states the law, no such day had been appointed.

3 County Courts Act 1984 s 86(3) (as amended: see note 2). As from a day to be appointed, the County Courts Act 1984 s 86(3) is amended by the Tribunals, Courts and Enforcement Act 2007 Sch 13 para 70(4), to the effect that except so far as may be otherwise provided by rules of court made for those purposes, a warrant or successive warrants of control may be issued if there is any such default for the whole of the above-mentioned sum of money and costs then remaining unpaid or for such part as the court may order either at the time of the original order or at any subsequent time; but except so far as may be otherwise provided by such rules, no warrant of control may be issued unless when it is issued the whole or some part of an instalment

which has already become due remains unpaid. At the date at which this title states the law, no such day had been appointed.

4 As to the meaning of 'court' see PARA 22.

5 le subject to CPR Sch 2 CCR Ord 26 r 1(3): see the text and note 8.

6 As to the meaning of 'judgment creditor' see PARA 1236.

7 CPR Sch 2 CCR Ord 26 r 1(2).

8 CPR Sch 2 CCR Ord 26 r 1(3).

9 As to the meaning of 'court officer' see PARA 49 note 3.

10 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

11 CPR Sch 2 CCR Ord 26 r 1(4). For forms of notice see *Practice Direction--Forms* PD 4, para 5, Table 3, Forms N326, N327; and see *The Civil Court Practice*. As to the use of the forms listed in Table 3 see PARA 14. As to levying execution see PARA 1315 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/B. COUNTY COURT WARRANTS OF EXECUTION, DELIVERY AND POSSESSION/(A) Warrants of Execution/1285. Cases where court's permission is required for issue of warrant.

1285. Cases where court's permission is required for issue of warrant.

Without prejudice to any enactment, rule or direction by virtue of which a person is required to obtain the permission of the court¹ for the issue of a warrant or to proceed to execution or otherwise to the enforcement of a judgment or order², a warrant of execution may not issue without the permission of the court where:

- 920 (1) six years or more have elapsed since the date of the judgment or order³;
- 921 (2) any change has taken place, whether by death or otherwise, in the parties entitled to enforce the judgment or order or liable to have it enforced against them⁴;
- 922 (3) the judgment or order is against the assets of a deceased person coming into the hands of his executors or administrators after the date of the judgment or order and it is sought to issue execution against such assets⁵; or
- 923 (4) any goods to be seized under a warrant of execution are in the hands of a receiver appointed by a court⁶.

An application for permission must be supported by a witness statement or affidavit⁷ establishing the applicant's right to relief and may be made without notice being served⁸ on any other party in the first instance; but the court may direct the application notice to be served on such persons as it thinks fit⁹. Where, by reason of one and the same event, a person seeks permission under head (2) above to enforce more judgments or orders than one, he may make one application only, specifying in a schedule all the judgments or orders in respect of which it is made¹⁰.

Where it is desired to enforce by warrant of execution a judgment or order of the High Court, or a judgment, order, decree or award which is or has become enforceable as if it were a judgment of the High Court, permission to issue execution is not required if permission has already been given by the High Court¹¹.

1 See eg the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 2; and PARA 1241. As to the meaning of 'court' see PARA 22.

2 CPR Sch 2 CCR Ord 26 r 5(4).

3 CPR Sch 2 CCR Ord 26 r 5(1)(a). Cf CPR Sch 1 RSC Ord 46 r 2(1)(a): see PARA 1274 head (1) in the text. As to limitation periods see generally **LIMITATION PERIODS**.

4 CPR Sch 2 CCR Ord 26 r 5(1)(b). Cf CPR Sch 1 RSC Ord 46 r 2(1)(b): see PARA 1274 head (2) in the text. As to parties to enforcement see PARA 1236 et seq.

5 CPR Sch 2 CCR Ord 26 r 5(1)(c). Cf CPR Sch 1 RSC Ord 46 r 2(1)(c): see PARA 1274 at head (3) in the text. As to enforcement against executors or administrators see PARA 1240.

6 CPR Sch 2 CCR Ord 26 r 5(1)(d). Cf CPR Sch 1 RSC Ord 46 r 2(1)(e): see PARA 1274 head (5) in the text. As to receivers see PARA 1497 et seq; and **RECEIVERS**.

7 As to witness statements and affidavits see PARA 981 et seq.

8 As to the meaning of 'service' see PARA 138 note 2.

9 CPR Sch 2 CCR Ord 26 r 5(2).

10 CPR Sch 2 CCR Ord 26 r 5(3). If the application notice is directed to be served on any person, it need set out only such part of the application as affects him: CPR Sch 2 CCR Ord 26 r 5(3).

11 CPR Sch 2 CCR Ord 26 r 2(1), (2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/B. COUNTY COURT WARRANTS OF EXECUTION, DELIVERY AND POSSESSION/(A) Warrants of Execution/1286. Issue of separate warrants in respect of money and costs.

1286. Issue of separate warrants in respect of money and costs.

Where judgment is given or an order made in a county court for payment otherwise than by instalments of a sum of money and costs to be assessed in accordance with the procedure for detailed assessment of costs¹ and default is made in payment of the sum of money before the costs have been assessed, a warrant of execution may issue² for recovery of the sum of money and a separate warrant may issue subsequently for the recovery of the costs if default is made in payment of them³.

1 In accordance with CPR Pt 47: see PARA 1779 et seq.

2 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

3 CPR Sch 2 CCR Ord 26 r 1(5). Cf CPR Sch 1 RSC Ord 47 r 3(1): see PARA 1277.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/B. COUNTY COURT WARRANTS OF EXECUTION, DELIVERY AND POSSESSION/(A) Warrants of Execution/1287. Issue of concurrent warrants.

1287. Issue of concurrent warrants.

Two or more warrants of execution may be issued¹ concurrently for execution in different districts², but no more must be levied³ under all the warrants together than is authorised to be levied under one of them; and the costs of more than one such warrant are not to be allowed against the debtor⁴ except by order of the court⁵.

1 As to the issue of warrants of execution see PARAS 1283, 1284; and as to when permission is required see PARA 1285.

2 As to county court districts see **COURTS** vol 10 (Reissue) PARAS 707-708.

3 As to levying execution see PARA 1315 et seq.

4 As to the meaning of 'judgment debtor' see PARA 1236.

5 CPR Sch 2 CCR Ord 26 r 4. The equivalent High Court provision has been revoked. As to the meaning of 'court' see PARA 22. As to the costs of execution see PARA 1374.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/B. COUNTY COURT WARRANTS OF EXECUTION, DELIVERY AND POSSESSION/(A) Warrants of Execution/1288. Execution of High Court judgment.

1288. Execution of High Court judgment.

Where it is desired to enforce by warrant of execution¹ a judgment or order of the High Court, or a judgment, order, decree or award which is or has become enforceable as if it were a judgment of the High Court, the request for a warrant of execution to be issued² may be filed³ in any county court in the district⁴ of which execution is to be levied⁵. Any restriction imposed by the relevant rules⁶ on the issue of execution applies as if the judgment, order, decree or award were a judgment or order of the county court⁷, except that permission to issue execution is not required if permission has already been given by the High Court⁸.

Notice of the issue of the warrant must be sent by the county court to the High Court⁹.

1 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

2 Ie the request referred to in CPR Sch 2 CCR Ord 26 r 1(1): see PARA 1283.

3 As to the meaning of 'filing' see PARA 1832 note 8.

4 As to county court districts see **COURTS** vol 10 (Reissue) PARAS 707-708.

5 CPR Sch 2 CCR Ord 26 r 2(1). As to levying execution see PARA 1315 et seq.

6 Ie imposed by CPR Sch 2 CCR Ord 26: see PARA 1283 et seq, PARA 1288 et seq.

7 CPR Sch 2 CCR Ord 26 r 2(2).

8 See CPR Sch 2 CCR Ord 26 r 2(2); and PARA 1285.

9 CPR Sch 2 CCR Ord 26 r 2(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/B. COUNTY COURT WARRANTS OF EXECUTION, DELIVERY AND POSSESSION/(A) Warrants of Execution/1289. Execution against a farmer.

1289. Execution against a farmer.

If after the issue of a warrant of execution¹ the district judge² for the district³ in which the warrant is to be executed has reason to believe that the debtor⁴ is a farmer, the execution creditor must, if so required by the district judge, furnish him with an official certificate, dated not more than three days beforehand, of the result of a search at the Land Registry as to the existence of any charge registered against the debtor under the Agricultural Credits Act 1928⁵.

1 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

2 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

3 As to county court districts see **COURTS** vol 10 (Reissue) PARAS 707-708.

4 As to the meaning of 'judgment debtor' see PARA 1236.

5 CPR Sch 2 CCR Ord 26 r 3. As to agricultural charges see **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1328 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/B. COUNTY COURT WARRANTS OF EXECUTION, DELIVERY AND POSSESSION/(A) Warrants of Execution/1290. Duration and renewal of warrant.

1290. Duration and renewal of warrant.

A warrant of execution¹ is valid for the purpose of execution in the first instance for 12 months beginning with the date of its issue, but if not wholly executed², it may be renewed from time to time, by order of the court³, for a period of 12 months at any one time, beginning with the day next following that on which it would otherwise expire, if an application for renewal is made before that day or such later day, if any, as the court may allow⁴. A note of any such renewal must be indorsed on the warrant and it is entitled to priority according to the time of its original issue or, where appropriate, its receipt by the district judge⁵ responsible for its execution⁶.

1 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

2 As to levying execution see PARA 1315 et seq.

3 As to the meaning of 'court' see PARA 22.

4 CPR Sch 2 CCR Ord 26 r 6(1). Cf CPR Sch 1 RSC Ord 46 r 8(1), (2): see PARAS 1279-1280.

5 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

6 CPR Sch 2 CCR Ord 26 r 6(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/B. COUNTY COURT WARRANTS OF EXECUTION, DELIVERY AND POSSESSION/(B) Warrants of Delivery and Possession/1291. Issue etc of warrants of delivery.

(B) WARRANTS OF DELIVERY AND POSSESSION

1291. Issue etc of warrants of delivery.

The rules relating to application for, the issue of and the duration and renewal of warrants of execution¹ have effect, so far as applicable and with the necessary modifications, in relation to warrants of delivery² as they have effect in relation to warrants of execution³.

Where a warrant of delivery is issued, the judgment creditor⁴ is entitled, by the same or a separate warrant, to execution against the debtor's⁵ goods for any money payable under the judgment or order⁶ which is to be enforced by the warrant of delivery⁷. Where a judgment or order is given or made for the delivery of goods or payment of their value and a warrant is issued to recover the goods or their value, money paid into court under the warrant must be appropriated first to any sum of money and costs awarded⁸.

Nothing in these provisions prejudices any power to enforce a judgment or order for the delivery of goods by an order of committal⁹.

1 Ie CPR Sch 2 CCR Ord 26 rr 1-6: see PARA 1283 et seq.

2 As to warrants of delivery see PARA 1248. For the prescribed forms see *Practice Direction--Forms* PD 4 para 5, Table 3 Form N46 (warrant of delivery and execution for damages and costs), Form N48 (warrant of delivery, where, if goods are not returned, levy is to be made for their value); and see *The Civil Court Practice*. As to the use of the forms listed in Table 3 see PARA 14.

3 CPR Sch 2 CCR Ord 26 r 16(5).

4 As to the meaning of 'judgment creditor' see PARA 1236.

5 As to the meaning of 'judgment debtor' see PARA 1236.

6 As to the meaning of 'judgment or order' see PARA 1226.

7 CPR Sch 2 CCR Ord 26 r 16(4).

8 CPR Sch 2 CCR Ord 26 r 16(4A).

9 CPR Sch 2 CCR Ord 26 r 18. As to orders of committal see PARAS 1249, 1514 et seq; and **CONTEMPT OF COURT**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/B. COUNTY COURT WARRANTS OF EXECUTION, DELIVERY AND POSSESSION/(B) Warrants of Delivery and Possession/1292. Issue etc of warrants of possession.

1292. Issue etc of warrants of possession.

The person desiring a warrant of possession¹ to be issued must file² a request certifying that the land which is subject of the judgment or order³ has not been vacated⁴. Where a warrant of possession is issued, the judgment creditor⁵ is entitled, by the same or a separate warrant, to execution against the debtor's⁶ goods for any money payable under the judgment or order which is to be enforced by the warrant of possession⁷. In such a case, or where an order for possession has been suspended on terms as to payment of a sum of money by instalments, the judgment creditor must certify in his request (1) the amount of money remaining due under the judgment or order; and (2) that the whole or part of any instalment due remains unpaid⁸.

The duration of any warrant of possession issued by a county court to enforce a judgment or order for the recovery of land or for the delivery of possession of land is such as may be fixed by or in accordance with rules of court⁹. The rules relating to permission to issue warrants of execution¹⁰ and the duration and renewal of such warrants¹¹ apply, with the necessary modifications, in relation to a warrant of possession as they apply in relation to a warrant of execution¹².

Nothing in the above provisions prejudices any power to enforce a judgment or order for the recovery of land by an order of committal¹³.

Special provision is made in relation to warrants to enforce an order for possession in a possession claim against trespassers¹⁴ under Part 55 of the Civil Procedure Rules¹⁵. Such a warrant for possession may be issued at any time after the making of the order¹⁶; but no such warrant of possession must be issued after the expiry of three months from the date of the order without the permission of the court¹⁷. An application for such permission may be made without notice being served¹⁸ on any other party unless the court otherwise directs¹⁹. Nothing in this provision authorises the issue of a warrant of possession before the date on which possession is ordered to be given²⁰.

1 As to warrants of possession see PARA 1247.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 As to the meaning of 'judgment or order' see PARA 1226.

4 CPR Sch 2 CCR Ord 26 r 17(2). For the prescribed form of warrant see *Practice Direction--Forms* PD 4 para 5, Table 3, Form N49; and see *The Civil Court Practice*. As to the use of the forms listed in Table 3 see PARA 14.

A warrant of possession issued before the date on which possession is to be given up pursuant to the court order is a nullity: *Bell v Tuohy* [2002] EWCA Civ 423, [2002] 3 All ER 975, [2002] All ER (D) 449 (Mar).

5 As to the meaning of 'judgment creditor' see PARA 1236.

6 As to the meaning of 'debtor' see PARA 1236.

7 CPR Sch 2 CCR Ord 26 r 17(3).

8 CPR Sch 2 CCR Ord 26 r 17(3A).

9 County Courts Act 1984 s 111(2) (amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(1), (2)).

10 le CPR Sch 2 CCR Ord 26 r 5: see PARA 1285. Natural justice does not require that a tenant should be given notice of an application to issue a warrant for possession in all cases: see *Jephson Homes Housing Association v Moisejevs* [2001] 2 All ER 901, 33 HLR 594, CA, applying *Leicester City Council v Aldwinckle* (1991) 24 HLR 40, CA.

11 le CPR Sch 2 CCR Ord 26 r 6: see PARA 1290.

12 CPR Sch 2 CCR Ord 26 r 17(6).

13 CPR Sch 2 CCR Ord 26 r 18. However, it is generally undesirable that a penal notice should be attached to a possession order, unless there are good and sufficient grounds. The normal way to enforce a possession order is by requesting and obtaining the issue of a warrant of possession, and if the last resort of a contempt application appears necessary, it is normally more appropriate for the contempt application to be based primarily on the defendant's obstruction of the bailiff when executing the warrant: see *Bell v Tuohy* [2002] EWCA Civ 423, [2002] 3 All ER 975, [2002] All ER (D) 449 (Mar). As to orders for committal see PARAS 1249, 1514 et seq; and **CONTEMPT OF COURT**.

14 As to the meaning of 'possession claim against trespassers' see PARA 1227 note 5.

15 See CPR Sch 2 CCR Ord 24 r 6; and the text and notes 15-19. As to possession claims against trespassers under CPR Pt 55 see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 660 et seq; **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1129 et seq. CPR Sch 2 CCR Ord 26 r 17 (see the text and notes 1-12) does not apply to the enforcement of an interim possession order ('IPO') under CPR Pt 55: see CPR 55.26(3).

16 CPR Sch 2 CCR Ord 24 r 6(1). For the prescribed form of warrant see *Practice Direction--Forms* PD 4 para 5, Table 3, Form N52; and see *The Civil Court Practice*.

17 CPR Sch 2 CCR Ord 24 r 6(2).

18 As to the meaning of 'service' see PARA 138 note 2.

19 See note 16.

20 CPR Sch 2 CCR Ord 24 r 6(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/B. COUNTY COURT WARRANTS OF EXECUTION, DELIVERY AND POSSESSION/(B) Warrants of Delivery and Possession/1293. Issue etc of warrant of restitution.

1293. Issue etc of warrant of restitution.

A warrant of restitution may be issued, with the permission of the court¹, in aid of any warrant of possession². An application for permission may be made without notice being served³ on any other party⁴. The application must be supported by evidence of wrongful re-entry into possession following the execution of the warrant of possession and of such further facts as would, in the High Court, enable the judgment creditor⁵ to have a writ of restitution⁶ issued⁷.

The rules relating to permission to issue warrants of execution⁸ and the duration and renewal of such warrants⁹ apply, with the necessary modifications, in relation to such a warrant in aid of a warrant of possession as they apply in relation to a warrant of execution¹⁰.

Nothing in the above provisions prejudices any power to enforce a judgment or order for the recovery of land by an order of committal¹¹.

Subject to the above provisions¹², a warrant of restitution may be issued in aid of a warrant of possession to enforce an order for possession in a possession claim against trespassers¹³.

1 As to the meaning of 'court' see PARA 22.

2 CPR Sch 2 CCR Ord 26 r 17(4).

3 As to the meaning of 'service' see PARA 138 note 2.

4 CPR Sch 2 CCR Ord 26 r 17(5). For the prescribed form of warrant of restitution see *Practice Direction--Forms* PD 4 para 5, Table 3, Form N50; and see *The Civil Court Practice*. As to the use of the forms listed in Table 3 see PARA 14.

5 As to the meaning of 'judgment creditor' see PARA 1236.

6 As to writs of restitution see PARA 1270.

7 See note 4.

8 Ie CPR Sch 2 CCR Ord 26 r 5: see PARA 1285.

9 Ie CPR Sch 2 CCR Ord 26 r 6: see PARA 1290.

10 CPR Sch 2 CCR Ord 26 r 17(6).

11 CPR Sch 2 CCR Ord 26 r 18. As to orders of committal see PARAS 1249, 1514 et seq; and **CONTEMPT OF COURT**. See also PARA 1292 note 13.

12 Ie subject to CPR Sch 2 CCR Ord 26 r 17: see the text and notes 1-10; and PARA 1292.

13 CPR Sch 2 CCR Ord 24 r 6(1). As to the meaning of 'possession claim against trespassers' see PARA 1227 note 5; and as to possession proceedings under CPR Pt 55 see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 660 et seq; **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1129 et seq. For the prescribed form of warrant of restitution see *Practice Direction--Forms* PD 4 para 5, Table 3, Form N51; and see *The Civil Court Practice*. CPR Sch 2 CCR Ord 26 r 17 (see the text and notes 1-10) does not apply to the enforcement of an interim possession order ('IPO') under CPR Pt 55: see CPR 55.26(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/C. EFFECT OF WRITS AND WARRANTS/(A) High Court Writs of Execution/1294. Effect of writs of execution against goods.

C. EFFECT OF WRITS AND WARRANTS

(A) HIGH COURT WRITS OF EXECUTION

1294. Effect of writs of execution against goods.

A writ of fieri facias¹ or other writ of execution² against goods binds the property³ in the goods of the execution debtor⁴ from the time when the writ is received by the person who is under a duty to indorse it⁵. Such a writ does not, however, prejudice the title to any goods of the execution debtor acquired by a person in good faith⁶ and for valuable consideration⁷ unless the person acquiring goods of the execution debtor had notice, at the time of the acquisition:

- 924 (1) that the writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been received by the person who was under a duty to indorse it but had not been executed⁸; or
- 925 (2) that an application for the issue of a warrant of execution against the goods of the execution debtor had been made to the district judge of a county court⁹ and the warrant issued on the application either remained unexecuted¹⁰ in the hands of the district judge of the court from which it was issued, or had been sent for execution to, and received by, the district judge of another county court and remained unexecuted in the hands of that district judge¹¹.

1 As to writs of fieri facias see PARA 1266.

2 As to writs of execution see PARA 1265 et seq.

3 I.e. the property cannot be conveyed except subject to the right of the execution creditor: *Woodland v Fuller* (1840) 11 Ad & El 859 (decided under earlier legislation). For these purposes, 'property' means the general property in goods, and not merely a special property: Courts Act 2003 s 99(1), Sch 7 para 8(5) (repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 148, 151(1), (4), Sch 23 Pt 3; at the date at which this title states the law, no such day had been appointed).

4 For these purposes, any reference to the goods of the execution debtor includes a reference to anything else of his that may lawfully be seized in execution: Courts Act 2003 Sch 7 para 8(7). As to goods that may be seized see PARA 1315.

5 Courts Act 2003 Sch 7 para 8(1). Schedule 7 para 8 applies to any writ of execution against goods which is issued from the High Court: Sch 7 para 6. As from a day to be appointed, however, Sch 7 para 8 does not apply to any writ that confers power to use the procedure in the Tribunals, Courts and Enforcement Act 2007 Sch 12 (see PARA 1386 et seq), but does apply to any other writ of execution against goods which is issued from the High Court: Courts Act 2003 Sch 7 para 6(2) (Sch 7 para 6 prospectively substituted by the Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13 paras 148, 151(1), (3)). At the date at which this title states the law, no such day had been appointed.

6 For these purposes, a thing is to be treated as done in good faith if it is in fact done honestly, whether it is done negligently or not: Courts Act 2003 Sch 7 para 8(6).

7 Courts Act 2003 Sch 7 para 8(2). As to what constitutes valuable consideration see **CONTRACT** vol 9(1) (Reissue) PARA 728 et seq.

8 Courts Act 2003 Sch 7 para 8(3).

9 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

10 The words 'remain unexecuted' do not include the case where the goods have actually been seized but are not in the physical possession of the enforcement officer or district judge: see *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd* [1966] 1 QB 764, [1964] 2 All ER 732 (decided under earlier legislation).

11 Courts Act 2003 Sch 7 para 8(4). As to execution out of the district of the county court see PARA 1300.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/C. EFFECT OF WRITS AND WARRANTS/(A) High Court Writs of Execution/1295. How goods are bound by the writ.

1295. How goods are bound by the writ.

When it is said that the debtor's goods, or the property in them, are 'bound'¹, what is meant is that the enforcement officer acquires a legal right to seize the goods. Notwithstanding the binding effect of the writ, the ownership continues in the judgment debtor² until the sale, and he can legally, until seizure, deal with the goods himself³ or, until sale, pass the property to others⁴. Any transfer or assignment of the goods after the date at which the binding power of the writ operates⁵ will (except in the case of a purchaser in good faith for valuable consideration and without notice⁶) be subject to the enforcement officer's right to follow up and seize the goods under the writ⁷.

1 See PARA 1294.

2 *Payne v Drewe* (1804) 4 East 523; *Lucas v Nockells* (1833) 10 Bing 157, HL; *Samuel v Duke* (1838) 3 M & W 622; *Woodland v Fuller* (1840) 11 Ad & El 859; *Re Clarke* [1898] 1 Ch 336, CA; and see *Giles v Grover* (1832) 9 Bing 128, HL (all decided under earlier legislation).

3 Eg by removing them out of the county, or out of the bailiwick of the enforcement officer to whom the writ has been issued: see *Re Davies, ex p Williams* (1872) 7 Ch App 314 (decided under earlier legislation).

4 *Re Davies, ex p Williams* (1872) 7 Ch App 314; but cf *Gladstone v Padwick* (1871) LR 6 Exch 203 at 210, per Martin B, where, however, it is probable that he was speaking of the inability to give a 'title' good enough to oust the right of seizure; see note 7.

5 See PARA 1294.

6 See note 5.

7 *Samuel v Duke* (1838) 3 M & W 622 at 629 per Parke B (the defendant may convey his property, but 'the sheriff has a right to the execution notwithstanding the conveyance'); and see *Re Davies, ex p Williams* (1872) 7 Ch App 314; *McPherson v Temiskaming Lumber Co Ltd* [1913] AC 145, PC; *Re Cooper (a bankrupt), ex p Trustee v Peterborough and Huntingdon County Courts Registrar and High Bailiff* [1958] Ch 922, [1958] 3 All ER 97, DC (all decided under earlier legislation).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/C. EFFECT OF WRITS AND WARRANTS/(A) High Court Writs of Execution/1296. Exceptions to binding power.

1296. Exceptions to binding power.

There are the following exceptions to the rules as to the binding power of the writ¹: (1) no goods will be bound as against the Crown²; (2) no goods will be bound as against a purchaser in good faith for valuable consideration without notice of the delivery of a writ of execution³; (3) no goods will be bound as against a purchaser from the enforcement officer under an execution which should have been postponed⁴; and (4) no goods will be bound against the judgment debtor's trustee in bankruptcy⁵, or as against the liquidator where the judgment debtor is a company, unless the execution is completed before the date of the bankruptcy order or the commencement of the winding up, as the case may be⁶.

1 As to the binding power of the writ see PARA 1295.

2 *Jeanes v Wilkins* (1749) 1 Ves Sen 195; *R v Wells* (1807) 16 East 278; *R v Sloper and Allen* (1818) 6 Price 114.

3 See the Courts Act 2003 s 99(1), Sch 7 para 8(2); and PARA 1294. It was held under earlier legislation that a creditor who had executed a deed of assignment to himself as trustee for the judgment debtor's creditors was a purchaser for valuable consideration: *Beebee & Co v Turner's Successors* (1931) 48 TLR 61. The burden of proof of good faith etc lies upon the claimant purchaser: *Murgatroyd v Wright* [1907] 2 KB 333. Cf *McPherson v Temiskaming Lumber Co Ltd* [1913] AC 145, PC (execution on timber cut by assignee of licence under assignment made subsequently to issue of writ).

4 See PARA 1297.

5 See PARA 1355; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 678 et seq.

6 See PARA 1354; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 882 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/C. EFFECT OF WRITS AND WARRANTS/(A) High Court Writs of Execution/1297. Priority of writs.

1297. Priority of writs.

If several writs of the same description are delivered to the enforcement officer by different judgment creditors for execution against the same judgment debtor, he must execute them in order, according to the day and hour at which each was delivered to him¹. A renewed writ ranks according to the time of the delivery of the original². Delivery to the sheriff's deputy in London has been held to be equivalent to delivery to the sheriff himself³. If the first judgment creditor orders the enforcement officer to suspend execution he will lose his priority if another writ is delivered during the suspension⁴. However, the priority of a writ is not necessarily lost by its temporary invalidity, since priority is a matter of equity and accordingly, if the temporary invalidity of the writ is not caused by any fault or voluntary action or inaction on the part of the creditor but by an erroneous decision of a lower court, the court will ensure that when the matter is put right the creditor does not lose the benefit of action taken under what is subsequently held to have been throughout a valid judgment⁵.

If several writs are handed to the enforcement officer at the same moment by one solicitor acting for several judgment creditors there is no priority; the enforcement officer must execute them simultaneously and make a return to that effect⁶, and he cannot call upon the solicitor to say which is to be executed first⁷.

If the enforcement officer executes one writ which ought to have been postponed to another, and the goods are actually sold, the purchaser obtains a good title, and the money must be handed to the creditor whose writ was executed⁸, unless he had notice of the prior writ⁹; but the creditor whose writ was entitled to priority has a cause of action against the enforcement officer¹⁰.

If several writs have to be executed against the same judgment debtor, the enforcement officer need not make separate seizures, but one seizure enures for the benefit of all in order of priority¹¹.

1 *Hutchinson v Johnston* (1787) 1 Term Rep 729; *Hunt v Hooper* (1844) 12 M & W 664; *Guest v Cowbridge Rly Co* (1868) LR 6 Eq 619; and see the Courts Act 2003 s 99(1), Sch 7 para 8(1); and PARA 1294.

2 See CPR Sch 1 RSC Ord 46 r 8(4); and PARA 1280.

3 *Woodland v Fuller* (1840) 11 Ad & El 859 at 867 per Patteson J.

4 *Hunt v Hooper* (1844) 12 M & W 664.

5 *Bankers Trust Co v Galadari (Chase Manhattan Bank NA intervening)* [1987] QB 222, [1986] 3 All ER 794, CA (writ issued to enforce a judgment set aside and then restored).

6 As to the return to the writ see PARA 1282.

7 *Ashworth v Earl of Uxbridge* (1842) 12 LJQB 39.

8 *Smalcomb v Buckingham* (1697) 5 Mod Rep 376; *Rybot v Peckham* (1778) 1 Term Rep 731n; *Payne v Drewe* (1804) 4 East 523.

9 *Hutchinson v Johnston* (1787) 1 Term Rep 729.

10 *Smalcomb v Buckingham* (1697) 5 Mod Rep 376; *Payne v Drewe* (1804) 4 East 523.

11 *Jones v Atherton* (1816) 7 Taunt 56; *Re Henderson, ex p Shaw* [1884] WN 60, CA; *Re Hille India Rubber Co (No 2)* [1897] WN 20.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/C. EFFECT OF WRITS AND WARRANTS/(B) County Court Warrants of Execution/1298. Effect of warrants of execution.

(B) COUNTY COURT WARRANTS OF EXECUTION

1298. Effect of warrants of execution.

Subject to the following provision, and to the provisions relating to execution out of the court's jurisdiction¹, a warrant of execution² against goods issued from a county court binds the property³ in the goods of the execution debtor as from the time at which application for the warrant was made to the district judge of the county court⁴. Such a warrant does not, however, prejudice the title to any goods of the execution debtor acquired by a person in good faith⁵ and for valuable consideration⁶ unless he had at the time when he acquired his title:

- 926 (1) notice that an application for the issue of a warrant of execution against the goods of the execution debtor had been made to the district judge of a county court and that the warrant issued on the application either remained unexecuted⁷ in the hands of the district judge of the court from which it was issued or had been sent for execution to, and received by, the district judge of another county court, and remained unexecuted in the hands of the district judge of that court; or
- 927 (2) notice that a writ of fieri facias⁸ or other writ of execution⁹ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of an enforcement officer or other officer charged with the execution of the writ¹⁰.

The effect of the binding power of a warrant of execution is similar to that of a writ of execution¹¹, and similar exceptions apply¹². The priority of several warrants of execution issued by a county court against the same debtor is determined by the time at which the applications for them were made¹³, except where the warrant is to be executed outside the jurisdiction of that court, in which case the property in the goods is bound from the time at which the district judge of the court which is to execute the warrant receives it¹⁴. The priority of a warrant is not necessarily lost by its temporary invalidity¹⁵.

1 le subject to the County Courts Act 1984 s 103(2): see PARA 1300.

2 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

3 le the property cannot be conveyed except subject to the right of the execution creditor: *Woodland v Fuller* (1840) 11 Ad & El 859 (decided under earlier legislation). For these purposes, 'property' means the general property in goods, and not merely a special property: County Courts Act 1984 s 99(4)(a).

4 County Courts Act 1984 s 99(1) (s 99 amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3)). It is the duty of the district judge, without fee, on application for a warrant of execution being made to him to indorse on its back the hour, day, month and year when he received the application: County Courts Act 1984 s 99(3) (as so amended). As to district judges in county courts see PARA 60; and **COURTS** vol 10 (Reissue) PARA 728 et seq.

5 For these purposes, a thing is to be treated as done in good faith if it is in fact done honestly whether it is done negligently or not: County Courts Act 1984 s 99(4)(c).

6 As to what constitutes valuable consideration see **CONTRACT** vol 9(1) (Reissue) PARA 728 et seq.

7 As to the meaning of 'remain unexecuted' see PARA 1294 note 10.

8 As to writs of fieri facias see PARA 1266.

9 As to writs of execution see PARA 1265 et seq.

10 County Courts Act 1984 s 99(2) (as amended (see note 4); further amended by the Courts Act 2003 s 109(1), Sch 8 para 274(1), (2)). 'Enforcement officer' means an individual who is authorised to act as an enforcement officer under the Courts Act 2003: County Courts Act 1984 s 99(4)(za) (added by the Courts Act 2003 s 109(1), Sch 8 para 274(3)).

The County Courts Act 1984 s 99 is substituted by the Tribunals, Courts and Enforcement Act 2007 s 69 as from a day to be appointed. From such date, the provisions apply to (1) a warrant of control issued under the County Courts Act 1984 85(2); (2) a warrant of delivery or of possession, but only if it includes a power to take control of and sell goods to recover a sum of money and only for the purposes of exercising that power: s 99(1) (as so substituted). The person to whom the warrant is directed must, as soon as possible after receiving it, endorse it by inserting on the back the date and time when he received it: s 99(2) (as so substituted). No fee may be charged for endorsing a warrant under s 99: s 99(3) (as so substituted). As from a day to be appointed, s 99 is repealed by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 74, Sch 23 Pt 3. At the date at which this title states the law, no day had been appointed for either purpose.

11 See PARA 1295.

12 See PARA 1296.

13 See the County Courts Act 1984 s 99(1); and the text and notes 1-4; and see *Murgatroyd v Wright*[1907] 2 KB 333.

14 See the County Courts Act 1984 s 103(2) (prospectively repealed); and PARA 1300.

15 See PARA 1297 text and note 5 (citing a case regarding High Court writs, but it is apprehended that the same equitable principles will apply).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/C. EFFECT OF WRITS AND WARRANTS/(B) County Court Warrants of Execution/1299. Records to be kept.

1299. Records to be kept.

Every district judge¹ by whom a warrant or order is issued² or received³ for execution must⁴ from time to time state in the records of his court⁵ what has been done in the execution of the warrant or order⁶. If the warrant or order has not been executed within one month from the date of its issue or receipt by him, the court officer⁷ of the court responsible for its execution must, at the end of that month and every subsequent month during which the warrant remains outstanding, send notice of the reason for non-execution to the judgment creditor⁸ and, if the warrant or order was received from another court, to that court⁹.

The district judge responsible for executing a warrant or order must give such information respecting it as may reasonably be required by the judgment creditor and, if the warrant or order was received by him from another court, by the district judge of that court¹⁰.

1 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

2 In practice, warrants of execution are issued by court officers: see PARA 1283.

3 As to execution out of the jurisdiction of a county court see PARA 1300.

4 Ie subject to CPR Sch 2 CCR Ord 25 r 7(1A): see PARA 1300.

5 As to county court records see **COURTS** vol 10 (Reissue) PARA 729; and PARA 1147.

6 CPR Sch 2 CCR Ord 25 r 7(1).

7 As to the meaning of 'court officer' see PARA 49 note 3.

8 As to the meaning of 'judgment creditor' see PARA 1236.

9 CPR Sch 2 CCR Ord 25 r 7(2).

10 CPR Sch 2 CCR Ord 25 r 7(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/C. EFFECT OF WRITS AND WARRANTS/(B) County Court Warrants of Execution/1300. Execution out of county court's jurisdiction; in general.

1300. Execution out of county court's jurisdiction; in general.

Where a warrant of execution¹ has been issued from a county court (a 'home court') against the goods of any person and the goods are out of the jurisdiction of that court², the court officer³ of that court may send the warrant of execution to the district judge⁴ of any other county court within the jurisdiction of which the goods are or are believed to be, with a warrant indorsed on it or annexed to it requiring execution of the original warrant⁵.

The original warrant binds the property⁶ in goods of the execution debtor which are within the jurisdiction of the court to which it is sent as from the time when it is received by the district judge of that court⁷. It is the duty of the district judge of the court to which the warrant is sent, without fee, on receipt of the warrant to indorse on its back the hour, day, month and year when he received it⁸.

On the receipt of the warrant, the district judge of the other county court must act in all respects as if the original warrant of execution had been issued by the court of which he is district judge and must within the prescribed time report to the district judge of the home court what he has done in the execution of the warrant⁹ and pay over all moneys received¹⁰ in pursuance of the warrant¹¹.

Where a warrant of execution has been received from another court, the court to which it has been sent for execution (the 'foreign court') must return the warrant to the home court either on the execution of the warrant¹² or, if the warrant is not executed, on the making of a final return to the warrant or on suspension¹³ of the warrant¹⁴.

Where, after a warrant has been sent to a foreign court for execution but before a final return has been made to the warrant, the home court is notified of a payment made in respect of the sum for which the warrant is issued, the home court must send notice of the payment to the foreign court¹⁵. The powers to stay execution and suspend any judgment or order in connection with such warrants are discussed elsewhere in this title¹⁶.

1 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

2 As to county court districts see **COURTS** vol 10 (Reissue) PARAS 707-708.

3 As to county court officers see **COURTS** vol 10 (Reissue) PARA 726 et seq.

4 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

5 County Courts Act 1984 s 103(1) (modified by virtue of CPR Sch 2 CCR Ord 26 r 1(1A)(c), which provides that the court officer is to discharge the functions under this provision; the County Courts Act 1984 s 103 amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3)). As from a day to be appointed, the County Courts Act 1984 s 103 is repealed by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 76, Sch 23 Pt 3. At the date at which this title states the law, no such day had been appointed.

6 As to the binding effect of a warrant of execution see PARA 1298.

7 County Courts Act 1984 s 103(2) (as amended (see note 4) and prospectively repealed (see note 5)).

8 County Courts Act 1984 s 103(3) (as amended (see note 4) and prospectively repealed (see note 5)).

9 See CPR Sch 2 CCR Ord 25 r 7(2), (3); and PARA 1299.

10 Where money is received in pursuance of a warrant of execution or committal sent by one court to another court, the court to which it is sent for execution (the 'foreign court') must, subject to CPR Sch 2 CCR Ord 25 r 7(5) and to the Insolvency Act 1986 ss 183, 184 (see PARA 1354; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 882 et seq) and to s 346 (see PARA 1355; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 678 et seq), send the money to the judgment creditor in the manner prescribed by the Court Funds Rules 1987, SI 1987/821 (see PARA 1568 et seq) and, where the money is received in pursuance of a warrant of committal, make a return to the home court: CPR Sch 2 CCR Ord 25 r 7(4); Interpretation Act 1978 s 17(2)(a). Where, however, interpleader proceedings are pending, the court must not proceed in accordance with this provision until the interpleader proceedings are determined and the district judge must then make a return showing how the money is to be disposed of and, if any money is payable to the judgment creditor, the court must proceed in accordance with CPR Sch 2 CCR Ord 25 r 7(4): CPR Sch 2 CCR Ord 25 r 7(5). As to warrants of committal see PARA 1522; and **CONTEMPT OF COURT**; and as to interpleader proceedings see PARAS 1350, 1628 et seq.

11 County Courts Act 1984 s 103(4) (as amended (see note 4) and prospectively repealed (see note 5)).

12 As to levying execution see PARA 1315 et seq.

13 See under CPR Sch 2 CCR Ord 25 r 8 (see PARA 1363) or CPR Sch 2 CCR Ord 26 r 10 (see PARA 1364): CPR Sch 2 CCR Ord 25 r 7(7)(b)(ii).

14 CPR Sch 2 CCR Ord 25 r 7(7). CPR Sch 2 CCR Ord 25 r 7(1) (see PARA 1299) does not apply to the district judge of the home court, but when such a warrant is returned to the home court under r 7(7), the court officer of the home court must state in the records of his court what has been done in the execution of the warrant or order: CPR Sch 2 CCR Ord 25 r 7(1A). As to the meaning of 'court officer' see PARA 49 note 3; and as to county court records see **COURTS** vol 10 (Reissue) PARA 729; and PARA 1147.

15 CPR Sch 2 CCR Ord 26 r 14.

16 See PARAS 1363-1365.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(i) Writs and Warrants/C. EFFECT OF WRITS AND WARRANTS/(B) County Court Warrants of Execution/1301. Information as to writs and warrants of execution.

1301. Information as to writs and warrants of execution.

Where a writ¹ against the goods of any person issued from the High Court is delivered to an enforcement officer² who is under a duty to execute the writ or to a sheriff³, then on demand from the district judge⁴ of a county court that person must (1) in the case of an enforcement officer, by writing signed by that officer or a person acting under his authority; and (2) in the case of a sheriff, by writing signed by any clerk in the office of the under-sheriff⁵, inform the district judge of the precise time the writ was delivered to him⁶. A bailiff⁷ of a county court must on demand show his warrant⁸ to any enforcement officer, any person acting under the authority of an enforcement officer and any sheriff's officer⁹.

1 As to writs of execution see PARA 1265 et seq.

2 'Enforcement officer' means an individual who is authorised to act as an enforcement officer under the Courts Act 2003: County Courts Act 1984 s 104(4) (s 104 substituted by the Courts Act 2003 s 109(1), Sch 8 para 275).

3 As to enforcement officers see PARA 1258.

4 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

5 As to under-sheriffs see **SHERIFFS**.

6 County Courts Act 1984 s 104(1) (as substituted: see note 1). Any writing purporting to be signed as mentioned in s 104(1) and the endorsement on any warrant issued from a county court are respectively sufficient justification to any district judge, or enforcement officer or sheriff, acting on it: s 104(3) (as so substituted).

7 As to bailiffs see PARA 1259.

8 As to warrants of execution see PARA 1283 et seq.

9 County Courts Act 1984 s 104(2) (as substituted: see note 1). As from a day to be appointed, s 104(2) is amended by the Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13 paras 68, 77, substituting a reference to the person to whom a warrant issued by a county court for a reference to a bailiff of a county court. At the date at which this title states the law, no such day had been appointed.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(ii) Execution of Writs and Warrants/A. DATE AND TIME OF EXECUTION/1302. Execution not to be levied on certain days.

(ii) Execution of Writs and Warrants

A. DATE AND TIME OF EXECUTION

1302. Execution not to be levied on certain days.

Unless the court¹ orders otherwise, a writ of execution² or a warrant of execution³ to enforce a judgment or order⁴ must not be executed on a Sunday, Good Friday or Christmas Day⁵. This prohibition does not apply to an Admiralty claim in rem⁶.

1 As to the meaning of 'court' see PARA 22.

2 As to writs of execution see PARA 1265 et seq.

3 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

4 As to the meaning of 'judgment or order' see PARA 1226.

5 *Practice Direction--Execution* PD RSC O 46, CCR O 26 para 1.1. The *National Standards for Enforcement Agents* (May 2002, LCD), 'Times and Hours' recommends that enforcement should not be undertaken on bank holidays unless the court specifically orders otherwise or in situations where legislation permits it. Enforcement agents must be respectful of the religion and culture of others at all times. They must be aware of the dates for religious festivals and carefully consider the appropriateness of undertaking enforcement on any day of religious or cultural observance or during any major religious or cultural festival: *National Standards for Enforcement Agents* (May 2002, LCD), 'Times and Hours'. As to the national standards and their advisory status see PARA 1261.

6 *Practice Direction--Execution* PD RSC O 46, CCR O 26 para 1.2. As to Admiralty claims in rem see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 158 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(ii) Execution of Writs and Warrants/A. DATE AND TIME OF EXECUTION/1303. Hours during which enforcement is to be carried out.

1303. Hours during which enforcement is to be carried out.

It is recommended¹ that enforcement should only be carried out between the hours of 6 am and 9 pm². Existing legislation³ must be observed⁴.

1 See by the *National Standards for Enforcement Agents* (May 2002, LCD), 'Times and Hours'. As to the national standards and their advisory status see PARA 1261.

2 *National Standards for Enforcement Agents* (May 2002, LCD), 'Times and Hours'.

3 See eg the Administration of Justice Act 1970 s 40 (unlawful harassment of debtors); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 838. As to the protection of tenants from unlawful eviction and harassment see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 608-609.

4 See note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(ii) Execution of Writs and Warrants/B. GENERAL GUIDANCE FOR ENFORCEMENT AGENTS/1304. Vulnerable or hazardous situations.

B. GENERAL GUIDANCE FOR ENFORCEMENT AGENTS

1304. Vulnerable or hazardous situations.

The National Standards for Enforcement Agents recommend:

- 928 (1) that enforcement agents¹ should withdraw from domestic premises if the only person is, or appears to be, under the age of 18 years although, if appropriate, they may ask when the debtor² will be home³; and that they should withdraw without making inquiries if the only persons present are children who appear to be under the age of 12 years⁴;
- 929 (2) that enforcement agents, enforcement agencies⁵ and creditors⁶ recognise that they each have a role in ensuring that the vulnerable and socially excluded are protected and that the recovery process includes procedures agreed between the agent or agency and creditor about how such situations should be dealt with. The exercise of appropriate discretion is needed, not only to protect the debtor, but also the enforcement agent, who is required to avoid taking action which could lead to accusations of inappropriate behaviour. Those who might be potentially vulnerable include the elderly, people with a disability, the seriously ill, the recently bereaved, single parent families, pregnant women, unemployed people, and those who have obvious difficulty in understanding, speaking or reading English⁷;
- 930 (3) that enforcement agents are trained to recognise and avoid potentially hazardous and aggressive situations and to withdraw when in doubt about their own or others' safety⁸. In circumstances where the enforcement agency requires it, and always where there have been previous acts or threats of violence by a debtor, a risk assessment should be undertaken prior to the enforcement agent attending a debtor's premises⁹.

1 As to the meaning of 'enforcement agent' see PARA 1262 note 1.

2 For these purposes, 'debtor' means a person who owes a sum of money; this may be a judgment debt or a criminal financial penalty fine which is in default or a liability order: *National Standards for Enforcement Agents* (May 2002, LCD), 'Terms Used'. As to the national standards and their advisory status see PARA 1261.

3 *National Standards for Enforcement Agents* (May 2002, LCD), 'Vulnerable Situations'.

4 See note 3.

5 As to the meaning of 'enforcement agency' see PARA 1262 note 1.

6 As to the meaning of 'creditor' for these purposes see PARA 1262 note 4.

7 See note 3. Wherever possible, enforcement agents should have arrangements in place for rapidly accessing translation services when these are needed, and provide on request information in large print or in Braille for debtors with impaired sight: *National Standards for Enforcement Agents* (May 2002, LCD), 'Vulnerable Situations'.

8 *National Standards for Enforcement Agents* (May 2002, LCD), 'Training and Certification'.

9 *National Standards for Enforcement Agents* (May 2002, LCD), 'Professionalism and Conduct of the Enforcement Agent'.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(ii) Execution of Writs and Warrants/B. GENERAL GUIDANCE FOR ENFORCEMENT AGENTS/1305. Professionalism and conduct of the enforcement agent; general guidance.

1305. Professionalism and conduct of the enforcement agent; general guidance.

The National Standards for Enforcement Agents require that enforcement agents¹:

- 931 (1) always produce relevant identification² on request, together with a written authorisation to act on behalf of the creditor³;
- 932 (2) act within the law at all times, including all defined legislation, and observe all health and safety requirements in carrying out enforcement⁴;
- 933 (3) maintain strict client confidentiality⁵;
- 934 (4) carry out their duties in a professional, calm and dignified manner, dressing appropriately and acting with discretion and fairness⁶;
- 935 (5) do not discriminate unfairly on any grounds, including those of age, disability, ethnicity, gender, race, religion or sexual orientation⁷;
- 936 (6) do not misrepresent their powers, qualifications, capacities, experience or abilities⁸;
- 937 (7) gain access to goods, for the purpose of distress⁹ or execution, without the use of unlawful force¹⁰;
- 938 (8) make available details of the comments and complaints procedure¹¹ on request or when circumstances indicate it would be appropriate to do so¹².

In addition to this non-statutory guidance, there are statutory restrictions on the use of information about clients¹³. Certain forms of discrimination¹⁴ and the harassment of debtors¹⁵ are prohibited by statute.

1 As to the meaning of 'enforcement agent' see PARA 1262 note 1.

2 Eg a badge or ID card.

3 *National Standards for Enforcement Agents* (May 2002, LCD), 'Professionalism and Conduct of the Enforcement Agent'. As to the meaning of 'creditor' for these purposes see PARA 1262 note 4. As to the national standards and their advisory status see PARA 1261.

4 *National Standards for Enforcement Agents* (May 2002, LCD), 'Professionalism and Conduct of the Enforcement Agent'. As to the meaning of 'enforcement' for these purposes see PARA 1260 note 2.

5 *National Standards for Enforcement Agents* (May 2002, LCD), 'Professionalism and Conduct of the Enforcement Agent'. Enforcement agents must comply with data protection legislation and, where appropriate, the Freedom of Information Act 2000 (see generally **CONFIDENCE AND DATA PROTECTION**): *National Standards for Enforcement Agents* (May 2002, LCD), 'Professionalism and Conduct of the Enforcement Agent'. As to confidentiality see further PARA 1306.

6 *National Standards for Enforcement Agents* (May 2002, LCD), 'Professionalism and Conduct of the Enforcement Agent'. As to the use of discretion in vulnerable situations see PARA 1304.

7 *National Standards for Enforcement Agents* (May 2002, LCD), 'Professionalism and Conduct of the Enforcement Agent'.

8 *National Standards for Enforcement Agents* (May 2002, LCD), 'Professionalism and Conduct of the Enforcement Agent'.

- 9 As to distress see generally **DISTRESS** vol 13 (2007 Reissue) PARA 901 et seq.
- 10 See note 8. As to the use of force see PARA 1308 et seq; as to the seizure of goods see PARA 1315 et seq; and as to the requirement to produce an inventory of the goods seized see PARA 1315.
- 11 As to the complaints procedure see PARA 1264.
- 12 *National Standards for Enforcement Agents* (May 2002, LCD), 'Complaints/Discipline'.
- 13 See note 5.
- 14 As to unlawful discrimination see generally **DISCRIMINATION**.
- 15 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 838. As to the protection of tenants from unlawful eviction and harassment see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 608-609.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(ii) Execution of Writs and Warrants/B. GENERAL GUIDANCE FOR ENFORCEMENT AGENTS/1306. Information and confidentiality.

1306. Information and confidentiality.

The National Standards for Enforcement Agents require that:

- 939 (1) all notices, correspondence and documentation issued by the enforcement agent¹ or agency² are clear and unambiguous and to the satisfaction of the creditor³;
- 940 (2) copies of the National Standards are freely available from the offices of enforcement agencies, or agents on request, and wherever possible from creditors and that enforcement agents provide clear and prompt information to debtors⁴ and, where appropriate, creditors⁵;
- 941 (3) all information obtained during the administration and enforcement⁶ of warrants⁷ is treated as confidential and that enforcement agents avoid, so far as it is practical, disclosing the purpose of their visit to anyone other than the debtor⁸;
- 942 (4) on each and every occasion when a visit is made to a debtor's property which incurs a fee for the debtor, enforcement agents leave a notice detailing the fees charged to date, including the one for that visit, and the fees which will be incurred if further action becomes necessary. If a written request is made an itemised account of fees should be provided. Enforcement agents should clearly explain and give in writing the consequences of the seizure of a debtor's goods and ensure that debtors are aware of the additional charges that will be incurred⁹;
- 943 (5) on returning any unexecuted warrants, the enforcement agent reports the outcome to the creditor and provides further appropriate information, where this is requested and paid for by the creditor¹⁰.

1 As to the meaning of 'enforcement agent' see PARA 1262 note 1.

2 As to the meaning of 'enforcement agency' see PARA 1262 note 1.

3 *National Standards for Enforcement Agents* (May 2002, LCD), 'Information and Confidentiality'. As to the national standards and their advisory status see PARA 1261. As to the meaning of 'creditor' for these purposes see PARA 1262 note 4.

4 As to the meaning of 'debtor' for these purposes see PARA 1304 note 2.

5 *National Standards for Enforcement Agents* (May 2002, LCD), 'Information and Confidentiality'.

6 As to the meaning of 'enforcement' for these purposes see PARA 1260 note 2.

7 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

8 See note 5.

9 See note 5. As to enforcement officers' fees see PARA 1368 et seq; and see generally **SHERIFFS**. As to the seizure of goods see PARA 1315 et seq.

10 See note 5.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(ii) Execution of Writs and Warrants/B. GENERAL GUIDANCE FOR ENFORCEMENT AGENTS/1307. Responsibilities of debtors and creditors; general guidance.

1307. Responsibilities of debtors and creditors; general guidance.

The National Standards for Enforcement Agents recommend that:

- 944 (1) the debtor¹ behaves lawfully and is encouraged to co-operate with the enforcement agent²;
- 945 (2) in order for the enforcement³ process to work effectively, creditors⁴ are fully aware of their own responsibilities, which should be observed and set out in terms of agreement with their enforcement agent or agency⁵;
- 946 (3) creditors notify the enforcement agency of all payments received and other contacts with the debtor. They have a responsibility to tell the debtor that if payment is not made within a specified period of time, action may be taken to enforce payment. Creditors should not issue a warrant⁶ knowing that the debtor is not at the address, as a means of tracing the debtor at no cost. They should provide a contact point at appropriate times to enable the enforcement agent or agency to make essential queries particularly where they have cause for concern⁷;
- 947 (4) creditors do not request the suspension of a warrant⁸ or make direct payment arrangements with debtors without appropriate notification and payment of fees due to the enforcement agent⁹.

1 As to the meaning of 'debtor' for these purposes see PARA 1304 note 2.

2 *National Standards for Enforcement Agents* (May 2002, LCD), 'Terms Used'. As to the national standards and their advisory status see PARA 1261. As to the meaning of 'enforcement agent' see PARA 1262 note 1.

3 As to the meaning of 'enforcement' for these purposes see PARA 1260 note 2.

4 As to the meaning of 'creditor' for these purposes see PARA 1262 note 4.

5 *National Standards for Enforcement Agents* (May 2002, LCD), 'Creditors' Responsibilities'. Creditors must consider carefully any specific requirements for financial guarantees etc so that these are adequate, fair and appropriate for the work involved. They must not seek payment from an enforcement agent or enforcement agency in order to secure a contract: *National Standards for Enforcement Agents* (May 2002, LCD), 'Creditors' Responsibilities'. As to the meaning of 'enforcement agency' see PARA 1262 note 1.

6 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

7 *National Standards for Enforcement Agents* (May 2002, LCD), 'Creditors' Responsibilities'.

8 As to the suspension of warrants see PARAS 1364-1366.

9 See note 7. As to enforcement officers' fees see PARA 1368 et seq; and see generally **SHERIFFS**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(ii) Execution of Writs and Warrants/C. RIGHTS OF ENTRY AND SEIZURE/(A) Executing Writs and Warrants of Possession/1308. Executing warrants of possession; in general.

C. RIGHTS OF ENTRY AND SEIZURE

(A) EXECUTING WRITS AND WARRANTS OF POSSESSION

1308. Executing warrants of possession; in general.

For the purpose of executing a warrant to give possession of any premises¹, it is not necessary to remove any goods from those premises².

¹ As to warrants of possession see PARA 1292.

² County Courts Act 1984 s 111(1). As to possession proceedings see generally **LANDLORD AND TENANT**; and as to the protection of tenants from unlawful eviction and harassment see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 608-609.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(ii) Execution of Writs and Warrants/C. RIGHTS OF ENTRY AND SEIZURE/(A) Executing Writs and Warrants of Possession/1309. Delivery of possession.

1309. Delivery of possession.

On the writ or warrant of possession¹ being issued, the claimant, or someone authorised on his behalf to receive possession, must go upon the premises, together with the enforcement officer or bailiff², to point out the property of which possession is to be given. The enforcement officer or bailiff must, as soon as is reasonably practicable³, proceed to deliver to the claimant complete and vacant⁴ possession of the premises, turning out, by force if need be, all other persons⁵, although if the person in possession attorns to the claimant this would appear to be sufficient⁶. If the enforcement officer or bailiff, however, in the claimant's presence, turns out a lawful undertenant who is protected by the Rent Acts, the only remedy of the undertenant is to intervene in the proceedings and have the judgment set aside⁷.

In executing a writ of possession the enforcement officer or bailiff may break into a house⁸.

The whole of the premises comprised in the writ must be delivered to the claimant, but the delivery of actual physical possession of one of several houses or part of a large estate, to be delivered in the name of the whole, is a sufficient delivery of the whole, unless other parts are in the possession of different persons, when each such part must be separately delivered⁹.

Possession must be delivered in such a manner as not to interfere with an easement, such as a right of way existing over the land¹⁰.

The execution is not complete until quiet possession has been delivered to the claimant and the bailiffs have gone away¹¹. If there is interference with the enforcement officer or bailiff in the execution of the writ or warrant, an order of committal for contempt can be applied for¹². An order of committal may also be applied for against the defendant if he dispossesses the claimant¹³ as distinguished from merely disturbing him¹⁴, but not unless the dispossession follows immediately upon the completion of the execution¹⁵.

Prolonged delay in executing a writ or warrant of possession may be in breach of the claimant's right to the peaceful enjoyment of his possessions under the first protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, now incorporated into domestic law¹⁶.

Where there has been a breach by one party of the obligation to give vacant possession of a property under a warrant for possession in the other party's favour, there remains an obligation on that other party to do what is right and reasonable with regard to any goods left at the premises¹⁷.

1 As to writs of possession see PARA 1267; and as to warrants of possession see PARA 1292.

2 *Floyd v Bethill* (1617) 2 Roll Abr 459, Return (H).

3 *Six Arlington Street Investments Ltd v Persons Unknown* [1987] 1 All ER 474, [1987] 1 WLR 188.

4 See *Norwich Union Life Insurance Society v Preston* [1957] 2 All ER 428, [1957] 1 WLR 813 (writ of possession against a mortgagor who refused to remove furniture and effects; held that 'possession' meant vacant possession to enable the plaintiffs to deal favourably with the premises to recoup them; further order made for the removal of furniture). It is submitted that this decision has a general application.

5 *Upton and Wells Case* (1589) 1 Leon 145.

6 *Calvert v Horsfall* (1803) 4 Esp 167; *Haskins v Lewis* [1931] 2 KB 1, CA; cf *Williams v Williams and Nathan* [1937] 2 All ER 559, CA.

7 *Williams v Williams and Nathan* [1937] 2 All ER 559, CA; *Barclays Bank Ltd v Roberts* [1954] 3 All ER 107, [1954] 1 WLR 1212, CA. In the last case the question whether the undertenant could recover damages if the enforcement officer had notice or sufficient facts to show that he was protected was left open: *Barclays Bank Ltd v Roberts* [1954] 3 All ER 107 at 112, [1954] 1 WLR 1212 at 1217, CA, per Evershed MR.

8 *Semayne's Case* (1604) 5 Co Rep 91a.

9 *Floyd v Bethill* (1617) 1 Roll Rep 420; 10 Vin Abr 539, Execution (H). An undivided share is an equitable interest which may be taken under a writ of sequestration: see PARA 1380.

10 *Goodtitle d Chester v Alker and Elmes* (1757) 1 Burr 133; *Doe d R v Archbishop of York* (1849) 14 QB 81.

11 *Molineux v Fulgam* (1622) Palm 289; *Kingsdale v Mann* (1703) 6 Mod Rep 27; *Anon* (1704) 6 Mod Rep 115; and see *Upton and Wells Case* (1589) 1 Leon 145, where persons hidden in the house turned the plaintiff out after the sheriff had gone, and it was held that there was no complete execution of the writ. Execution is complete without the return being made: *Hoe's Case* (1600) 5 Co Rep 89b. It is doubtful how far the return is necessary to the enforcement officer justifying his action under the writ: see *Freeman v Blewitt* (1701) 1 Salk 409 per Holt CJ. As to removal of furniture see *Norwich Union Life Insurance Society v Preston* [1957] 2 All ER 428, [1957] 1 WLR 813; and note 4.

12 *Alliance Building Society v Austen* [1951] 2 All ER 1068; *Lacon v De Groat* (1893) 10 TLR 24; and see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 442. The remedy of committal for contempt will only be exercised in extreme cases, the usual remedy being an application for a writ or warrant of restitution: see *Alliance Building Society v Austen* [1951] 2 All ER 1068. See also *Bell v Tuohy* [2002] EWCA Civ 423, [2002] 3 All ER 975, [2002] All ER (D) 449 (Mar). As to writs or warrants of restitution see PARA 1270.

13 *Smith v Earl of Dorset* (1651) Sty 277; *Style's Case* (1610) 2 Brownl 216.

14 *Smith v Earl of Dorset* (1651) Sty 277. Driving off the claimant's cattle is a dispossession (*Smith v Earl of Dorset* (1651) Sty 277); see *Dogget v Roe* (1688) Comb 150.

15 *Kingsdale v Mann* (1703) 6 Mod Rep 27.

16 See the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)), Protocol I art 1, now incorporated into domestic law by the Human Rights Act 1998 s 1(3), Sch 1 Pt II art 1; and PARA 1235; and see eg Application 22774/93 *Immobiliare Saffi v Italy* (1999) 7 BHRC 256, ECtHR.

17 See *Scotland v Solomon* [2002] EWHC 1886 (Ch), [2002] All ER (D) 71 (Sep).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(ii) Execution of Writs and Warrants/C. RIGHTS OF ENTRY AND SEIZURE/(B) Executing Writs and Warrants against Goods/1310. Rights of entry in order to levy execution.

(B) EXECUTING WRITS AND WARRANTS AGAINST GOODS

1310. Rights of entry in order to levy execution.

The enforcement officer, bailiff or other enforcement agent proceeding to levy an execution against goods¹ may legally enter the dwelling house and premises of the judgment debtor² or of any stranger to whose premises the debtor's property has been removed³, but he must not gain entry by force against the will of the judgment debtor or such stranger⁴.

When acting under a writ of fieri facias⁵ or warrant of execution⁶ the enforcement agent is not warranted in breaking open the outer door of a dwelling house⁷, but he may enter if the door is open⁸, or may open it by any of the usual means, such as by turning the key, lifting the latch or drawing back the bolt⁹, or by turning the handle. He may also make an entry through an open window¹⁰, or by further opening a window which is already partly open¹¹, but not by opening a window which is shut, even if it is not fastened¹².

If he is locked in, or unable to take out goods lawfully seized, he may break out if there is nobody there to open the door or after refusal to open it¹³; and if, after an entry has been made, he is forcibly expelled, he may break open the outer door to re-enter without any previous demand for re-entry¹⁴.

The privilege of not having an outer door broken open, and the rule that forcible entry must not be made against the judgment debtor's or occupier's will, only extend to the occupier of the house, and do not operate to protect a person who flees or puts his goods there to prevent the execution of process¹⁵. In order to justify the entering and searching of a stranger's house to seize the goods of the person against whom the process is issued, the enforcement officer or bailiff must prove that the goods to be seized were in fact in the house. He cannot justify by proving that there was reasonable ground of suspicion¹⁶. He may, however, justify entering an administrator's house, on a writ of fieri facias against an intestate, to search for the goods even though they may not be found there, because the administrator may naturally be expected to be in custody of them¹⁷.

The privilege is confined to dwelling houses. The outer door of premises occupied by the debtor, but not being his dwelling house nor within the curtilage of his dwelling house, may lawfully be broken open¹⁸.

In the case of an execution against property, the fact that an outer door is illegally broken open does not affect the validity of the subsequent seizure and sale of the property, although it gives a right of action to the person aggrieved¹⁹.

Once an entry has been made, the doors of particular rooms, cupboards or trunks may be broken open in order to complete the execution²⁰. It is not necessary to demand that inner doors, cupboards or trunks be opened before the breaking²¹.

The enforcement officer or bailiff must not remain upon premises for an unreasonable time²². In the case of a stranger's premises, the enforcement officer or bailiff enters subject to the further peril of being a trespasser if the debtor's goods are not found upon the premises²³.

The enforcement officer or bailiff may not legally take goods from the judgment debtor's person²⁴.

- 1 As to goods which may be seized see PARA 1315 et seq.
- 2 *Semayne's Case* (1604) 5 Co Rep 91a; *Kerbey v Denby* (1836) 1 M & W 336. The same applies to the premises of his personal representative, whether or not the judgment debtor's goods are, in fact, found there: *Semayne's Case* (1604) 5 Co Rep 91a; *Cooke v Birt* (1814) 5 Taunt 765.
- 3 *Biscop v White* (1600) Cro Eliz 759; *Semayne's Case* (1604) 5 Co Rep 91a.
- 4 See *Vaughan v McKenzie*[1969] 1 QB 557, [1968] 1 All ER 1154, DC, where the door was unfastened, but the debtor physically resisted the bailiff's entry. 'It seems to me that the essential criterion in any such situation is whether the householder has left a means of entrance available for me without the employment of any degree of force': *Vaughan v McKenzie*[1969] 1 QB 557 at 563, [1968] 1 All ER 1154 at 1156, DC, per Winn LJ. See also *Southam v Smout*[1964] 1 QB 308, [1963] 3 All ER 104, CA.
- 5 As to writs of fieri facias see PARA 1266.
- 6 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.
- 7 *Semayne's Case* (1604) 5 Co Rep 91a; *Duke of Brunswick v Slowman* (1849) 8 CB 317. Where the Crown was a party the sheriff could break into a house to effect execution (see *Semayne's Case* (1604) 5 Co Rep 91a), but since the commencement of the Crown Proceedings Act 1947, an order in favour of the Crown in civil proceedings to which the Crown is a party is enforced in the same manner as an order in a claim between subjects and not otherwise: see s 26(1); and PARA 1239. In executing writs of possession an enforcement officer may break into the house: *Semayne's Case* (1604) 5 Co Rep 91a; see also PARA 1309.
- 8 *Semayne's Case* (1604) 5 Co Rep 91a.
- 9 *Ryan v Shilcock*(1851) 7 Exch 72 (a case of distress, but the same rule probably applies to execution of process: see *Ryan v Shilcock*(1851) 7 Exch 72); *Hancock v Austin* (1863) 14 CBNS 634; *Attack v Bramwell* (1863) 3 B & S 520. See also *Southam v Smout*[1964] 1 QB 308 [1963] 3 All ER 104, CA.
- 10 *Nixon v Freeman* (1860) 5 H & N 647 (a case of distress).
- 11 *Crabtree v Robinson*(1885) 15 QBD 312 (a case of distress).
- 12 *Nash v Lucas*(1867) LR 2 QB 590; and see **DISTRESS** vol 13 (2007 Reissue) PARA 1006.
- 13 *Pugh v Griffith* (1838) 7 Ad & El 827; *White v Wiltshire* (1619) Palm 52.
- 14 *Aga Kurboolie Mahomed v R* (1843) 4 Moo PCC 239; *Bannister v Hyde* (1860) 2 E & E 627; *Boyd v Profaze* (1867) 16 LT 431; *Eagleton v Gutteridge* (1843) 11 M & W 465.
- 15 *Semayne's Case* (1604) 5 Co Rep 91a; *Lee v Gansel* (1774) 1 Cowp 1.
- 16 *Biscop v White* (1600) Cro Eliz 759; and see *Morrish v Murrey* (1844) 13 M & W 52; *Johnson v Leigh* (1815) 6 Taunt 246; *Sheers v Brooks* (1792) 2 Hy Bl 120.
- 17 *Cooke v Birt* (1814) 5 Taunt 765.
- 18 *Hodder v Williams*[1895] 2 QB 663, CA; *Penton v Brown* (1664) 1 Keb 698; *Hobson v Thelluson*(1867) LR 2 QB 642; *Brown v Glenn*(1851) 16 QB 254. This right does not apply to cases of distress by a landlord, who may not break any outer door or building: *Brown v Glenn*(1851) 16 QB 254; *American Concentrated Must Corp v Hendry* (1893) 62 LJQB 388, CA; *Long v Clarke*[1894] 1 QB 119, CA. As to enforcement against executors and administrators see PARA 1240.
- 19 *Semayne's Case* (1604) 5 Co Rep 91a; *Percival v Stamp*(1853) 9 Exch 167; *Hooper v Lane* (1857) 6 HL Cas 443, HL; but cf *Duke of Brunswick v Slowman* (1849) 8 CB 317.
- 20 *R v Bird* (1679) 2 Show 87 (writ of fieri facias); *Lee v Gansel* (1774) 1 Cowp 1 (door of lodger's apartment broken open in order to arrest him); *Lloyd v Sandilands* (1818) 8 Taunt 250 (window of apartment broken on refusal to open door).
- 21 *Hutchison v Birch* (1812) 4 Taunt 619; but cf *Ratcliffe v Burton* (1802) 3 Bos & P 223.

22 *Watson v Murray & Co*[1955] 2 QB 1 [1955] 1 All ER 350; *Playfair v Musgrove* (1845) 14 M & W 239; *Ash v Dawney*(1852) 8 Exch 237; *Reed v Harrison* (1778) 2 Wm Bl 1218; and see *Aitkenhead v Blades* (1813) 5 Taunt 198.

23 See *Semayne's Case* (1604) 5 Co Rep 91a; *Cooke v Birt* (1814) 5 Taunt 765.

24 See *Sunbolf v Alford* (1838) 3 M & W 248; *Storey v Robinson* (1795) 6 Term Rep 138.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(ii) Execution of Writs and Warrants/C. RIGHTS OF ENTRY AND SEIZURE/(B) Executing Writs and Warrants against Goods/1311. Notice of seizure.

1311. Notice of seizure.

When first executing a writ of fieri facias¹, the relevant enforcement officer² must deliver to the debtor or leave at each place where execution is levied a notice in the prescribed form³ informing the debtor of the execution⁴.

Any bailiff upon levying execution must deliver to the debtor or leave at the place where execution is levied a notice of the warrant⁵.

1 As to writs of fieri facias see PARA 1266.

2 As to the meaning of 'relevant enforcement officer' see PARA 1278 note 3. As to enforcement officers see PARA 1258.

3 For the prescribed form see *Practice Direction--Forms* PD 4 para 4, Table 2, Form 55; and see *The Civil Court Practice*. As to the use of the forms listed in Table 2 see PARA 14.

4 CPR Sch 1 RSC Ord 45 r 2.

5 CPR Sch 2 CCR Ord 26 r 7. As to bailiffs see PARA 1259. As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285. As to goods which may be seized see PARA 1315 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(ii) Execution of Writs and Warrants/C. RIGHTS OF ENTRY AND SEIZURE/(B) Executing Writs and Warrants against Goods/1312. Entry to enforce writ or warrant of delivery.

1312. Entry to enforce writ or warrant of delivery.

The rules regarding rights of entry set out above¹ apply in so far as they are applicable to the delivery of goods². Thus, an enforcement officer or bailiff cannot break into a house to execute a writ or warrant of delivery or even of specific delivery³.

1 See PARA 1310.

2 As to writs and warrants of delivery see PARAS 1268, 1291.

3 *Cazet de la Borde v Othon* (1874) 23 WR 110.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(ii) Execution of Writs and Warrants/C. RIGHTS OF ENTRY AND SEIZURE/(B) Executing Writs and Warrants against Goods/1313. Entry to enforce writ of sequestration.

1313. Entry to enforce writ of sequestration.

Generally speaking, it is the duty of the sequestrators immediately¹ upon receipt of the writ of sequestration² to enter upon the contemnor's property and to take possession of all his real and personal estate. In so doing they act upon the instructions of the person on whose application the writ was issued, who is answerable in damages for any wrong done to any third person³.

In taking possession of property under the writ, sequestrators are not expected to use force. They may, however, break inner doors or boxes to get possession of property affected by the writ⁴. They may not interfere with the person of the contemnor⁵ and they must resort to the court for assistance in obtaining possession if they are otherwise unable to obtain it. Any resistance to or interference with the sequestrators in their duties by any person, whether in defence of his own property or otherwise, is a contempt of court⁶ and on such resistance or disturbance an injunction will be granted to give the sequestrators possession⁷.

A sequestrator may be guilty of contempt of court if he abuses his powers⁸.

¹ Any delay may enable a holder for value in good faith to be interposed: see *Payne v Drewe* (1804) 4 East 523.

² As to writs of sequestration see PARA 1269; and see further **CONTEMPT OF COURT**. As to the enforcement of such writs see PARA 1380 et seq.

³ *Copeland v Mape* (1812) 2 Ball & B 66; but see *Lord Pelham v Duchess of Newcastle* (1713) 3 Swan 290n per Serjeant Hooper; *Lady Dacres v Chute* (1683) 1 Vern 160.

⁴ *Lowten v Colchester Corpn* (1817) 2 Mer 395; *Re Suarez, Suarez v Suarez* (1918) 88 LJ Ch 10. The contents of boxes should be scheduled when the boxes are broken, but not removed without order: *Lord Pelham v Duchess of Newcastle* (1713) 3 Swan 290n. Confidential documents deposited in court will, in a proper case, be excepted from inspection: *Re Suarez, Suarez v Suarez* (1918) 88 LJ Ch 10.

⁵ *Tatham v Parker* (1855) 1 Sm & G 506.

⁶ *Harvey v Harvey* (1681) 2 Cas in Ch 82; *Angel v Smith* (1804) 9 Ves 335; *Brooks v Greathed* (1820) 1 Jac & W 176.

⁷ *Lord Pelham v Duchess of Newcastle* (1713) 3 Swan 289n.

⁸ *Lord Pelham v Lord Harley* (1713) 3 Swan 291n; *Lowten v Colchester Corpn* (1817) 2 Mer 395; and see *Roe v Davies* [1878] WN 147; and see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 448.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(ii) Execution of Writs and Warrants/C. RIGHTS OF ENTRY AND SEIZURE/(B) Executing Writs and Warrants against Goods/1314. Protection of officers.

1314. Protection of officers.

No county court officer¹ in executing a court warrant, and no person at whose instance any such warrant is executed, is to be deemed a trespasser by reason of any irregularity or informality in any proceeding on the validity of which the warrant depends, or in the form of the warrant, or in the mode of executing it². Any person aggrieved³ may bring a claim for any special damage sustained by him by reason of the irregularity or informality against the person guilty of it⁴ but, unless the damages awarded exceed £2, can recover no costs⁵.

In any claim commenced against a person for anything done in pursuance of the County Courts Act 1984, the production of the county court warrant is to be deemed sufficient proof of the authority of the court previous to the issue of the warrant⁶.

No claim may be commenced against any bailiff⁷ for anything done in obedience to a warrant issued by the district judge⁸ unless (1) a demand for inspection of the warrant and for a copy of it is made or left at the office of the bailiff by the party intending to bring the claim, or his legal representative⁹ or agent; and (2) the bailiff refuses or neglects to comply with the demand within six days after it is made¹⁰. The demand must be in writing and signed by the person making it¹¹.

If a claim is commenced against a bailiff in a case where such a demand has been made and not complied with, judgment must be given for the bailiff if the warrant is produced or proved at the trial, notwithstanding any defect of jurisdiction or other irregularity in the warrant; but the district judge who issued the warrant may be joined as a defendant in the claim¹². If the district judge is so joined and judgment is given against him, the costs to be recovered by the claimant against the district judge include such costs as the claimant is liable to pay to the bailiff¹³.

1 As to county court officers see **COURTS** vol 10 (Reissue) PARA 726.

2 County Courts Act 1984 s 125(1).

3 As to the meaning of 'person aggrieved' see generally **JUDICIAL REVIEW** vol 61 (2010) PARA 664.

4 As to irregular execution see PARA 1375 et seq; as to rights of entry see PARA 1308 et seq; and as to the general law of trespass applying to bailiffs see **SHERIFFS**.

5 County Courts Act 1984 s 125(1), (2). As from a day to be appointed, s 125(1) is amended by the Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13 paras 68, 80, to disallow claims by a person aggrieved in the case of a warrant of control (to which the Tribunals, Courts and Enforcement Act 2007 Sch 12 (see PARA 1386 et seq) applies). At the date at which this title states the law, no such day had been appointed.

6 See the County Courts Act 1984 s 127; and **COURTS** vol 10 (Reissue) PARA 738.

7 For these purposes (except in head (1) in the text), 'bailiff' includes any person acting by the order and in aid of a bailiff: County Courts Act 1984 s 126(4). In the County Courts Act 1984 generally, 'bailiff' includes district judge: see PARA 1258. See also *Dews v Ryley* (1851) 20 LJCP 264, distinguishing *Andrews v Marris* (1841) 1 QB 3 (both decided under earlier legislation).

As from a day to be appointed, the County Courts Act 1984 s 126(4) is amended by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 81(1), (3), Sch 23 Pt 3, to provide that for these purposes, 'bailiff' in relation to a warrant means the person to whom the warrant is directed, and (except in

head (1) in the text), includes any person acting by the order and in aid of that person. At the date at which this title states the law, no such day had been appointed.

8 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

9 As to the meaning of 'legal representative' see PARA 63 note 2.

10 County Courts Act 1984 s 126(1) (amended by the Courts and Legal Services Act 1990 Sch 18 para 49(2); and by virtue of s 74(1), (3)). As from a day to be appointed, the County Courts Act 1984 s 126 does not apply to an action for anything done under a power to use the procedure in the Tribunals, Courts and Enforcement Act 2007 Sch 12 (see PARA 1386 et seq): County Courts Act 1984 s 126(5) (added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 Sch 13 para 81(1), (4)). At the date at which this title states the law, no such day had been appointed for either purpose.

11 County Courts Act 1984 s 126(2).

12 County Courts Act 1984 s 126(3) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3)). As from a day to be appointed, the County Courts Act 1984 s 126(3) is amended by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 para 81(2), Sch 23 Pt 3 to delete the words '; but the district judge who issued the warrant may be joined as a defendant in the claim'. At the date at which this title states the law, no such day had been appointed.

13 County Courts Act 1984 s 126(3) (as amended: see note 12). For an analogous case of protection of constables acting under a magistrates' warrant see *Atkins v Kilby* (1840) 11 Ad & El 777. A defendant was formerly obliged to give notice of his intention to rely on the defence afforded by this provision (*Denny v Bennett* (1896) 44 WR 333), and although this obligation has now gone, it is still desirable that he should do so. As from a day to be appointed, the County Courts Act 1984 s 126(3) is amended by the Tribunals, Courts and Enforcement Act 2007 Sch 13 para 81(2), Sch 23 Pt 3, with the effect that the text to note 13 is deleted. At the date at which this title states the law, no such day had been appointed.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(A) Property which may be Seized/1315. Property which may be seized; in general.

(iii) Levying Execution against Goods

A. SEIZURE OF PROPERTY

(A) PROPERTY WHICH MAY BE SEIZED

1315. Property which may be seized; in general.

Where an enforcement officer¹ or other person who is under a duty to execute a writ of execution² is executing it, the officer may, by virtue of the writ, seize any goods³ of the execution debtor that are not exempt goods, and any money, banknotes, bills of exchange, promissory notes, bonds, specialties or securities for money belonging to the execution debtor⁴. Exempt goods are:

- 948 (1) such tools, books, vehicles and other items of equipment as are necessary to the execution debtor for use personally by him in his employment, business or vocation⁵;
- 949 (2) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the execution debtor and his family⁶.

Similarly, every bailiff or officer executing any warrant of execution⁷ issued from a county court against the goods of any person⁸ may by virtue of it seize any of that person's goods except those listed in heads (1) and (2) above, and may also seize any money, banknotes, bills of exchange, promissory notes, bonds, specialties or securities for money belonging to that person⁹.

The National Standards for Enforcement Agents require the enforcement agent¹⁰ to produce an inventory of the goods seized and leave it with the debtor¹¹, or at the premises, with any other documents that are required by regulations or statute¹².

The goods and chattels and other property seized under a writ of fieri facias must be those of the judgment debtor and not of any other person¹³. At common law, goods and corporeal chattels, capable of sale, were alone seizable under a writ of fieri facias, and in general real property was not so seizable¹⁴.

1 As to enforcement officers see PARA 1258; and **SHERIFFS**.

2 As to writs of execution see PARA 1265 et seq.

3 As to the meaning of 'goods' for these purposes see PARA 1294 note 4.

4 Courts Act 2003 s 99(1), Sch 7 para 9(1), (2). Schedule 7 para 9 applies to any writ of execution against goods which is issued from the High Court: Sch 7 para 6. As from a day to be appointed, however, Sch 7 para 9 does not apply to any writ that confers power to use the procedure in the Tribunals, Courts and Enforcement Act 2007 Sch 12 (see PARA 1386 et seq), but does apply to any other writ of execution against goods which is issued from the High Court: Courts Act 2003 Sch 7 para 6(2) (Sch 7 para 6 prospectively substituted by the

Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13 paras 148, 151(1), (3); at the date at which this title states the law, no such day had been appointed).

5 As to the meaning of 'employment, business or vocation' cf **INCOME TAXATION**.

6 Courts Act 2003 Sch 7 para 9(3). See also the Judgments Act 1838 s 12 (amended by the Statute Law Revision (No 2) Act 1888, the Statute Law Revision (No 2) Act 1874 and the Statute Law Revision (No 2) Act 1890). For the procedure where the judgment debtor whose goods have been seized, or are about to be seized, by an enforcement officer under a writ of execution claims that they are not liable to execution see CPR Sch 1 RSC Ord 17 r 2A; and PARA 1599.

7 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

8 Any reference to the goods of an execution debtor in the County Courts Act 1984 Pt V (ss 85-111) includes a reference to anything else of his that may lawfully be seized in execution: s 89(2) (s 89 repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 72; at the date at which this title states the law, no such day had been appointed).

9 County Courts Act 1984 s 89(1) (amended by the Courts and Legal Services Act 1990 s 15(2); prospectively repealed (see note 8)). See also the Judgments Act 1838 s 12 (as amended: see note 6).

10 As to the meaning of 'enforcement agent' see PARA 1262 note 1.

11 As to the meaning of 'debtor' for these purposes see PARA 1304 note 2.

12 *National Standards for Enforcement Agents* (May 2002, LCD), 'Professionalism and Conduct of the Enforcement Agent'. As to the national standards and their advisory status see PARA 1261. As to the inventory and notice to be delivered or sent by the court under CPR Sch 2 CCR Ord 26 r 12 see PARA 1333.

13 *Glasspoole v Young* (1829) 9 B & C 696.

14 *Francis v Nash* (1734) Lee *temp* Hard 53; *Wood v Wood* (1843) 4 QB 397; *Collingridge v Paxton* (1851) 11 CB 683. For examples of what can and cannot be seized see PARA 1315 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(A) Property which may be Seized/1316. Guidance for enforcement agents seizing goods.

1316. Guidance for enforcement agents seizing goods.

The National Standards for Enforcement Agents stress that enforcement agents¹ may only take goods in accordance with the appropriate regulations² or statute³. In addition creditors⁴ may agree other restrictions with agents acting on their behalf⁵.

The National Standards require enforcement agents:

- 950 (1) to ensure that goods are handled with reasonable care so that they do not suffer any damage while in the agents' possession and to have insurance in place for goods in transit so that if damage occurs this is covered by the policy. A receipt for the goods removed should be given to the debtor or left at the premises⁶;
- 951 (2) not to remove anything clearly identifiable as an item belonging to, or for the exclusive use of, a child⁷;
- 952 (3) to take reasonable steps to satisfy themselves that the value of the goods impounded in satisfaction of the judgment does not exceed the value of the debt and charges owed⁸.

1 As to the meaning of 'enforcement agent' see PARA 1262 note 1.

2 See eg the Distress for Rent Rules 1988, SI 1988/2050, r 12; and **DISTRESS**.

3 *National Standards for Enforcement Agents* (May 2002, LCD), 'Goods'. As to the national standards and their advisory status see PARA 1261. As to goods which may be seized see PARA 1315 et seq.

4 As to the meaning of 'creditor' for these purposes see PARA 1262 note 4.

5 *National Standards for Enforcement Agents* (May 2002, LCD), 'Goods'.

6 See note 5. As to the inventory of goods seized see PARA 1315.

7 See note 5.

8 See note 5. A failure to observe head (3) in the text may infringe the debtor's Convention rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) in particular under art 8 and under Protocol I art 1, now incorporated into domestic law by the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 8, Pt II art 1: see PARA 1235.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(A) Property which may be Seized/1317. Leasehold interests.

1317. Leasehold interests.

Leasehold interests in land are affected by the writ of fieri facias¹. The term is bound by the issue of the writ in the same manner as were goods at common law². In the case of a term of years no seizure of the land by the enforcement officer is possible, as he has no right to possession³, but the judgment debtor's term is sold by the enforcement officer and assigned under his seal of office without seizure or possession⁴. The judgment debtor cannot be ejected by the enforcement officer⁵, but the purchaser has a right of entry upon which, if necessary, he must bring a claim⁶.

A sale of a term of years by the enforcement officer is not an assignment of the term by the judgment debtor so as to cause a forfeiture of the lease operating in the event of assignment⁷. If a forfeiture occurs under a covenant expressly directed against an execution this does not entitle a purchaser to recover money paid upon a contract to purchase 'the debtor's interest (if any)'⁸.

1 In the case of leaseholds, this applies however short the term (*Sparrow v Earl of Bristol* (1813) 1 Marsh 10; *Doe d Westmoreland v Smith* (1827) 1 Man & Ry KB 137), eg a yearly tenancy, where the execution debtor had entered under an agreement for a lease and paid rent: *Doe d Westmoreland v Smith* (1827) 1 Man & Ry KB 137; see also *Ronan v King* [1894] 2 IR 648, CA. As to other chattels real see PARA 1318.

2 See PARA 1295. An assignment by the execution debtor subsequent to the issue of the writ is therefore of no effect against an assignment by the enforcement officer: *Burdon v Kennedy* (1757) 3 Atk 739. Where the writ is returned without the term being sold, however, a person who became an incumbrancer on the term while the writ was in the hands of the enforcement officer will rank before a second fieri facias issued after the return: *Williams v Craddock* (1831) 4 Sim 313. As to the registration of writs and orders affecting land see PARA 1250.

3 *Coleman v Rawlinson* (1858) 1 F & F 330.

4 A deed is required under the Law of Property Act 1925 s 52(1): *Coleman v Rawlinson* (1858) 1 F & F 330; *Harley v Harley* (1860) 11 I Ch R 451 (decided under earlier legislation). It has been held that the deed may be executed with the sheriff's seal by the undersheriff, and is good on ejectment without proof of his authority: *Doe d James v Brawn* (1821) 5 B & Ald 243; *Wood v Rowcliffe* (1846) 6 Hare 183. The sale of the term is good, notwithstanding that the assignment was not executed until after the return of the writ: *Doe v Donston* (1818) 1 B & Ald 230. The deed is, however, necessary for the vesting of the term in the purchaser (*Playfair v Musgrove* (1845) 14 M & W 239), and entry and payment of the purchase price are not a substitute for it (*Doe d Hughes v Jones* (1842) 1 Dowl NS 352).

5 *R v Deane* (1680) 2 Show 85. The enforcement officer is liable to a claim for trespass if he attempts it: *Playfair v Musgrove* (1845) 14 M & W 239.

6 If he cannot enter peaceably (*Taylor v Cole* (1791) 1 Hy BI 555, Ex Ch; explained in *Playfair v Musgrove* (1845) 14 M & W 239 at 247 per Rolfe B); see also *Doe d Batten v Murless* (1817) 6 M & S 110; and Bac Abr, Execution (C), where the proposition in the text is directly asserted.

7 *Doe d Mitchinson v Carter* (1798) 8 Term Rep 57. But it is otherwise if the judgment debtor connives in the sale: *Doe d Mitchinson v Carter* (1799) 8 Term Rep 300.

8 *Griffin v Caddell* (1875) IR 9 CL 488. As to the effect of such a contract see also *Ronan v King* [1894] 2 IR 648, CA. If the enforcement officer makes a misdescription of the term the contract will be avoided, but not if he sells all the debtor's interest: see *Palmer's Case* (1597) 4 Co Rep 74a. A sale of 'the debtor's interest' does not pass a licence: *Re Gilmer* (1885) 17 LR 1r 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(A) Property which may be Seized/1318. Rentcharges and incorporeal property.

1318. Rentcharges and incorporeal property.

A rentcharge upon land for a term of years or a Crown annuity in the nature of such a rentcharge can be sold under a writ of fieri facias¹. A writ of fieri facias which affects land² should be registered or protected at the Land Registry³.

At common law incorporeal things are generally exempt from seizure under a fieri facias, but this is now subject to the statutory exceptions in respect of the judgment debtor's specialities or securities for money⁴.

1 *Wotton v Shirt* (1600) Cro Eliz 742; *York v Twine* (1605) Cro Jac 78. As to rentcharges and annuities see **RENTCHARGES AND ANNUITIES**.

2 For these purposes, 'land' includes land of any tenure and mines and minerals, whether or not severed from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments, also a manor, an advowson and a rent and other incorporeal hereditaments, and an easement, right, privilege or benefit in, over or derived from land, but not an undivided share in land, and 'hereditament' means real property which, on an intestacy occurring before 1 January 1926, might have devolved on an heir: Land Charges Act 1972 s 17(1); and see **LAND CHARGES**.

3 See the Land Charges Act 1972 s 6(1)(a); the Land Registration Act 2002 s 87; and PARA 1250.

4 See PARA 1315.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(A) Property which may be Seized/1319. Fixtures.

1319. Fixtures.

The fact that no real property can be seized under a writ of fieri facias excludes from its operation such fixtures as would, under the old law, have descended to the judgment debtor's heir as distinguished from his personal representative¹; but such fixtures as can, between landlord and tenant, be severed by the tenant can be seized on a fieri facias against the tenant². Where the lease comprises tenant's fixtures, the enforcement officer may sever them and sell them separately³.

1 *Winn v Ingilby* (1822) 5 B & Ald 625. Such fixtures include eg a dyer's vat (*Day v Bisbitch* (1595) Cro Eliz 374), and millstones, tackling and implements of a mill (*Place v Fagg* (1829) 4 Man & Ry KB 277); see also *Bain v Brand* (1876) 1 App Cas 762, HL; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 173.

2 *Poole's Case* (1703) 1 Salk 368; *Minshall v Lloyd* (1837) 2 M & W 450; *Richardson v Ardley* (1869) 38 LJ Ch 508; *Hawtry v Butlin* (1873) LR 8 QB 290; *Crossley Bros Ltd v Lee* [1908] 1 KB 86. In special circumstances, railway rails for mining purposes were held seizable: *Earl of Antrim v Dobbs* (1891) 30 LR Ir 424; *Duke of Beaufort v Bates* (1862) 3 De GF & J 381. A wrongful severance by the tenant will not entitle the enforcement officer to seize under a fieri facias against him: *Farrant v Thompson* (1822) 5 B & Ald 826.

3 *Barnard v Leigh* (1815) 1 Stark 43.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(A) Property which may be Seized/1320. Heirlooms.

1320. Heirlooms.

Heirlooms, properly so called, are exempt from seizure under a fieri facias as being realty, while chattels held under trusts, which are commonly known as heirlooms, are also probably excluded¹.

¹ As to heirlooms and quasi heirlooms generally see **REAL PROPERTY** vol 39(2) (Reissue) PARA 89. As to the question of equitable interests generally see PARA 1325; and see *Foley v Burnell* (1785) 4 Bro Parl Cas 319, HL, where the property in chattels left as heirlooms had vested absolutely in the judgment debtor, and the chattels became seizable.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(A) Property which may be Seized/1321. Growing crops.

1321. Growing crops.

Growing crops which are produced by human labour¹ can be seized under a fieri facias². Thus the enforcement officer can seize corn or potatoes, but not trees, or grass, or apples upon trees³. Having seized growing crops the enforcement officer may cut, thresh or dress them⁴, and the usual time for the removal of the goods by a purchaser from the enforcement officer will be extended until the ripening of the crops seized⁵.

Where the judgment debtor is tenant of land let to farm, there are certain statutory provision for the landlord's benefit, which may be summarised as follows⁶. The enforcement officer may not remove or sell for removal any straw, chaff, colder, turnips or manure⁷, and where there exists any covenant or written agreement against the removal of produce from the land, between the tenant and landlord, the enforcement officer, if he has written notice of the covenant or agreement⁸, cannot (except at the suit of the Crown)⁹ remove such produce or sell it for removal¹⁰.

The enforcement officer may, however, sell to a purchaser under a written contract to abide by the terms of such covenants or agreements, or by the tenant's customary liabilities¹¹. Further, whether or not there are such covenants or agreements, any purchaser¹² will be bound by the judgment debtor's customary or contractual liabilities in respect of the taking or disposal of those crops, manures etc¹³. No clover or artificial grasses growing under standing corn can be seized or sold in execution¹⁴.

The enforcement officer is not liable for any breach or omission to comply with these statutory provisions unless the breach or omission is wilful¹⁵.

1 Ie fructus industriales: see **AGRICULTURAL LAND**.

2 *Evans v Roberts* (1826) 5 B & C 829; *Scorell v Boxall* (1827) 1 Y & J 396; and see *Poole's Case* (1703) 1 Salk 368. As to emblements generally (ie the tenant's right to carry away crops) see **AGRICULTURAL LAND** vol 1 (2008) PARA 369. As to seizure where the debtor is a tenant see the text and notes 6-15.

3 *Rodwell v Phillips* (1842) 9 M & W 501; and see the cases cited in note 2. Corn may be seized by the enforcement officer when green in the blade (*Gwilliam v Barker* (1815) 1 Price 274), though probably not if not appearing above ground (*Baghaw v Farnsworth* (1860) 2 LT 390). When the corn belongs to a tenant, note, however, the prior right of distress given to a landlord by the Landlord and Tenant Act 1851 s 2: see **DISTRESS** vol 13 (2007 Reissue) PARA 1043. As to fruit growing on trees see *Saunders (Inspector of Taxes) v Pilcher* [1949] 2 All ER 1097, CA; and **AGRICULTURAL LAND**.

4 The expenses of cutting etc may not, however, be deducted against the judgment creditor or the debtor without their authority (*Re Woodham, ex p Conder* (1887) 20 QBD 40); nor can they be allowed against the trustee in bankruptcy (*Re Woodham, ex p Conder* (1887) 20 QBD 40).

5 *Wharton v Naylor* (1848) 12 QB 673; and see note 3; and PARA 1352 note 4.

6 See the Sale of Farming Stock Act 1816; and the text and notes 7-15. The whole Act is repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 para 5, Sch 23 Pt 3. At the date at which this title states the law, no such day had been appointed.

7 See the Sale of Farming Stock Act 1816 s 1 (prospectively repealed: see note 6). 'Colder' is believed to be an East Anglian term for corn not separated from the chaff by ordinary threshing.

8 The tenant must give notice to the enforcement officer of all such covenants or agreements of which he knows, and of his landlord's address, and forthwith on executing process the enforcement officer must give notice of his so doing to the landlord and his agent, waiting for a reply until the last day possible for the sale: see the Sale of Farming Stock Act 1816 s 2 (ss 2-11 amended by the Statute Law Revision Act 1888 and prospectively repealed (see note 6)).

9 *R v Osbourne* (1818) 6 Price 94.

10 See the Sale of Farming Stock Act 1816 s 1 (prospectively repealed: see note 6). The Act does not extend to straw, turnips or other articles which the tenant may remove from the farm consistently with some contract in writing: see s 8 (as amended (see note 8) and prospectively repealed (see note 6)).

11 See the Sale of Farming Stock Act 1816 s 3 (as amended (see note 8) and prospectively repealed (see note 6)). Under any such contract the purchaser will have the facilities which the tenant would have had for consuming his crop (use of the barns, stables and buildings etc (see s 3) (as so amended and prospectively repealed)), and will be protected from any distress by the landlord upon the crop or the objects so used in consuming it (see s 6 (as so amended and prospectively repealed)); and the enforcement officer or purchaser will be protected against claims for trespass based upon the exercise of such facilities (see s 10 (as so amended and prospectively repealed)). The enforcement of contracts made under these provisions is provided for: see s 4 (as so amended and prospectively repealed). The enforcement officer must before sale make inquiry as to the landlord's address: see s 5 (as so amended and prospectively repealed).

12 Is whether from the enforcement officer or the tenant: *Wilmot v Rose* (1854) 3 E & B 563.

13 See the Sale of Farming Stock Act 1816 s 11 (as amended (see note 8); also amended by the Statute Law Revision Act 1873; and prospectively repealed (see note 6)).

14 See the Sale of Farming Stock Act 1816 s 7 (as amended (see note 8) and prospectively repealed (see note 6)).

15 See the Sale of Farming Stock Act 1816 s 9 (as amended (see note 8) and prospectively repealed (see note 6)). As to growing crops generally see **AGRICULTURAL LAND**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(A) Property which may be Seized/1322. Money and securities for money.

1322. Money and securities for money.

At common law the requirement that the property seizable under fieri facias should be capable of sale¹ excluded from the operation of the writ money belonging to the debtor, but to this rule a statutory exception was created, under which the enforcement officer may seize the money or bank notes (whether of the Bank of England or of any other bank) and any cheques, bills of exchange, promissory notes, bonds, specialities or other securities for money belong to the judgment debtor². To be seizable under this provision, the money must be in the debtor's possession or control, and not merely be payable to³ or held in trust for him⁴. It has been held that a cheque payable to the debtor and in the hands of the Accountant General of the High Court, but not delivered, cannot be seized⁵; and that securities for money do not include life insurance policies⁶. When execution issues against a pawnbroker the enforcement officer may seize goods in pledge in the pawnbroker's possession, but may sell only those in respect of which the period for redemption has expired; with respect to the rest he has a right to possess the pawnbroker's qualified interest⁷, to sell when the time for redemption has expired or to receive any money paid for redemption⁸.

On the seizure of money or bank notes the enforcement officer's duty is to deliver them, or a sufficient part of them, to the judgment creditor, and to pay over any surplus remaining after payment of his poundage and expenses to the judgment debtor⁹.

On the seizure of other securities the enforcement officer's duty is to hold them as security for the amount due under the writ, and he has power¹⁰ to sue for the recovery of the sum secured when the time for payment arrives¹¹. Payment to the enforcement officer by a party liable on such security discharges him to the extent of his payment. The enforcement officer must pay over the money recovered, or a sufficient part of it, to the judgment creditor, and any surplus remaining, after payment of his poundage and expenses, to the judgment debtor¹².

The provisions summarised above must now be considered with the new provision made in the Courts Act 2003¹³ and the County Courts Act 1984¹⁴ allowing the seizure of money, banknotes, bills of exchange, promissory notes, bonds, specialities or securities for money. These provisions are discussed elsewhere in this title¹⁵.

¹ See PARA 1315.

² See the Judgments Act 1838 s 12 (amended by the Statute Law Revision (No 2) Act 1874, the Statute Law Revision (No 2) Act 1888 and the Statute Law Revision (No 2) Act 1890); and the text and notes 3-12.

³ Money in the hands of the debtor's agent for the express purpose of paying the debt to the enforcement officer cannot be seized: *Bell v Hutchison* (1844) 8 Jur 895.

⁴ *Robinson v Peace* (1838) 7 Dowl 93; *France v Campbell, Winter v Campbell* (1841) 9 Dowl 914; *Brown v Perrott* (1841) 4 Beav 585. The same rule applies to money in court to the credit of the debtor in another claim: *France v Campbell, Winter v Campbell* (1841) 9 Dowl 914.

⁵ *Courtoy v Vincent* (1852) 15 Beav 486, distinguishing *Watts v Jefferyes* (1851) 3 Mac & G 422, where the cheque had been delivered out to an agent, but returned by him to the office. The procedure open in such cases to the execution creditor is by way of charging order: *Brereton v Edwards* (1888) 21 QBD 488, CA; *The Dirigo* [1920] P 425; *Re Prior, ex p Prior* [1921] 3 KB 333, CA. As to charging orders see PARA 1467 et seq.

6 *Alleyne v Darcy* (1855) 5 I Ch R 56; *Re Sargent's Trusts* (1879) 7 LR Ir 66, not following the dictum in *Stokoe v Cowan* (1861) 29 Beav 637.

7 See **PLEDGES AND PAWNS** vol 36(1) (2007 Reissue) PARA 32.

8 *Re Rollason, Rollason v Rollason, Halse's Claim* (1887) 34 ChD 495; see also the argument in *Squire v Huetson* (1841) 1 QB 308, and *Legg v Evans* (1840) 6 M & W 36, where a distinction was drawn between goods in pawn, which may be sold in default of redemption, and goods subject to a lien, which may not. As to the case where the execution is against the person who has pawned the goods see PARA 1346.

9 Judgments Act 1838 s 12 (as amended: see note 2). Until the money is paid over it is not the judgment creditor's property: *Masters v Stanley* (1840) 8 Dowl 169; *Wood v Wood* (1843) 4 QB 397; *Collingridge v Paxton* (1851) 11 CB 683.

10 He is not bound to sue unless the judgment creditor enters into a bond with two sureties to indemnify him from all costs and expenses, the expense of such bond to be deducted out of any money recovered: Judgments Act 1838 s 12 (as amended: see note 2).

11 Judgments Act 1838 s 12 (as amended: see note 2). The enforcement officer may sue in his own name: s 12 (as so amended).

12 Judgments Act 1838 s 12 (as amended: see note 12).

13 See the Courts Act 2003 s 99(1), Sch 7 para 9(2)(b); and PARA 1315.

14 See the County Courts Act 1984 s 89(1)(b) (prospectively repealed); and PARA 1315.

15 See PARA 1315.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(A) Property which may be Seized/1323. Ships.

1323. Ships.

The enforcement officer may seize a ship (whether British or foreign¹) or share of a ship². Seizure may be effected by putting a man aboard with a warrant, which he should affix to the mast, but actual seizure of a British ship does not appear to be necessary³. The sale of a registered British ship is completed by transfer of the ship, or share, by bill of sale⁴.

1 *Union Bank of London v Lenanton* (1878) 3 CPD 243, CA; *The Joannis Vatis* (No 2) [1922] P 213.

2 *Chasteauneuf v Capeyron* (1882) 7 App Cas 127, PC; *Harley v Harley* (1860) 11 I Ch R 451; and see *Dickinson v Kitchen* (1858) 8 E & B 789.

3 See *Harley v Harley* (1860) 11 I Ch R 451, where a share of a ship was seized by procuring the certificate of registration for the purpose of the sale of the share by the sheriff.

4 See under the Merchant Shipping Act 1995 s 16, Sch 1: see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 306 et seq. See also *Chasteauneuf v Capeyron* (1882) 7 App Cas 127, PC; *Harley v Harley* (1860) 11 I Ch R 451. In the latter case the sheriff had himself registered as transferee, and then transferred by bill of sale to a purchaser. There appears to be no reason why a share in ship which is not at sea should not be sold by the enforcement officer in whose district the ship is registered.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(A) Property which may be Seized/1324. Exemptions from execution.

1324. Exemptions from execution.

The statutory exemptions relating to the tools, books and vehicles necessary to the debtor for use in his employment, business and vocation¹ and his family's clothing, bedding, furniture and other household equipment and provisions² are discussed elsewhere in this title³.

A judgment or order given or made against a member of Her Majesty's military, air or naval forces cannot be enforced by levying execution against his arms, ammunition, equipment, instruments or clothing used for military⁴, air force⁵ or naval⁶ purposes.

Railway rolling stock and plant are exempt from execution⁷, as are key system assets under the legislation relating to a public-private partnership agreement for the London underground⁸; and the sale in execution, without a court order, of certain aircraft registered outside the United Kingdom may be prohibited by Order in Council⁹.

¹ See the Courts Act 2003 s 99(1), Sch 7 para 9(3)(a); the County Courts Act 1984 s 89(1)(a)(i); and PARA 1315.

² See the Courts Act 2003 Sch 7 para 9(3)(b); the County Courts Act 1984 s 89(1)(a)(ii); and PARA 1315. Wearing apparel was seizable at common law, except while actually being worn: see *Sunbolf v Alford* (1838) 3 M & W 248. An agreement between a husband and wife that the wife's wearing apparel was to remain the husband's absolute property was held to be effectual against her execution creditors in *Rondeau, Le Grande & Co v Marks* [1918] 1 KB 75, CA.

³ See PARA 1315.

⁴ Army Act 1955 s 185. The exemption may be extended by Order in Council to visiting forces: see the Visiting Forces Act 1952 s 8(2). However, the Visiting Forces and International Headquarters (Application of Law) Order 1999, SI 1999/1736, does not extend such exemption.

⁵ Air Force Act 1955 s 185. The exemption may be extended by Order in Council to visiting forces: see the Visiting Forces Act 1952 s 8(2); and note 4.

⁶ Naval Discipline Act 1957 s 102. This also applies to members of any naval force of a Commonwealth country or raised under the law of any colony: s 102. The exemption may be extended by Order in Council to visiting forces: see the Visiting Forces Act 1952 s 8(2); and note 4.

⁷ See the Railway Companies Act 1867 ss 4, 5; and **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 191.

⁸ See the Greater London Authority Act 1999 s 216(4) (amended, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13 para 130; at the date at which this title states the law, no such day had been appointed); and **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES**.

⁹ Civil Aviation Act 1982 s 90(2)(d). At the date at which this title states the law, no such order had been made.

UPDATE

1324 Exemptions from execution

TEXT AND NOTES 4-6--Army Act 1955, Air Force Act 1955 and Naval Discipline Act 1957 replaced: Armed Forces Act 2006.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(A) Property which may be Seized/1325. Equitable interests.

1325. Equitable interests.

As a general rule, equitable interests cannot be seized under a writ of fieri facias¹, but this does not apply where the whole of the beneficial interest is vested in the judgment debtor². Thus under a fieri facias against a beneficiary his equitable interests cannot be seized³ unless he is also entitled to the whole of the beneficial interest⁴. The rule also excludes from the operation of the writ all equities of redemption⁵. Where, however, the legal ownership vests in the judgment debtor by virtue of a rule of equity, as under a contract for the sale to him of after-acquired property, the enforcement officer can seize the goods⁶.

1 *Scarlett v Hanson* (1883) 12 QBD 213, CA; *Miller & Co v Solomon* [1906] 2 KB 91; *Stevens v Hince* (1914) 110 LT 935.

2 *Stevens v Hince* (1914) 110 LT 935.

3 Under the old divided system of the courts of law and equity it was, however, the practice of the Court of Chancery where the judgment creditor had issued his writ to grant an order authorising the sheriff to seize the chattels or land, or even to grant an order giving validity to acts done by him, where the only bar to his seizure at law was the fact that there was a trustee holding the legal ownership: see eg *Horsley v Cox* (1869) 4 Ch App 92. As to the reforms of the court system effected by the Supreme Court of Judicature Act 1873 (repealed) see **COURTS** vol 10 (Reissue) PARA 601 et seq.

4 *Stevens v Hince* (1914) 110 LT 935.

5 Since the Law of Property Act 1925, a mortgagor of a legal estate in land retains a legal estate: this is not affected by a fieri facias since, at common law prior to the Judicature Acts, a fieri facias could not touch equities of redemption: *Scott v Scholey* (1807) 8 East 467; *Lyster v Dolland* (1792) 1 Ves 431; *Re Duke of Newcastle* (1869) LR 8 Eq 700. Nor does a fieri facias affect the equity of redemption of chattels legally mortgaged: *Ladbroke v Crickett* (1788) 2 Term Rep 649; *Dickinson v Kitchen* (1858) 8 E & B 789 (ships); *Steward v Lombe* (1820) 1 Brod & Bing 506; *Cross v Barnes* (1877) 46 LJQB 479 (fixtures comprised in a mortgage).

6 Under the Supreme Court Act 1981 s 49(1), which provides that in case of a conflict between the rules of law and the rules of equity, the rules of equity are to prevail: see *Anon* [1875] WN 203. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. For property to vest under this rule it must be taken into possession (*Holroyd v Marshall* (1862) 10 HL Cas 191), and, if it has so vested in another person, it cannot be seized under a fieri facias against the judgment debtor (see *Anon* (1876) Bitt Prac Cas 128). All the cases cited in this note were decided under earlier legislation. As to after-acquired property generally see **SETTLEMENTS** vol 42 (Reissue) PARA 644 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(A) Property which may be Seized/1326. Goods in the hands of trustees or executors.

1326. Goods in the hands of trustees or executors.

Under a fieri facias against a trustee, chattels of the trust estate cannot be seized by the enforcement officer¹, and where a fieri facias has issued against an executor or administrator of a deceased person in respect of a personal debt of the executor or administrator, the enforcement officer cannot take in execution goods and chattels of the deceased in his hands as such personal representative², unless there has been such lapse of time and there are such circumstances³ as to lead to the conclusion that the deceased's creditors have been satisfied⁴.

1 *Caillaud v Estwick* (1794) 2 Anst 381; *Dawson v Wood* (1810) 3 Taunt 256; and see *Burgh v Francis* (1673) Cas temp Finch 28; *Finch v Earl of Winchelsea* (1715) 1 P Wms 277; *Foley v Burnell* (1783) 1 Bro CC 274; *Shingler v Holt* (1861) 7 H & N 65; *Duncan v Cashin* (1875) LR 10 CP 554; *Wright v Redgrave* (1879) 11 Ch D 24, CA.

2 *Farr v Newman* (1792) 4 Term Rep 621; *Gaskell v Marshall* (1831) 1 Mood & R 132; *Fenwick v Laycock* (1841) 2 QB 108; *Re Morgan, Pillgrem v Pillgrem* (1881) 18 ChD 93, CA. If, however, the goods are sold by the enforcement officer upon a fieri facias against an executor who is also residuary legatee, and the purchaser (though having knowledge that the goods were assets of the testator) has no knowledge of outstanding debts or other reason why the sale of the goods is improper, the sale will be valid (*Nugent v Gifford* (1738) 1 Atk 463, explained in *Graham v Drummond* [1896] 1 Ch 968 at 974; and see *Mead v Lord of Orrery* (1745) 3 Atk 235; *Taylor v Hawkins* (1803) 8 Ves 209; *Whale v Booth* (1784) 4 Doug KB 36; *Storry v Walsh* (1854) 18 Beav 559; see also *Graham v Drummond* [1896] 1 Ch 968 where the same rule is extended to equitable execution), although the executor could have challenged the enforcement officer's right to seize (*Fenwick v Laycock* (1841) 2 QB 108). In a claim for a false return of nulla bona it lies upon the enforcement officer to prove, if such is the case, that the debtor's title was merely that of a personal representative: *Kelly v Browne* (1883) 12 LR Ir 348. As to returns of nulla bona see PARA 1282.

3 *Re Morgan, Pillgrem v Pillgrem* (1881) 18 ChD 93, CA. Lapse of time will not justify such seizure of goods if the executor is carrying out the trusts of the will: cf *Ray v Ray* (1815) Coop G 264.

4 See the cases cited in notes 2-3. As to execution against executors and administrators see PARA 1240.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(A) Property which may be Seized/1327. Joint property and property of husband and wife.

1327. Joint property and property of husband and wife.

Where goods belong to the judgment debtor jointly or in common with some other person, they may be seized under a fieri facias unless the co-owner has become solely entitled by survival upon the death of the debtor before the delivery of the writ¹.

Where execution has issued against a husband, property given by the husband to his wife may be seized if after the gift it continues to be in the husband's order and disposition or reputed ownership² or if it is avoided under certain provisions of the Insolvency Act 1986³. Similarly, goods claimed by a wife under a deed not registered as a bill of sale may be taken if they are in the husband's possession or apparent possession⁴, but personal chattels belonging to a wife will not be deemed to be in her husband's possession or apparent possession, or in his order and disposition or reputed ownership, merely because they remain in the house where the husband and wife are living together⁵.

¹ *Farrar v Beswick* (1836) 1 M & W 682; *Mayhew v Herrick* (1849) 7 CB 229; and see 11 Vin Abr 22, Execution (Sa 3). The principle is that each of the two persons has an interest in the goods which is capable of being seized, and each is entitled to possession and entitled to sell without the consent of the other. In interpleader proceedings by the other co-owner, the court may order a sale and the division of the proceeds between the judgment creditor and the co-owner claimant according to the proportions of their respective interests: see *The James W Elwell* [1921] P 351. As to interpleader proceedings see PARAS 1350, 1585 et seq.

² *Ie* under the Married Women's Property Act 1882 s 10: see **GIFTS** vol 52 (2009) PARA 262. This provision is now of limited significance in view of the enactment of the provisions referred to in note 4.

³ *Ie* under the Insolvency Act 1986 ss 423, 424, which apply whether or not insolvency proceedings have been taken: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 663 et seq.

⁴ See the Bills of Sale Act 1878 s 8; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1620 et seq.

⁵ *Ramsay v Margrett* [1894] 2 QB 18, CA; *French v Gething* [1922] 1 KB 236, CA; *Koppel v Koppel* [1966] 2 All ER 187, [1966] 1 WLR 802, CA, distinguishing *Youngs v Youngs* [1940] 1 KB 760, [1940] 1 All ER 349, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(B) Effect of Seizure by Enforcement Officer under High Court Process/1328. What constitutes seizure.

(B) EFFECT OF SEIZURE BY ENFORCEMENT OFFICER UNDER HIGH COURT PROCESS

1328. What constitutes seizure.

For an act of the enforcement officer or bailiff to constitute a seizure of goods it is not necessary that there should be any physical contact with the goods seized¹, nor does such contact necessarily amount to seizure². An entry upon the premises on which the goods are situated, together with an intimation of an intention to seize the goods, will amount to a valid seizure³, even where the premises are extensive and the property seized widely scattered⁴, but some act must be done sufficient to intimate to the judgment debtor or his employees that a seizure has been made⁵, and it is not sufficient to enter upon the premises and demand the debt⁶. Any act which, if not done with the court's authority, would amount to a trespass to goods will constitute a seizure of them when done under the writ or warrant⁷. Whether or not there has been a seizure is a question of fact⁸. The enforcement officer or bailiff should clearly specify which of the debtor's goods have been seized as he must not over-levy⁹.

1 *Bissicks v Bath Colliery Co* (1877) 2 Ex D 459; affd 3 Ex D 174, CA.

2 *Re Davies, ex p Williams*(1872) 7 Ch App 314; *Re Williams, ex p Jones* (1880) 42 LT 157.

3 *Watson v Murray & Co*[1955] 2 QB 1, [1955] 1 All ER 350; *Bissicks v Bath Colliery Co* (1877) 2 Ex D 459; affd 3 ExD 174, CA; for a more modern example of what constitutes seizure see *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd*[1966] 1 QB 764, [1964] 2 All ER 732. Similarly, a seizure of part of the goods in a house in the name of the whole is a good seizure: *Cole v Davies* (1698) 1 Ld Raym 724. As to the right of entry of the enforcement officer or the bailiff see PARAS 1310-1312.

4 *Gladstone v Padwick*(1871) LR 6 Exch 203.

5 *Balls v Thick* (1845) 9 Jur 304.

6 Ie although the demand is made by the bailiff having the warrant in his hands: *Nash v Dickenson*(1867) LR 2 CP 252.

7 *Mortimore v Cragg* (1878) 3 CPD 216, CA; *Andrews v Saunderson* (1857) 1 H & N 725. The text from the commencement of this paragraph to this point was described as a convenient summary of the principles as to seizure in *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd*[1966] 1 QB 764 at 776, [1964] 2 All ER 732 at 737 per Edmund Davies J.

8 *Bird v Bass* (1843) 6 Man & G 143; *Balls v Thick* (1845) 9 Jur 304; *Bower v Hett*[1895] 2 QB 51; affd [1895] 2 QB 337, CA; *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd*[1966] 1 QB 764, [1964] 2 All ER 732.

9 As to the requirement to provide an inventory of the goods seized see PARA 1315.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(B) Effect of Seizure by Enforcement Officer under High Court Process/1329. Effect of seizure under writ of fieri facias.

1329. Effect of seizure under writ of fieri facias.

By the seizure the goods are placed in the custody of the law, and the seizure is for the benefit of those who are by law entitled¹. The general property in the goods remains in the execution debtor², though what is called a special property in them vests in the enforcement officer, so that he can maintain claims for trespass or conversion against any person who takes them away³. No property in the goods passes to the execution creditor⁴. By the seizure they are taken out of the execution debtor's order and disposition⁵, and may be taken out of his apparent possession⁶.

Where the debtor becomes bankrupt after seizure of the goods but before their sale, the official receiver or trustee in bankruptcy is entitled to the benefit of the execution in priority to the judgment creditor⁷.

1 *Giles v Grover* (1832) 1 Cl & Fin 72, HL; *Union Bank of London v Lenanton* (1878) 3 CPD 243, CA.

2 *Giles v Grover* (1832) 1 Cl & Fin 72, HL; *Woodland v Fuller* (1840) 11 Ad & El 859; *Playfair v Musgrove* (1845) 14 M & W 239; *Payne v Drewe* (1804) 4 East 523; *Samuel v Duke* (1838) 3 M & W 622; *Union Bank of London v Lenanton* (1878) 3 CPD 243, CA; *Re Clarke* [1898] 1 Ch 336, CA.

3 *Wilbraham v Snow* (1670) 2 Wms Saund 47; *Giles v Grover* (1832) 1 Cl & Fin 72, HL. There must, however, be an actual seizure: *Blades v Arundale* (1813) 1 M & S 711. A person is not guilty of theft in taking his own goods which have been wrongfully seized by the enforcement officer under an execution against that person's wife (*R v Knight* (1908) 73 JP 15, CCA); but the sale by the judgment debtor to a third party after actual seizure does not give the purchaser protection under the Courts Act 2003 Sch 7 para 8(2) (see PARA 1294) or the County Courts Act 1984 s 99 (see PARA 1298), whether or not he had notice of the seizure, although the sale is effective to pass title subject to the enforcement officer's rights (*Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd* [1966] 1 QB 764, [1964] 2 All ER 732) (decided under earlier legislation).

4 *Giles v Grover* (1832) 1 Cl & Fin 72, HL.

5 *Fletcher v Manning* (1844) 12 M & W 571; *Re Baldwin, ex p Foss* (1858) 2 De G & J 230.

6 In *Re Brenner, ex p Saffery* (1881) 16 ChD 668, CA, it was held, not following *Re Cole, ex p Mutton* (1872) LR 14 Eq 178, that the seizure of the execution debtor's goods took them out of his apparent possession, but in *Sales Agency Ltd v Elite Theatres* [1917] 2 KB 164, CA, it was said that this was not necessarily so in every case, the question of apparent possession being one of fact. See also *Re Eales, ex p Steel* (1905) 54 WR 202, DC. The seizure is not a satisfaction of the execution creditor's debt, even to the value of the goods seized: *Lee v Dangar, Grant & Co* [1892] 1 QB 231; affd [1892] 2 QB 337, CA. The expression 'satisfaction' has been used in the cases incautiously when it was immaterial to consider the distinction between seizing and selling by the enforcement officer: *Lee v Dangar, Grant & Co* [1892] 2 QB 337 at 350, CA; see *Clerk v Withers* (1704) 2 Ld Raym 1072; *Lansdowne v Connor* (1889) 24 LR 1r 50. The seizure is, however, said to be pro tanto a discharge: *Re A Debtor, ex p Smith* [1902] 2 KB 260 at 265, CA, per Vaughan Williams LJ.

7 See PARA 1354.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(B) Effect of Seizure by Enforcement Officer under High Court Process/1330. Retaining possession after seizure; 'walking possession'.

1330. Retaining possession after seizure; 'walking possession'.

After seizure of goods under a writ of fieri facias it is the enforcement officer's duty to retain possession of them until sale¹. If he abandons the goods, they are no longer subject to the writ², and he will be liable to the judgment creditor for damages³. He may, however, after withdrawal, re-enter if directed to do so by the judgment creditor⁴. The question whether an abandonment has taken place is a question of fact, in determining which any absence of the enforcement officer or any person acting under his authority, unless satisfactorily explained (for example that it was caused by some urgent necessity⁵), will be considered to be prima facie an abandonment⁶.

Once the enforcement officer has completed seizure, he may retain possession of the goods even without leaving a person on the premises, if he has taken 'walking possession'⁷. Walking possession is usually taken by obtaining the judgment debtor's written consent⁸, but the consent may be signed in the debtor's absence by any responsible person in the house such as the judgment debtor's wife or a caretaker⁹. Whether the enforcement officer has retained possession of goods where the judgment debtor has failed or refused to sign an agreement to give walking possession is a matter of inference to be deduced from the evidence as a whole¹⁰. Seizure relates only to those goods which the enforcement officer has clearly indicated he has seized, and walking possession is also restricted to those goods¹¹. Where walking possession is taken of the contents of a shop, the enforcement officer's continual possession is not defeated by an oral undertaking by the judgment debtor to replace stocks sold¹².

1 *Ackland v Paynter* (1820) 8 Price 95.

2 *Blades v Arundale* (1813) 1 M & S 711; *Crowder v Long* (1828) 8 B & C 598.

3 Other persons will be able to obtain priority by distress or execution: *Crowder v Long* (1828) 8 B & C 598; *Shaw v Kirby* (1888) 52 JP 182. The enforcement officer must, however, abandon possession where he has received a claim for rent under the Landlord and Tenant Act 1709 s 1 (see PARA 1352), and the judgment creditor does not pay off such claim: *Foster v Hilton* (1831) 1 Dowl 35. As to the measure of damages see *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd* [1966] 1 QB 764, [1964] 2 All ER 732.

4 *Miller & Co v Solomon* [1906] 2 KB 91, DC; but not unless so directed: *Shaw v Kirby* (1888) 52 JP 182. It has been held in Ireland that the managing clerk of the execution creditor's solicitor has no authority to direct the enforcement officer to withdraw: *Whyte v Nutting* [1897] 2 IR 241.

5 *Ackland v Paynter* (1820) 8 Price 95; *Bagshawes Ltd v Deacon* [1898] 2 QB 173, CA.

6 *Ackland v Paynter* (1820) 8 Price 95; *Bagshawes Ltd v Deacon* [1898] 2 QB 173, CA. A withdrawal so as to facilitate a sale of a business to a limited company is an abandonment: *Bagshawes Ltd v Deacon* [1898] 2 QB 173, CA. The fact that the officer, after seizure and before departure from the premises, has left his warrant in a drawer in the debtor's house, will not prevent his absence from being an abandonment: *Blades v Arundale* (1813) 1 M & S 711.

7 In *National Commercial Bank of Scotland Ltd v Arcam Demolition and Construction Ltd* [1966] 2 QB 593 at 599, [1966] 3 All ER 113 at 114-115, CA, Lord Denning MR described walking possession thus: 'It was at one time thought that, in order to retain possession the bailiff, as the sheriff's officer, must actually remain in the house with the goods. He used to sit down in the kitchen and make himself at home; but that has long since been regarded as unnecessary. It is sufficient if he visits the house frequently to make sure that the goods are

safely there and not removed. He then still retains possession; but he need not even do as much as that--he need not visit the house--if he gets an agreement signed by some responsible person in the house to see that the goods are not removed. After getting such an agreement he is said to take 'walking possession'. In the same case *Davies LJ* (at 600-601 and at 115) approved the Lord Chancellor's departmental circular to county court registrars (now known as district judges), part of which read: 'The Lord Chancellor considers that it is to the public advantage that walking possession should be adopted by high bailiffs (now district judges) to the utmost possible extent, goods being removed or a possession man being put into close possession only in the cases where it is considered that the course is necessary to safeguard the goods'. See also *Watson v Murray & Co* [1955] 2 QB 1, [1955] 1 All ER 350; and PARA 1371. As to walking possession in distress cases generally and in distress for non-domestic rates or council tax cases see **DISTRESS** vol 13 (2007 Reissue) PARAS 1018, 1106, 1118.

8 A copy of the written consent is left with the judgment debtor. The consent includes a list of the goods seized, and an undertaking by the judgment debtor not to remove the goods, to inform any other person who may wish to levy that the goods have already been seized, and to notify the enforcement officer of any such visit, and also an authorisation for the enforcement officer to re-enter the premises at any time. For the form of a walking possession agreement see the Sheriffs' Fees (Amendment) Order 1956, SI 1956/502, art 1, Schedule. See further **SHERIFFS** vol 42 (Reissue) PARA 1141.

9 *National Commercial Bank of Scotland Ltd v Arcam Demolition and Construction Ltd* [1966] 2 QB 593, [1966] 3 All ER 113, CA (signature of judgment debtor's wife sufficient even though judgment debtor objected).

10 *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd* [1966] 1 QB 764, [1964] 2 All ER 732 (sheriff's officer seized residential caravan; debtor refused to sign agreement for walking possession; officer told debtor not to move the caravan and officer made nine visits over five weeks; held on the facts that seizure had not been abandoned); see also *Bower v Hett* [1895] 2 QB 337, CA (bailiff went out of possession under an arrangement with the judgment debtor that he might at any time come in again and re-take possession of goods; held that he had abandoned possession); *Ackland v Paynter* (1820) 8 Price 95 (enforcement officer ought to account for failure to keep possession); *Bagshawes Ltd v Deacon* [1898] 2 QB 173, *Lumsden v Burnett* [1898] 2 QB 177, CA.

11 See note 8. As to the inventory of goods seized see PARA 1315.

12 *Re Dalton (a bankrupt), ex p Herrington and Carmichael (a firm) v Trustee* [1963] Ch 336, [1962] 2 All ER 499, DC.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(B) Effect of Seizure by Enforcement Officer under High Court Process/1331. Payment to enforcement officer.

1331. Payment to enforcement officer.

The enforcement officer has authority from the judgment creditor to receive the amount to be levied¹, and can give a discharge². If payment or tender³ is made, he must withdraw from possession⁴, and if no payment is made, he must, after the seizure, proceed at once to prepare for sale⁵.

1 See *Rook v Wilmot* (1590) Cro Eliz 209; *Taylor v Baker* (1677) Freem KB 453.

2 *Gregory v Slowman* (1852) 1 E & B 360.

3 I.e. by the judgment debtor or another person: *R v Bird* (1679) 2 Show 87. Where a third person's goods have been seized, and that person has paid money to prevent a sale, he may bring a claim to recover the money so paid: *Kanhaya Lal v National Bank of India* (1913) 29 TLR 314, PC.

4 The execution creditor, if satisfied, should direct him to withdraw, but will not be liable for not so doing except upon proof of malice: *Phillips v General Omnibus Co* (1880) 50 LJQB 112.

5 *Re Crook, ex p Sheriff of Southampton* (1894) 63 LJQB 756, where it was also decided that no valid sale can be made before seizure. Appraisement before sale is usual but not necessary: *Bealy v Sampson* (1688) 2 Vent 93.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(C) Custody etc of Goods Seized under County Court Process/1332. Custody of goods seized.

(C) CUSTODY ETC OF GOODS SEIZED UNDER COUNTY COURT PROCESS

1332. Custody of goods seized.

Goods seized in execution under process of a county court¹ must, until sale², be deposited by the bailiff³ in some fit place, or remain in the custody of a fit person approved by the district judge to be put in possession by the bailiff⁴, or be safeguarded in such other manner as the district judge directs⁵. The district judge may from time to time as he thinks fit appoint such number of persons for keeping possession of such goods as appears to him to be necessary⁶.

1 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

2 As to the sale of goods under execution see PARA 1339 et seq.

3 As to the meaning of 'bailiff' see PARA 1258.

4 This is similar to the concept of 'walking possession' where goods are seized by the enforcement officer: see PARA 1330.

5 County Courts Act 1984 s 90 (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3); repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 72, Sch 23 Pt 3).

6 County Courts Act 1984 s 95(1) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3); repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 Sch 13 para 73, Sch 23 Pt 3). See further PARA 1340.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(C) Custody etc of Goods Seized under County Court Process/1333. Inventory of goods removed.

1333. Inventory of goods removed.

Where goods seized in execution¹ are removed, the court² must forthwith deliver or send to the debtor a sufficient inventory of the goods removed and must, not less than four days before the time fixed for the sale³, give him notice of the time and place at which the goods will be sold⁴. The inventory and notice must be given to the debtor by delivering them to him personally or by sending them to him by post at his place of residence or, if his place of residence is not known, by leaving them for him, or sending them to him by post, at the place from which the goods were removed⁵.

1 As to goods which may be seized see PARA 1315 et seq.

2 As to the meaning of 'court' see PARA 22.

3 As to the sale of goods seized see PARA 1339 et seq.

4 CPR Sch 2 CCR Ord 26 r 12(1).

5 CPR Sch 2 CCR Ord 26 r 12(2). As to the recommended practice whereby an inventory is left by the enforcement agent see PARA 1315.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(C) Custody etc of Goods Seized under County Court Process/1334. Disposal of bills of exchange etc seized.

1334. Disposal of bills of exchange etc seized.

The district judge must hold any bills of exchange, promissory notes, bonds, specialties or other securities for money seized in execution under process of a county court¹ as security for the amount directed to be levied by the execution, or for so much of that amount as has not been otherwise levied or raised, for the benefit of the claimant². The claimant may sue in the name of the defendant, or in the name of any person in whose name the defendant might have sued, for the recovery of the sum secured or made payable thereby when the time of payment arrives³.

1 As to the power to seize bills of exchange etc in execution see the County Courts Act 1984 s 89(1)(b) (prospectively repealed); and PARA 1315.

2 County Courts Act 1984 s 91 (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3); repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 72, Sch 23 Pt 3). The statute uses the term 'plaintiff' instead of 'claimant', which is the terminology used under the Civil Procedure Rules: see PARA 18.

3 See note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/A. SEIZURE OF PROPERTY/(C) Custody etc of Goods Seized under County Court Process/1335. Penalty for rescuing goods seized in execution.

1335. Penalty for rescuing goods seized in execution.

If any person rescues or attempts to rescue any goods seized in execution¹ under process of a county court, he is liable on summary conviction to imprisonment for a term not exceeding one month or a fine of an amount not exceeding level 4 on the standard scale, or to both², or, alternatively, may be committed to prison by the judge³ for contempt of court⁴ for a specified period not exceeding one month or fined by the judge an amount not exceeding level 4 on the standard scale, or both⁵. A bailiff⁶ of the court may take the offender into custody with or without a warrant and bring him before the judge⁷.

The judge may at any time revoke an order committing a person to prison under these provisions and, if he is already in custody, order his discharge⁸.

Before imposing any penalty under this jurisdiction, the judge must give the alleged offender the opportunity to obtain legal advice and representation and allow time for him to contest the allegations if he does not admit them and put forward any mitigation⁹. An alleged contemnor has a common law right to adequate notice of what is being alleged, and nothing in the above provisions cuts down that right. Moreover, as a matter of good practice, the charge should be put in writing and, unless it is clear that the defendant has already read and understood it, it must be read over to him at the outset of a hearing under these provisions in order to eliminate any possibility that he is unaware of the case which he has to answer¹⁰.

1 As to goods which may be seized in execution see the County Courts Act 1984 s 89; and PARA 1315.

2 County Courts Act 1984 s 92(1)(a). As to the meaning of 'standard scale' see PARA 63 note 3. As from a day to be appointed, the maximum term of imprisonment is increased to 51 weeks: s 92(1)(a) (amended, as from a day to be appointed, by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 33(1), (3)). At the date at which this title states the law, no such day had been appointed.

3 In relation to a county court, 'judge' for the purposes of the County Courts Act 1984 means a judge assigned to the district of that court under s 5(1), and any person sitting as a judge for that district under s 5(3), (4): s 147(1). See **COURTS** vol 10 (Reissue) PARA 724.

4 See generally **CONTEMPT OF COURT**.

5 County Courts Act 1984 s 92(1)(b) (amended by the Statute Law (Repeals) Act 1986). Where it is alleged that any person has committed such an offence, the court officer must issue a summons which must be served on the alleged offender personally not less than eight days before the return day appointed in the summons: CPR Sch 2 CCR Ord 34 r 1(a). CPR Sch 2 CCR Ord 29 r 1(5) applies with the necessary modifications where an order is made under the County Courts Act 1984 s 92 committing a person to prison: CPR Sch 2 CCR Ord 34 r 1A. See PARA 1514; and **CONTEMPT OF COURT**.

6 As to the meaning of 'bailiff' see PARA 1258.

7 County Courts Act 1984 s 92(1). It has been held under earlier legislation that the bailiff's power to arrest the offender is given to him as an individual officer and that a wrongful exercise of it does not render the district judge of the county court liable: *Smith v Pritchard* (1849) 8 CB 565. See also *R v Briggs* (1883) 47 JP 615; *R v Holsworthy Justices, ex p Edwards* [1952] 1 All ER 411, DC.

As from a day to be appointed, the County Courts Act 1984 s 92 does not apply in the case of goods seized under the Tribunals, Courts and Enforcement Act 2007 Sch 12 (see PARA 1386 et seq): County Courts Act 1984 s 92(3) (added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13 paras 68, 73). At the date at which this title states the law, no such day had been appointed.

8 County Courts Act 1984 s 92(2). See note 7.

9 *Read v King* [1997] CLY 1262, CA (a decision on the County Courts Act 1984 s 14: see **COURTS** vol 10 (Reissue) PARA 740). This decision is fortified by the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) art 6, now incorporated into domestic law by the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 6 (right to a fair and public hearing: see PARA 1235; and **COURTS** vol 10 (Reissue) PARA 312). See also the text and note 10.

10 *Newman (t/a Mantella Publishing) v Modern Bookbinders Ltd* [2000] 2 All ER 814, [2000] 1 WLR 2559, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/B. SALES UNDER EXECUTION/(A) Sale of Goods by Enforcement Officer under High Court Process/1336. Sale by enforcement officer.

B. SALES UNDER EXECUTION

(A) SALE OF GOODS BY ENFORCEMENT OFFICER UNDER HIGH COURT PROCESS

1336. Sale by enforcement officer.

The enforcement officer is not entitled to hand over goods seized under a writ of fieri facias to the judgment creditor in satisfaction of the debt¹, although at a sale the judgment creditor² or judgment debtor may be a purchaser of the goods³. It is the enforcement officer's duty, within a reasonable time after the seizure⁴, to sell the goods⁵ for a reasonable price⁶, and it is also his duty not to conduct the sale as to prevent them fetching such a price as might have been obtained⁷. He may not sell on the debtor's premises without the debtor's consent, except possibly if a sale elsewhere is impossible⁸. When the enforcement officer's term of office expires after the seizure of the goods but before they have been sold, it seems that he may sell the goods after he is out of office⁹.

Where any goods seized under a writ of execution issued from the High Court by an enforcement officer or other person under a duty to execute it, are to be sold for a sum exceeding £20 (including legal incidental expenses), the sale must, unless the court otherwise orders, be made by public auction, and not by bill of sale or private contract, and must be publicly advertised on, and during three days preceding, the day of sale¹⁰. It has, however, been held that if the sale is made otherwise than in fulfilment of these requirements its validity is not affected until set aside by the court¹¹.

1 *Thomson v Clerk* (1596) Cro Eliz 504.

2 *A-G v Fort* (1804) 8 Price 365; *Stratford v Twynam* (1822) Jac 418; *Cookson v Fryer* (1858) 1 F & F 328; *Re Rogers, ex p Villars* (1874) 9 Ch App 432.

3 The enforcement officer may not himself keep the goods and pay the amount of the levy: *Waller v Weedale* (1604) Noy 107.

4 It is no excuse that he considered the delay beneficial to all parties: *Re Sheriff of Essex, Terrell v Fisher* (1862) 10 WR 796. A week's delay to verify a notice of an act of bankruptcy has been held to be unreasonably long (*Ayshford v Murray* (1870) 23 LT 470), but no precise time is specified. Any unreasonable delay will, on proof of damage, but not otherwise (*Re Sheriff of Essex, Terrell v Fisher* (1862) 10 WR 796), render the enforcement officer liable to the judgment creditor (*Aireton v Davis* (1833) 3 Moo & S 138; *Ayshford v Murray* (1870) 23 LT 470; see also *Mullet v Challis* (1851) 16 QB 239), and to the judgment debtor (*Carlile v Parkins* (1822) 3 Stark 163; *Ash v Dawnay* (1852) 8 Exch 237).

5 The enforcement officer need not accept an indemnity offered by a claimant for not selling a chattel having special value, but may proceed to sell notwithstanding such offer: *Harrison v Forster* (1836) 4 Dowl 558.

6 It is not sufficient that he sells them to the highest bidder greatly under their value (*Keightley v Birch* (1814) 3 Camp 521); cf *Cramer v Murphy* (1887) 20 LR Ir 572, where it was held that the enforcement officer can sell at any price if the goods have been properly advertised and there is no negligence. The proper course, if an adequate price cannot be obtained at the sale, is to adjourn the sale to a named day (*Edge v Kavanagh* (1888) 24 LR Ir 1; and see *Cramer v Murphy* (1887) 20 LR Ir 572, where there were two adjournments), or to return that the goods remain on his hands for want of buyers (*Keightley v Birch* (1814) 3 Camp 521; *Edge v Kavanagh* (1888) 24 LR Ir 1).

7 Eg by improper lotting of the goods: *Wright v Child*(1866) LR 1 Exch 358. A clearly negligent sale has been set aside by the court in Ireland: *Edge v Kavanagh* (1888) 24 LR Ir 1.

8 *Watson v Murray & Co*[1955] 2 QB 1, [1955] 1 All ER 350.

9 *Clerk v Withers* (1704) 2 Ld Raym 1072; *Wilcox v Pokinhorn* (1728) 1 Barn KB 81.

10 Courts Act 2003 s 99(1), Sch 7 para 10(1), (2). Schedule 7 para 10 applies to any writ of execution against goods which is issued from the High Court: Sch 7 para 6. As from a day to be appointed, however, Sch 7 para 10 does not apply to any writ that confers power to use the procedure in the Tribunals, Courts and Enforcement Act 2007 Sch 12 (see PARA 1386 et seq), but does apply to any other writ of execution against goods which is issued from the High Court: Courts Act 2003 Sch 7 para 6(2) (Sch 7 para 6 prospectively substituted by the Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13 paras 148, 151(1), (3)). At the date at which this title states the law, no such day had been appointed. The enforcement officer may proceed to advertise immediately after seizure: *Re Crook, ex p Sheriff of Southampton* (1894) 63 LJQB 756, DC (decided under earlier legislation).

11 *Crawshaw v Harrison*[1894] 1 QB 79 (decided under earlier legislation). Application to set aside an irregular sale may be made to the court by any person injured by the irregularity: *Crawshaw v Harrison*[1894] 1 QB 79.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/B. SALES UNDER EXECUTION/(A) Sale of Goods by Enforcement Officer under High Court Process/1337. Sale otherwise than by public auction.

1337. Sale otherwise than by public auction.

An order of the court¹ that a sale under of goods seized under an execution may be made otherwise than by public auction² may be made on the application of (1) the person at whose instance the writ of execution³ under which the sale is to be made was issued; (2) the person against whom that writ was issued (the 'judgment debtor'); (3) if the writ was directed to a sheriff, that sheriff; and (4) if the writ was directed to one or more enforcement officers, the relevant enforcement officer⁴. Such an application must be made in accordance with Part 23 of the Civil Procedure Rules⁵ and the application notice must contain a short statement of the grounds of the application⁶.

Where the applicant for an order under these provisions is not the sheriff or enforcement officer, the sheriff or enforcement officer must, on the demand of the applicant, send to the applicant a list stating whether he has notice of the issue of another writ or writs of execution against the goods of the judgment debtor and, so far as is known to him, the name and address of every creditor who has obtained the issue of another such writ of execution, and where the sheriff or enforcement officer is the applicant, he must prepare such a list⁷.

If the person who seized the goods has notice of another execution or other executions, the court must not consider an application for leave to sell privately until the prescribed notice⁸ has been given to the other execution creditor or creditors⁹. An execution creditor given such notice is entitled to appear before the court and to be heard on the application for the order¹⁰. Not less than four clear days before the hearing the applicant must serve the application notice on each of the other persons by whom the application might have been made and on every person named in the list mentioned above¹¹.

The applicant must produce the list to the court on the hearing of the application¹². Every person on whom the application notice was served may attend and be heard on the hearing of the application¹³.

1 Ie under the Courts Act 2003 s 99(1), Sch 7 para 10. As to the meaning of 'court' see PARA 22.

2 As to sale by public auction see PARA 1336.

3 As to writs of execution see PARA 1265 et seq.

4 CPR Sch 1 RSC Ord 47 r 6(1). As to enforcement officers see PARA 1258; and as to the meaning of 'relevant enforcement officer' see PARA 1278 note 3.

5 Ie CPR Pt 23: see PARA 303 et seq.

6 CPR Sch 1 RSC Ord 47 r 6(2).

7 CPR Sch 1 RSC Ord 47 r 6(3).

8 Service of the application notice on a person named in the list (see the text and notes 9-10) is notice to him for these purposes: see CPR Sch 1 RSC Ord 47 r 6(5). As to the meaning of 'service' see PARA 138 note 2.

9 Courts Act 2003 Sch 7 para 10(3). As to the application of Sch 7 para 10 see PARA 1336 note 10.

10 Courts Act 2003 Sch 7 para 10(3).

11 CPR Sch 1 RSC Ord 47 r 6(4).

12 CPR Sch 1 RSC Ord 47 r 6(6).

13 CPR Sch 1 RSC Ord 47 r 6(7). For the prescribed form of order for sale see *Practice Direction--Forms* PD 4, para 4, Table 2, Form PF97 QB; and see *The Civil Court Practice*. As to the use of the forms listed in Table 2 see PARA 14.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/B. SALES UNDER EXECUTION/(A) Sale of Goods by Enforcement Officer under High Court Process/1338. Title acquired by purchaser of company property.

1338. Title acquired by purchaser of company property.

Where a creditor has issued execution against the goods or land of a company or has attached any debt due to it, and the company is subsequently wound up, then despite the rights of the liquidator as against the creditor and the enforcement officer¹, a person who purchases in good faith under a sale² by an enforcement officer or other officer charged with the execution of the writ³ any goods of a company on which execution has been levied in all cases acquires a good title to them against the liquidator⁴. Similarly, nothing in the statutory provisions concerning the effect of an individual's bankruptcy on an execution against goods⁵ entitles the trustee of a bankrupt's estate to claim goods from a person who has acquired them in good faith under a sale by an enforcement officer or other officer charged with an execution⁶.

1 Ie the rights set out in the Insolvency Act 1986 s 183: see PARA 1354. As to enforcement officers see PARA 1258; and **SHERIFFS**.

2 As to sales under execution see PARAS 1336-1337.

3 As to writs of execution see PARA 1265 et seq.

4 See the Insolvency Act 1986 s 183(1), (2)(b) (s 183(2)(b) amended by the Courts Act 2003 s 109(1), Sch 8 para 295(1), (2)); and PARA 1354. As to third party interests see further PARA 1346 et seq.

5 Ie the Insolvency Act 1986 s 346: see PARA 1355.

6 Insolvency Act 1986 s 346(7) (amended by the Courts Act 2003 Sch 8 para 297(1), (2)).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/B. SALES UNDER EXECUTION/(B) Sale of Goods Seized under County Court Process/1339. Period to elapse before sale.

(B) SALE OF GOODS SEIZED UNDER COUNTY COURT PROCESS

1339. Period to elapse before sale.

No goods seized in execution¹ under process of a county court² must be sold for the purpose of satisfying the warrant of execution³ until the expiration of a period of at least five days⁴ next following the day on which the goods have been so seized unless the goods are of a perishable nature or the person whose goods have been seized so requests in writing⁵.

1 As to the goods that may be seized see PARA 1315 et seq.

2 As to the meaning of 'county court' see PARA 1283 note 2.

3 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

4 As to the calculation of this period see generally **TIME**.

5 County Courts Act 1984 s 93. Section 93 is repealed by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 74, Sch 23 Pt 3 as from a day to be appointed. At the date at which this title states the law, no such day had been appointed.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/B. SALES UNDER EXECUTION/(B) Sale of Goods Seized under County Court Process/1340. Appointment of brokers and appraisers.

1340. Appointment of brokers and appraisers.

The district judge¹ may from time to time as he thinks fit appoint such number of persons for keeping possession, and such number of brokers and appraisers for the purpose of selling or valuing any goods seized in execution² under process of the court, as appears to him to be necessary³. He may direct security to be taken from any broker, appraiser or other person so appointed for such sum and in such manner as he thinks fit for the faithful performance of his duties without injury or oppression⁴; and may dismiss any broker, appraiser or other person so appointed⁵.

Prescribed fees⁶ are payable out of the produce of goods distrained or sold to brokers and appraisers so appointed in respect of their duties⁷.

The judge⁸ may appoint in writing any bailiff⁹ of the court to act as a broker or appraiser for the purpose of selling or valuing any goods seized in execution under process of the court¹⁰ and a bailiff so appointed may, without other licence in that behalf, perform all the duties which brokers or appraisers appointed as described above may perform under the County Courts Act 1984¹¹.

1 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

2 As to goods which may be seized in execution see PARA 1315 et seq; and as to the custody of goods seized see PARA 1332.

3 County Courts Act 1984 s 95(1) (s 95(1)-(3) amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3)). The County Courts Act 1984 s 95 is repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 74, Sch 23 Pt 3. At the date at which this title states the law, no such day had been appointed.

4 County Courts Act 1984 s 95(2) (as amended and prospectively repealed: see note 3).

5 County Courts Act 1984 s 95(3) (as amended and prospectively repealed: see note 3).

6 The fees prescribed by an order under the Courts Act 2003 s 92 (fees): County Courts Act 1984 s 95(4) (amended by the Courts Act 2003 s 109(1), Sch 8 para 271(c)). As to fees orders see **COURTS** vol 10 (Reissue) PARA 705; PARA 87; and see *The Civil Court Practice*.

7 County Courts Act 1984 s 95(4) (prospectively repealed: see note 3).

8 As to the meaning of 'judge' see PARA 1335 note 3.

9 As to the meaning of 'bailiff' see PARA 1258.

10 County Courts Act 1984 s 96(1). Section 96 is repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 Sch 13 para 74, Sch 23 Pt 3. At the date at which this title states the law, no such day had been appointed.

11 County Courts Act 1984 s 96(2). See note 10.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/B. SALES UNDER EXECUTION/(B) Sale of Goods Seized under County Court Process/1341. Goods not to be sold except by brokers or appraisers.

1341. Goods not to be sold except by brokers or appraisers.

No goods seized in execution¹ under process of a county court² must be sold for the purpose of satisfying the warrant of execution³ except by one of the brokers or appraisers appointed⁴ for the purpose⁵.

1 As to goods which may be seized in execution see PARA 1315 et seq; and as to the custody of goods seized see PARA 1332.

2 As to the meaning of 'county court' see PARA 1283 note 2.

3 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

4 I.e. appointed under the County Courts Act 1984 Pt V (ss 85-111): s 94. As to the appointment of brokers and appraisers see PARA 1340.

5 County Courts Act 1984 s 94 (repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 74, Sch 23 Pt 3). At the date at which this title states the law, no such day had been appointed.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/B. SALES UNDER EXECUTION/(B) Sale of Goods Seized under County Court Process/1342. Sale by public auction.

1342. Sale by public auction.

Where any goods are to be sold under execution¹ for a sum exceeding £20 (including legal incidental expenses), the sale must, unless the court² from which the warrant of execution issued³ otherwise orders, be made by public auction⁴ and not by bill of sale or private contract⁵. The sale must be publicly advertised by the district judge⁶ on, and during three days next preceding, the day of sale⁷.

Where an interpleader claimant⁸ alleges that goods have been sold at an undervalue, a sale by public auction is not conclusive evidence that this is not the case and the court will hear evidence as to the value of the goods to determine whether they were in fact sold at an undervalue⁹.

1 As to goods which may be seized for sale under execution see PARA 1315 et seq.

2 As to the meaning of 'court' for these purposes see PARA 1283 note 2.

3 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

4 As to sales by public auction see generally **AUCTION**.

5 County Courts Act 1984 s 97(1). Section 97 is repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 74, Sch 23 Pt 3. At the date at which this title states the law, no such day had been appointed. As to private sales see PARA 1343.

6 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

7 County Courts Act 1984 s 97(1) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3); and prospectively repealed (see note 5)).

8 Ie any person making a claim to or in respect of goods seized in execution or their proceeds or value: see CPR Sch 2 CCR Ord 33 r 1(A1); and PARA 1631. As to interpleader see PARAS 1350, 1628 et seq.

9 *Observer Ltd v Gordon (Cranfield, Claimants)* [1983] 2 All ER 945, [1983] 1 WLR 1008.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/B. SALES UNDER EXECUTION/(B) Sale of Goods Seized under County Court Process/1343. Sale otherwise than by public auction.

1343. Sale otherwise than by public auction.

Where the district judge¹ responsible for the execution of the warrant² is the district judge by whom it was issued and he has no notice of any other warrant or writ of execution³ against the goods of the debtor, an order that a sale under an execution may be made otherwise than by public auction⁴ may be made by the court⁵ of its own initiative⁶ with the consent of the execution creditor and the debtor or after giving them an opportunity of being heard⁷. Subject to that, such an order⁸ may be made on the application of the execution creditor or the debtor or the district judge responsible for the execution of the warrant⁹.

Where he is not the applicant for such an order, the district judge responsible for the execution of the warrant must, on the demand of the applicant, furnish him with a list containing the name and address of every execution creditor under any other warrant or writ of execution against the goods of the debtor of which the district judge has notice. Where the district judge is the applicant, he must prepare such a list¹⁰.

Where any goods are seized in execution and the district judge has notice of another execution or other executions, the court must not consider an application for leave to sell privately until the prescribed notice¹¹ has been given to the other execution creditor or creditors, who may appear before the court and be heard upon the application¹². Not less than four days before the day fixed for the hearing of the application, the applicant must give notice of the application to each of the other persons by whom the application might have been made and to every person named in the list furnished or prepared by the district judge¹³. The applicant must produce the list to the court on the hearing of the application¹⁴.

Every person to whom notice of the application was given may attend and be heard on the hearing of the application¹⁵.

1 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

2 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285. As to execution of the warrant see PARA 1310 et seq.

3 As to writs of execution see PARA 1265 et seq.

4 I.e. an order under CPR Sch 2 CCR Ord 26 r 15: see the text and notes 1-3, 5-15.

5 As to the meaning of 'court' see PARA 22.

6 The wording in CPR Sch 2 CCR Ord 26 r 15 is 'of its own motion'.

7 CPR Sch 2 CCR Ord 26 r 15(6). As to the priority of writs and warrants see PARA 1297.

8 I.e. an order under the County Courts Act 1984 s 97: see the text and notes 11-12; and PARA 1342.

9 CPR Sch 2 CCR Ord 26 r 15(1).

10 CPR Sch 2 CCR Ord 26 r 15(2).

11 See the text and note 13.

12 County Courts Act 1984 s 97(2) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3); repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 74, Sch 23 Pt 3; at the date at which this title states the law, no such day had been appointed).

13 CPR Sch 2 CCR Ord 26 r 15(3).

14 CPR Sch 2 CCR Ord 26 r 15(4).

15 CPR Sch 2 CCR Ord 26 r 15(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/B. SALES UNDER EXECUTION/(B) Sale of Goods Seized under County Court Process/1344. Account of sale.

1344. Account of sale.

Where goods are sold under an execution¹, the court² must furnish the debtor with a detailed account in writing of the sale and of the application of the proceeds³.

1 As to sales under an execution see PARA 1339 et seq.

2 As to the meaning of 'court' see PARA 22.

3 CPR Sch 2 CCR Ord 26 r 13. For the prescribed form of details of sale see *Practice Direction--Forms* PD 4, para 5, Table 3, Form N444; and see *The Civil Court Practice*. As to the use of the forms listed in Table 3 see PARA 14.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/B. SALES UNDER EXECUTION/(B) Sale of Goods Seized under County Court Process/1345. Title acquired by purchaser.

1345. Title acquired by purchaser.

Where any goods in the possession of an execution debtor at the time of seizure by a district judge¹ or other officer charged with the enforcement of a warrant or other process of execution² issued from a county court³ are sold by that district judge or other officer⁴ without any claims having been made to them, the purchaser of the goods so sold acquires a good title to those goods⁵, subject to the right of any lawful claimant⁶ to any remedy to which he may be entitled against any person other than the district judge or other officer⁷.

Where a creditor has issued execution against the goods or land of a company or has attached any debt due to it, and the company is subsequently wound up, then despite the rights of the liquidator as against the creditor and the district judge⁸, a person who purchases in good faith under a sale by an enforcement officer⁹ or other officer charged with the execution of the writ any goods of a company on which execution has been levied in all cases acquires a good title to them against the liquidator¹⁰. Similarly, nothing in the statutory provisions concerning the effect of an individual's bankruptcy on an execution against goods¹¹ entitles the trustee of a bankrupt's estate to claim goods from a person who has acquired them in good faith under a sale by an enforcement officer or other officer charged with an execution¹².

Where a claim is made to or in respect of any goods seized in execution under process of a county court, and the claimant does not comply with the statutory requirement to make a deposit or to give security¹³, the bailiff¹⁴ must sell the goods as if no such claim had been made, and pay the proceeds of the sale into court to abide the judge's decision¹⁵, unless the district judge decides that, in all the circumstances, the judge's decision on the claim ought to be awaited, in which case the goods must not be sold¹⁶. It has been held that where the goods are sold under this provision, the purchaser obtains a good title if the claimant is the real owner¹⁷, but the position is less clear if the claimant is not the real owner and the real owner makes no claim until after the sale¹⁸.

1 As to goods that may be seized see PARA 1315 et seq. As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

2 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

3 As to the meaning of 'county court' see PARA 1283 note 2.

4 As to sales under execution see PARAS 1339-1345.

5 County Courts Act 1984 s 98(1)(a). Section 98 is repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 74, Sch 23 Pt 3. At the date at which this title states the law, no such day had been appointed.

6 Ie any person who proves that at the time of sale he had a title to any goods so seized and sold: County Courts Act 1984 s 98(2) (prospectively repealed: see note 5).

7 County Courts Act 1984 s 98(2) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3); and prospectively repealed (see note 5)). These provisions have effect subject to those of the Insolvency Act 1986 ss 183, 184 and 346 (see the text and notes 8-11; and PARAS 1354-1355): County Courts Act 1984 s 98(3) (substituted by the Insolvency Act 1986 s 439(2), Sch 14; prospectively repealed (see note 5)). As to third party interests see further PARA 1346 et seq.

8 le the rights set out in the Insolvency Act 1986 s 183: see PARA 1354.

9 As to enforcement officers see PARA 1258.

10 See the Insolvency Act 1986 s 183(1), (2)(b) (s 183(2)(b) amended by the Courts Act 2003 s 109(1), Sch 8 para 295(1), (2)); and PARA 1354.

11 le the Insolvency Act 1986 s 346: see PARA 1355.

12 Insolvency Act 1986 s 346(7) (amended by the Courts Act 2003 Sch 8 para 297(1), (2)).

13 le the requirement contained in the County Courts Act 1984 s 100(1): see PARA 1632.

14 As to the meaning of 'bailiff' see PARA 1258.

15 See the County Courts Act 1984 s 100(3); and PARA 1632. As to the meaning of 'judge' for these purposes see PARA 1335 note 3.

16 See the County Courts Act 1984 s 100(4); and PARA 1632.

17 *Goodlock v Cousins* [1897] 1 QB 558, CA.

18 See *Goodlock v Cousins* [1897] 1 QB 558, CA; *Crane & Sons v Ormerod* [1903] 2 KB 37, CA; *Cramer v Matthews* (1881) 7 QBD 425; *Jelks v Hayward* [1905] 2 KB 460 (all decisions under earlier legislation); and see the discussion of this point in PARA 1632 at notes 12-13.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/C. THIRD PARTY INTERESTS/(A) In general/1346. Third parties' interests in the debtor's property.

C. THIRD PARTY INTERESTS

(A) IN GENERAL

1346. Third parties' interests in the debtor's property.

Where the judgment debtor is the owner of goods subject to the rights of other persons, the enforcement officer may seize the goods in execution under process of the High Court¹ if the debtor is entitled to the possession of them, and may sell his rights in them but not those of the other persons entitled. Thus, goods subject to an innkeeper's lien², or to a lien for work done upon them³, can be seized⁴, but goods seized under a distress for rent⁵, pledged, or hired out by the judgment debtor⁶, or goods in bond upon which advances have been made and which are held to the order of persons lending money to the judgment debtor⁷, cannot be seized, unless, perhaps, the advances are paid off by the execution creditor⁸.

The same principles will apply to seizure of goods in execution under process of a county court⁹.

1 As to goods which may be seized in execution see PARA 1315 et seq.

2 *Proctor v Nicholson* (1835) 7 C & P 67.

3 *Duncan v Garratt* (1824) 1 C & P 169.

4 The subject to the lien; if the enforcement officer sells, he is liable for the amount of the lien: *Proctor v Nicholson* (1835) 7 C & P 67; and see *The James W Elwell* [1921] P 351 (ship subject to master's lien for wages). The same rule would apply to goods lent to, or deposited with, other persons by the debtor.

5 *Haythorn v Bush* (1834) 2 Cr & M 689; *Reddell v Stowey* (1841) 2 Mood & R 358. The landlord may waive his rights: see *Belcher v Patten* (1848) 6 CB 608. As to provision for rent where goods are seized under an execution see PARAS 1352-1353.

6 *Garstin v Asplin* (1815) 1 Madd 150; *Izod v Lamb* (1830) 1 Cr & J 35; *Balls v Thick* (1845) 9 Jur 304; *Earl Powlett v Lee* (1852) 19 LTOS 23. Trover could be maintained by the pledgee against the sheriff seizing such goods: *Rogers v Kennay* (1846) 9 QB 592. It was suggested in *Rogers v Kennay* (1846) as reported in 15 LJQB 381 at 382 per Lord Denman CJ, that although the goods cannot be seized, the right to redeem pledges can be disposed of by seizure and sale of the pawn tickets; but see *Re Rollason, Rollason v Rollason, Halse's Claim* (1887) 34 Ch D 495. As to the right to seize pledged goods under a fieri facias against a pawnbroker see PARA 1322.

7 *Young v Lambert* (1870) LR 3 PC 142.

8 See *Scott v Scholey* (1807) 8 East 467.

9 See note 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/C. THIRD PARTY INTERESTS/(A) In general/1347. Debtor's interests in third parties' property.

1347. Debtor's interests in third parties' property.

Where the judgment debtor has a saleable interest in goods which are the property of some other person, and is entitled to possession of the goods, they may be seized by the enforcement officer in execution under process of the High Court¹, and the interest may be sold. Thus, if the goods are hired to the debtor for a term, his interest in them can be seized², although if, after notice from the owner, the enforcement officer purports to sell the absolute property in the goods, he may be liable for damages to the reversion³. If the hiring is of such a nature that the debtor has no saleable interest⁴, or if his interest has determined before seizure⁵, or is determinable by the fact of seizure⁶, the enforcement officer cannot legally seize; if he does seize and sell, the owner of goods hired to the judgment debtor and sold may recover a proportion of the proceeds of sale paid to the execution creditor⁷. Similarly, where the judgment debtor has a right of sale, as in the case of a pledge to a pawnbroker, his interest can be seized⁸; but where the debtor has a mere lien⁹, or is merely in possession of the goods as borrower, or upon deposit, the goods cannot be seized¹⁰.

The same principles will apply to seizure of goods in execution under process of a county court¹¹.

1 As to goods which may be seized in execution see PARA 1315 et seq.

2 In such cases, the owner could not maintain action (now known as a 'claim': see PARA 18) for conversion of or trespass to the goods because he had no right to possession of the goods: *Bradley v Copley* (1845) 1 CB 685; cf *Jelks v Hayward* [1905] 2 KB 460. The statements in those cases as to the liability of the enforcement officer or other person seizing or selling goods in the possession of a judgment debtor in execution of a judgment are now subject to the provisions of the Courts Act 2003 s 99(1), Sch 7 para 11 and the County Courts Act 1984 s 98: see PARA 1349.

3 *Ward v Macauley* (1791) 4 Term Rep 489; *Dean v Whittaker* (1823) 1 C & P 347; *Duffill v Spottiswoode* (1828) 3 C & P 435; *Lancashire Waggon Co v Fitzhugh* (1861) 6 H & N 502; cf *Jones Bros (Holloway) Ltd v Woodhouse* [1923] 2 KB 117 (goods on hire-purchase agreement).

4 *Cooper v Willomatt* (1845) 1 CB 672.

5 *Manders v Williams* (1849) 4 Exch 339. No claim by the bailor will lie when demand for possession is necessary before the bailor has a right to it: *Bradley v Copley* (1845) 1 CB 685.

6 *Jelks v Hayward* [1905] 2 KB 460. Modern hire-purchase agreements entitle the owner to resume possession if the chattel is seized in execution: see generally **CONSUMER CREDIT**.

7 *Jones Bros (Holloway) Ltd v Woodhouse* [1923] 2 KB 117.

8 See PARA 1322. As to the position when execution issues against the pledgor see PARA 1346 note 6.

9 *Legg v Evans* (1840) 6 M & W 36.

10 Ie even if the judgment debtor so acts as to appear to be owner of the goods: see *Dawson v Wood* (1810) 3 Taunt 256.

11 See note 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/C. THIRD PARTY INTERESTS/(A) In general/1348. Third parties' claims.

1348. Third parties' claims.

Those cases must now be considered in which a third party claims the goods adversely to the debtor. As a general rule it may be said that the enforcement officer may only seize and sell in execution under process of the High Court¹ goods which could be recovered, or retained, by the judgment debtor in a claim between him and such third party. To this rule there are, however, several exceptions.

In the first place, the enforcement officer may seize goods held by the third party under a conveyance or bill of sale by the judgment debtor executed in fraud of his creditors, although such a conveyance or bill would be valid against the judgment debtor². It may be noticed that the fact that the fraudulent conveyance is effected under the guise of a judgment and execution under a previous writ of fieri facias³ does not affect its invalidity against the enforcement officer acting under an execution in good faith⁴. It is the enforcement officer's duty to make all reasonable inquiries to ascertain whether a conveyance or prior writ of fieri facias relied on is fraudulent⁵. Where there are goods seized under a former writ, founded on a judgment fraudulent against a creditor seeking to enforce a subsequent execution, and those goods remain in the enforcement officer's hands or are capable of being seized, the enforcement officer is compellable to seize and sell the goods under that subsequent execution⁶.

In the second place, the enforcement officer seizing under a writ of fieri facias and the judgment creditor are not bound by estoppel affecting the judgment debtor; consequently, where the judgment debtor would be estopped from asserting his valid title to goods against the third person, the enforcement officer may nevertheless seize those goods⁷; similarly, the enforcement officer will not be precluded from raising defences against the third party which could not by reason of an estoppel be raised by the judgment debtor⁸.

In the third place, the enforcement officer can seize goods where the judgment debtor would not be entitled to them as against a claimant, in those cases where the claimant's title is derived from the judgment debtor and where, as previously explained⁹, the property in the goods is bound by the writ and the claimant's title is later in date than the date of such binding.

The same principles will apply to seizure of goods in execution under process of a county court¹⁰.

Where a claim is made to any goods taken or intended to be taken in execution, or to their proceeds, by a person other than the person against whom the process is issued, the enforcement officer or district judge may apply to the court for relief by way of interpleader¹¹.

1 As to goods which may be seized in execution see PARA 1315 et seq.

2 *Turvil v Tipper* (1625) Lat 222; *Paget v Perchard* (1794) 1 Esp 205; *Imray v Magnay* (1843) 11 M & W 267; see also the cases cited in note 3. A sale for good consideration is not fraudulent merely because it was made with intent to defeat an expected execution creditor: *Wood v Dixie* (1845) 7 QB 892; *Holbird v Anderson* (1793) 5 Term Rep 235; see also *Darvill v Terry* (1861) 6 H & N 807. As to gifts between husband and wife see PARA 1327.

3 As to writs of fieri facias see PARA 1266.

4 *Bradley v Wyndham* (1743) 1 Wils 44; *West v Skip* (1749) 1 Ves Sen 239; *Imray v Magnay* (1843) 11 M & W 267.

5 *Imray v Magnay* (1843) 11 M & W 267.

6 *Imray v Magnay* (1843) 11 M & W 267.

7 *Richards v Johnston* (1859) 4 H & N 660.

8 Eg that an assignment by the judgment debtor to the claimant was void as being an act of bankruptcy (*Chase v Goble* (1841) 2 Man & G 930), or as being subsequent to another bill of sale (*Gadsden v Barrow* (1854) 9 Exch 514); see also *Edwards v English* (1857) 7 E & B 564. The enforcement officer will not, however, be allowed to set up his own wrongdoing; eg in a claim by a landlord under the Landlord and Tenant Act 1709 s 1 (see PARA 1353), he will not be allowed to set up the title of a third person and allege that he had no right to seize at all: see *Duck v Braddyll* (1824) M'Cle 217.

9 See PARA 1295. This 'binding' operates only against the property of the judgment debtor, and therefore, when the claimant's title is hostile to and independent of that of the judgment debtor, it will prevail against the enforcement officer.

10 See note 1.

11 See PARA 1350.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/C. THIRD PARTY INTERESTS/(B) Protection of Officers/1349. Protection of officer selling goods under execution.

(B) PROTECTION OF OFFICERS

1349. Protection of officer selling goods under execution.

Where any goods¹ in the possession of an execution debtor are seized by an enforcement officer or other person under a duty to execute a writ of execution² issued from the High Court are sold by that officer without any claims having been made to them, the purchaser of the goods acquires a good title to them and no person is entitled to recover against the officer or anyone acting under his authority for any sale of the goods or for paying over the proceeds prior to the receipt of a claim to the goods, unless it is proved that the person from whom recovery is sought had notice, or might by making reasonable inquiry have ascertained, that the goods were not the property of the execution debtor³.

Similarly, where any goods in the possession of an execution debtor at the time of seizure by district judge⁴ or other officer charged with the enforcement of a warrant or other process of execution⁵ issued from a county court⁶ are sold by that district judge or other officer without any claims having been made to them, no person is entitled to recover against the district judge or other officer, or anyone lawfully acting under his authority, for any sale of the goods, or for paying over the proceeds prior to the receipt of a claim to the goods⁷, unless it is proved that the person from whom the recovery is sought had notice, or might by making reasonable inquiry have ascertained, that the goods were not the property of the execution debtor⁸.

Nothing in these provisions affects the right of any lawful claimant⁹ to any remedy to which he may be entitled against any person other than the enforcement officer, district judge or other officer charged with the execution of the writ¹⁰.

The provisions set out above are subject to the provisions of the Insolvency Act 1986¹¹ regarding the effect of individual or corporate insolvency on an execution¹².

1 As to the goods that may be seized see PARA 1315 et seq.

2 As to writs of execution see PARA 1265 et seq.

3 Courts Act 2003 s 99(1), Sch 7 para 11(1), (2). Schedule 7 para 11 applies to any writ of execution against goods which is issued from the High Court: Sch 7 para 6. As from a day to be appointed, however, Sch 7 para 11 does not apply to any writ that confers power to use the procedure in the Tribunals, Courts and Enforcement Act 2007 Sch 12 (see PARA 1386 et seq), but does apply to any other writ of execution against goods which is issued from the High Court: Courts Act 2003 Sch 7 para 6(2) (Sch 7 para 6 prospectively substituted by the Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13 paras 148, 151(1), (3)). At the date at which this title states the law, no such day had been appointed. As to the meanings of 'notice' and 'reasonable inquiry' see *Observer Ltd v Gordon (Cranfield, Claimants)* [1983] 2 All ER 945, [1983] 1 WLR 1008.

4 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

5 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

6 As to the meaning of 'county court' see PARA 1283 note 2.

7 County Courts Act 1984 s 98(1)(b) (substituted by the Courts Act 2003 s 109(1), Sch 8 para 273). The County Courts Act 1984 s 98 is repealed, as from a day to be appointed, by the Tribunals, Courts and

Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 74, Sch 23 Pt 3. At the date at which this title states the law, no such day had been appointed.

8 County Courts Act 1984 s 98(1) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3); and prospectively repealed (see note 8)).

9 le any person who proves that at the time of sale he had a title to any goods seized and sold: Courts Act 2003 Sch 7 para 11(4); County Courts Act 1984 s 98(2) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3); and prospectively repealed (see note 8)).

10 Courts Act 2003 Sch 7 para 11(3); County Courts Act 1984 s 98(2) (as amended (see note 10) and prospectively repealed (see note 8)).

11 le the Insolvency Act 1986 ss 183, 184, 346: see PARAS 1354-1355; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**.

12 Courts Act 2003 Sch 7 para 11(5); County Courts Act 1984 s 98(3) (substituted by the Insolvency Act 1986 s 439(2), Sch 14; and prospectively repealed (see note 8)).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/C. THIRD PARTY INTERESTS/(C) Interpleader/1350. Interpleader in the High Court and county court.

(C) INTERPLEADER

1350. Interpleader in the High Court and county court.

In interpleader in the High Court, relief is available to a sheriff¹ where a claim is made by any person, other than the person against whom the process is issued, to any money, goods, or chattels taken, or intended to be taken, by a sheriff in execution under any process or to the proceeds or value of any such goods or chattels².

Where a person makes a claim to or in respect of any goods seized under a warrant of execution³, or in respect of the proceeds or value of the goods ('interpleader under execution')⁴, the district judge⁵ may, as well before as after any proceedings are brought against him, call before the court⁶ the party at whose instance the process was issued and the party making the claim⁷. Upon the issue of the interpleader notice⁸ any claim brought in any county court, or other court, in respect of the interpleader claim or of any damage arising out of the execution of the warrant must be stayed⁹. The stay is limited to the persons who would be parties to the interpleader notice¹⁰.

On the hearing of interpleader proceedings on the district judge's application, the judge¹¹ must adjudicate upon the interpleader claim and must also adjudicate between the parties or between either of them and the district judge upon any claim to damages arising or capable of arising out of the execution of the warrant by the district judge. The judge makes such order in respect of any such claim and the costs of the proceedings as he thinks fit¹².

Damages ought to be awarded against the district judge where the interpleader claimant can prove substantial loss or injury¹³, although if a claim for damages is not made during the proceedings it cannot be made afterwards¹⁴.

Particular provision is made where interpleader proceedings are ordered to be transferred from the High Court under an execution¹⁵.

Sheriff's interpleader¹⁶ and interpleader proceedings under execution are discussed in detail elsewhere in this title¹⁷.

1 CPR Sch 1 RSC Ord 17 refers to a sheriff, and references in that Order to a sheriff are to be construed as including references to an individual authorised to act as an enforcement officer under the Courts Act 2003 and any other officer charged with the execution of process by or under the authority of the High Court: CPR Sch 1 RSC Ord 17 r 1(2). As to the abolition of any rule of law requiring a writ of execution issued from the High Court to be directed to a sheriff see the Courts Act 2003 s 99(2); and PARA 1258 text and note 8. As to persons other than a sheriff being protected see *Levasseur v Mason and Barry Ltd*[1891] 2 QB 73, CA (receiver of judgment debtor's property appointed by the court). The rule would also allow an application for relief by a sequestrator appointed by the court.

2 CPR Sch 1 RSC Ord 17 r 1(1)(b).

3 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

4 See CPR Sch 2 CCR Ord 33 Pt I (rr 1-5); and PARAS 1631-1638. As to the sale of goods to which a claim is made see the County Courts Act 1984 s 100; and PARAS 1345, 1632.

5 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

6 As to the meaning of 'court' see PARA 22.

7 County Courts Act 1984 s 101(1) (s 101 amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3)). Where a claim is made to or in respect of any goods seized in execution under process of a county court, a district judge has an obligation to consider whether the claim is on its face sufficient in detail and credible in substance. Once, however, a claim meets those elementary tests, the district judge has no option but to issue an interpleader summons under the County Courts Act 1984 s 101 (as so amended): *Newman (t/a Mantella Publishing) v Modern Bookbinders Ltd* [2000] 2 All ER 814, [2000] 1 WLR 2559, CA. As from a day to be appointed, the County Courts Act 1984 s 101 does not apply in the case of goods seized under the Tribunals, Courts and Enforcement Act 2007 Sch 12 (see PARA 1386 et seq): County Courts Act 1984 s 101(4) (added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13 paras 68, 75). At the date at which this title states the law, no such day had been appointed.

8 As to the interpleader notice see CPR Sch 2 CCR Ord 33 r 4(1); and PARA 1636.

9 See the County Courts Act 1984 s 101(2).

10 Thus in *Hills v Renny* (1880) 5 Ex D 313, CA, it was held that the provision did not apply to proceedings against purchasers who had bought under a sale by the bailiff which had occurred before the action. It was not argued in this case that there was a discretionary power to order a stay under the inherent jurisdiction of the court. As to the protection of purchasers of goods taken in execution see the County Courts Act 1984 s 98(1)(a); and PARA 1345; and cf *Curtis v Maloney* [1951] 1 KB 736, [1950] 2 All ER 982, CA; *Dyal Singh v Kenyon Insurance Ltd* [1954] AC 287, [1954] 1 All ER 847, PC.

11 As to the meaning of 'judge' for these purposes see PARA 1335 note 3.

12 See the County Courts Act 1984 s 101(3) (as amended: see note 7).

13 See eg *London, Chatham and Dover Rly Co v Cable* (1899) 80 LT 119, DC, where two gas stoves of the value of £18 18s (£18.90) exempt from execution were seized and sold for £1 14s (£1.70); *Jelks v Hayward* [1905] 2 KB 460, where furniture let out on hire was seized and sold by the high bailiff, who was held liable for damages for conversion. See also *De Coppett v Barnett* (1901) 17 TLR 273, CA, and cf *Cave v Cape* [1954] 1 QB 367, [1954] 1 All ER 428, CA.

14 *West v Automatic Salesman Ltd* [1937] 2 KB 398, [1937] 2 All ER 706, CA.

15 See CPR Sch 2 CCR Ord 16 r 7; and PARA 1644.

16 See PARA 1587 et seq.

17 See PARA 1628 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/C. THIRD PARTY INTERESTS/(D) Provision for Rent and Taxes/1351. Priority of claim for tax.

(D) PROVISION FOR RENT AND TAXES

1351. Priority of claim for tax.

If at any time at which any goods or chattels belonging to any person (the 'person in default') are liable to be taken by virtue of any execution¹ or other process, warrant, or authority whatever, or by virtue of any assignment, on any account or pretence whatever, except at the suit of the landlord for rent, the person in default is in arrears in respect of any such sums as are referred to below², the goods or chattels may not be so taken unless on demand made by the collector of taxes the person at whose suit the execution or seizure is made, or to whom the assignment was made, pays or causes to be paid to the collector, before the sale or removal of the goods or chattels, all such sums as have fallen due at or before the date of seizure³. The sums referred to are:

- 953 (1) sums due from the person in default on account of deductions of income tax from taxable earnings⁴ paid during the period of 12 months next before the date of seizure, being deductions which the person in default was liable to make under PAYE regulations⁵ less the amount of the repayments of income tax which he was liable to make during that period; and
- 954 (2) sums due from the person in default in respect of deductions required to be made by him for that period under the statutory provisions⁶ relating to sub-contractors in the construction industry⁷.

If those sums are not paid within ten days of the date of the demand referred to above, the collector may distrain the goods and chattels notwithstanding the seizure or assignment, and may proceed to the sale of them⁸ for the purpose of obtaining payment of the whole of those sums, and the reasonable costs and charges attending such distress and sale⁹.

Where, however, tax is claimed for more than one year, the person at whose instance the seizure has been made may, on paying to the collector the tax which is due for one whole year, proceed in his seizure in like manner as if no tax had been claimed¹⁰.

As from a day to be appointed these provisions will no longer apply¹¹.

1 As to goods which may be seized in execution see PARA 1315 et seq.

2 I.e. the sums referred to in the Taxes Management Act 1970 s 62(1A): see heads (1)-(2) in the text.

3 Taxes Management Act 1970 s 62(1) (amended by the Finance Act 1989 s 153(2)).

4 I.e. as defined by the Income Tax (Earnings and Pensions) Act 2003 s 10: see **INCOME TAXATION**.

5 I.e. under the Income Tax (Earnings and Pensions) Act 2003 s 684: see **INCOME TAXATION**.

6 I.e. under the Finance Act 2004 s 61: see **INCOME TAXATION**.

7 Taxes Management Act 1970 s 62(1A) (added by the Finance Act 1989 s 153(3); amended by the Income Tax (Earnings and Pensions) Act 2003 s 722, Sch 6 Pt 2 paras 123, 132; and the Finance Act 2004 s 76, Sch 12 para 4).

8 le as prescribed by the Taxes Management Act 1970: see s 61; and **DISTRESS** vol 13 (2007 Reissue) PARA 1127 et seq.

9 Taxes Management Act 1970 s 62(2) (amended by the Finance Act 1989 s 153(4)). Every collector so doing is indemnified by virtue of the Taxes Management Act 1970: s 62(2) (as so amended).

10 Taxes Management Act 1970 s 62(1) proviso.

11 Taxes Management Act 1970 s 62(4) (added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13 paras 32, 34). At the date at which this volume states the law no such day had been appointed.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/C. THIRD PARTY INTERESTS/(D) Provision for Rent and Taxes/1352. Provision for rent where goods seized in execution under High Court process.

1352. Provision for rent where goods seized in execution under High Court process.

Where a landlord who has a claim for rent due against his tenant has distrained¹ and is in possession of the goods, the enforcement officer will not be entitled to levy upon them in the event of a writ of fieri facias issuing against the tenant². If, however, the landlord has not distrained before the enforcement officer seizes the goods, they are in the custody of the law and, as a general rule, exempt from distress by the landlord³, and this exemption extends both while in the enforcement officer's hands, and also for a time after the sale reasonably sufficient for the removal of the goods by the purchaser⁴.

Although a seizure by the enforcement officer prevents the landlord from distraining, he is entitled under an execution in the High Court to have the rent due, not exceeding:

- 955 (1) four weeks' arrears, if the premises are let on a weekly rent⁵;
- 956 (2) four terms' arrears, if the premises are let for any other term less than a year⁶; or
- 957 (3) one year's rent,

paid to him before the removal of the goods from the premises⁷. This subject is dealt with elsewhere in this work⁸, but it may here be noticed that where a claim is made by the landlord the enforcement officer is liable to the landlord not only for removal of the goods without payment of the rent⁹, but also for a negligent sale of the goods, whereby the landlord loses the amount of the rent due to him¹⁰. After notice of a claim by the landlord¹¹, the enforcement officer may seize sufficient goods to cover such claim, in addition to the debt due under the fieri facias¹².

The landlord is also entitled, as an exception to the general rule that goods in the custody of the law cannot be taken under a distress for rent, and subject to certain restrictions, to take in distress growing crops of a farm tenant for rent accrued due since the date of the seizure by the enforcement officer¹³.

1 As to distress for rent see generally **DISTRESS**.

2 See the cases cited in PARA 1346 note 5. As to writs of fieri facias see PARA 1266.

3 *Re Mackenzie, ex p Sheriff of Hertfordshire* [1899] 2 QB 566, CA; and see *Eaton v Southby* (1738) Willes 131; *Wharton v Naylor* (1848) 12 QB 673; *Lewis v Davies* [1914] 2 KB 469, CA. There is an exception to the rule in the case of growing crops (see the text and note 13), and also in the case of distress for rent due to the Crown (*R v Cotton* (1751) Park 112). See **DISTRESS** vol 13 (2007 Reissue) PARA 1032 et seq.

4 *Peacock v Purvis* (1820) 2 Brod & Bing 362; *Wright v Dewes* (1834) 1 Ad & El 641; *Re Davis, ex p Pollen's Trustees* (1885) 55 LJQB 217. The landlord can distrain the goods if they remain on the premises after a fraudulent and fictitious bill of sale made of them under an execution (*Smith v Russell* (1811) 3 Taunt 400); if the enforcement officer has abandoned them (*Blades v Arundale* (1813) 1 M & S 711); or if the execution creditor waives his rights (*Seven v Mihill* (1756) 1 Keny 370). See also the restriction imposed by the Sale of Farming Stock Act 1816 s 6 cited in PARA 1321 note 11.

5 Execution Act 1844 s 67 (amended by the Statute Law Revision Act 1891; repealed except as relates to the process of the High Court by the Supreme Court Act 1981 s 152(4), Sch 7; repealed, as from a day to be

appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 86, 146, Sch 14 para 8, Sch 23 Pt 4; at the date at which this volume states the law, no such day had been appointed).

6 See note 5.

7 Landlord and Tenant Act 1709 s 1 (amended by the Statute Law Revision Act 1948; repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 Sch 14 para 2(a), Sch 23 Pt 4; at the date at which this volume states the law, no such day had been appointed). See *Lewis v Davies* [1914] 2 KB 469, CA; and *Re British Salicylates Ltd* [1919] 2 Ch 155. Where the judgment debtor is bankrupt the landlord can only recover six months' rent: see the Insolvency Act 1986 s 347(6) (amended by the Courts Act 2003 s 109(1), Sch 8 para 298(1), (2); repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 Sch 14 para 44(1), (5), Sch 23 Pt 4; at the date at which this volume states the law, no such day had been appointed); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 688.

8 See **DISTRESS**. See also *Cox v Harper* [1910] 1 Ch 480; and **LANDLORD AND TENANT**.

9 In such proceedings the landlord need only prove the fact of occupation, and the burden of proving payment of the rent lies upon the enforcement officer: *Harrison v Barry* (1819) 7 Price 690.

10 *Groombridge v Fletcher* (1834) 2 Dowl 353.

11 Not, however, before such notice: *Re M'Carthy* (1881) 7 LR Ir 473, CA.

12 In Ireland it has been held that the enforcement officer is not bound to notify the judgment creditor of the landlord's claim (*Davidson v Allen* (1886) 20 LR Ir 16); but see **DISTRESS** vol 13 (2007 Reissue) PARA 1037.

13 Landlord and Tenant Act 1851 s 2 (repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 Sch 14 para 13, Sch 23 Pt 4; at the date at which this volume states the law, no such day had been appointed). See also **DISTRESS** vol 13 (2007 Reissue) PARA 1043.

UPDATE

1352 Provision for rent where goods seized in execution under High Court process

NOTE 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/C. THIRD PARTY INTERESTS/(D) Provision for Rent and Taxes/1353. Claims for rent where goods seized in execution under county court process.

1353. Claims for rent where goods seized in execution under county court process.

The provisions set out in the previous paragraph¹ do not apply to goods seized in execution under process of a county court², but the following provisions apply in substitution³. The landlord⁴ of any tenement in which any goods are seized may claim the rent of the tenement in arrear at the date of the seizure, at any time within the five days next following that date, or before the removal of the goods, by delivering to the bailiff⁵ or officer⁶ making the levy a claim in writing, signed by himself or his agent, stating the amount of rent claimed to be in arrear and the period in respect of which the rent is due⁷. Where such a claim is made, the bailiff or officer making the levy must in addition distrain for the rent so claimed and the cost of the distress⁸, and must not, within five days next after the distress, sell any part of the goods seized, unless the goods are of a perishable nature or the person whose goods have been seized so requests in writing⁹.

The bailiff must afterwards sell under the execution and distress such of the goods as will satisfy:

- 958 (1) first, the costs of and incidental to the sale¹⁰;
- 959 (2) next, the claim of the landlord not exceeding:
21
 - 36. (a) in a case where the tenement is let by the week, four weeks' rent;
 - 37. (b) in a case where the tenement is let for any other term less than a year, the rent of two terms of payment¹¹;
 - 38. (c) in any other case, one year's rent¹²; and
- 22
 - 960 (3) lastly, the amount for which the warrant of execution issued¹³.

If any replevin¹⁴ is made of the goods seized, the bailiff must nevertheless sell such portion of them as will satisfy the costs of and incidental to the sale under the execution and the amount for which the warrant of execution issued¹⁵. In any event the surplus of the sale, if any, and the residue of the goods must be returned to the execution debtor¹⁶.

The fees of the district judge¹⁷ and broker¹⁸ for keeping possession, appraisalment and sale under any such distress are to be the same as would have been payable if the distress had been an execution of the court, and no other fees must be demanded or taken in that respect¹⁹.

Nothing in the provisions set out above affects the relevant provisions²⁰ of the Insolvency Act 1986²¹.

1 le the Landlord and Tenant Act 1709 s 1: see PARA 1352.

2 As to goods which may be seized in execution see PARA 1315 et seq. As to the meaning of 'county court' for these purposes see PARA 1283 note 2.

3 County Courts Act 1984 s 102(1). The County Courts Act 1984 s 102 is repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 76, Sch 23 Pt 3. At the date at which this title states the law, no such day had been appointed.

4 For these purposes, 'landlord' in relation to any land, means the person entitled to the immediate reversion or, if the property therein is held in joint tenancy, any of the persons entitled to the immediate reversion: County Courts Act 1984 s 147(1).

5 As to the meaning of 'bailiff' see PARA 1258.

6 As to county court officers see **COURTS** vol 10 (Reissue) PARA 726 et seq.

7 County Courts Act 1984 s 102(2) (prospectively repealed: see note 3).

8 As to distress for rent see generally **DISTRESS**.

9 County Courts Act 1984 s 102(3) (prospectively repealed: see note 3).

10 County Courts Act 1984 s 102(4)(a) (prospectively repealed: see note 3).

11 Cf the Execution Act 1844 s 67 (as amended and repealed except in relation to the High Court and prospectively repealed) under which four terms' rent may be recovered where the execution is under High Court process: see PARA 1352.

12 County Courts Act 1984 s 102(4)(b) (prospectively repealed: see note 3).

13 County Courts Act 1984 s 102(4)(c). As to the issue of warrants of execution see PARAS 1283, 1284; and as to when permission is required see PARA 1285. Where the judgment debtor is bankrupt the landlord can only recover six months' rent: see the Insolvency Act 1986 s 347(6) (amended by the Courts Act 2003 s 109(1), Sch 8 para 298(1), (2); repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 Sch 14 para 44(1), (5), Sch 23 Pt 4; at the date at which this volume states the law, no such day had been appointed); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 688.

14 As to replevin see **COURTS** vol 10 (Reissue) PARA 714; **DISTRESS** vol 13 (2007 Reissue) PARA 1081 et seq.

15 County Courts Act 1984 s 102(5) (prospectively repealed: see note 3).

16 County Courts Act 1984 s 102(6) (prospectively repealed: see note 3).

17 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

18 As to the appointment of brokers see PARAS 1332, 1340.

19 County Courts Act 1984 s 102(7) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3); and prospectively repealed (see note 3)). As to such fees see PARA 1340. However, the seizure of goods under a warrant of execution and a subsequent distraint to satisfy a landlord's claim for rent have been held to be separate proceedings in respect of which separate fees may be taken: *Re Broster, ex p Pruddah* [1897] 2 QB 429 (decided under earlier legislation).

20 Ie the Insolvency Act 1986 s 346: see PARA 1355.

21 County Courts Act 1984 s 102(8) (substituted by the Insolvency Act 1986 s 439(2), Sch 14; and prospectively repealed (see note 3)).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/C. THIRD PARTY INTERESTS/(E) Effect of Judgment Debtor's Insolvency/1354. Liquidator's rights where execution issued against property of an insolvent company.

(E) EFFECT OF JUDGMENT DEBTOR'S INSOLVENCY

1354. Liquidator's rights where execution issued against property of an insolvent company.

Where a creditor has issued execution¹ against the goods² or land of a company or has attached any debt due to it, and the company is subsequently wound up, he is not entitled to retain the benefit of the execution or attachment against the liquidator unless he has completed the execution or attachment³ before the commencement of the winding up⁴. However, the rights so conferred on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court thinks fit⁵. Further, a person who purchases in good faith under a sale by the enforcement officer⁶ or other officer charged with the execution of the writ any goods of a company on which execution has been levied in all cases acquires a good title to them against the liquidator⁷.

Where a company's goods are taken in execution and, before their sale or the completion of the execution⁸, notice is served on the enforcement officer, or other officer, charged with execution of the writ or other process, that a provisional liquidator has been appointed or that a winding-up order has been made, or that a resolution for voluntary winding up has been passed, the enforcement officer or other officer must, on being so required, deliver the goods and any money seized or received in part satisfaction of the execution to the liquidator⁹. The costs of execution are a first charge on the goods or money so delivered, and the liquidator may sell the goods, or a sufficient part of them, for the purpose of satisfying the charge¹⁰.

If under an execution in respect of a judgment for a sum exceeding £500¹¹ a company's goods are sold or money is paid in order to avoid sale, the enforcement officer or other officer must deduct the costs of the execution from the proceeds of sale or the money paid and retain the balance for 14 days¹². If within that time notice is served on the enforcement officer or other officer of a petition for the winding up of the company having been presented, or of a meeting having been called at which there is to be proposed a resolution for voluntary winding up, and an order is made or a resolution passed (as the case may be), the enforcement officer or other officer must pay the balance to the liquidator, who is entitled to retain it as against the execution creditor¹³. However, the rights so conferred on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court thinks fit¹⁴.

These provisions are discussed in more detail elsewhere in this work¹⁵.

1 As to issuing execution see PARA 1265 et seq.

2 For these purposes, 'goods' includes all chattels personal: Insolvency Act 1986 ss 183(4), 184(6).

3 For these purposes, (1) an execution against goods is completed by seizure and sale, or by the making of a charging order under the Charging Orders Act 1979 s 1 (see PARA 1467 et seq); (2) an attachment of a debt is completed by receipt of the debt; and (3) an execution against land is completed by seizure, by the appointment of a receiver, or by the making of a charging order as mentioned in head (1): Insolvency Act 1986 s 183(3).

4 Insolvency Act 1986 s 183(1). If a creditor has had notice of a meeting having been called at which a resolution for voluntary winding up is to be proposed, the date on which he had notice is substituted, for these purposes, for the date of commencement of the winding up: s 183(1)(a).

5 Insolvency Act 1986 s 183(2)(c).

6 For these purposes, 'enforcement officer' means an individual who is authorised to act as an enforcement officer under the Courts Act 2003 (see PARA 1258): see the Insolvency Act 1986 ss 183(4), 184(6) (amended by the Courts Act 2003 s 109(1), Sch 8 paras 295(1), (3), 296(1), (4) respectively).

7 Insolvency Act 1986 s 183(2)(b) (amended by the Courts Act 2003 Sch 8 para 295(2)); and see PARA 1345.

8 le by the receipt or recovery of the full amount of the levy: Insolvency Act 1986 s 184(1).

9 Insolvency Act 1986 s 184(1), (2) (amended by the Courts Act 2003 Sch 8 para 296(2), (3)).

10 Insolvency Act 1986 s 184(2).

11 The money sum for the time being specified for these purposes is subject to increase or reduction by order under the Insolvency Act 1986 s 416: s 184(7).

12 Insolvency Act 1986 s 184(3) (amended by SI 1986/1996).

13 Insolvency Act 1986 s 184(4) (amended by the Courts Act 2003 Sch 8 para 296(3)).

14 Insolvency Act 1986 s 184(5).

15 See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 882, 884.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/C. THIRD PARTY INTERESTS/(E) Effect of Judgment Debtor's Insolvency/1355. Rights of official receiver or trustee in bankruptcy where execution issued against bankrupt's property.

1355. Rights of official receiver or trustee in bankruptcy where execution issued against bankrupt's property.

Subject to the statutory restrictions on proceedings and remedies¹ and to the following provisions, where the creditor of any person who is adjudged bankrupt has, before the commencement of the bankruptcy², issued execution³ against the goods or land of that person or attached a debt due to that person from another person, that creditor is not entitled, as against the official receiver or trustee of the bankrupt's estate, to retain the benefit of the execution or attachment, or any sums paid to avoid it, unless the execution or attachment was completed⁴, or the sums were paid, before the commencement of the bankruptcy⁵.

Where any goods of a person have been taken in execution, then, if before the completion of the execution notice is given to the enforcement officer⁶ or other officer charged with the execution that that person has been adjudged bankrupt, the enforcement officer or other officer must on request deliver to the official receiver or trustee of the bankrupt's estate the goods and any money seized or recovered in part satisfaction of the execution⁷. The costs of the execution are a first charge on the goods or money so delivered and the official receiver or trustee may sell the goods or a sufficient part of them for the purpose of satisfying the charge⁸.

Where under an execution in respect of a judgment for a sum exceeding such sum as may be prescribed for these purposes⁹ the goods of any person are sold or money is paid in order to avoid a sale and before the end of the period of 14 days beginning with the day of the sale or payment the enforcement officer or other officer charged with the execution is given notice that a bankruptcy petition has been presented in relation to that person, and a bankruptcy order is or has been made on that petition, the balance of the proceeds of sale or money paid, after deducting the costs of execution, is to be comprised in the bankrupt's estate in priority to the claim of the execution creditor¹⁰. Accordingly, in the case of an execution in respect of a judgment for a sum exceeding the prescribed sum, the enforcement officer or other officer charged with the execution must not dispose of the above-mentioned balance at any time within the period of 14 days so mentioned or while there is pending a bankruptcy petition of which he has been given such notice¹¹. He must pay that balance, where it is so comprised in the bankrupt's estate, to the official receiver or (if there is one) to the trustee of that estate¹².

The rights so conferred on the official receiver or the trustee may, however, be set aside by the court, to such extent and on such terms as it thinks fit, in favour of the creditor who has issued the execution or attached the debt¹³. Furthermore, nothing in these provisions entitles the trustee of a bankrupt's estate to claim goods from a person who has acquired them in good faith under a sale by an enforcement officer or other officer charged with an execution¹⁴.

In relation to any execution against property which has been acquired by or has devolved upon the bankrupt since the commencement of the bankruptcy, neither the enforcement officer's or other officer's duties set out above¹⁵ nor the provisions relating to the proceeds of sale¹⁶ apply unless, at the time the execution is issued or before it is completed, the property has been or is claimed for the bankrupt's estate as after-acquired property¹⁷ and a copy of the notice given under the relevant statutory provision¹⁸ has been or is served on the enforcement officer or other officer charged with the execution¹⁹.

These provisions are discussed in more detail elsewhere in this work²⁰.

- 1 le subject to the Insolvency Act 1986 s 285: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 218.
- 2 As to the commencement of the bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 213.
- 3 As to issuing execution see PARA 1265 et seq.
- 4 For these purposes (1) an execution against goods is completed by seizure and sale or by the making of a charging order under the Charging Orders Act 1979 s 1 (see PARA 1467 et seq); (2) an execution against land is completed by seizure, by the appointment of a receiver or by the making of a charging order under s 1; (3) an attachment of a debt is completed by the receipt of the debt: Insolvency Act 1986 s 346(5).
- 5 Insolvency Act 1986 s 346(1).
- 6 For these purposes, 'enforcement officer' means an individual who is authorised to act as an enforcement officer under the Courts Act 2003 (see PARA 1258): Insolvency Act 1986 s 346(9) (added by the Courts Act 2003 s 109(1), Sch 8 para 297(1), (4)).
- 7 Insolvency Act 1986 s 346(2)(a) (amended by the Courts Act 2003 Sch 8 para 297(2)).
- 8 Insolvency Act 1986 s 346(2)(b).
- 9 The sum so prescribed is £1,000: Insolvency Proceedings (Monetary Limits) Order 1986 SI 1986/1996, art 3, Schedule Pt II (substituted by SI 2004/547).
- 10 Insolvency Act 1986 s 346(3) (amended by the Courts Act 2003 Sch 8 para 297(2)).
- 11 Insolvency Act 1986 s 346(4)(a) (amended by the Courts Act 2003 Sch 8 para 297(2)).
- 12 Insolvency Act 1986 s 346(4)(b).
- 13 Insolvency Act 1986 s 346(6).
- 14 Insolvency Act 1986 s 346(7) (amended by the Courts Act 2003 Sch 8 para 297(3)); and see PARA 1345.
- 15 le the Insolvency Act 1986 s 346(2): see the text and notes 7-8.
- 16 le the Insolvency Act 1986 s 346(3): see the text and notes 9-10.
- 17 le under the Insolvency Act 1986 s 307: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 445.
- 18 See note 17.
- 19 Insolvency Act 1986 s 346(8) (amended by the Courts Act 2003 Sch 8 para 297(2)).
- 20 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 678 et seq.

UPDATE

1355 Rights of official receiver or trustee in bankruptcy where execution issued against bankrupt's property

NOTE 9--SI 1986/1996 art 3 amended: SI 2009/465.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iii) Levying Execution against Goods/C. THIRD PARTY INTERESTS/(E) Effect of Judgment Debtor's Insolvency/1356. County court procedure on bankruptcy or winding up of debtor.

1356. County court procedure on bankruptcy or winding up of debtor.

Where the district judge¹ responsible for the execution of a warrant² is required by any provision of the Insolvency Act 1986³ or any other enactment relating to insolvency to retain the proceeds of sale of goods sold under the warrant or money paid in order to avoid a sale⁴, the court⁵ must, as soon as practicable after the sale or the receipt of the money, send notice to the execution creditor and, if the warrant issued out of another court⁶, to that court⁷.

Where the district judge responsible for the execution of a warrant:

- 961 (1) receives notice that a bankruptcy order has been made against the debtor or, if the debtor is a company, that a provisional liquidator has been appointed or that an order has been made or a resolution passed for the winding up of the company; and
- 962 (2) withdraws from possession of goods seized or pays over to the official receiver or trustee in bankruptcy or, if the debtor is a company, to the liquidator the proceeds of sale of goods sold under the warrant or money paid in order to avoid a sale or seized or received in part satisfaction of the warrant,

the court must send notice to the execution creditor and, if the warrant issued out of another court, to that court⁸.

Where the court officer⁹ of a court to which a warrant issued out of another court has been sent for execution receives any such notice as is referred to in head (1) above after he has sent to the home court any money seized or received in part satisfaction of the warrant, he must forward the notice to that court¹⁰.

1 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

2 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

3 See eg the Insolvency Act 1986 ss 183, 194, 346; and PARAS 1354-1355.

4 As to when execution is superseded on payment see PARA 1366.

5 As to the meaning of 'court' see PARA 22.

6 As to execution out of the jurisdiction of a county court see PARA 1300.

7 CPR Sch 2 CCR Ord 26 r 8(1).

8 CPR Sch 2 CCR Ord 26 r 8(2). As to bankruptcy and winding up see generally **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANIES**.

9 As to the meaning of 'court officer' see PARA 49 note 3. As to county court officers see **COURTS** vol 10 (Reissue) PARA 726 et seq.

10 CPR Sch 2 CCR Ord 26 r 8(3). As to the home court see PARA 1300.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iv) Stay or Suspension of Execution/A. IN GENERAL/1357. Stay of execution generally.

(iv) Stay or Suspension of Execution

A. IN GENERAL

1357. Stay of execution generally.

The court's power to stay proceedings should not be confused with its power to stay the execution of a final judgment or order. The court has an inherent jurisdiction to control its own proceedings so as to prevent an abuse of process, and accordingly to stay proceedings which are frivolous, vexatious or harassing, or which are manifestly groundless or in which there is clearly no cause of action in law or equity¹, or where the justice of the case so requires². The court's power to stay proceedings may be exercised under particular statutory provisions³, or under the Civil Procedure Rules ('CPR')⁴ as well as or as an alternative to a stay under its inherent jurisdiction, since these powers are cumulative, not exclusive, in their operation⁵. The court does not, however, have an inherent jurisdiction over all judgments or orders which it has made under which it can stay execution in all cases⁶. On the contrary, the court's inherent jurisdiction to stay the execution of a judgment or order is limited in its extent⁷, and can only be exercised on grounds that are relevant to a stay of the enforcement proceedings themselves, and not to matters which may operate as a defence in law or relief in equity, for such matters must be specifically raised by way of defence in the claim itself⁸. The special circumstances which entitle the court to stay execution of a money judgment⁹ are circumstances which go to the enforcement of the judgment and not those which go to its validity or correctness¹⁰, unless the defendant is seeking to appeal the judgment¹¹. The court has no inherent jurisdiction or other power to stay or suspend the execution of a judgment or order for possession of land against a trespasser¹².

If neither the judgment creditor nor anyone authorised by him to receive payment is within the jurisdiction, a stay of execution may be obtained, generally on payment of the money into court¹³.

A stay of execution only operates to prevent the judgment creditor from putting into operation the legal processes of execution and does not affect rights acquired independently of the process stayed¹⁴.

¹ See *Metropolitan Bank Ltd v Pooley*(1885) 10 App Cas 210, HL; and PARA 533. Such inherent powers of the court are preserved by the Supreme Court Act 1981 s 49(3). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to the inherent jurisdiction of county courts see *Langley v North West Water Authority*[1991] 3 All ER 610, [1991] 1 WLR 697, CA; and **COURTS** vol 10 (Reissue) PARA 702.

² See eg *Edmeades v Thames Board Mills Ltd*[1969] 2 QB 67, [1969] 2 All ER 127, CA (unreasonable refusal to submit to reasonable medical examination). As to the meaning of 'stay' see PARA 233 note 11.

³ See PARA 531.

⁴ See PARA 532.

⁵ See PARA 529. A county court's power to suspend or stay a judgment or order may be exercised by the district judge: CPR Sch 2 CCR Ord 25 r 8(1). As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq. As to the effect of a stay of proceedings see PARA 530.

6 *London Permanent Benefit Building Society v de Baer*[1969] 1 Ch 321, [1968] 1 All ER 372, explaining *Polini v Gray, Surla v Freccia*(1879) 12 ChD 438, CA, and *Marine and General Mutual Life Assurance Society v Feltwell Fen Second District Drainage Board*[1945] KB 394.

7 See *Jones v Savery*[1951] 1 All ER 820, CA (stay of execution of an order for possession for a reasonable time), explaining and following *Sheffield Corpn v Luxford*[1929] 2 KB 180, DC.

8 *TC Trustees Ltd v JS Darwen (Successors) Ltd*[1969] 2 QB 295, [1969] 1 All ER 271, CA.

9 le under CPR Sch 1 RSC Ord 47 r 1(1): see PARA 1361.

10 *TC Trustees Ltd v JS Darwen (Successors) Ltd*[1969] 2 QB 295, [1969] 1 All ER 271, CA. A cross-claim is not such a special circumstance: *Ferdinand Wagner (a firm) v Laubscher Bros & Co (a firm)*[1970] 2 QB 313, [1970] 2 All ER 174, CA. See further PARA 1359 text and note 2. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

11 See PARA 1358.

12 *McPhail v Persons, names unknown, Bristol Corpn v Ross*[1973] Ch 447, [1973] 3 All ER 393, CA, approving *Department of the Environment v James*[1972] 3 All ER 629, [1972] 1 WLR 1279.

13 *Re A Debtor (No 1838 of 1911)*[1912] 1 KB 53, CA.

14 *Clifton Securities Ltd v Huntley*[1948] 2 All ER 283.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iv) Stay or Suspension of Execution/A. IN GENERAL/1358. Stay of execution pending an appeal.

1358. Stay of execution pending an appeal.

Unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of any order or decision of the lower court¹.

Where a foreign company not subject to any international conventions to facilitate enforcement of a judgment debt² applies for a stay of execution it must produce cogent, full and frank evidence that there is a real risk of injustice if enforcement is allowed to take place pending appeal³.

1 See CPR 52.7; *Hyams v Plender* [2001] 2 All ER 179, [2001] 1 WLR 32, CA; and PARA 1669. As to the meaning of 'stay' see PARA 233 note 11.

2 See generally **CONFLICT OF LAWS**.

3 See *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065, [2001] All ER (D) 258 (Dec) (the defendant, a company registered in the British Virgin Islands, appealed against the trial judge's refusal to grant a stay of execution pending appeal on the ground that, due to its poor financial position, unless a stay was granted it would be unable to pursue its appeal; the defendant produced a balance sheet showing its financial position but the Court of Appeal found that the balance sheet was not cogent, full or frank and that there was no significant risk of the appeal being stifled if a stay was refused).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iv) Stay or Suspension of Execution/A. IN GENERAL/1359. Grounds on which stay of execution pending an appeal may be granted.

1359. Grounds on which stay of execution pending an appeal may be granted.

The court has an absolute and unfettered discretion as to whether it will make an order granting a stay of execution pending an appeal, and as to the terms upon which a stay will be granted¹, and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing². When granting a stay of execution pending an appeal a court should not impose a condition that a sum to be paid to a party is to be irrecoverable in the event of the appeal succeeding unless that sum is less than the party will recover in any event³. As a rule, a stay of execution as to costs pending an appeal is not granted when the respondent's solicitor undertakes to repay the costs paid to him if the applicant is successful on the appeal, but this practice is not invariable⁴.

1 *A-G v Emerson* (1889) 24 QBD 56, CA; *Becker v Earl's Court Ltd* (1911) 56 Sol Jo 206, CA. As to the meaning of 'stay' see PARA 233 note 11. An appeal does not operate as a stay unless the court so orders: see PARA 1358.

2 *Barker v Lavery* (1885) 14 QBD 769, CA; *The Annot Lyle* (1886) 11 PD 114, CA; see however, *M'Carthy v Cork Steam Packet Co* (1885) 16 LR Ir 194. The application should be made promptly: *Tuck v Southern Counties Deposit Bank* (1889) 42 ChD 471, CA; *Automatic Weighing Machine Co v Combined Weighing and Advertising Machine Co* (1889) 58 LJ Ch 647, CA. For the factors to be considered see *Burnet v Francis Industries plc* [1987] 2 All ER 323, [1987] 1 WLR 802, CA. Examples of special circumstances are that an appeal would be nugatory if stay was refused, by reason of the respondent's poverty (*Wilson v Church (No 2)* (1879) 12 ChD 454, CA) or if payment of a judgment debt destroys the substratum of the appeal (*Metropolitan Real and General Property Trust Ltd v Slaters and Bodega Ltd* [1941] 1 All ER 310, CA); absence from England without address of a party to whom money in court was ordered to be paid out (*Bradford v Young, Re Falconar's Trusts* (1884) 28 ChD 18, CA; and see *Re A Debtor (No 1838 of 1911)* [1912] 1 KB 53, CA); that an administration order has been made against the estate of a debtor dead since judgment and before execution issued (*Ranken v Harwood, Ranken v Boulton* (1846) 5 Hare 215); judgment in favour of alien enemy (*Robinson & Co v Continental Insurance Co of Mannheim* [1915] 1 KB 155). An allegation on an appeal that there has been misdirection at the trial is not sufficient (*Monk v Bartram* [1891] 1 QB 346, CA); nor is the fact that the respondents to an appeal are a Scottish company (*Re Queensland Mercantile Agency Co* (1891) 61 LJ Ch 48); nor that the party wishes to consider the advisability of appealing (*Webber v London, Brighton and South Coast Rly Co* (1881) 51 LJQB 154, CA); nor that the witnesses have been indicted for perjury (*Warwick v Bruce* (1815) 4 M & S 140); nor that the defendants are a statutory body charged with the duty of draining an area of fen lands and the execution would make it impossible for them to perform that duty (*Marine and General Mutual Life Assurance Society v Feltwell Fen Second District Drainage Board* [1945] KB 394). See also *Brook v Emerson* (1906) 95 LT 821, CA, and *Gordon-Smith v Peizer* (1921) 65 Sol Jo 607. As to the special procedure on application for a stay of execution by writ of fieri facias see PARA 1361; and as to procedure in county courts see PARAS 1363-1366.

3 *Doyle v White City Stadium Ltd* [1935] 1 KB 110, CA; *Bloor v Liverpool Derricking and Carrying Co Ltd* [1936] 3 All ER 399, CA.

4 *A-G v Emerson* (1889) 24 QBD 56, CA; see also *Grant v Banque Franco-Egyptienne* (1878) 3 CPD 202, CA; *Merry v Nickalls* (1873) 8 Ch App 205; *Cooper v Cooper* (1876) 2 ChD 492, CA; *Morgan v Elford* (1876) 4 ChD 352, CA; *Brewer v Yorke, Yorke v Brewer* (1882) 20 ChD 669, CA; *Bradford v Young, Re Falconar's Trusts* (1884) 28 ChD 18, CA. A refusal to give a personal undertaking was held to be no ground for granting a stay in *Becker v Earl's Court Ltd* (1911) 56 Sol Jo 206, CA. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iv) Stay or Suspension of Execution/A. IN GENERAL/1360. Orders having the effect of a stay.

1360. Orders having the effect of a stay.

Certain circumstances have the effect of a stay of execution. Thus after the Court of Protection has appointed a receiver a stay is normally granted against execution on the patient's property¹.

An order for an interpleader issue has the effect of a stay², and a third party debt order against a judgment debtor attaching the judgment debt operates as a stay of execution as against the judgment creditor³, but a third party debt order obtained by the judgment creditor against a debtor of the judgment debtor is not a stay against the judgment debtor so long as the third party has not paid under the order⁴.

Where a creditor who has obtained a judgment in the High Court takes an order for payment by instalments in the county court, he cannot afterwards issue execution in the High Court⁵ but an order for sale in foreclosure proceedings does not operate as a stay on the judgment debt⁶.

1 *Re Winkle* [1894] 2 Ch 519, CA. A stay of execution may be granted to enable leave to be obtained to pay out of the patient's estate: see *Ames v Parkinson* (1847) 2 Ph 388; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 640. As to the meaning of 'stay' see PARA 233 note 11.

2 *Angell v Baddeley* (1877) 3 Ex D 49, CA; *Re Ford, ex p Ford* (1886) 18 QBD 369; and see *Re Follows, ex p Follows* [1895] 2 QB 521.

3 *Re Connan, ex p Hyde* (1888) 20 QBD 690, CA.

4 *Re Renison, ex p Greaves* [1913] 2 KB 300, DC. An interim order is not a stay: *Re HB* [1904] 1 KB 94, CA. A judgment for a sum to be settled and paid by a subsequent date to be ascertained by the court does not amount to a stay for the purpose of issuing a bankruptcy notice (*Re A Debtor* [1912] 3 KB 242, CA), nor does the appointment of a receiver by way of equitable execution (*Re Bond, ex p Capital and Counties Bank Ltd* [1911] 2 KB 988). As to receivers by way of equitable execution see PARA 1497 et seq.

5 *Jones v Jenner* (1856) 25 LJ Ex 319, per Pollock CB; *Montgomery & Co v De Bulmes* [1898] 2 QB 420, CA.

6 *Re Kelday, ex p Meston* (1888) 36 WR 585, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iv) Stay or Suspension of Execution/B. STAY OF EXECUTION UNDER HIGH COURT PROCESS/1361. Power to stay execution by writ of fieri facias.

B. STAY OF EXECUTION UNDER HIGH COURT PROCESS

1361. Power to stay execution by writ of fieri facias.

Where a judgment is given or an order made for the payment by any person of money¹, and the court² is satisfied, on an application made at the time of the judgment or order³, or at any time thereafter, by the judgment debtor⁴ or other party liable to execution⁵, that there are special circumstances which render it inexpedient to enforce the judgment or order or that the applicant is unable from any cause to pay the money, then, notwithstanding anything in the rules allowing the issue of more than one writ⁶, the court may by order stay the execution of the judgment or order by writ of fieri facias⁷ either absolutely or for such period and subject to such conditions as the court thinks fit⁸.

An application under these provisions, if not made at the time the judgment is given or order made, must be made in accordance with Part 23 of the Civil Procedure Rules⁹ and may be so made notwithstanding that the party liable to execution did not acknowledge service¹⁰ of the claim form or serve a defence¹¹ or take any previous part in the proceedings¹². The grounds on which such an application is made must be set out in the application notice and be supported by a witness statement or affidavit¹³ made by or on behalf of the applicant substantiating those grounds¹⁴. The application notice and a copy of the supporting witness statement or affidavit must, not less than four clear days before the hearing, be served on the party entitled to enforce the judgment or order¹⁵.

An order staying execution under these provisions may be varied or revoked by a subsequent order¹⁶.

The power to stay execution by writ of fieri facias under these provisions is separate and distinct from the power to stay execution pending an appeal¹⁷.

1 As to the meaning of 'judgment or order for the payment of money' see PARA 1226.

2 As to the meaning of 'court' see PARA 22.

3 As to the meaning of 'judgment or order' see PARA 1226.

4 As to the meaning of 'judgment debtor' see PARA 1236.

5 As to parties liable to execution see PARA 1237 et seq.

6 Ie notwithstanding anything in CPR Sch 1 RSC Ord 47 r 2 or r 3 (see PARA 1277): CPR Sch 1 RSC Ord 47 r 1(1).

7 As to writs of fieri facias see PARA 1266.

8 CPR Sch 1 RSC Ord 47 r 1(1). As to the meaning of 'stay' see PARA 233 note 11.

9 Ie in accordance with CPR Pt 23: see PARA 303 et seq.

10 As to acknowledgment of service see PARAS 184-186. As to the meaning of 'service' see PARA 138 note 2.

11 As to serving a defence see PARAS 199-205.

12 CPR Sch 1 RSC Ord 47 r 1(2).

13 As to witness statements and affidavits see PARA 981 et seq.

14 CPR Sch 1 RSC Ord 47 r 1(3). In particular, where such application is made on the grounds of the applicant's inability to pay, the supporting witness statement or affidavit must disclose his income, the nature and value of any property of his and the amount of any other liabilities of his: see CPR Sch 1 RSC Ord 47 r 1(3).

15 CPR Sch 1 RSC Ord 47 r 1(4).

16 CPR Sch 1 RSC Ord 47 r 1(5).

17 *Ellis v Scott*[1964] 2 All ER 987n, [1964] 1 WLR 976; and see PARA 1358. The tests to be applied in staying execution under CPR Sch 1 RSC Ord 47 r 1 are quite different from those applicable to proceedings for summary judgment (see CPR Pt 24; and PARA 524 et seq), and therefore a stay of execution by writ of fieri facias of a judgment, including a foreign judgment duly registered in England, will not ordinarily be granted simply on the ground that the defendants are bringing a cross-claim in another claim against the claimant impugning the foreign judgment, at any rate in the absence of special circumstances rendering it inexpedient to enforce the judgment: *Ferdinand Wagner (a firm) v Laubscher Bros & Co (a firm)*[1970] 2 QB 313, [1970] 2 All ER 174, CA. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iv) Stay or Suspension of Execution/B. STAY OF EXECUTION UNDER HIGH COURT PROCESS/1362. Power to stay execution for matters occurring after High Court judgment.

1362. Power to stay execution for matters occurring after High Court judgment.

Without prejudice to the power to stay execution by writ of fieri facias¹, a party against whom a judgment has been given or an order made may apply to the court² for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order. The court may by order grant such relief, and on such terms, as it thinks just³. The facts must be such as would or might have prevented the order being made, or would or might have led to a stay of execution if they had already occurred at the date of the order⁴.

1 le without prejudice to CPR Sch 1 RSC Ord 47 r 1: see PARA 1361. As to the meaning of 'stay' see PARA 233 note 11.

2 As to the meaning of 'court' see PARA 22.

3 CPR Sch 1 RSC Ord 45 r 11.

4 *London Permanent Benefit Building Society v de Baer* [1969] 1 Ch 321, [1968] 1 All ER 372. CPR Sch 1 RSC Ord 45 r 11 should not be construed as giving an entitlement to a stay of execution as a method of attacking the validity of a judgment, but only of staying its enforcement: see *London Permanent Benefit Building Society v de Baer* [1969] 1 Ch 321, [1968] 1 All ER 372. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iv) Stay or Suspension of Execution/C. STAY OF EXECUTION OR SUSPENSION OF WARRANT UNDER COUNTY COURT PROCESS/1363. Power to stay execution under county court process.

C. STAY OF EXECUTION OR SUSPENSION OF WARRANT UNDER COUNTY COURT PROCESS

1363. Power to stay execution under county court process.

If at any time it appears to the satisfaction of a county court¹ that any party² to any proceedings is unable from any cause to pay any sum recovered against him, whether by way of satisfaction of the claim or counterclaim in the proceedings or by way of costs or otherwise, or any instalment of such a sum, the court may, in its discretion, stay any execution issued in the proceedings for such time and on such terms as the court thinks fit, and so from time to time until it appears that the cause of inability has ceased³. The power of the court to stay execution of any warrant may be exercised by the district judge or, in accordance with the following provisions, by the court officer⁴.

An application by the debtor to stay execution of a warrant of execution must be in the appropriate form⁵ stating the proposed terms, the grounds on which it is made and including a signed statement of the debtor's means⁶. Where the debtor makes such an application, the court must send the judgment creditor⁷ a copy of the debtor's application and statement of means⁸. The court must require the creditor to notify the court in writing, within 14 days of service⁹ of notification upon him, giving his reasons for any objection he may have to the granting of the application¹⁰.

If the judgment creditor does not notify the court of any objection within the time stated, the court officer may make an order suspending the warrant on terms of payment¹¹. Upon receipt of a notice by the judgment creditor¹², the court officer may, if the judgment creditor objects only to the terms offered, determine the date and rate of payment and make an order suspending the warrant on terms of payment¹³. Any party affected by such an order may, within 14 days of service of the order on him and giving his reasons, apply on notice for the order to be reconsidered. The court must fix a day for the hearing of the application before the district judge and give to the judgment creditor and the debtor not less than eight days' notice of the day so fixed¹⁴. On hearing such an application, the district judge may confirm the order or set it aside and make such new order as he thinks fit¹⁵. The order so made must be entered in the records of the court¹⁶.

Where the judgment creditor states in his notice¹⁷ that he wishes the bailiff to proceed to execute the warrant, the court must fix a day for a hearing before the district judge of the debtor's application and give to the judgment creditor and to the debtor not less than two days' notice of the day so fixed¹⁸.

Where an order is made by the district judge suspending a warrant of execution, the debtor may be ordered to pay the costs of the warrant and any fees or expenses incurred before its suspension and the order may authorise the sale of a sufficient portion of any goods seized to cover such costs, fees and expenses and the expenses of sale¹⁹.

Subject to any directions given by the district judge, where a warrant of execution has been suspended, it may be reissued on the judgment creditor's filing²⁰ a request showing that any condition subject to which the warrant was suspended has not been complied with²¹.

- 1 As to the meaning of 'county court' for these purposes see PARA 1283 note 2.
- 2 In the County Courts Act 1984, unless the context otherwise requires, 'party' includes every person served with notice of, or attending, any proceeding, whether named as a party to that proceeding or not: s 147(1).
- 3 County Courts Act 1984 s 88. Where a warrant of execution is sent by the district judge of a home court to the district judge of another court for execution under s 103 (see PARA 1300), that other court has the same power as the home court of staying the execution under s 88 as respects any goods within the jurisdiction of that other court: s 103(5) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3); repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 76, Sch 23 Pt 3; at the date at which this title states the law, no such day had been appointed). As to the meaning of 'stay' see PARA 233 note 11.
- 4 CPR Sch 2 CCR Ord 25 r 8(1). As to county court officers and district judges in county courts see **COURTS** vol 10 (Reissue) PARA 726 et seq.
- 5 For the appropriate form see *Practice Direction--Forms* PD 4 para 3, Table 1, Form N244; and see *The Civil Court Practice*. As to the use of the forms listed in Table 1 see PARA 14.
- 6 CPR Sch 2 CCR Ord 25 r 8(2).
- 7 As to the meaning of 'judgment creditor' see PARA 1236.
- 8 CPR Sch 2 CCR Ord 25 r 8(3)(a).
- 9 As to the meaning of 'service' see PARA 138 note 2.
- 10 CPR Sch 2 CCR Ord 25 r 8(3)(b).
- 11 CPR Sch 2 CCR Ord 25 r 8(4).
- 12 *Ie* under CPR Sch 2 CCR Ord 25 r 8(3)(b): see the text and notes 9-10.
- 13 CPR Sch 2 CCR Ord 25 r 8(5).
- 14 CPR Sch 2 CCR Ord 25 r 8(6).
- 15 CPR Sch 2 CCR Ord 25 r 8(7).
- 16 See note 15. As to county court records see **COURTS** vol 10 (Reissue) PARA 729; and PARA 1147.
- 17 See note 12.
- 18 CPR Sch 2 CCR Ord 25 r 8(8).
- 19 CPR Sch 2 CCR Ord 25 r 8(10).
- 20 As to the meaning of 'filing' see PARA 1832 note 8.
- 21 CPR Sch 2 CCR Ord 25 r 8(9).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iv) Stay or Suspension of Execution/C. STAY OF EXECUTION OR SUSPENSION OF WARRANT UNDER COUNTY COURT PROCESS/1364. Withdrawal and suspension of warrant at creditor's request.

1364. Withdrawal and suspension of warrant at creditor's request.

Where an execution creditor requests the district judge¹ responsible for executing a warrant² to withdraw from possession, then subject to the following provisions he is to be treated as having abandoned the execution, and the court must mark the warrant as withdrawn by request of the execution creditor³. Where, however, the request is made in consequence of a claim having been made⁴ to goods seized under the warrant, the execution is to be treated as being abandoned in respect only of the goods claimed⁵.

If the district judge responsible for executing a warrant is requested by the execution creditor to suspend it in pursuance of an arrangement between him and the debtor, the court must mark the warrant as suspended by request of the execution creditor and the execution creditor may subsequently apply to the district judge holding the warrant for it to be reissued. If he does so, the application is deemed⁶ to be an application to issue the warrant⁷.

Nothing in these provisions prejudices any right of the execution creditor to apply for the issue of a fresh warrant or authorises the reissue of a warrant which has been withdrawn or has expired or has been superseded by the issue of a fresh warrant⁸.

1 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

2 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285. As to executing such warrants see PARA 1310 et seq.

3 CPR Sch 2 CCR Ord 26 r 10(1).

4 Ie under CPR Sch 2 CCR Ord 33 r 1 (interpleader claim): see PARA 1631.

5 CPR Sch 2 CCR Ord 26 r 10(2).

6 Ie for the purpose of the County Courts Act 1984 s 85(3) (time of making of application to issue warrant): see PARA 1283.

7 CPR Sch 2 CCR Ord 26 r 10(3).

8 CPR Sch 2 CCR Ord 26 r 10(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iv) Stay or Suspension of Execution/C. STAY OF EXECUTION OR SUSPENSION OF WARRANT UNDER COUNTY COURT PROCESS/1365. Suspension of part warrant.

1365. Suspension of part warrant.

Rules of court may make provision for the suspension of any judgment or order, on terms, in connection with any warrant issued with respect to any instalment payable under the judgment or order¹. Where a warrant² issued for part of a sum of money and costs payable under a judgment or order³ is suspended on payment of instalments⁴, the judgment or order must, unless the court⁵ otherwise directs, be treated as suspended on those terms as respects the whole of the sum of money and costs then remaining unpaid⁶.

1 County Courts Act 1984 s 103(6) (added by the Courts and Legal Services Act 1990 s 125(2), Sch 17 para 16; amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(2); repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 76, Sch 23 Pt 3; at the date at which this title states the law, no such day had been appointed).

2 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

3 As to the meaning of 'judgment or order' see PARA 1226.

4 As to the execution of orders for payment by instalments see PARA 1284.

5 As to the meaning of 'court' see PARA 22.

6 CPR Sch 2 CCR Ord 26 r 11.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iv) Stay or Suspension of Execution/C. STAY OF EXECUTION OR SUSPENSION OF WARRANT UNDER COUNTY COURT PROCESS/1366. Execution superseded on payment.

1366. Execution superseded on payment.

If the person against whom the execution is issued¹, before the actual sale of the goods², pays or causes to be paid or tendered to the district judge³ of the court⁴ from which the warrant is issued, or to the bailiff⁵ holding the warrant, the amount inserted in, or indorsed upon, the warrant⁶, or such part as the person entitled agrees to accept in full satisfaction, together with the amount stated by the officer of the court⁷ to whom the payment or tender is made to be the amount of the fees for the execution of the warrant, the execution is superseded, and the goods must be discharged and set at liberty⁸.

1 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

2 As to sales under execution see PARA 1339 et seq.

3 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

4 As to the meaning of 'court' for these purposes see PARA 1283 note 2.

5 As to the meaning of 'bailiff' see PARA 1258.

6 Ie under the County Courts Act 1984 s 87(1): see PARA 1283.

7 As to county court officers see **COURTS** vol 10 (Reissue) PARA 726 et seq.

8 County Courts Act 1984 s 87(2) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3); repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 71(1), (3), Sch 23 Pt 3; at the date at which this title states the law, no such day had been appointed). As to county court fees see PARA 87; and see *The Civil Court Practice*.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(iv) Stay or Suspension of Execution/D. STAY OR SUSPENSION OF EXECUTION OF POSSESSION ORDER/1367. In general.

D. STAY OR SUSPENSION OF EXECUTION OF POSSESSION ORDER

1367. In general.

Under the Administration of Justice Act 1970, the court has power to stay or suspend the execution of a possession order in favour of a mortgagee, or postpone the date of the delivery of possession, where it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage¹. These powers are discussed elsewhere in this work².

In relation to certain accelerated possession claims³, where the judge is satisfied, on a hearing directed under Part 55 of the Civil Procedure Rules⁴, that exceptional hardship would be caused by requiring possession to be given up by the date in the order of possession, he may vary the date on which possession must be given up⁵. Similarly, under the Housing Act 1985 the court has an extended discretion to stay or suspend the execution of an order for, or postpone the date of, possession of a dwelling house let on a secure tenancy, for such period or periods as the court thinks fit⁶.

The variation of possession orders in these and other cases is discussed elsewhere in this work⁷.

1 See the Administration of Justice Act 1970 s 36 (amended by the Statute Law (Repeals) Act 2004); and **MORTGAGE** vol 77 (2010) PARA 554 et seq; and see eg *Royal Bank of Scotland v Miller*[2001] EWCA Civ 344, [2002] QB 255, [2001] All ER (D) 378 (Feb); *Rees Investments Ltd v Groves*[2001] All ER (D) 292 (Jun).

2 See **MORTGAGE** vol 77 (2010) PARA 554 et seq.

3 Ie claims under CPR 55.11-55.19 (accelerated possession claims of property let on assured shorthold tenancy): see **LANDLORD AND TENANT**.

4 Ie directed under CPR 55.18(1): see **LANDLORD AND TENANT**.

5 CPR 55.18(3).

6 See the Housing Act 1985 s 85(2); and **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1356. Section 85(2) does not deprive the court of its power to set aside a writ of possession even after execution: *Governors of the Peabody Donation Fund v Hay* (1986) 19 HLR 145, CA. The tenant is not entitled to notice of an application for a warrant for possession and the warrant may be executed without the tenant's knowledge: *Leicester City Council v Aldwinckle* (1991) 24 HLR 40, CA.

7 See generally **LANDLORD AND TENANT**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(v) Costs and Expenses of Execution/A. COSTS AND EXPENSES OF EXECUTION UNDER HIGH COURT PROCESS/1368. Right to levy costs and expenses.

(v) Costs and Expenses of Execution

A. COSTS AND EXPENSES OF EXECUTION UNDER HIGH COURT PROCESS

1368. Right to levy costs and expenses.

The enforcement officer and persons authorised by him are entitled to certain statutory fees and charges for enforcing writs of execution¹, and in every case of execution the party entitled to execution may levy the poundage fees and expenses of execution. The indorsement on the writ of fieri facias and other writs requiring the enforcement officer to raise money specifically includes a fixed sum² for costs of execution, and also instructs him to raise 'the fees and charges to which he is entitled' over and above the sum recovered under the judgment or order³. On the other hand, where a judgment or order is for less than £600, and does not entitle the claimant to costs against the person against whom the writ of fieri facias to enforce the judgment or order is issued, the writ may not authorise the enforcement officer to whom it is directed to 'levy any fees, poundage or other costs of execution'⁴. The costs of the execution are costs of the writ of execution, and not of the claim in which judgment was recovered or the order was made⁵, and consequently they are not a debt due from the judgment debtor⁶. It is doubtful whether the costs of a previous abortive execution can be included in the direction to levy⁷. The costs of a writ of possession may be ordered to be paid by the defendant, and execution can issue for them⁸.

1 See generally **SHERIFFS**. Other enforcement agents are not bound by the statutory scale of fees and charges, and may charge such fees as may be customary, and recover them from the person who actually appointed them, whether the judgment creditor or his solicitor: see *Foster v Blakelock* (1826) 5 B & C 328.

2 As to the fixed costs of issuing enforcement proceedings see PARA 1768.

3 See PARAS 1266-1269.

4 CPR Sch 1 RSC Ord 47 r 4.

5 *Marquis of Salisbury v Ray* (1860) 8 CBNS 193; *Armitage v Jessop* (1866) LR 2 CP 12.

6 *Re Long & Co, ex p Cuddeford* (1888) 20 QBD 316, CA.

7 The creditor cannot add the costs of an abortive execution to his debt so as to make up the amount required to support a bankruptcy petition: *Re Long & Co, ex p Cuddeford* (1888) 20 QBD 316, CA.

8 See *Dartford Brewery Co Ltd v Moseley* [1906] 1 KB 462, CA. The court has a discretion as to costs: see the Supreme Court Act 1981 s 51 (substituted by the Courts and Legal Services Act 1990 s 4; and amended by the Access to Justice Act 1999 s 31); and PARAS 721, 1732. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(v) Costs and Expenses of Execution/A. COSTS AND EXPENSES OF EXECUTION UNDER HIGH COURT PROCESS/1369. Enforcement officer's remuneration.

1369. Enforcement officer's remuneration.

The enforcement officer is entitled to (1) poundage; and (2) certain fees and expenses allowed him by statute or order of court under statutory authority, but no other remuneration or charge¹. In executions for money, the enforcement officer, in order to become entitled to his poundage, must levy (namely seize) and get the money². If he does not seize, he is not entitled to poundage, even though the money is paid or tendered to him after the writ has been delivered to him for execution³. If by compulsion of the writ after seizure the enforcement officer gets the money even without sale he is entitled to poundage⁴. He is also entitled to it if a compromise is effected by reason of the seizure⁵. If the execution is withdrawn, satisfied or stopped he is also entitled to poundage, as against the person issuing the execution or the person at whose instance the sale is stopped, on the amount which would have been received if the execution had not been so withdrawn, satisfied or stopped⁶. If, however, the execution debtor becomes bankrupt after seizure but before sale, the enforcement officer is not entitled to poundage on goods handed over to the trustee or official receiver, since it is not a cost of execution which under the Insolvency Act 1986⁷ is made a first charge on the goods seized⁸. It may be that where the trustee in bankruptcy gets the benefit of the sale, poundage may be charged as against him⁹. If the judgment and writ of execution are set aside after seizure and sale, poundage is payable by the execution creditor¹⁰, but not if a sale has not taken place¹¹.

The poundage is calculated upon the sum payable to or received by the execution creditor as the result of the levy¹². In addition, if the enforcement officer pays to the landlord out of the proceeds the rent due, he is entitled to poundage on the amount of the rent¹³, but must hand the clear rent to the landlord¹⁴.

In case of a difference between the enforcement officer and the party liable to pay poundage as to the amount, the amount must be assessed by the court¹⁵.

1 Sheriffs Act 1887 s 20(2) (amended by the Statute Law Revision Act 1908): see **SHERIFFS** vol 42 (Reissue) PARA 1123. As from a day to be appointed, the Sheriffs Act 1887 s 20(2) does not apply to the execution of process under a power to use the procedure in the Tribunals, Courts and Enforcement Act 2007 Sch 12 (taking control of goods (see PARA 1386 et seq)): Sheriffs Act 1887 s 20(2A) (added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13 para 20; at the date at which this title states the law, no such day had been appointed).

2 *Miles v Harris* (1862) 12 CBNS 550; *Mortimore v Cragg* (1878) 3 CPD 216, CA. The enforcement officer cannot refuse to execute the writ until his fees are paid to him: *Hescott's Case* (1694) 1 Salk 330.

3 *Colls v Coates* (1840) 11 Ad & El 826; *Nash v Dickenson* (1867) LR 2 CP 252. After a tender to him the enforcement officer cannot sell, nor can he levy upon the amount tendered: *Taylor v Bekon* (1677) 2 Lev 203; *Burn v Hutchinson* (1844) 2 Dow & L 43.

4 *R v Jetherell* (1757) Park 176; *Bissicks v Bath Colliery Co* (1877) 2 Ex D 459; affd (1878) 3 Ex D 174, CA (where the test was whether there had been a seizure in fact which procured the money to be paid); *Mortimore v Cragg* (1878) 3 CPD 216, CA, overruling *Roe v Hammond* (1877) 2 CPD 300.

5 *Alchin v Wells* (1793) 5 Term Rep 470; *R v Robinson* (1835) 2 Cr M & R 334.

6 Order dated 8 July 1920, SR & O 1920/1250 (see PARA 1370 text and notes 4-6); *Madeley v Greenwood* (1897) 42 Sol Jo 34; *Union Bank of Manchester Ltd v Grundy* [1924] 1 KB 833, CA; but cf *Re Thomas, ex p Sheriff of Middlesex* [1899] 1 QB 460, CA. See also PARA 1373.

7 See the Insolvency Act 1986 s 346; and PARA 1355.

8 *Re Ludmore* (1884) 13 QBD 415; *Re Thomas, ex p Sheriff of Middlesex* [1899] 1 QB 460, CA; *Madeley v Greenwood* (1897) 42 Sol Jo 34 (all decided under earlier legislation). Under the Insolvency Act 1986 s 346 it would appear that the enforcement officer would be entitled to poundage on money received by him in part satisfaction of the execution which he also has to hand over. See further **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 678 et seq. See also *Cohen v De las Rivas, ex p Sheriff of Durham* (1891) 64 LT 661 (seizure of ship, sale restrained, percentage for preparing for sale not allowed). The enforcement officer may have become entitled to fees other than poundage: *Re Craycraft, ex p Browning* (1878) 8 ChD 596; *Re Priestly* (1889) 23 LR Ir 536. It is submitted that the rule in the text applies where the execution debtor is a company and is wound up after seizure and before sale: see PARA 1354; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 882, 884.

9 *Clarke v Nicholson* (1835) 1 Cr M & R 724.

10 *Bullen v Ansley and Smith* (1807) 6 Esp 111.

11 *Miles v Harris* (1862) 12 CBNS 550.

12 *R v Robinson* (1835) 2 Cr M & R 334; but not exceeding the amount stated on the writ (*Byrne v Hutchinson* (1875) IR 9 CL 75); see also *Re Purcell* (1884) 13 LR Ir 489. On a compromise with the Crown for penalties the sheriff was held entitled on the amount accepted by the Crown: *R v Robinson* (1835) 2 Cr M & R 334. Poundage cannot be claimed for money which under the writ the enforcement officer had no authority to collect: *R v Villers* (1820) 8 Price 587. For the sale of poundage see **SHERIFFS**.

13 *Davies v Edmonds* (1843) 12 M & W 31.

14 *Gore v Gofton* (1725) 1 Stra 643; see *Re Broster, ex p Pruddah* [1897] 2 QB 429. See also PARA 1352.

15 See PARA 1370 note 6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(v) Costs and Expenses of Execution/A. COSTS AND EXPENSES OF EXECUTION UNDER HIGH COURT PROCESS/1370. Fees under writ of fieri facias.

1370. Fees under writ of fieri facias.

Under a writ of fieri facias¹ the enforcement officer is entitled to expenses of making inquiries, a fee or fees² for seizure, mileage, keeping possession, removal and warehousing of goods and animals, advertising sale by auction, and commission to the auctioneer³. These fees are regulated by an order⁴ made under the Sheriffs Act 1887⁵, and are subject to detailed assessment by the court⁶. Seizure is necessary to entitle the enforcement officer to the fees⁷. It will be observed that the execution creditor is liable to the enforcement officer for the expenses, and the seizure and mileage, even if the execution results in nothing⁸. The fees for seizure or mileage are not payable on a second writ where the enforcement officer is in possession under the first, unless seizure is made in a different place⁹.

1 As to writs of fieri facias see PARA 1266.

2 For the fees under other writs see the Sheriffs Act 1887 s 20(3) (amended by the Statute Law (Repeals) Act 1998); and **SHERIFFS**.

3 All these fees may be levied even though not indorsed on the writ: *Curtis v Mayne* (1842) 2 Dowl NS 37.

4 Ie the Order dated 8 July 1920, SR & O 1920/1250: see **SHERIFFS** vol 42 (Reissue) PARA 1123 et seq.

5 Ie under the Sheriffs Act 1887 s 20(2): see **SHERIFFS** vol 42 (Reissue) PARA 1123.

6 Order dated 8 July 1920, SR & O 1920/1250; *Union Bank of Manchester Ltd v Grundy* [1924] 1 KB 833, CA; and see **SHERIFFS** vol 42 (Reissue) PARA 1127. The relevant Order uses the word 'taxation' instead of the phrase 'detailed assessment by the court'; but as to the terminology now used see PARA 1734 et seq. Such assessment is not subject to review (*Townend v Sheriff of Yorkshire* (1890) 24 QBD 621; *Union Bank of Manchester Ltd v Grundy* [1924] 1 KB 833, CA), except in case of bankruptcy of the debtor (see *Re Beeston, ex p Board of Trade* (1899) 68 LJQB 344; on appeal [1899] 1 QB 626, CA). An appeal will, however, will lie against the costs judge's or district judge's refusal to assess: *Madeley v Greenwood* (1897) 42 Sol Jo 34.

7 *Nash v Dickenson* (1867) LR 2 CP 252.

8 *Smith v Broadbent & Co* [1892] 1 QB 551. See also *Marley Tile Co Ltd v Burrows* [1978] QB 241, [1978] 1 All ER 657, CA.

9 *Re Wells, ex p Sheriff of Kent* (1893) 68 LT 231.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(v) Costs and Expenses of Execution/A. COSTS AND EXPENSES OF EXECUTION UNDER HIGH COURT PROCESS/1371. Possession money.

1371. Possession money.

The right to the fee for possession arises when the enforcement officer takes possession, but is not payable if he is paid before seizure. It is common practice for the bailiff to take 'walking possession' by agreement with the judgment debtor¹, and where walking possession is taken under an agreement in the appropriate form, a fee for keeping possession under the agreement is chargeable for each day including that on which execution is levied². Possession money is not payable for a period after the enforcement officer has removed the goods³. Possession money is allowed for such period only as is reasonably necessary for the purpose of selling⁴. As between execution creditor and debtor, however, where possession has been retained with their consent, possession money is chargeable for the whole period of retention even though the judgment debtor ultimately becomes bankrupt⁵. Possession money is not payable after demand of possession by the official receiver of the execution debtor's estate⁶. Where successive writs are delivered to the enforcement officer, possession taken enures for the benefit of all writs, and only one possession fee is chargeable⁷.

¹ This was done in *Watson v Murray & Co* [1955] 2 QB 1, [1955] 1 All ER 350. See also *National Commercial Bank of Scotland Ltd v Arcam Demolition and Construction Ltd and Hatherley Hall Ltd, Claimants* [1966] 2 QB 593, [1966] 3 All ER 113, CA ('walking possession' taken by agreement with person other than the judgment debtor).

² Order dated 8 July 1920, SR & O 1920/1250, Schedule, Fee 4 (substituted by SI 1956/502; and amended by SI 1971/808; and by virtue of the Decimal Currency Act 1969 s 10(1)); see **SHERIFFS** vol 42 (Reissue) PARA 1141. The fee for walking possession is less than that for physical possession and the latter is not chargeable where a walking possession agreement is signed at the time of the levy. For the form of such an agreement see the Sheriffs' Fees (Amendment) Order 1956, SI 1956/502, Schedule. Formerly there was doubt whether possession money was chargeable where walking possession was taken: see *Lumsden v Burnett* [1898] 2 QB 177, CA; and *Day v Davies* [1938] 2 KB 74, [1938] 1 All ER 686, CA, decided on a similar provision in the Distress for Rent Rules 1920, SR & O 1920/1712 (revoked); see now the Distress for Rent Rules 1988, SI 1988/2050; and **DISTRESS**. The latter specifically deal with the case of 'walking possession' in distress cases and prescribe a lower fee for it than for physical possession. See further PARA 1330.

³ *Howes v Young, Howes v Stone* (1876) 1 Ex D 146 at 150; *Re Grubb, ex p Sims* (1877) 4 Ch D 521; affd 5 Ch D 375, CA.

⁴ *Davies v Edmonds* (1843) 12 M & W 31; *Re Finch, ex p Sheriff of Essex* (1891) 65 LT 466.

⁵ *Re Hurley* (1893) 5 R 390; *Re Beeston, ex p Board of Trade* [1899] 1 QB 626, CA; and see **SHERIFFS** vol 42 (Reissue) PARA 1141.

⁶ After notice of a receiving order it ceases to be the duty of the enforcement officer to remain in possession, and he is therefore only entitled to possession money until that time: *Re Harrison, ex p Sheriff of Essex* [1893] 2 QB 111. A high bailiff (now the district judge: see PARA 1258) of a county court, where goods taken in execution are claimed by a third party, is entitled to possession money only up to the time when the claimant deposits in court the amount representing the value of the goods: *Newsum, Sons & Co Ltd v James* [1909] 2 KB 384. As to such deposit see PARA 1345; and as to the costs and expenses of execution under the process of a county court see PARA 1374.

⁷ *Glasbrook v David and Vaux* [1905] 1 KB 615. Where the enforcement officer appropriates certain goods to answer each execution, he may perhaps charge possession money on each: *Re Morgan, ex p Board of Trade* [1904] 1 KB 68.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(v) Costs and Expenses of Execution/A. COSTS AND EXPENSES OF EXECUTION UNDER HIGH COURT PROCESS/1372. Recovery of fees by enforcement officer.

1372. Recovery of fees by enforcement officer.

The enforcement officer can take his poundage and fees out of the property seized¹, but the property seized must be that of the execution debtor². If the property seized is subject to a lien, the enforcement officer can only seize subject to that lien and cannot claim his fees as a first charge on the proceeds³. In general, however, the execution creditor is liable to him and may be sued for the fees when they have been earned⁴. The enforcement officer can recover notwithstanding that the judgment and all subsequent proceedings have been set aside⁵, although not for poundage where the setting aside has been after seizure but before sale⁶. Where the execution creditor becomes disentitled to recover, the enforcement officer cannot sell the property seized in order to obtain his possession money, fees or expenses⁷, or his poundage⁸. The enforcement officer has no right of action against the solicitor who puts him in motion by delivering the writ to him to be executed⁹. A bailiff cannot maintain a claim against the execution creditor for his fees¹⁰, but where there is an express promise by the solicitor¹¹, or where the solicitor requests that a particular bailiff should be employed, that bailiff can sue him¹².

An unintentional overcharge does not render the enforcement officer liable to a penalty for misconduct¹³.

1 See *Curtis v Mayne* (1842) 2 Dowl NS 37.

2 *Newman v Merriman* (1872) 26 LT 397; see *Royle v Busby* (1880) 6 QBD 171, CA.

3 *The Ile de Ceylan* [1922] P 256.

4 See **SHERIFFS** vol 42 (Reissue) PARA 1126.

5 *Bullen v Ansley and Smith* (1807) 6 Esp 111; *Rawstorne v Wilkinson* (1815) 4 M & S 256.

6 *Miles v Harris* (1862) 12 CBNS 550.

7 *Sneary v Abdy* (1876) 1 Ex D 299.

8 *Goode v Langley* (1827) 7 B & C 26.

9 *Maybery v Mansfield* (1846) 9 QB 754; *Seal v Hudson* (1847) 4 Dow & L 760; *Cole v Terry* (1861) 5 LT 347; *Royle v Busby* (1880) 6 QBD 171, CA.

10 *Smith v Broadbent & Co* [1892] 1 QB 551.

11 *Ormerod v Foskett* (1796) Peake Add Cas 77.

12 *Foster v Blakelock* (1826) 5 B & C 328; *Walbank v Quarterman* (1846) 3 CB 94; *Maile v Mann* (1848) 2 Exch 608; and see **SHERIFFS**.

13 *Lee v Dangar, Grant & Co* [1892] 2 QB 337, CA; and see **SHERIFFS**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(v) Costs and Expenses of Execution/A. COSTS AND EXPENSES OF EXECUTION UNDER HIGH COURT PROCESS/1373. Fees when execution withdrawn etc.

1373. Fees when execution withdrawn etc.

It seems that when an execution is withdrawn, satisfied or stopped, the enforcement officer is entitled, as against the person issuing the execution or the person at whose instance the sale is stopped, to the same fees as if the execution had been completed¹. Where the execution is withdrawn by the execution creditor, the enforcement officer is entitled to the bailiff's fees and possession money².

If the completion of the execution is prevented by the execution debtor becoming bankrupt or, in the case of a company, being wound up, the costs of the execution are a first charge on the goods or money delivered by the enforcement officer to the official receiver, trustee of the bankrupt's estate or liquidator, as the case may be, who may sell the goods or a sufficient part of them to satisfy the charge³.

1 Order dated 8 July 1920, SR & O 1920/1250; *Madeley v Greenwood* (1897) 42 Sol Jo 34; *Union Bank of Manchester Ltd v Grundy* [1924] 1 KB 833, CA; but cf *Re Thomas, ex p Sheriff of Middlesex* [1899] 1 QB 460, CA. As to poundage see PARA 1369. When a sale is stopped, the person at whose instance it is stopped is not necessarily the person liable: see *Montague v Davies, Benachi & Co* [1911] 2 KB 595, DC, where an order directing the sheriff to withdraw was obtained on the application of the liquidator of the defendant company, but the execution creditor and not the liquidator was held liable for the sheriff's fees. In *Re Thomas, ex p Sheriff of Middlesex* [1899] 1 QB 460 at 463, CA, however, Lindley MR said that an official receiver or trustee in bankruptcy who stops a sale must pay the fees, and this was approved in *Montague v Davies, Benachi & Co* [1911] 2 KB 595, DC. See further **SHERIFFS** vol 42 (Reissue) PARA 1126.

2 *Pirie v Stewart* [1899] 2 IR 546.

3 See the Insolvency Act 1986 ss 184(2), 346(2)(b); and PARAS 1354-1355.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(v) Costs and Expenses of Execution/B. COSTS AND EXPENSES OF EXECUTION UNDER COUNTY COURT PROCESS/1374. Costs and expenses of execution; in general.

B. COSTS AND EXPENSES OF EXECUTION UNDER COUNTY COURT PROCESS

1374. Costs and expenses of execution; in general.

A warrant of execution¹ authorises the officer executing it to levy, as well as the money payable under the judgment or order, the costs of the execution². The fee for issuing the warrant³ is included in the total amount to be inserted or indorsed on the warrant, but the fees for its execution are not⁴; thus the former is, but the latter are not, part of the debt due from the judgment debtor⁵. It is doubtful whether the costs of a previous abortive execution can be included in the direction to levy⁶. The costs of a warrant of possession may be ordered to be paid by the defendant, and execution can issue for them⁷.

Brokers, appraisers and other persons appointed for keeping possession of, selling or valuing goods seized in execution under process of the court are to be paid prescribed fees⁸. It has been held that where goods taken in execution are claimed by a third party⁹, a person holding the office of high bailiff (now the district judge)¹⁰ of a county court is entitled to possession money only up to the time when the claimant deposits in court the amount representing the value of the goods¹¹.

If the completion of the execution is prevented by the execution debtor becoming bankrupt or, in the case of a company, being wound up, the costs of the execution are a first charge on the goods or money delivered by the district judge or other court officer to the official receiver, trustee of the bankrupt's estate or liquidator, as the case may be, who may sell the goods or a sufficient part of them to satisfy the charge¹².

1 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

2 See the County Courts Act 1984 s 85(2); and PARA 1283.

3 As to the fee for issuing the warrant see PARA 1283.

4 See the County Courts Act 1984 s 87(1); and PARA 1283.

5 *Re Long & Co, ex p Cuddeford*(1888) 20 QBD 316, CA.

6 The creditor cannot add the costs of an abortive execution to his debt so as to make up the amount required to support a bankruptcy petition: *Re Long & Co, ex p Cuddeford*(1888) 20 QBD 316, CA.

7 See *Dartford Brewery Co Ltd v Moseley*[1906] 1 KB 462, CA. The court has a discretion as to costs: see the Supreme Court Act 1981 s 51 (substituted by the Courts and Legal Services Act 1990 s 4; and amended by the Access to Justice Act 1999 s 31); and see PARAS 721, 1732. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

8 See the County Courts Act 1984 s 95(4); and PARA 1340.

9 As to third party claims see PARA 1346 et seq.

10 See PARA 1258.

- 11 *Newsum, Sons & Co Ltd v James*[1909] 2 KB 384.
- 12 See the Insolvency Act 1986 ss 184(2), 346(2)(b); and PARAS 1354-1355.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(vi) Wrongful and Irregular Execution/1375. Wrongful execution.

(vi) Wrongful and Irregular Execution

1375. Wrongful execution.

An execution is wrongful where it is neither authorised nor justified by the writ or warrant of execution or by the judgment under which it is issued¹; or where the writ or warrant is issued maliciously and without reasonable or probable cause²; or where unfair means, such as the procuring of a search warrant, are used to enable the bailiff to enter into the premises of the execution debtor³. Thus, where a claimant maliciously and without reasonable or probable cause indorses on the writ a larger amount than the judgment debt⁴, the execution is wrongful, and on proof of malice the person at whose instance it is levied will be liable in damages⁵. Also on proof of malice an execution will be treated as wrongful when the execution creditor, after he has become bound by a composition or arrangement⁶, or by an individual voluntary arrangement under the Insolvency Act 1986⁷, neglects to withdraw the enforcement officer, or when he levies for a debt provable in bankruptcy on the goods of a bankrupt who has obtained his discharge⁸. Malice, however, is not a necessary ingredient in a claim for an excessive execution⁹.

An execution is also wrongful where the indorsement on a writ directs the enforcement officer to levy at a wrong address or on the goods of a person other than the execution debtor¹⁰, or where the goods are seized under a writ of fieri facias issued after payment of the whole of the judgment debt¹¹, or after a valid tender of the amount due¹²; in such case a claim lies at the instance of the person aggrieved without proof of malice¹³, for when a judgment debt has been paid, the judgment is no longer of any force or effect, and an execution issued under it is void. Where the judgment has been partly satisfied, however, and the debtor complains of an excessive execution for the balance, he must, in order to recover damages, prove either that the execution was obviously excessive¹⁴ or that there was malice and absence of reasonable and probable cause¹⁵. Executions are also wrongful when levied after a stay has been ordered by the court¹⁶, or agreed upon between the parties¹⁷; or where the warrant issued by the enforcement officer to the person issuing the writ or his attorney is wilfully altered and a wrongful use is made of it¹⁸; or where the writ or warrant is executed without leave on a Sunday, Good Friday or Christmas Day¹⁹, or after notice from the execution creditor not to proceed and to withdraw from possession of the goods taken under it²⁰; or when issued against a foreign sovereign or a person subject to diplomatic immunity²¹.

Wrongful executions are, however, not necessarily void from their inception²²; thus, when a enforcement officer does what he has no authority to do, for example breaks into an execution debtor's premises, he will be liable for the trespass, but the execution remains good²³. Similarly an excessive execution may give rise to a claim for damages but does not avoid the execution altogether²⁴.

The time and manner in which writs and warrants should be executed is discussed elsewhere in this title²⁵. A wrongful execution will infringe the property rights protected by article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms²⁶ and may also infringe the rights under article 8 of the Convention²⁷ of the person whose property is wrongfully taken.

1 See *Moore v Lambeth County Court Registrar (No 2)*[1970] 1 QB 560, [1970] 1 All ER 980, CA, where a county court warrant of execution was issued for £87.25 but suspended if the defendant paid £2 a month. The defendant made payments under the warrant so that the amount owing was 'at best' (per Russell LJ at 570 and at 984) £4.25. The bailiff levied execution for £87.25. It was held that the county court registrar (now the district judge) was liable and damages were awarded, for it was sufficient for the plaintiff (now the claimant) to show that the seizure was 'obviously' excessive. In this case Russell LJ considered many of the earlier cases and in particular distinguished *De Medina v Grove*(1847) 10 QB 172, Ex Ch; *Jenings v Florence* (1857) 2 CBNS 467; and *Clissold v Cratchley*[1910] 2 KB 244, CA (see the text and note 11). It is submitted that any unauthorised or irregular execution is wrongful, the defendant's knowledge or malice being an element in assessing damages, but that no damages, or nominal damages, would be awarded where the wrong or irregularity is minimal. See also *Watson v Murray & Co*[1955] 2 QB 1, [1955] 1 All ER 350. The liability of an enforcement officer in respect of goods seized and for the acts of his officers is discussed in **SHERIFFS**; as to his protection in relation to irregular execution see PARA 1378 text and note 12; and as regards relief by interpleader see PARAS 1350, 1585 et seq.

2 *Cash v Wells* (1830) 1 B & Ad 375; *Pinches v Harvey*(1841) 1 QB 868; *Gillott v Aston* (1842) 12 LJQB 5; *Parry v Great Ship Co* (1863) 4 B & S 556; *Bartlett v Stinton*(1866) LR 1 CP 483.

3 *Anon* (1758) 2 Keny 372. As to malice in the context of the issue and execution of a search warrant see eg *Gibbs v Rea*[1998] AC 786, [1998] 3 WLR 72, PC.

4 *Gilding v Eyre* (1861) 10 CBNS 592; *Woolley v Morgan, Cobbold and Woolley v Morgan* (1888) 4 TLR 211; *Wentworth v Bullen* (1829) 9 B & C 840; *De Medina v Grove*(1847) 10 QB 172, Ex Ch; *Churchill v Siggers* (1854) 3 E & B 929; *Mellin v Pedley* (1879) 68 LT Jo 134. For the effect of an execution on an incorrect judgment see PARA 1376.

5 The malicious issue of a second fieri facias when the sheriff still held goods under the first was held actionable in *Waterer v Freeman* (1617) Hob 205, explained in *Wren v Weild*(1869) LR 4 QB 730 at 736 (but see CPR Sch 1 RSC Ord 47 r 2). Where malice is alleged and proved, the court may consider awarding exemplary damages: see *Moore v Lambeth County Court Registrar (No 2)*[1970] 1 QB 560 at 572, [1970] 1 All ER 980 at 986, CA, per Sachs LJ.

6 *Phillips v General Omnibus Co* (1880) 50 LJQB 112. As to compositions and arrangements and their binding effect on creditors see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 863 et seq, 885.

7 As to individual voluntary arrangements see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 81 et seq.

8 *Davis v Shapley* (1830) 1 B & Ad 54.

9 *Moore v Lambeth County Court Registrar (No 2)*[1970] 1 QB 560, [1970] 1 All ER 980, CA: see note 1.

10 *Morris v Salberg*(1889) 22 QBD 614, CA; *Jarmain v Hooper* (1843) 7 Scott NR 663; see also *Smith v Critchfield*(1885) 14 QBD 873, CA; *De Coppett v Barnett* (1901) 17 TLR 273, CA; *Hilliard v Hanson*(1882) 21 ChD 69, CA; and *Salberg v Morris* (1887) 4 TLR 47. For the rights of a third party against the enforcement officer see PARA 1348.

11 *Clissold v Cratchley*[1910] 2 KB 244, CA.

12 *Cubitt v Gamble* (1919) 35 TLR 223.

13 *Clissold v Cratchley*[1910] 2 KB 244, CA.

14 See *Moore v Lambeth County Court Registrar (No 2)*[1970] 1 QB 560, [1970] 1 All ER 980, CA; and note 1.

15 See *Clissold v Cratchley*[1910] 2 KB 244, CA; *Churchill v Siggers* (1854) 3 E & B 929; *Jenings v Florence* (1857) 2 CBNS 467; cf however *De Medina v Grove*(1847) 10 QB 172 at 176, Ex Ch, per Wilde CJ, commented on in *Churchill v Siggers* (1854) 3 E & B 929 at 939; see also the cases cited in note 2.

16 *Winter v Lightbound* (1720) 1 Stra 301. As to whether execution is wrongful where there has been a stay as to money judgment but not explicitly as to costs see *Moore v Lambeth County Court Registrar (No 2)*[1970] 1 QB 560, [1970] 1 All ER 980, CA.

17 *Veal v Warner* (1669) 1 Mod Rep 20; *Cash v Wells* (1830) 1 B & Ad 375; *Bikker v Beeston* (1860) 29 LJ Ex 121.

18 *Hale v Castleman* (1746) 1 Wm Bl 2.

19 See *Practice Direction--Execution* PD RSC O 46, CCR O 26; and PARA 1302.

20 *Walker v Hunter* (1845) 2 CB 324. The enforcement officer, however, will not be liable for acts of his officers done after he has countermanded the execution of the writ: *Brown v Copley* (1844) 2 Dow & L 332.

21 See PARA 1242.

22 Trespass lies where the writ is void, or there is no writ: *Cameron v Lightfoot* (1778) 2 Wm BI 1190; *Parsons v Loyd* (1772) 3 Wils 341.

23 See PARA 1310.

24 See *Watson v Murray & Co*[1955] 2 QB 1, [1955] 1 All ER 350; *Moore v Lambeth County Court Registrar (No 2)*[1970] 1 QB 560, [1970] 1 All ER 980, CA; and note 1.

25 See PARA 1302 et seq.

26 See the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) Protocol I, art 1, now incorporated into domestic law by the Human Rights Act 1998 s 1(3), Sch 1 Pt II art 1; and PARA 1235.

27 See the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 8; the Human Rights Act 1998 Sch 1 Pt I art 8 (right to respect for private and family life); and PARA 1235.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(vi) Wrongful and Irregular Execution/1376. Execution on incorrect judgment.

1376. Execution on incorrect judgment.

Where payment of a debt or part of a debt has preceded a judgment for the full debt, an execution for the amount of the judgment is not wrongful so long as the judgment stands¹. Similarly where an enforcement officer, acting under a writ of possession, ejects a sub-tenant of the defendant, neither the enforcement officer nor the claimant is liable in damages even though the sub-tenant has a protected sub-tenancy².

1 *McMullan v Bradshaw* (1916) 50 ILT 205; *Huffer v Allen* (1866) LR 2 Exch 15, applied in *Turley v Daw* (1906) 94 LT 216 (no action against bailiff for false return of service of judgment summons while committal order founded on it stands). In *Huffer v Allen* (1866) LR 2 Exch 15, the question was raised, but not determined, whether, if the judgment has been rectified, the plaintiff (now known as the 'claimant'), upon proof that the defendant had signed judgment and issued execution with knowledge of the payment, and had acted maliciously and without reasonable and probable cause, could have maintained an action (now known as a 'claim': see PARA 18). It is submitted that he could, and that as to excess there would have been a sufficient termination of the former action in his favour: see the judgments of Kelly CB and Pigott B in *Huffer v Allen* (1866) LR 2 Exch 15; and cf *Churchill v Siggers* (1854) 3 E & B 929 (not cited in *Huffer v Allen* (1866) LR 2 Exch 15); *Hodges v Callaghan* (1857) 2 CBNS 306; *Gilding v Eyre* (1861) 10 CBNS 592; and the cases cited in PARA 1235. In such a case there may also be an infringement of the claimant's Convention rights: see PARA 1235. On the other hand, a judgment for a larger amount than is actually due at the time when the judgment is entered is itself irregular and may be set aside as of right: *Bolt and Nut Co (Tipton) Ltd v Rowlands Nicholls & Co Ltd* [1964] 2 QB 10, [1964] 1 All ER 137, CA.

2 *Williams v Williams and Nathan* [1937] 2 All ER 559, CA; *Barclays Bank Ltd v Roberts* [1954] 3 All ER 107, [1954] 1 WLR 1212, CA; and see PARA 1309.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(vi) Wrongful and Irregular Execution/1377. Irregular execution.

1377. Irregular execution.

An execution is irregular where any of the requirements of a rule of court or a practice direction have not been complied with, and in such a case the proceedings may be set aside or amended or otherwise dealt with in such manner and upon such terms as the court thinks fit¹. Such non-compliance does not nullify the proceedings, any step taken in the proceedings or any document, judgment or order therein unless the court orders otherwise².

In the High Court, if the writ of execution is irregular or ought not to have issued³, the master or district judge⁴ will, in general, set it aside, and, if goods or money have been levied under it, order them to be restored, or if the party is in custody under it, order him to be discharged. Similarly, when an execution has been irregularly executed he will, as a rule, order such restoration or discharge⁵.

1 See CPR 3.10(b); and PARA 257.

2 See CPR 3.10(a); and PARA 257.

3 *Turner v Pulman* (1848) 2 Exch 513; *Backhouse v Mellor*, *Proudham v Mellor* (1859) 28 LJ Ex 141.

4 As to masters and district judges in the High Court see **COURTS** vol 10 (Reissue) PARA 647 et seq.

5 *Rhodes v Hull* (1857) 26 LJ Ex 265.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(vi) Wrongful and Irregular Execution/1378. Examples of irregularity: effect.

1378. Examples of irregularity: effect.

An execution is irregular where it is levied by an unauthorised officer¹, or where the writ or warrant does not follow the judgment precisely in the names of the parties², or the terms of the judgment³, or where a several execution is issued on a joint judgment⁴, or where there is an error in the amount ordered to be recovered or paid⁵. In any of these cases the execution will be set aside unless the irregularity is waived by the execution debtor⁶, or set right by amendment, which will generally be done⁷, unless bankruptcy on the part of the execution debtor intervenes, in which case the execution will be set aside⁸. An application to set aside should be made as early as possible⁹. Even though the writ or warrant is irregular, the party at whose suit it is issued and his solicitor may justify under it, unless it has been set aside for irregularity¹⁰, in which case the execution creditor and his solicitor are liable in trespass for an arrest or seizure made under it¹¹. Where an execution is irregular, whether it is set aside or not, the enforcement officer and all persons acting under the enforcement officer, are, in general, protected by the writ, provided it is not void on the face of it, and did not issue from a court without jurisdiction, and provided he or they do not join in the same plea with the party¹². The setting aside of a writ on the ground of irregularity does not prevent the claimant issuing and executing another writ¹³.

The title of a purchaser in good faith from the enforcement officer will be good even if the execution is irregular, unless it was altogether void¹⁴, or the goods were the goods of a stranger and not of the party against whom the execution issued¹⁵, in which latter case the owner may recover even against a purchaser in good faith for value¹⁶.

1 *Rhodes v Hull* (1857) 26 LJ Ex 265.

2 *Fisher v Magnay* (1843) 6 Scott NR 588.

3 *Phillips v Birch* (1842) 2 Dowl NS 97.

4 *Clarke v Clement and English* (1796) 6 Term Rep 525; *Money Penny v De Massy* (1851) 11 Ch R 597; and see *Raynes v Jones* (1841) 9 M & W 104.

5 *Webber v Hutchins* (1841) 8 M & W 319; *Cobbold v Chilver* (1842) 4 Man & G 62; *King v Birch* (1842) 3 QB 425.

6 *Lewis v Gompertz* (1837) Will Woll & Dav 592 (request for time).

7 As to the court's general power to rectify procedural errors see CPR 3.10; and PARA 257; and as to the power to correct slips and omissions in judgments and orders see CPR 40.12; and PARA 1144.

8 *Hunt v Pasman* (1815) 4 M & S 329; *Webber v Hutchins* (1841) 8 M & W 319. See generally PARA 1355; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**.

9 *Austin v Davey* (1844) 1 New Pract Cas 50; *Brooks v Hodson* (1844) 7 Man & G 529; *Jones v Davis* (1847) 1 Saund & C 290, where the defendant alleged that he had not been served with process and knew nothing of the action (now known as a 'claim'); see also CPR 3.10(a); and PARA 1377 note 2.

10 *Philips v Biron* (1722) 1 Stra 509; *Codrington v Lloyd* (1838) 8 Ad & El 449; *Blanchenay v Burt* (1843) 4 QB 707; *Jones v Williams* (1841) 8 M & W 349; *Prentice v Harrison* (1843) 4 QB 852; *Rankin v De Medina* (1845) 1 CB 183; *Collett v Foster* (1857) 2 H & N 356; *Williams v Smith* (1863) 14 CBNS 596; *Smith v Sydney* (1870) LR 5 QB 203. If the writ is only erroneous, a party may justify under it after it has been set aside for an act done under it before it was set aside: *Smith v Sydney* (1870) LR 5 QB 203; *Wilson v Tumman* (1843) 6 Scott NR 894.

11 *Codrington v Lloyd* (1838) 8 Ad & El 449; *Barker v Braham and Norwood* (1773) 2 Wm Bl 866; *Bates v Pilling* (1826) 6 B & C 38; *Keene v Dilke* (1849) 4 Exch 388; *Loton v Devereux* (1832) 3 B & Ad 343, where the judgment was set aside without costs and the defendant was not allowed to include in his damages his cost of setting aside the judgment. See also on this point *Holloway v Turner* (1845) 6 QB 928.

12 *Philips v Biron* (1722) 1 Stra 509; *Bates v Pilling* (1826) 6 B & C 38; *King v Harrison* (1812) 15 East 612; *Hooper v Lane* (1847) 10 QB 546, Ex Ch; cf *Bushell v Timson* [1934] 2 KB 79 (execution on an award under the repealed Workmen's Compensation Act 1925). For the statutory protection given to officers of the county court see PARA 1314; and **COURTS** vol 10 (Reissue) PARAS 737-738.

13 *McCornish v Melton* (1834) 3 Dowl 215; *Mackie v Warren* (1828) 5 Bing 176.

14 See *Bushell v Timson* [1934] 2 KB 79.

15 *Jeanes v Wilkins* (1749) 1 Ves Sen 195; *Doe d Batten v Murless* (1817) 6 M & S 110; *Doe v Thorn* (1813) 1 M & S 425; *Anon* (1578) 3 Dyer 363a, pl 24; *Hoe's Case* (1600) 5 Co Rep 89b.

16 *Farrant v Thompson* (1822) 2 Dow & Ry KB 1; *Tancred v Allgood* (1859) 4 H & N 438. For the position of a purchaser in good faith for value under a regular execution see PARAS 1338, 1345.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(vi) Wrongful and Irregular Execution/1379. Restitution.

1379. Restitution.

Where a wrongful or irregular execution has been set aside, or where a judgment or order has been reversed after execution on it has taken place, restitution will be made to the successful party¹. The order setting aside the execution or reversing the judgment or order should provide for this; and if it does, execution may issue upon it in the ordinary course². If the order does not so provide, another order may be made, or a writ of restitution³ may be issued, commanding the judgment creditor to restore the property or pay over the proceeds of sale⁴.

1 As to restitution generally see **RESTITUTION**.

2 The repayment of money recovered will be ordered with interest: *Rodger v Comptoir D'Escompte de Paris* (1871) LR 3 PC 465; *Imperial Mercantile Credit Association v Coleman* (1873) LR 6 HL 189. In the case of reversal of judgment in ejectment, the order should provide for ascertaining the profits of the land since judgment, and direct payment of the amount: see *Sympson v Juxon* (1625) Cro Jac 699.

3 As to writs of restitution see PARA 1270.

4 *Doe d Stephens v Lord* (1837) 7 Ad & El 610; *Doe d Pitcher v Roe* (1841) 9 Dowl 971. The successful party, however, cannot recover both the proceeds of sale and the property itself: *Doe v Thorn* (1813) 1 M & S 425.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(vii) Sequestration and Sale by Sequestrators/1380. Property that may be taken.

(vii) Sequestration and Sale by Sequestrators

1380. Property that may be taken.

The rights of entry and seizure under a writ of sequestration¹ are discussed elsewhere in this title². Under such a writ the contemnor's property of every description may be taken, corporeal or incorporeal³, including estates in land, whether freehold⁴ or leasehold⁵, and chattels, whether things in possession⁶ or things in action⁷, including money⁸, stocks⁹ and any personal estate¹⁰, and whether the contemnor's interest therein is legal or equitable.

Property of which the contemnor is merely a trustee cannot be taken¹¹, and things in action can be taken only where they are alienable by the contemnor¹². Thus pensions normally are seizable¹³, unless their alienation is forbidden by statute¹⁴. A fund in court which is liable to a solicitor's lien in another suit cannot be taken¹⁵, but where a trust is being administered in the Chancery Division, the judge may order funds to which a beneficiary is entitled to be paid to sequestrators appointed by the Family Division¹⁶.

Sequestrators are bound by the same general restrictions as the enforcement officer acting under a writ of fieri facias in respect of property exempted from seizure¹⁷. The pay, arms and equipment of soldiers and airmen¹⁸, rolling stock and plant of railways¹⁹, and ecclesiastical property of all kinds are exempt from seizure²⁰.

The onus of proving that the writ would be futile or unreasonable lies on the party against whom relief is sought²¹.

Writs and orders affecting land should be registered²².

1 As to writs of sequestration see PARA 1269.

2 See PARA 1313.

3 See *Wilson v Metcalfe* (1839) 1 Beav 263 (arrears of rentcharge).

4 *Whitehead v Harrison* (1730) 1 Barn KB 431.

5 *Ellard v Warren* (1681) 3 Rep Ch 87; *Wharam v Broughton* (1748) 1 Ves Sen 180.

6 *Empringham v Short* (1844) 3 Hare 461 (farming stock, furniture etc); *Dickinson v Smith* (1813) 4 Madd 177; *Dixon v Smith* (1818) 1 Swan 457 (growing crops, grass etc); see also *Simmonds v Lord Kinnaird* (1799) 4 Ves 735.

7 *Miller v Huddleston* (1882) 22 ChD 233. A bank should transfer the contemnor's assets to the sequestrators without a specific order to that effect: see *Eckman v Midland Bank Ltd* [1973] QB 519, [1973] 1 All ER 609, NIRC; and PARA 1381.

8 No sale being contemplated by the writ, cash can be seized like any other property, eg a bank balance (*Miller v Huddleston* (1882) 22 ChD 233; *Guerrine (otherwise Roberts) v Guerrine* [1959] 2 All ER 594n, [1959] 1 WLR 760); and see note 7.

9 *Cowper v Taylor* (1848) 16 Sim 314; but see *Dundas v Dutens* (1790) 1 Ves 196, and *M'Carthy v Gould* (1810) 1 Ball & B 387.

10 'Personal estate' includes both legal and equitable things in action: *Bucknell v Bucknell*[1969] 2 All ER 998, [1969] 1 WLR 1204.

11 The origin of the writ of sequestration being purely equitable, there has never been any question as to this.

12 An annuity terminable on the contemnor ceasing to be beneficially entitled to it will determine on the issue of the writ, and, therefore, the sequestrators will not be able to take it: *Dixon v Rowe* (1876) 35 LT 548.

13 The pensions of a county court judge (*Willcock v Terrell* (1878) 3 Ex D 323, CA), a civil servant (*Sansom v Sansom* (1879) 4 PD 69), an officer in the Indian navy (*Dent v Dent*(1867) LR 1 P & D 366), and an Indian civil servant (*Knill v Dumergue*[1911] 2 Ch 199, CA) have been held to be seizable. The order made is that the contemnor be restrained from receiving the pension, and the sequestrators be directed to receive it (*M'Carthy v Goold* (1810) 1 Ball & B 387; *Willcock v Terrell* (1878) 3 Ex D 323, CA; *Sansom v Sansom* (1879) 4 PD 69). For the similar form of order made pursuant to the Crown Proceedings Act 1947 s 27 see PARA 1383. Some pensions, such as children's pensions under the Judicial Pensions Act 1981 or the Judicial Pensions and Retirement Act 1993, are paid subject to a liability to apply them for the benefit of other persons, and would not be seizable: see **COURTS** vol 10 (Reissue) PARAS 547, 566.

14 As to things in action not capable of alienation see **CHOSES IN ACTION** vol 13 (2009) PARA 1 et seq. Money paid in commutation of an inalienable pension can be seized: *Crowe v Price*(1889) 22 QBD 429, CA; and cf *Re Saunders, ex p Saunders*[1895] 2 QB 424, CA; *Re Ward, ex p Ward*[1897] 1 QB 266, CA; *Re Lupton, ex p Official Receiver*[1912] 1 KB 107, CA.

15 *Munt v Munt* (1862) 2 Sw & Tr 661.

16 *Re Slade, Slade v Hulme*(1881) 18 ChD 653.

17 See the Courts Act 2003 s 99(1), Sch 7 para 9 (which applies to 'an enforcement officer or other person who is under a duty to execute the writ'); and PARA 1315; but cf *Johnson v Burgess*(1873) LR 15 Eq 398.

18 See PARA 1324.

19 Ie under the Railway Companies Act 1867 s 4: see PARA 1242.

20 Such property can only be reached by a writ of sequestrari de bonis ecclesiasticis or of fieri facias de bonis ecclesiasticis: see PARA 1278. The profits of the fellowship of a college are not ecclesiastical property: *Mosely v Warburton* (1697) 1 Ld Raym 265.

21 *Capron v Capron*[1927] P 243.

22 See PARA 1250. However, under the Land Registration Act 2002, no notice may be entered on the register in respect of an order appointing a receiver or sequestrator: see s 87(2)(a); and **LAND REGISTRATION**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(vii) Sequestration and Sale by Sequestrators/1381. Rights and duties of third parties.

1381. Rights and duties of third parties.

As regards the rights of third parties, it may, generally speaking, be said that the sequestrators may seize all that, and only that, of which the contemnor would at law or in equity be entitled to possession in a claim against such persons, and subject to all rights, legal or equitable, belonging to such persons. The exceptions to this rule are: (1) the sequestrators are entitled to property held by third parties under a conveyance in fraud of the sequestration¹; (2) the sequestrators, like the enforcement officer under a writ of fieri facias, are not bound, it is submitted, by estoppels against the contemnor²; (3) the sequestrators may seize property claimed under a voluntary conveyance, or under a conveyance accepted with knowledge of the issue of the writ, at a date subsequent to such issue³.

In relation to their dealings with a contemnor's property following the issue of a writ of sequestration, banks and other third parties are, where they know of the issue of the writ, under a duty not to take any action which may frustrate the object of the writ, but to make full disclosure to the sequestrators of the contemnor's assets held or disposed of by them, and to transfer any such assets to the sequestrators on being so requested without a specific court order to that effect⁴. This principle applies regardless of whether the third party holds property belonging to the contemnor⁵.

1 *Witham v Bland* (1675) 3 Swan 276n; *Coulston v Gardiner* (1681) 3 Swan 279n; *Bird v Littlehales* (1743) 3 Swan 299n; *Hamblyn v Ley* (1743) 3 Swan 301n; *Blenkinsopp v Blenkinsopp* (1852) 1 De GM & G 495.

2 See PARA 1348.

3 See note 1.

4 *Eckman v Midland Bank Ltd* [1973] QB 519 at 528, [1973] 1 All ER 609 at 616, per Sir John Donaldson; see also *Bucknell v Bucknell* [1969] 2 All ER 998 at 1006, [1969] 1 WLR 1204 at 1213 per Brandon J. In cases where someone other than the contemnor has an interest in the property, or there is doubt whether the property is liable to sequestration, the sequestrators should be informed in order that a specific court order may be sought: *Eckman v Midland Bank Ltd* [1973] QB 519 at 528, [1973] 1 All ER 609 at 616. A third party who unreasonably compels the sequestrators to seek a court order may be liable for the costs of such proceedings: see *Bucknell v Bucknell* [1969] 2 All ER 998 at 1007, [1969] 1 WLR 1204 at 1214; *Eckman v Midland Bank Ltd* [1973] QB 519 at 529, [1973] 1 All ER 609 at 617.

5 *Messenger Newspapers Group Ltd v National Graphical Association* [1984] 1 All ER 293, [1984] ICR 345, CA (auditors under a duty to divulge details of assets). The consent of the contemnor has no relevance to whether a third party is required to give information to sequestrators since sequestration would otherwise be impossible to effect: *Messenger Newspapers Group Ltd v National Graphical Association* [1984] 1 All ER 293, [1984] ICR 345, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(vii) Sequestration and Sale by Sequestrators/1382. Effect of death of either party.

1382. Effect of death of either party.

The death of the person issuing the writ does not prevent or determine the sequestration: his interest in it devolves with his interest in the judgment or order¹. In the case of death of the contemnor occurring after the issue of the writ², the sequestration continues in force³ against the contemnor's personal representatives⁴ unless it is merely for the purpose of enforcing a personal interim order such as an order to give further information⁵. A jointure or annuity secured upon land for the benefit of the widow, however, is not affected⁶.

1 le whether the sequestration is for disobedience of a final or interim order: *Hyde v Forster* (1748) 1 Dick 132. The deceased's personal representatives should be joined in the claim: *Hyde v Forster* (1748) 1 Dick 132. See, however, *Wharam v Broughton* (1748) 1 Ves Sen 180.

2 Death before the issue of the writ has been already considered: see PARA 1243.

3 *Burdett v Rockley* (1682) 1 Vern 58; *Hyde v Greenhill* (1746) 1 Dick 106; *Hawkins v Crook* (1747) 3 Atk 594; *Maxwell v Kelsy* (1807) 2 Mol 320; *Pratt v Inman* (1889) 43 ChD 175. It seems in the earlier cases to have been doubtful whether it was not necessary to revive the sequestration by order: see *Whitehead v Harrison* (1730) 1 Barn KB 431; *Marquess of Caermarthen v Hawson* (1730) 3 Swan 294n. It would now be necessary to obtain the leave of the court under CPR Sch 1 RSC Ord 46 r 2(1)(b): see PARA 1274.

4 *Pratt v Inman* (1889) 43 ChD 175. Formerly it was enforceable against the heir in the case of realty descending to the heir (*Marquess of Caermarthen v Hawson* (1730) 3 Swan 294n); but not in the case of an estate tail (*Lord of Athol v Earl of Derby* (1672) 1 Cas in Ch 220).

5 *Burdett v Rockley* (1682) 1 Vern 58; *Hawkins v Crook* (1747) 3 Atk 594; and see *Pratt v Inman* (1889) 43 ChD 175. As to orders to give further information see PARA 611.

6 *Proctor v Reynel* (1664) 1 Rep Ch 247; *Langley v Breydon* (1677) cited in 2 Cas in Ch 46; and see *Burdett v Rockley* (1682) 1 Vern 58 (widow's claim for dower).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(vii) Sequestration and Sale by Sequestrators/1383. Enforcement of writ of sequestration.

1383. Enforcement of writ of sequestration.

In getting into their hands the contemnor's property the sequestrators may require the assistance of the court, the form of which will vary with the nature of the property. Thus, to obtain chattels or lands denied to them by the contemnor or others, they can apply for committal for contempt, and for an injunction to be followed by a writ of assistance or possession¹. To obtain rents due from the contemnor's tenants or debtors they must first obtain, if the money is not paid on request, an order of the court², which will not usually be granted in the case of tenants until after attornment by them (that is, acknowledgment of the sequestrators as landlords), which will, however, be compelled by order³. When a real dispute as to liability exists, the court may order a claim to be brought in the name of the contemnor⁴. Where the liability is admitted, the order to pay to the sequestrators will be made summarily⁵.

When money belonging to the contemnor is in court, it will be ordered to be paid out⁶, but no sequestration has effect in respect of any money due or accruing or alleged to be due or accruing from the Crown⁷. In such a case the court may, on the judgment creditor's application, make an order restraining the judgment debtor from receiving the money⁸ and directing payment by the Crown to the sequestrator⁹.

1 As to committal for contempt see PARAS 1249, 1514; and **CONTEMPT OF COURT**; and as to writs of possession and writs of assistance see PARAS 1267, 1271.

2 *Re Hoare, ex p Nelson* (1880) 14 ChD 41, CA; *Re Pollard, v Pollard* (1902) 87 LT 61. The debtor or tenant may receive his costs on the making of the order (*White v Wood* (1843) 2 Y & C Ch Cas 615; *Miller v Huddleston* (1882) 22 ChD 233), but not where his refusal to pay the sequestrators without an order is unreasonable (see PARA 1381 note 4).

3 A separate notice is usually sent to tenants calling upon them to attorn to the sequestrators. Should it be necessary to compel attornment, the sequestrators should apply for the order to attorn: *Wood v Adams* (1780) 2 Dick 576; *Rowley v Ridley* (1784) 3 Swan 306n; *Goldsmith v Goldsmith* (1846) 5 Hare 123. Until such attornment, no claim can be brought against the tenant for rent: see *Rowley v Ridley* (1784) 3 Swan 306n; *Goldsmith v Goldsmith* (1846) 5 Hare 123.

4 *Craig v Craig* [1896] P 171, where all the cases in this and the next note are reviewed: *Simmonds v Lord Kinnaid* (1799) 4 Ves 735; *Johnson v Chippindall* (1828) 2 Sim 55; *Crispin v Cumano* (1869) LR 1 P & D 622; *Manton v Manton* (1870) 40 LJ Ch 93; *Ward v Booth* (1872) LR 14 Eq 195; explained in *Re Slade, Slade v Hulme* (1881) 18 ChD 653.

5 *Lord Pelham v Duchess of Newcastle* (1713) 3 Swan 290n, as explained in *Johnson v Chippindall* (1828) 2 Sim 55; *Francklyn v Colhoun, Francklyn v Thornhill, Rucker v Pinney* (1819) 3 Swan 276; *Wilson v Metcalfe* (1839) 1 Beav 263; *Miller v Huddleston* (1882) 22 ChD 233. In *Bayley v Bayley* (1859) 29 LJPM & A 72, a writ of assistance was granted at the applicant's risk against tenants who refused to pay the sequestrators; a writ of attachment was refused.

6 *Claydon v Finch* (1873) LR 15 Eq 266; *Re Slade, Slade v Hulme* (1881) 18 ChD 653; and see *Knight v Knight* (1856) 4 WR 771. In such case the application should be in the claim in which the money was paid in: *Knight v Knight* (1856) 4 WR 771. Even money paid into court by the contemnor on an order for security for costs will be so ordered to be paid out: *Conn v Garland* (1873) 9 Ch App 101. When the contemnor is entitled to a reversionary interest in stock in court, the interest may be ordered to be sold: *Cowper v Taylor* (1848) 16 Sim 314.

7 See the Crown Proceedings Act 1947 s 27(1) (amended by the Supreme Court Act 1981 ss 152(4), 153, Sch 7); CPR 66.7(3); and PARAS 1428-1429.

8 For the exceptions to this rule see PARA 1428 text and notes 9, 10.

9 See CPR 66.7(3); and PARA 1429.

UPDATE

1383 Enforcement of writ of sequestration

NOTE 7--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(vii) Sequestration and Sale by Sequestrators/1384. Management of property and sale by sequestrators.

1384. Management of property and sale by sequestrators.

The sequestrators, having taken possession so far as they are able to do so, are not to levy for the benefit of any person, but merely to detain and hold the property in their hands until the contempt is cleared and the court makes further order to the contrary¹, and therefore an order is required to regulate the rights of the parties². The sequestrators should apply to the court for any orders necessary to complete their seizure of the property³, and for orders of management and the like⁴. Without an order sequestrators have no power to enter into any contract⁵ or to do any act on behalf of the contemnor or his estate, other than merely to detain the latter⁶. A sequestration does not prevent a distress upon the contemnor's goods by the landlord⁷.

No sequestered property can be sold without leave of the court⁸, and no land, except possibly leaseholds⁹, can be ordered to be sold¹⁰. Where the contempt is non-payment into court, an order will be made for sale of personal property, payment of the proceeds into court and payment of the costs of the sequestration; for example such orders have been made as to farm produce¹¹, household furniture¹², and a reversionary interest in stock standing to the contemnor's credit in another cause¹³. Unless such a sale is completed before the making of the bankruptcy order, the rights of the official receiver or trustee in bankruptcy will take priority to the rights of the execution creditor¹⁴.

There is no apparent reason why sequestrators should be immune from suit or exempt from liability for professional negligence in the management of the contemnor's affairs. Moreover, it is wrong in principle to grant a blanket release and discharge to a sequestrator without first investigating any claims made against him; although once appointed sequestrators become officers of the court, they are nevertheless still subject to liability based on the ordinary standard of care¹⁵.

1 *Wharam v Broughton* (1748) 1 Ves Sen 180. There is no right acquired in the property sequestered by the party at whose instance the sequestration issued: *Burne v Robinson* (1844) 7 I Eq R 188.

2 For an example see *Lord Pelham v Lord Harley* (1713) 3 Swan 291n.

3 See PARA 1383.

4 It was formerly the practice to require the return of the writ before proceeding to obtain any such order (*Yarroth v Seys* (1720) Bunb 62; *Lord Pelham v Duchess of Newcastle* (1713) 3 Swan 289n); but it is not now the practice to file the return (*Goldsmith v Goldsmith* (1846) 5 Hare 123). On the return it appeared how much the sequestrators had obtained, and, if insufficient, a new writ issued for sale of the chattels to raise the remainder due: *Yarroth v Seys* (1720) Bunb 62.

5 In an appropriate case, however, the sequestrators may be directed by the court to carry out the terms of a contract for the sale of land already entered into by the contemnor: see *Hipkin v Hipkin* [1962] 2 All ER 155, [1962] 1 WLR 491.

6 Thus, management orders are necessary to enable them to let land (*Neale v Bealing* (1744) 3 Swan 304n; notice should be given to the contemnor of such an application (*Neale v Bealing* (1744) 3 Swan 304n; see also *Dunkley v Scribner* (1815) 2 Madd 443)); to fell timber (*Lady Dacres v Chute* (1683) 1 Vern 160; for the necessity for a licence to fell timber in certain cases see **FORESTRY** vol 52 (2009) PARA 120 et seq); or to settle a dilapidation claim with an outgoing tenant (*Re Burkill, Godfrey v Burkill* (1873) 1 Seton's Judgments and Orders (7th Edn) 447). A reference may be ordered to inquire whether an action for recovery of possession of land should be defended (*Crone v O'dell* (1827) 2 Mol 389); and orders may be made for the redemption by sequestrators of mortgages upon the property (*Hamblyn v Ley* (1743) 3 Swan 301n).

- 7 *Dixon v Smith* (1818) 1 Swan 457; and see **DISTRESS** vol 13 (2007 Reissue) PARA 1032.
- 8 *Desbrow v Crommie* (1729) 1 Barn KB 212; and see *Cavil v Smith* (1791) 3 Bro CC 361.
- 9 See *Ellard v Warren* (1681) 3 Rep Ch 87; but see *Shaw v Wright* (1796) 3 Ves 22.
- 10 *Shaw v Wright* (1796) 3 Ves 22; and see *Sutton v Stone* (1745) 1 Dick 107. See also *Hipkin v Hipkin* [1962] 2 All ER 155, [1962] 1 WLR 491; and note 5.
- 11 *Dickinson v Smith* (1813) 4 Madd 177; *Dixon v Smith* (1818) 1 Swan 457.
- 12 *Mitchell v Draper* (1803) 9 Ves 208; but see the Courts Act 2003 s 99(1), Sch 7 para 9; and PARA 1315.
- 13 *Cowper v Taylor* (1848) 16 Sim 314.
- 14 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 685.
- 15 *IRC v Hoogstraten* [1985] QB 1077, [1984] 3 All ER 25, CA. However, it has always been recognised that the court has power, by making an order for release and discharge, to protect its officers, whether sequestrators or receivers, from all liability for acts done in the course of duty; therefore, it is not obliged to wait until the end of the limitation period before protecting an officer against a claim, particularly where the claimant, having ample opportunity to do so, has neglected to prosecute the claim: *IRC v Hoogstraten* [1985] QB 1077, [1984] 3 All ER 25, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(vii) Sequestration and Sale by Sequestrators/1385. Discharge of writ of sequestration.

1385. Discharge of writ of sequestration.

There is no set form of order for bringing sequestration to an end and the terms of the order must depend on the circumstances of a particular case¹. Such an order obtained by a fraud on the court will be set aside².

If a receiver is appointed in the proceedings to enforce an order in which the writ of sequestration is issued, it will discharge the writ³. A writ irregularly issued will be discharged⁴, although an irregularity may be waived by the contemnor, for example by his giving directions to the sequestrators⁵.

1 *IRC v Hoogstraten* [1985] QB 1077, [1984] 3 All ER 25, CA. It is not the present practice for the return to the writ to be required: see *IRC v Hoogstraten* [1985] QB 1077, [1984] 3 All ER 25, CA; and see *Goldsmith v Goldsmith* (1846) 5 Hare 123. The return, however, may still be necessary where the contemnor is a beneficed clergyman in order to found process directed to the bishop: *Allen v Williams* (1854) 2 Sm & G 455; and see PARA 1278. Where a sequestration order is set aside on grounds other than irregularity, a court is not prevented from exercising its discretion to withdraw the protection afforded by the order to the applicant: *Raja v Van Hoogstraten (Tombstone Ltd intervening)* [2007] EWHC 1743 (Ch), [2007] All ER (D) 428 (Jul); affd sub nom *Tombstone Ltd v Raja* [2008] EWCA Civ 1444, [2008] All ER (D) 180 (Dec). CPR Sch 1 RSC Ord 46 r 9 (see PARA 1282) deals only with the return made by a enforcement officer.

2 *Ward v Cornwall* (1871) 19 WR 1075; *Lewis v Lewis* (1680) Cas temp Finch 471.

3 *Shaw v Wright* (1796) 3 Ves 22.

4 Eg, under the old practice, an order for a sequestration made before the return of an executed writ of attachment was held to be irregular and discharged: *Martin v Kerridge* (1733) 3 P Wms 240; *Re Brown* (1868) 16 WR 962. As to irregular executions see generally PARAS 1377-1378.

5 *Const v Barr* (1826) 2 Russ 161.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/A. ENFORCEMENT POWER AND ENFORCEMENT AGENTS/1386. Enforcement power.

(viii) Taking Control of Goods

A. ENFORCEMENT POWER AND ENFORCEMENT AGENTS

1386. Enforcement power.

The following provisions are not in force¹. The provisions described below and in the following paragraphs apply where an enactment, writ or warrant confers power to use the procedure in Schedule 12 to the Tribunals, Courts and Enforcement Act 2007 (taking control of goods and selling them to recover a sum of money)². The power conferred by a writ or warrant of control to recover a sum of money, and any power conferred by a writ or warrant of possession or delivery to take control of goods and sell them to recover a sum of money, is exercisable only by using that procedure³. A power to use this procedure to recover a particular sum is called an 'enforcement power'⁴.

Only an enforcement agent⁵ may take control of goods and sell them under an enforcement power⁶.

The statutory provisions relating to the procedure in Schedule 12⁷ bind the Crown⁸, but the procedure may not be used (1) to recover debts due from the Crown; (2) to take control of or sell goods of the Crown (including goods owned by the Crown jointly or in common with another person); or (3) to enter premises occupied by the Crown⁹.

1 The Tribunals, Courts and Enforcement Act 2007 Pt 3 Ch 1 (ss 62-70) and Sch 12 are to be brought into force as from a day to be appointed. At the date at which this title states the law, no such day had been appointed. The Chapter replaces the common law rules about the exercise of the powers which under it become powers to use the procedure in Sch 12: s 65(1). The rules replaced include (1) rules distinguishing between an illegal, an irregular and an excessive exercise of a power; (2) rules that would entitle a person to bring proceedings of a kind for which Sch 12 para 66 provides (remedies available to the debtor: see PARA 1409); (3) rules of replevin (see **COURTS** vol 10 (Reissue) PARA 714; **DISTRESS** vol 13 (2007 Reissue) PARA 1081 et seq); (4) rules about rescuing goods: s 65(2). Where (a) by any provision of Pt 3 a power becomes a power to use the procedure in Sch 12; and (b) before the commencement of that provision, goods have been distrained or executed against, or made subject to a walking possession agreement, under the power, Pt 3 does not affect the continuing exercise of the power in relation to those goods: s 66.

2 Tribunals, Courts and Enforcement Act 2007 s 62(1). Using the procedure in Sch 12 to recover a sum means taking control of goods and selling them to recover that sum in accordance with Sch 12 and regulations under it: Sch 12 para 1(1).

3 Tribunals, Courts and Enforcement Act 2007 s 62(2). As to the procedure see PARA 1389 et seq. 'Control' (except in Sch 12 para 5(4)(a) (see PARA 1389 note 15)) means control under an enforcement power: Sch 12 para 3(1). Schedule 12 is subject to the Insolvency Act 1986 ss 183, 184 and 346 (see PARAS 1354-1355; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 882 et seq; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 678 et seq); Tribunals, Courts and Enforcement Act 2007 Sch 12 para 69.

4 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 1(2).

5 'Enforcement agent', in the Tribunals, Courts and Enforcement Act 2007 Sch 12 means an individual authorised by s 63(2) to act as an enforcement agent: Sch 12 para 2(1); see PARA 1387. An enforcement agent, if he is not the person on whom an enforcement power is conferred, may act under the power only if authorised by that person: Sch 12 para 2(3). In relation to goods taken control of by an enforcement agent under an

enforcement power, references to the enforcement agent are references to any person for the time being acting as an enforcement agent under the power: Sch 12 para 2(4).

- 6 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 2(2).
- 7 ie the Tribunals, Courts and Enforcement Act 2007 Pt 3 (ss 62-90).
- 8 Tribunals, Courts and Enforcement Act 2007 s 89(1).
- 9 Tribunals, Courts and Enforcement Act 2007 s 89(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/A. ENFORCEMENT POWER AND ENFORCEMENT AGENTS/1387. Enforcement agents.

1387. Enforcement agents.

The following provisions are not in force¹. For the purposes of the procedure for taking control of goods², an individual may act as an enforcement agent³ only if one of the following applies: (1) he acts under a certificate to act as an enforcement agent⁴; (2) he is exempt⁵; (3) he acts in the presence and under the direction of a person to whom head (1) or (2) applies⁶. A person is guilty of an offence if, knowingly or recklessly, he purports to act as an enforcement agent without being authorised to do so⁷.

A certificate to act as an enforcement agent may be issued by a judge assigned to a county court district⁸ or, in prescribed⁹ circumstances, by a district judge¹⁰.

1 See PARA 1386 note 1.

2 PARA 1386. As to the meaning of 'control' see PARA 1386 note 3.

3 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

4 He under the Tribunals, Courts and Enforcement Act 2007 s 64.

5 An individual is exempt if he acts in the course of his duty as one of the following: (1) a constable; (2) an officer of Revenue and Customs; (3) a person appointed under the Courts Act 2003 s 2(1) (court officers and staff); Tribunals, Courts and Enforcement Act 2007 s 63(3). An individual is also exempt if he acts in the course of his duty as an officer of a government department: s 63(4). For the purposes of an enforcement power conferred by a warrant, an individual is exempt if in relation to the warrant he is a civilian enforcement officer, as defined in the Magistrates' Courts Act 1980 s 125A (civilian enforcement officers: see **MAGISTRATES**): Tribunals, Courts and Enforcement Act 2007 s 63(5).

6 Tribunals, Courts and Enforcement Act 2007 s 63(1), (2).

7 Tribunals, Courts and Enforcement Act 2007 s 63(6). A person guilty of an offence under s 63 is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 63(7). As to the meaning of 'standard scale' see PARA 63 note 3.

8 As to county court districts see PARA 58.

9 'Prescribed' means prescribed by regulations; and 'regulations' means regulations made by the Lord Chancellor: Tribunals, Courts and Enforcement Act 2007 s 90(1).

10 Tribunals, Courts and Enforcement Act 2007 s 64(1). The Lord Chancellor must make regulations about certificates under s 64: s 64(2). The regulations may in particular include provision (1) for fees to be charged for applications; (2) for certificates to be issued subject to conditions, including the giving of security; (3) for certificates to be limited to purposes specified by or under the regulations; (4) about complaints against holders of certificates; (5) about suspension and cancellation of certificates; (6) to modify or supplement Sch 12 for cases where a certificate is suspended or cancelled or expires; (7) requiring courts to make information available relating to certificates: s 64(3). Any power to make regulations under Pt 3 is exercisable by statutory instrument: s 90(2), (3). A statutory instrument containing regulations under Sch 12 para 24(2) (see PARA 1396) or 31(5) (see PARA 1397) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament: s 90(4). In any other case a statutory instrument containing regulations is subject to annulment in pursuance of a resolution of either House of Parliament: s 90(5). Regulations may include any of the following that the Lord Chancellor considers necessary or expedient: (a) supplementary, incidental or consequential provision; (b) transitional, transitional or saving provision: s 90(6). Regulations may make different provision for different cases: s 90(7).

A certificate under the Law of Distress Amendment Act 1888 s 7 (see **DISTRESS** vol 13 (2007 Reissue) PARA 994) which is in force on the coming into force of the Tribunals, Courts and Enforcement Act 2007 s 64 has effect as a certificate under s 64, subject to any provision made by regulations: s 64(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/A. ENFORCEMENT POWER AND ENFORCEMENT AGENTS/1388. Power of High Court to stay execution.

1388. Power of High Court to stay execution.

The following provisions are not in force¹. If, at any time, the High Court is satisfied that a party to proceedings² is unable to pay (1) a sum recovered against him (by way of satisfaction of the claim or counterclaim in the proceedings or by way of costs or otherwise); or (2) any instalment of such a sum, the court may stay the execution of any writ of control³ issued in the proceedings, for whatever period and on whatever terms it thinks fit⁴. The court may act under this power from time to time until it appears that the cause of the inability to pay has ceased⁵.

1 See PARA 1386 note 1.

2 For these purposes a party to proceedings includes every person, whether or not named as a party, who is served with notice of the proceedings or attends them: Tribunals, Courts and Enforcement Act 2007 s 70(3).

3 As to writs of control (formerly writs of fieri facias: see PARA 1266 note 2) see PARA 1265 et seq.

4 Tribunals, Courts and Enforcement Act 2007 s 70(1).

5 Tribunals, Courts and Enforcement Act 2007 s 70(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1389. Binding property in the debtor's goods.

B. PROCEDURE FOR TAKING CONTROL OF GOODS

1389. Binding property in the debtor's goods.

The following provisions are not in force¹. For the purposes of any enforcement power², the property in all goods³ of the debtor⁴, except goods that are exempt goods⁵ or are protected under any other enactment, becomes bound in accordance with the following provisions⁶. Where the power is conferred by a writ issued from the High Court the writ binds the property in the goods from the time when it is received by the person who is under a duty to indorse it⁷. Where the power is conferred by a warrant⁸, the warrant binds the property in the goods from the time when it is received by the person who is under a duty to indorse it under the relevant statutory provision⁹. Where the above provisions do not apply but notice of enforcement is given to the debtor¹⁰, the notice binds the property in the goods from the time when the notice is given¹¹.

An assignment or transfer of any interest of the debtor's in goods while the property in them is bound for the purposes of an enforcement power is subject to that power and does not affect the operation of the enforcement procedure in relation to the goods, except as specifically¹² provided¹³. This, however, does not prejudice the title to any of the debtor's goods that a person acquires in good faith¹⁴, for valuable consideration and without notice¹⁵.

1 See PARA 1386 note 1.

2 As to the meaning of 'enforcement power' see PARA 1386.

3 'Goods' means property of any description, other than land: Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 3(1).

4 In relation to an enforcement power, 'debtor' means the person liable to pay the debt or, if two or more persons are jointly or severally liable, any one or more of them: Tribunals, Courts and Enforcement Act 2007 Sch 12 para 1(3), (5). 'Debt' means the sum recoverable: Sch 12 para 1(4). In Sch 12, references to goods of the debtor or another person are references to goods in which the debtor or that person has an interest, but references to goods of the debtor do not include references to trust property in which either the debtor or a co-owner has an interest not vested in possession: Sch 12 para 3(2). 'Interest' means a beneficial interest, and 'co-owner' in relation to goods of the debtor means a person other than the debtor who has an interest in the goods, but only if the enforcement agent knows that the person has an interest in the particular goods, or would know, if he made reasonable inquiries: Sch 12 para 3(1).

5 'Exempt goods' means goods that regulations exempt by description or circumstances or both: Tribunals, Courts and Enforcement Act 2007 Sch 12 para 3(1). As to regulations see PARA 1387 note 10.

6 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 4(1).

7 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 4(2). As to writs of execution see PARA 1265 et seq.

8 I.e. a warrant to which the County Courts Act 1984 s 99 (see PARA 1298) or the Magistrates' Courts Act 1980 s 125ZA (see **MAGISTRATES**) applies.

9 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 4(3).

10 I.e. under the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 7(1): see PARA 1391.

11 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 4(4).

12 le by the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 61 (application to assignee or transferee): see PARA 1406.

13 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 5(1).

14 For these purposes, a thing is to be treated as done in good faith if it is in fact done honestly (whether it is done negligently or not): Tribunals, Courts and Enforcement Act 2007 Sch 12 para 5(3).

15 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 5(2). For these purposes, 'notice' means (1) where the property in the goods is bound by a writ or warrant, notice that the writ or warrant, or any other writ or warrant by virtue of which the goods of the debtor might be seized or otherwise taken control of, had been received by the person who was under a duty to indorse it and that goods remained bound under it; (2) where the property in the goods is bound by notice under Sch 12 para 7(1), notice that that notice had been given and that goods remained bound under it: Sch 12 para 5(4). In head (1), 'indorse' in relation to a warrant to which the County Courts Act 1984 s 99 or the Magistrates' Courts Act 1980 s 125ZA applies, means endorse under that section: Tribunals, Courts and Enforcement Act 2007 Sch 12 para 5(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1390. Goods ceasing to be bound.

1390. Goods ceasing to be bound.

The following provisions are not in force¹. For the purposes of any enforcement power² the property in goods³ of the debtor⁴ ceases to be bound⁵ in accordance with the following provisions⁶. The property in any goods ceases to be bound (1) when the goods are sold; (2) in the case of money⁷ used to pay any of the amount outstanding⁸, when it is used⁹. The property in all goods ceases to be bound when any of the following happens: (a) the amount outstanding is paid, out of the proceeds of sale or otherwise; (b) the instrument under which the power is exercisable¹⁰ ceases to have effect; (c) the power ceases to be exercisable for any other reason¹¹.

1 See PARA 1386 note 1.

2 As to the meaning of 'enforcement power' see PARA 1386.

3 As to the meaning of 'goods' see PARA 1389 note 3.

4 As to the meaning of 'debtor' and as to references to goods of the debtor see PARA 1389 note 4.

5 In the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 4: see PARA 1389.

6 Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 6(1).

7 'Money' means money in sterling or another currency: Tribunals, Courts and Enforcement Act 2007 Sch 12 para 3(1).

8 As to the meaning of 'amount outstanding' see PARA 1401.

9 Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 6(2).

10 As to instruments under which the power is exercisable see PARA 1389.

11 Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 6(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1391. Notice and period of control.

1391. Notice and period of control.

The following provisions are not in force¹. An enforcement agent² may not take control of goods³ unless the debtor⁴ has been given notice⁵. Regulations⁶ must state (1) the minimum period of notice; (2) the form of the notice; (3) what it must contain; (4) how it must be given; (5) who must give it⁷. The enforcement agent must keep a record of the time when the notice is given⁸. If regulations authorise it, the court⁹ may order in prescribed¹⁰ circumstances that the notice given may be less than the minimum period¹¹. The order may be subject to conditions¹².

An enforcement agent may not take control of goods after the prescribed period¹³. The period may be prescribed by reference to the date of notice of enforcement or of any writ or warrant conferring the enforcement power¹⁴ or any other date¹⁵. Regulations may provide for the period to be extended or further extended by the court in accordance with the regulations¹⁶.

1 See PARA 1386 note 1.

2 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

3 As to the meaning of 'goods' see PARA 1389 note 3. As to the meaning of 'control' see PARA 1386 note 3 and as to taking control of goods see PARA 1386.

4 As to the meaning of 'debtor' see PARA 1389 note 4.

5 Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 7(1).

6 As to regulations see PARA 1387 note 10.

7 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 7(2).

8 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 7(3).

9 'Court', unless otherwise stated, and subject to rules of court, means (1) the High Court, in relation to an enforcement power under a writ of the High Court; (2) a county court, in relation to an enforcement power under a warrant issued by a county court; (3) in any other case, a magistrates' court: Tribunals, Courts and Enforcement Act 2007 Sch 12 para 3(1).

10 As to the meaning of 'prescribed' see PARA 1387 note 9.

11 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 7(4).

12 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 7(5).

13 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 8(1).

14 As to the meaning of 'enforcement power' see PARA 1386.

15 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 8(2).

16 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 8(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1392. Goods which may be taken.

1392. Goods which may be taken.

The following provisions are not in force¹. An enforcement agent² may take control of goods³ only if they are on premises⁴ that he has power to enter⁵ or on a highway⁶. An enforcement agent may take control of goods only if they are goods of the debtor⁷. Subject to the above and to any other enactment under which goods are protected, an enforcement agent may take control of goods anywhere in England and Wales and may take control of any goods that are not exempt⁸. However, regulations⁹ may authorise him to take control of exempt goods in prescribed¹⁰ circumstances, if he provides the debtor with replacements in accordance with the regulations¹¹.

Generally, an enforcement agent may not take control of goods whose aggregate value is more than the amount outstanding¹² and an amount in respect of future costs, calculated in accordance with regulations¹³. However, an enforcement agent may take control of goods of higher value on premises or on a highway, only to the extent necessary, if there are not enough goods of a lower value within a reasonable distance on a highway or on premises that he has power to enter, either without warrant¹⁴ or under an existing warrant¹⁵.

1 See PARA 1386 note 1.

2 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

3 As to the meaning of 'goods' see PARA 1389 note 3. As to the meaning of 'control' see PARA 1386 note 3 and as to taking control of goods see PARA 1386.

4 'Premises' means any place, and in particular includes a vehicle, vessel, aircraft or hovercraft and a tent or movable structure: Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 3(1).

5 Ie under the Tribunals, Courts and Enforcement Act 2007 Sch 12.

6 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 9. As to highways see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 1 et seq. As to goods on a highway see PARA 1397.

7 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 10. As to references to goods of the debtor see PARA 1389 note 4.

8 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 11(1). As to the meaning of 'exempt goods' see PARA 1389 note 5.

9 As to regulations see PARA 1387 note 10.

10 As to the meaning of 'prescribed' see PARA 1387 note 9.

11 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 11(2).

12 As to the meaning of 'amount outstanding' see PARA 1401. For the purposes of the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 12 goods are above a given value only if it is or ought to be clear to the enforcement agent that they are: Sch 12 para 12(3).

13 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 12(1). This does not affect the power to keep control of goods if they rise in value once they have been taken: Sch 12 para 12(4).

14 Ie under the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 14: see PARA 1394.

15 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 12(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1393. Method of taking control of goods.

1393. Method of taking control of goods.

The following provisions are not in force¹. To take control of goods² an enforcement agent³ must do one of the following: (1) secure the goods on the premises⁴ on which he finds them; (2) if he finds them on a highway⁵, secure them on a highway, where he finds them or within a reasonable distance; (3) remove them and secure them elsewhere; (4) enter into a controlled goods agreement⁶ with the debtor⁷.

Regulations⁸ may make further provision about taking control in any of the ways listed above, including provision determining the time when control is taken and prohibiting use of any of those ways for goods by description or circumstances or both⁹.

1 See PARA 1386 note 1.

2 As to the meaning of 'goods' see PARA 1389 note 3. As to the meaning of 'control' see PARA 1386 note 3 and as to taking control of goods see PARA 1386.

3 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

4 As to the meaning of 'premises' see PARA 1392 note 4.

5 As to highways see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 1 et seq; and as to goods on a highway see PARA 1397. Any liability of an enforcement agent (including criminal liability) arising out of his securing goods on a highway is excluded to the extent that he acted with reasonable care: Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 13(2).

6 A controlled goods agreement is an agreement under which the debtor (1) is permitted to retain custody of the goods; (2) acknowledges that the enforcement agent is taking control of them; and (3) agrees not to remove or dispose of them, nor to permit anyone else to, before the debt is paid: Tribunals, Courts and Enforcement Act 2007 Sch 12 paras 3(1), 13(4). As to the meanings of 'debtor' and 'debt' see PARA 1389 note 4.

7 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 13(1).

8 As to regulations see PARA 1387 note 10.

9 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 13(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1394. Entry to take control of goods.

1394. Entry to take control of goods.

The following provisions are not in force¹. An enforcement agent² may enter relevant premises³ to search for and take control of goods⁴. Where there are different relevant premises entry to each of them is authorised⁵. Repeated entry to the same premises is authorised, subject to any restriction in regulations⁶. In general, premises are relevant if the enforcement agent reasonably believes that they are the place, or one of the places, where the debtor⁷ usually lives or carries on a trade or business⁸.

If an enforcement agent applies to the court⁹ it may issue a warrant authorising him to enter specified premises to search for and take control of goods¹⁰. Before issuing the warrant the court must be satisfied that all the following conditions are met:

- 963 (a) an enforcement power¹¹ has become exercisable;
- 964 (b) there is reason to believe that there are goods on the premises that the enforcement power will be exercisable to take control of if the warrant is issued;
- 965 (c) it is reasonable in all the circumstances to issue the warrant¹².

The warrant authorises repeated entry to the same premises, subject to any restriction in regulations¹³.

Where goods on any premises have been taken control of and have not been removed by the enforcement agent, the enforcement agent may enter the premises to inspect the goods or to remove them for storage or sale¹⁴. This authorises repeated entry to the same premises¹⁵.

1 See PARA 1386 note 1.

2 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

3 As to the meaning of 'premises' see PARA 1392 note 4.

4 Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 14(1). As to the meaning of 'goods' see PARA 1389 note 3. As to the meaning of 'control' see PARA 1386 note 3 and as to taking control of goods see PARA 1386.

5 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 14(2).

6 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 14(3). As to regulations see PARA 1387 note 10.

7 As to the meaning of 'debtor' see PARA 1389 note 4.

8 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 14(6). If the enforcement agent is acting under s 72(1) (CRAR (commercial rent arrears recovery): see **LANDLORD AND TENANT**), the only relevant premises are the demised premises: Sch 12 para 14(4). If he is acting under the Social Security Administration Act 1992 s 121A (recovery of contributions etc: see **SOCIAL SECURITY AND PENSIONS**), premises are relevant if they are the place, or one of the places, where the debtor carries on a trade or business: Tribunals, Courts and Enforcement Act 2007 Sch 12 para 14(5) (repealed, as from a day to be appointed, by the Finance Act 2008 s 129(1), (3), Sch 43 Pt 1 para 10(1), (2); at the date at which this title states the law, no such day had been appointed).

9 As to the meaning of 'court' see PARA 1391 note 9.

- 10 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 15(1).
- 11 As to the meaning of 'enforcement power' see PARA 1386.
- 12 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 15(2).
- 13 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 15(3).
- 14 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 16(1).
- 15 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 16(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1395. Use of force.

1395. Use of force.

The following provisions are not in force¹. Where (1) an enforcement agent² has power³ to enter premises⁴ to inspect goods⁵ or to remove them for storage or sale; (2) he reasonably believes that the debtor⁶ carries on a trade or business on the premises; (3) he is acting under an enforcement power under a writ or warrant of control issued for the purpose of recovering a sum payable under a High Court or county court judgment, the enforcement agent may if necessary use reasonable force to enter premises or to do anything for which the entry is authorised⁷.

If an enforcement agent has power to enter premises either without⁸ or under⁹ a warrant, then if the enforcement agent applies to the court¹⁰ it may issue a warrant which authorises him to use, if necessary, reasonable force to enter the premises or to do anything for which entry is authorised¹¹.

If an enforcement agent is applying for power to enter premises under a warrant¹², then if the enforcement agent applies to the court it may include in the warrant provision authorising him to use, if necessary, reasonable force to enter the premises or to do anything for which entry is authorised¹³.

The court may not issue a warrant authorising the use of force¹⁴ or include provision in a warrant to enter premises¹⁵ unless it is satisfied that prescribed¹⁶ conditions are met¹⁷. Such a warrant may require any constable¹⁸ to assist the enforcement agent to execute the warrant¹⁹.

1 See PARA 1386 note 1.

2 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

3 Ie under the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 16: see PARA 1394.

4 As to the meaning of 'premises' see PARA 1392 note 4.

5 As to the meaning of 'goods' see PARA 1389 note 3.

6 As to the meaning of 'debtor' see PARA 1389 note 4.

7 Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 paras 17, 19(1), (2)(a). As to authorised entry on to premises see PARA 1394.

8 Ie under the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 14 or 16: see PARA 1394.

9 Ie under the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 15: see PARA 1394.

10 As to the meaning of 'court' see PARA 1391 note 9.

11 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 20.

12 See note 9.

13 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 21.

14 Ie under the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 20.

15 Ie under the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 21.

- 16 As to the meaning of 'prescribed' see PARA 1387 note 9.
- 17 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 22(1).
- 18 As to the meaning of 'constable' see PARA 1283 note 18.
- 19 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 22(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1396. Powers of entry.

1396. Powers of entry.

The following provisions are not in force¹. They apply where an enforcement agent² has power³ to enter premises⁴.

The power to enter and any power to use force⁵ are subject to any restriction imposed by or under regulations⁶. A power to use force does not include power to use force against persons, except to the extent that regulations provide that it does⁷.

The enforcement agent may enter and remain on the premises only within prescribed⁸ times of day⁹. Regulations may give the court¹⁰ power in prescribed circumstances to authorise him to enter or remain on the premises at other times¹¹. The authorisation may be by order or in a warrant¹² and may be subject to conditions¹³.

The enforcement agent must on request show the debtor and any person who appears to him to be in charge of the premises evidence of his identity and his authority to enter the premises¹⁴. The request may be made before the enforcement agent enters the premises or while he is there¹⁵.

The enforcement agent may take other people onto the premises¹⁶, who may assist him in exercising any power, including a power to use force¹⁷ but must not remain on the premises without the enforcement agent¹⁸. The enforcement agent may take any equipment onto the premises¹⁹ and may leave equipment on the premises if he leaves controlled goods²⁰ there²¹.

After entering the premises the enforcement agent must provide a notice for the debtor giving information about what the enforcement agent is doing²². Regulations must state the form of the notice and what information it must give²³. Regulations may prescribe circumstances in which a notice need not be provided after re-entry to premises²⁴. If the debtor is on the premises when the enforcement agent is there, the enforcement agent must give him the notice then²⁵. If the debtor is not there, the enforcement agent must leave the notice in a conspicuous place on the premises²⁶. If the enforcement agent knows that there is someone else there or that there are other occupiers, a notice he leaves must be in a sealed envelope addressed to the debtor²⁷.

If the premises are occupied by any person apart from the debtor, the enforcement agent must leave at the premises a list of any goods he takes away²⁸.

The enforcement agent must leave the premises as effectively secured as he finds them²⁹.

1 See PARA 1386 note 1.

2 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

3 ie under the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 14 or 16 or under a warrant under Sch 12 para 15: see PARA 1394.

4 Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 23. As to the meaning of 'premises' see PARA 1392 note 4.

5 As to the power to use force see PARA 1395.

6 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 24(1). As to regulations see PARA 1387 note 10.

7 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 24(2). A statutory instrument containing regulations under Sch 12 para 24(2) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament: s 90(4).

8 As to the meaning of 'prescribed' see PARA 1387 note 9.

9 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 25(1).

10 As to the meaning of 'court' see PARA 1391 note 9.

11 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 25(2).

12 Ie under the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 15: see PARA 1394.

13 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 25(3).

14 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 26(1).

15 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 26(2).

16 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 27(1).

17 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 27(2).

18 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 27(3).

19 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 27(4).

20 'Controlled goods' means goods taken control of that (1) have not been sold or abandoned; (2) if they have been removed, have not been returned to the debtor (unless subject to a controlled goods agreement); and (3) if they are goods of another person, have not been returned to that person: Tribunals, Courts and Enforcement Act 2007 Sch 12 para 3(1). As to the meaning of 'goods' see PARA 1389 note 3. As to the meaning of 'debtor' see PARA 1389 note 4. As to the meaning of 'controlled goods agreement' see PARA 1393 note 6.

21 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 27(5).

22 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 28(1).

23 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 28(2).

24 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 28(3).

25 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 28(4).

26 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 28(5).

27 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 28(6).

28 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 29.

29 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 30.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1397. Goods on a highway.

1397. Goods on a highway.

The following provisions are not in force¹. If the enforcement agent² applies to the court³ it may issue a warrant which authorises him to use, if necessary, reasonable force to take control of goods⁴ on a highway⁵. The court may not issue a warrant unless it is satisfied that prescribed⁶ conditions are met⁷. The warrant may require any constable⁸ to assist the enforcement agent to execute it⁹. The power to use force is subject to any restriction imposed by or under regulations¹⁰. The power to use force does not include power to use force against persons, except to the extent that regulations provide that it does¹¹.

The enforcement agent may not exercise any power under Schedule 12 to the Tribunals, Courts and Enforcement Act 2007 on a highway except within prescribed times of day¹². Regulations may give the court power in prescribed circumstances to authorise him to exercise a power at other times¹³. The authorisation may be subject to conditions¹⁴.

If the enforcement agent takes control of goods on a highway or enters a vehicle on a highway with the intention of taking control of goods, he must provide a notice for the debtor giving information about what he is doing¹⁵. Regulations must state the form of the notice and what information it must give¹⁶. If the debtor is present when the enforcement agent is there, the enforcement agent must give him the notice then¹⁷. Otherwise the enforcement agent must deliver the notice to any relevant premises¹⁸ in a sealed envelope addressed to the debtor¹⁹.

1 See PARA 1386 note 1.

2 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

3 As to the meaning of 'court' see PARA 1391 note 9.

4 As to the meaning of 'goods' see PARA 1389 note 3. As to the meaning of 'control' see PARA 1386 note 3 and as to taking control of goods see PARA 1386.

5 Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 31(1). As to highways see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 1 et seq.

6 As to the meaning of 'prescribed' see PARA 1387 note 9.

7 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 31(2).

8 As to the meaning of 'constable' see PARA 1283 note 18.

9 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 31(3).

10 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 31(4). As to regulations see PARA 1387 note 10.

11 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 31(5). A statutory instrument containing regulations under Sch 12 para 31(5) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament: s 90(4).

12 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 32(1).

13 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 32(1).

14 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 32(1).

- 15 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 33(1).
- 16 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 33(2).
- 17 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 33(3).
- 18 le as defined by the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 14: see PARA 1394.
- 19 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 33(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1398. Inventory and care of goods removed.

1398. Inventory and care of goods removed.

The following provisions are not in force¹. If an enforcement agent² takes control of goods³ he must provide the debtor⁴ with an inventory of them as soon as reasonably practicable⁵. If there are co-owners⁶ of any of the goods, the enforcement agent must instead provide the debtor as soon as reasonably practicable with separate inventories of goods owned by the debtor and each co-owner and an inventory of the goods without a co-owner⁷. The enforcement agent must as soon as reasonably practicable provide the co-owner of any of the goods with the inventory of those goods and a copy of the notice⁸ giving information about what the enforcement agent is doing⁹. Regulations¹⁰ must state the form of an inventory and what it must contain¹¹.

An enforcement agent must take reasonable care of controlled goods¹² that he removes from the premises¹³ or highway where he finds them¹⁴. He must comply with any provision of regulations about their care while they remain controlled goods¹⁵.

1 See PARA 1386 note 1.

2 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

3 As to the meaning of 'goods' see PARA 1389 note 3. As to the meaning of 'control' see PARA 1386 note 3 and as to taking control of goods see PARA 1386.

4 As to the meaning of 'debtor' see PARA 1389 note 4.

5 Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 34(1).

6 As to the meaning of 'co-owner' see PARA 1389 note 4.

7 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 34(2).

8 See under the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 28: see PARA 1396.

9 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 34(3).

10 As to regulations see PARA 1387 note 10.

11 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 34(4).

12 As to the meaning of 'controlled goods' see PARA 1396 note 20.

13 As to the meaning of 'premises' see PARA 1392 note 4.

14 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 35(1).

15 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 35(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1399. Valuation and sale of goods removed.

1399. Valuation and sale of goods removed.

The following provisions are not in force¹. Before the end of the minimum period², the enforcement agent³ must (1) make or obtain a valuation of the controlled goods⁴ in accordance with regulations⁵; (2) give the debtor⁶, and separately any co-owner⁷, an opportunity to obtain an independent valuation of the goods⁸.

An enforcement agent must sell or dispose of controlled goods for the best price that can reasonably be obtained in accordance with the statutory provisions⁹. That does not apply to money¹⁰ that can be used for paying any of the outstanding amount¹¹, unless the best price is more than its value if used in that way¹².

The following provisions¹³ apply to the sale of controlled goods, except where the controlled goods are securities or the sale is by exchange of one currency for another¹⁴. The sale must not be before the end of the minimum period except with the agreement of the debtor and any co-owner¹⁵. Regulations must specify the minimum period¹⁶. Before the sale, the enforcement agent must give notice of the date, time and place of the sale to the debtor and any co-owner¹⁷. Regulations must state (a) the minimum period of notice; (b) the form of the notice; (c) what it must contain (besides the date, time and place of sale); (d) how it must be given¹⁸. The enforcement agent may replace a notice with a new notice, subject to any restriction in regulations¹⁹. Any notice must be given within the permitted period²⁰, which unless extended is 12 months beginning with the day on which the enforcement agent takes control of the goods²¹. Any extension must be by agreement in writing between the creditor²² and debtor before the end of the period²³. They may extend the period more than once²⁴.

The sale must be by public auction unless the court²⁵ orders otherwise²⁶. The court may make an order only on an application by the enforcement agent²⁷. Regulations may make provision about the types of sale the court may order²⁸. In an application for such an order the enforcement agent must state whether he has reason to believe that an enforcement power has become exercisable by another creditor against the debtor or a co-owner²⁹. If the enforcement agent states that he does, the court may not consider the application until notice of it has been given to the other creditor in accordance with regulations (or until the court is satisfied that an enforcement power³⁰ is not exercisable by the other creditor against the debtor or a co-owner)³¹. Regulations may make further provision about the sale of controlled goods, including in particular requirements for advertising and provision about the conduct of a sale³².

Regulations may make provision about the place of sale of controlled goods³³. They may prescribe circumstances in which the sale may be held on premises where goods were found by the enforcement agent³⁴. Except where the regulations provide otherwise, the sale may not be held on those premises without the consent of the occupier³⁵. If the sale may be held on those premises, the following provisions³⁶ apply³⁷. The enforcement agent and any person permitted by him may enter the premises to conduct or attend the sale and may bring equipment onto the premises for the purposes of the sale³⁸. This authorises repeated entry to the premises³⁹. If necessary the enforcement agent may use reasonable force to enable the sale to be conducted and any person to enter under this provision⁴⁰. The enforcement agent must on request show the debtor and any person who appears to him to be in charge of the premises evidence of his identity and his authority to enter and hold the sale on the premises⁴¹. The request may be

made before the enforcement agent enters the premises or while he is there⁴². The enforcement agent must leave the premises as effectively secured as he finds them⁴³.

1 See PARA 1386 note 1.

2 'Minimum period' means the period specified by regulations under the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 49, in the case of securities (see PARA 1400) and Sch 12 para 39 in any other case (see the text to notes 15-16): s 62(1), Sch 12 para 36(2). 'Securities' includes bills of exchange, promissory notes, bonds, specialties and securities for money: Sch 12 para 3(1).

3 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

4 As to the meaning of 'controlled goods' see PARA 1396 note 20. As to the meaning of 'goods' see PARA 1389 note 3.

5 As to regulations see PARA 1387 note 10.

6 As to the meaning of 'debtor' see PARA 1389 note 4.

7 As to the meaning of 'co-owner' see PARA 1389 note 4.

8 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 36(1).

9 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 37(1).

10 As to the meaning of 'money' see PARA 1390 note 7.

11 Cf the meaning of 'amount outstanding': see PARA 1401.

12 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 37(2).

13 Ie the Tribunals, Courts and Enforcement Act 2007 Sch 12 paras 39-42.

14 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 38.

15 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 39(1).

16 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 39(2).

17 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 40(1).

18 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 40(2).

19 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 40(3).

20 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 40(4).

21 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 40(5).

22 'Creditor' means the person for whom the debt is recoverable: Tribunals, Courts and Enforcement Act 2007 Sch 12 para 1(3), (6).

23 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 40(6).

24 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 40(7).

25 As to the meaning of 'court' see PARA 1391 note 9.

26 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 41(1).

27 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 41(2).

28 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 41(3).

29 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 41(4).

30 As to the meaning of 'enforcement power' see PARA 1386.

- 31 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 41(5).
- 32 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 42.
- 33 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 43(1).
- 34 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 43(2).
- 35 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 43(3).
- 36 le the Tribunals, Courts and Enforcement Act 2007 Sch 12 paras 44-46.
- 37 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 43(4).
- 38 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 44(1).
- 39 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 44(2).
- 40 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 44(3).
- 41 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 45(1).
- 42 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 45(2).
- 43 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 46.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1400. Holding and disposal of securities.

1400. Holding and disposal of securities.

The following provisions are not in force¹. They apply to securities² as controlled goods³. Regulations⁴ may make provision about how securities are to be held and disposed of⁵. Regulations may in particular make provision for purposes corresponding to those for which provision is made in relation to the disposal of other controlled goods⁶.

The creditor⁷ may sue in the name of the debtor⁸, or in the name of any person in whose name the debtor might have sued, for the recovery of any sum secured or made payable by securities, when the time of payment arrives⁹. Before any such proceedings are commenced or the securities are otherwise disposed of, the enforcement agent¹⁰ must give notice of the disposal to the debtor and any co-owner¹¹. Regulations must state (1) the minimum period of notice; (2) the form of the notice; (3) what it must contain; (4) how it must be given¹². The enforcement agent may replace a notice with a new notice, subject to any restriction in regulations¹³. Any notice must be given within the permitted period¹⁴, which unless extended is 12 months beginning with the time of payment¹⁵. Any extension must be by agreement in writing between the creditor and debtor before the end of the period¹⁶. They may extend the period more than once¹⁷.

1 See PARA 1386 note 1.

2 As to the meaning of 'securities' see PARA 1399 note 2.

3 Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 47. As to the meaning of 'controlled goods' see PARA 1396 note 20.

4 As to regulations see PARA 1387 note 10.

5 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 48(1). In Sch 12, references to disposal include, in relation to securities, realising the sums secured or made payable by them, suing for the recovery of those sums or assigning the right to sue for their recovery: Sch 12 para 48(2). The power to make regulations under Sch 12 para 48 is subject to Sch 12 para 49 (see the text and notes 7-17): Sch 12 para 48(4).

6 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 48(3). See PARA 1399.

7 As to the meaning of 'creditor' see PARA 1399 note 22.

8 As to the meaning of 'debtor' see PARA 1389 note 4.

9 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 49(1).

10 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

11 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 49(2). As to the meaning of 'co-owner' see PARA 1389 note 4.

12 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 49(3).

13 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 49(4).

14 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 49(5).

15 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 49(6).

16 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 49(7).

17 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 49(8).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1401. Application of proceeds.

1401. Application of proceeds.

The following provisions are not in force¹. Proceeds from the exercise of an enforcement power² must be used to pay the amount outstanding³. Proceeds are any of the following: (1) proceeds of sale or disposal of controlled goods⁴; (2) money⁵ taken in exercise of the power⁶ that can be used for paying any of the outstanding amount⁷.

The amount outstanding is the sum of (a) the amount of the debt⁸ which remains unpaid (or an amount that the creditor⁹ agrees to accept in full satisfaction of the debt); (b) any amounts recoverable out of proceeds in accordance with regulations¹⁰ relating to costs¹¹.

If the proceeds are less than the amount outstanding, which amounts in heads (a) and (b) must be paid, and how much of any amount, is to be determined in accordance with regulations¹². If the proceeds are more than the amount outstanding, the surplus must be paid to the debtor¹³.

If there is a co-owner¹⁴ of any of the goods, the enforcement agent¹⁵ must first pay the co-owner a share of the proceeds of those goods proportionate to his interest¹⁶ and then deal with the rest of the proceeds under the above provisions¹⁷. Regulations may make provision for resolving disputes about what share is due to the co-owner¹⁸.

1 See PARA 1386 note 1.

2 As to the meaning of 'enforcement power' see PARA 1386.

3 Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 50(1).

4 As to the meaning of 'controlled goods' see PARA 1396 note 20.

5 As to the meaning of 'money' see PARA 1390 note 7.

6 Ie if the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 37(1) does not apply to it (see PARA 1399).

7 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 50(2).

8 As to the meaning of 'debt' see PARA 1389 note 4.

9 As to the meaning of 'creditor' see PARA 1399 note 22.

10 Ie under the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 62 (costs); see PARA 1407. As to regulations see PARA 1387 note 10.

11 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 50(3).

12 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 50(4).

13 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 50(5). As to the meaning of 'debtor' see PARA 1389 note 4.

14 As to the meaning of 'co-owner' see PARA 1389 note 4.

15 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

16 As to the meaning of 'interest' see PARA 1389 note 4.

- 17 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 50(6).
- 18 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 50(7).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1402. Passing of title in goods.

1402. Passing of title in goods.

The following provisions are not in force¹. A purchaser of controlled goods² acquires good title, with two exceptions³, which apply only if the goods are not the debtor's⁴ at the time of sale⁵. The first exception is where the purchaser, the creditor⁶, the enforcement agent⁷ or a related party⁸ has notice that the goods are not the debtor's⁹. The second exception is where a lawful claimant¹⁰ has already made an application to the court¹¹ claiming an interest¹² in the goods¹³.

1 See PARA 1386 note 1.

2 As to the meaning of 'controlled goods' see PARA 1396 note 20.

3 Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 51(1).

4 As to the meaning of 'debtor' see PARA 1389 note 4.

5 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 51(2). As to sale of the goods see PARA 1399.

6 As to the meaning of 'creditor' see PARA 1399 note 22.

7 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

8 A related party is any person who acts in exercise of an enforcement power, other than the creditor or enforcement agent: Tribunals, Courts and Enforcement Act 2007 Sch 12 para 51(6).

9 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 51(3).

10 A lawful claimant in relation to goods is a person who has an interest in them at the time of sale, other than an interest that was assigned or transferred to him while the property in the goods was bound for the purposes of the enforcement power: Tribunals, Courts and Enforcement Act 2007 Sch 12 para 51(5).

11 As to the meaning of 'court' see PARA 1405 note 2; definition applied by the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 51(7).

12 As to the meaning of 'interest' see PARA 1389 note 4.

13 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 51(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1403. Abandonment of goods.

1403. Abandonment of goods.

The following provisions are not in force¹. Controlled goods² other than securities³ and money⁴ that can be used for paying any of the outstanding amount⁵ are abandoned (1) if the enforcement agent⁶ does not give the debtor⁷ or any co-owner⁸ notice of sale⁹ within the permitted period¹⁰; (2) if they are unsold after a sale of which due notice¹¹ has been given¹². Regulations¹³ may prescribe other circumstances in which controlled goods are abandoned¹⁴. If such controlled goods are abandoned then, in relation to the enforcement power¹⁵ concerned, (a) the enforcement power ceases to be exercisable and; (b) as soon as reasonably practicable the enforcement agent must make the goods available for collection by the debtor, if he removed them from where he found them¹⁶. Where the enforcement power was under a writ or warrant, these provisions do not affect any power to issue another writ or warrant¹⁷. Regulations may make further provision about arrangements as to making the goods available for collection, including in particular provision about the disposal of goods uncollected after a prescribed¹⁸ period¹⁹.

Securities as controlled goods are abandoned (i) if the enforcement agent does not give the debtor or any co-owner notice of disposal²⁰ within the permitted period²¹; (ii) if they are not disposed of in accordance with such notice of disposal²². Regulations may prescribe other circumstances in which securities are abandoned²³. If securities are abandoned then, in relation to the enforcement power concerned, (A) the enforcement power ceases to be exercisable; and (B) as soon as reasonably practicable the enforcement agent must make the securities available for collection by the debtor, if he removed them from where he found them²⁴. Where the enforcement power was under a writ or warrant, these provisions do not affect any power to issue another writ or warrant²⁵.

1 See PARA 1386 note 1.

2 As to the meaning of 'controlled goods' see PARA 1396 note 20.

3 As to the meaning of 'securities' see PARA 1399 note 2.

4 As to the meaning of 'money' see PARA 1390 note 7.

5 Ie if the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 37(1) does not apply to it (see PARA 1399).

6 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

7 As to the meaning of 'debtor' see PARA 1389 note 4.

8 As to the meaning of 'co-owner' see PARA 1389 note 4.

9 Ie under the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 40: see PARA 1399.

10 Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 paras 52, 53(1). As to the permitted period see PARA 1399 text to note 21.

11 Ie in accordance with the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 40: see PARA 1399.

12 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 53(2).

- 13 As to regulations see PARA 1387 note 10.
- 14 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 53(3).
- 15 As to the meaning of 'enforcement power' see PARA 1386.
- 16 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 54(1).
- 17 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 54(3).
- 18 As to the meaning of 'prescribed' see PARA 1387 note 9.
- 19 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 54(2).
- 20 le under the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 49: see PARA 1400.
- 21 Tribunals, Courts and Enforcement Act 2007 Sch 12 paras 55, 56(1).
- 22 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 56(2).
- 23 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 56(3).
- 24 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 57(1).
- 25 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 57(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1404. Payment of amount outstanding.

1404. Payment of amount outstanding.

The following provisions are not in force¹. Where the debtor² pays the amount outstanding³ in full after the enforcement agent⁴ has taken control of goods⁵ and before they are sold⁶ or abandoned⁷, then if the enforcement agent has removed the goods, he must as soon as reasonably practicable make them available for collection by the debtor⁸. No further step may be taken under the enforcement power⁹ concerned¹⁰. For these purposes the amount outstanding is reduced by the value of any controlled goods¹¹ consisting of money¹² required to be used to pay that amount, and the requirement to make the goods available for collection does not apply to that money¹³.

If a further step is taken despite the prohibition above¹⁴, the enforcement agent is not liable unless he had notice¹⁵, when the step was taken, that the amount outstanding had been paid in full¹⁶, and this applies to a related party¹⁷ as to the enforcement agent¹⁸. If the step taken is sale of any of the goods the purchaser acquires good title unless, at the time of sale, he or the enforcement agent had notice that the amount outstanding had been paid in full¹⁹. These provisions do not affect any right of the debtor or a co-owner²⁰ to a remedy against any person other than the enforcement agent or a related party²¹.

1 See PARA 1386 note 1.

2 As to the meaning of 'debtor' see PARA 1389 note 4.

3 As to the meaning of 'amount outstanding' see PARA 1401.

4 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

5 As to the meaning of 'goods' see PARA 1389 note 3. As to the meaning of 'control' see PARA 1386 note 3 and as to taking control of goods see PARA 1386.

6 As to sale of goods see PARA 1399.

7 As to abandonment of goods see PARA 1403.

8 Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 58(1), (2).

9 As to the meaning of 'enforcement power' see PARA 1386.

10 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 58(3).

11 As to the meaning of 'controlled goods' see PARA 1396 note 20.

12 As to the meaning of 'money' see PARA 1390 note 7.

13 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 58(4).

14 Ie under the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 58(3).

15 A person has notice that the amount outstanding has been paid in full if he would have found it out if he had made reasonable inquiries: Tribunals, Courts and Enforcement Act 2007 Sch 12 para 59(5).

16 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 59(1), (2).

17 As to the meaning of 'related party' see PARA 1402 note 8; definition applied by the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 59(7).

18 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 59(3).

19 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 59(4).

20 As to the meaning of 'co-owner' see PARA 1389 note 4.

21 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 59(6).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1405. Third party claiming goods.

1405. Third party claiming goods.

The following provisions are not in force¹. They apply where a person makes an application to the court² claiming that goods³ taken control of⁴ are his and not the debtor's⁵. After receiving notice of the application the enforcement agent⁶ must not sell the goods, or dispose of them (in the case of securities⁷), unless directed by the court⁸. The court may direct the enforcement agent to sell or dispose of the goods if the applicant fails to make, or to continue to make, the required payments into court⁹. The required payments are (1) payment on making the application¹⁰ of an amount equal to the value of the goods, or to a proportion of it directed by the court¹¹; (2) payment, at prescribed times (on making the application or later), of any amounts prescribed in respect of the enforcement agent's costs of retaining the goods¹². If the court does not direct a sale as above, the court may still direct the enforcement agent to sell or dispose of the goods before the court determines the applicant's claim, if it considers it appropriate¹³.

If the court makes a direction for sale, the statutory provisions as to sale¹⁴ apply subject to any modification directed by the court, and the enforcement agent must pay the proceeds of sale or disposal into court¹⁵.

1 See PARA 1386 note 1.

2 In the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 60, 'court', subject to rules of court, means (1) the High Court, in relation to an enforcement power under a writ of the High Court; (2) a county court, in relation to an enforcement power under a warrant issued by a county court; (3) in any other case, the High Court or a county court: s 62(1), Sch 12 para 60(8). As to the meaning of 'enforcement power' see PARA 1386.

3 As to the meaning of 'goods' see PARA 1389 note 3.

4 As to the meaning of 'control' see PARA 1386 note 3 and as to taking control of goods see PARA 1386.

5 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 60(1). As to the meaning of 'debtor' see PARA 1389 note 4.

6 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

7 As to the meaning of 'securities' see PARA 1399 note 2.

8 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 60(2).

9 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 60(3).

10 If the applicant makes a payment related to the value of the goods but the enforcement agent disputes the value of the goods, any underpayment is to be determined by reference to an independent valuation carried out in accordance with regulations, and paid at the prescribed time: Tribunals, Courts and Enforcement Act 2007 Sch 12 para 60(5). As to regulations see PARA 1387 note 10. As to the meaning of 'prescribed' see PARA 1387 note 9.

11 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 60(4)(a).

12 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 60(4)(b).

13 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 60(6).

14 le the Tribunals, Courts and Enforcement Act 2007 Sch 12 paras 38-49, and regulations under them: see
PARAS 1399-1400.

15 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 60(7).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1406. Application of power to assignee or transferee.

1406. Application of power to assignee or transferee.

The following provisions are not in force¹. The statutory power to take control of goods² applies with modifications where an interest³ of the debtor's⁴ in goods is assigned or transferred while the property in the goods is bound for the purposes of an enforcement power⁵, and the enforcement agent⁶ knows that the assignee or transferee has an interest in the particular goods or would know, if he made reasonable inquiries⁷.

The provisions as to inventory⁸, valuation⁹, sale¹⁰ and remedies after payment of the amount outstanding¹¹ apply as if the assignee or transferee were a co-owner¹² of the goods with the debtor¹³. If the interest of the assignee or transferee was acquired in good faith¹⁴, for valuable consideration and without notice¹⁵, the requirement to pay to the co-owner a share of the proceeds of sale¹⁶ applies as if 'co-owner' included the assignee or transferee¹⁷. If the interest of the assignee or transferee was not acquired in good faith, for valuable consideration and without notice, the enforcement agent must pay any surplus¹⁸ to the assignee or transferee and to the debtor (if he retains an interest)¹⁹. If the surplus is payable to two or more persons it must be paid in shares proportionate to their interests²⁰.

1 See PARA 1386 note 1.

2 In the Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12. As to the meaning of 'goods' see PARA 1389 note 3. As to the meaning of 'control' see PARA 1386 note 3 and as to taking control of goods see PARA 1386.

3 As to the meaning of 'interest' see PARA 1389 note 4.

4 As to the meaning of 'debtor' see PARA 1389 note 4.

5 As to the meaning of 'enforcement power' see PARA 1386.

6 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

7 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 61(1).

8 In the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 34: see PARA 1398.

9 In the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 36: see PARA 1399.

10 In the Tribunals, Courts and Enforcement Act 2007 Sch 12 paras 39-41: see PARA 1399.

11 In the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 59(6): see PARA 1404 text to note 21.

12 As to the meaning of 'co-owner' see PARA 1389 note 4.

13 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 61(2).

14 As to the meaning of 'good faith' for these purposes see PARA 1389 note 14, applied by the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 61(6).

15 As to the meaning of 'notice' for these purposes see PARA 1389 note 15, applied by the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 61(6).

16 In the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 50(6): see PARA 1401 text to notes 14-17.

- 17 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 61(3).
- 18 le under the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 50(5): see PARA 1401 text to note
13.
- 19 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 61(4).
- 20 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 61(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1407. Costs.

1407. Costs.

The following provisions are not in force¹. Regulations² may make provision for the recovery by any person from the debtor³ of amounts in respect of costs of enforcement-related services⁴. The regulations may provide for recovery to be out of proceeds or otherwise⁵. The amount recoverable under the regulations in any case is to be determined by or under the regulations⁶. The regulations may in particular provide for the amount, if disputed, to be assessed in accordance with rules of court⁷.

1 See PARA 1386 note 1.

2 As to regulations see PARA 1387 note 10.

3 As to the meaning of 'debtor' see PARA 1389 note 4.

4 Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 62(1). 'Enforcement-related services' means anything done under or in connection with an enforcement power, or in connection with obtaining an enforcement power, or any services used for the purposes of a provision of Sch 12 or regulations under it: Sch 12 para 62(5). As to the meaning of 'enforcement power' see PARA 1386.

5 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 62(2).

6 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 62(3).

7 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 62(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1408. Limitation of liability for sale or payment of proceeds.

1408. Limitation of liability for sale or payment of proceeds.

The following provisions are not in force¹. Any liability of an enforcement agent² or related party³ to a lawful claimant⁴ for the sale of controlled goods⁵ is excluded except in two cases⁶. The first exception is where at the time of the sale the enforcement agent had notice⁷ that the goods were not the debtor's⁸, or not his alone⁹. The second exception is where before sale the lawful claimant had made an application to the court¹⁰ claiming an interest in the goods¹¹.

Any liability of an enforcement agent or related party to a lawful claimant¹² for paying over proceeds is excluded except in two cases¹³. The first exception is where at the time of the payment he had notice that the goods were not the debtor's, or not his alone¹⁴. The second exception is where before that time the lawful claimant had made an application to the court claiming an interest in the goods¹⁵.

These provisions do not affect the liability of a person other than the enforcement agent or a related party and do not apply to the creditor¹⁶ if he is the enforcement agent¹⁷.

1 See PARA 1386 note 1.

2 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

3 As to the meaning of 'related party' see PARA 1402 note 8.

4 A lawful claimant in relation to goods is a person who has an interest in them at the time of sale, other than an interest that was assigned or transferred to him while the property in the goods was bound for the purposes of the enforcement power: Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 63(4). As to the meaning of 'goods' see PARA 1389 note 3. As to the meaning of 'interest' see PARA 1389 note 4. As to the meaning of 'enforcement power' see PARA 1386.

5 As to the meaning of 'controlled goods' see PARA 1396 note 20. As to the sale of controlled goods see PARA 1399.

6 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 63(1).

7 The enforcement agent or a related party has notice of something if he would have found it out if he had made reasonable inquiries: Tribunals, Courts and Enforcement Act 2007 Sch 12 para 65(2), (3). A related party is any person who acts in exercise of an enforcement power, other than the creditor or enforcement agent: Sch 12 para 65(4).

8 As to the meaning of 'debtor' see PARA 1389 note 4.

9 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 63(2).

10 As to the meaning of 'court' see PARA 1405 note 2; definition applied by the Tribunals, Courts and Enforcement Act 2007 Sch 12 para 65(5).

11 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 63(3).

12 A lawful claimant in relation to goods is a person who has an interest in them at the time of sale: Tribunals, Courts and Enforcement Act 2007 Sch 12 para 64(4).

13 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 64(1).

14 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 64(2).

- 15 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 64(3).
- 16 As to the meaning of 'creditor' see PARA 1399 note 22.
- 17 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 65(1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1409. Remedies available to the debtor and creditor.

1409. Remedies available to the debtor and creditor.

The following provisions are not in force¹. Where an enforcement agent² (1) breaches a provision of the statutory power to take control of goods³; or (2) acts under an enforcement power⁴ under a writ, warrant, liability order or other instrument that is defective, the breach or defect does not make the enforcement agent, or a person he is acting for, a trespasser, but the debtor⁵ may bring proceedings in respect of the breach or defect⁶.

Subject to rules of court, the proceedings may be brought in the High Court, in relation to an enforcement power under a writ of the High Court, in a county court, in relation to an enforcement power under a warrant issued by a county court and in any other case, in the High Court or a county court⁷. In the proceedings the court may, without prejudice to any other powers of the court⁸, (a) order goods to be returned to the debtor; (b) order the enforcement agent or a related party⁹ to pay damages in respect of loss suffered by the debtor as a result of the breach or of anything done under the defective instrument¹⁰. The power to order damages does not apply where the enforcement agent acted in the reasonable belief that he was not breaching a statutory provision, or (as the case may be) that the instrument was not defective¹¹.

If a debtor wrongfully interferes with controlled goods¹² and the creditor suffers loss as a result, the creditor may bring a claim against the debtor in respect of the loss¹³.

1 See PARA 1386 note 1.

2 As to the meaning of 'enforcement agent' see PARA 1386 note 5.

3 I.e. the Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12. As to the meaning of 'goods' see PARA 1389 note 3. As to the meaning of 'control' see PARA 1386 note 3 and as to taking control of goods see PARA 1386. In the case of a breach of Sch 12 para 58(3) (prohibition on taking a further step under the enforcement power: see PARA 1404 text to notes 9-10), Sch 12 para 66 is subject to Sch 12 para 59 (see PARA 1404 text to notes 14-21): Sch 12 para 66(9).

4 As to the meaning of 'enforcement power' see PARA 1386.

5 As to the meaning of 'debtor' see PARA 1389 note 4.

6 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 66(1).

7 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 66(2).

8 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 66(7).

9 A related party is either of the following (if different from the enforcement agent): (1) the person on whom the enforcement power is conferred; (2) the creditor: Tribunals, Courts and Enforcement Act 2007 Sch 12 para 66(6). As to the meaning of 'creditor' see PARA 1399 note 22.

10 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 66(5).

11 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 66(8).

12 As to the meaning of 'controlled goods' see PARA 1396 note 20.

13 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 67.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(2) EXECUTION AND RELATED ENFORCEMENT PROCEDURES/(viii) Taking Control of Goods/B. PROCEDURE FOR TAKING CONTROL OF GOODS/1410. Offences.

1410. Offences.

The following provisions are not in force¹. A person is guilty of an offence if he intentionally obstructs a person lawfully acting as an enforcement agent². A person is guilty of an offence if he intentionally interferes with controlled goods³ without lawful excuse⁴.

A person guilty of an offence under either of the provisions above is liable on summary conviction to imprisonment for a term not exceeding 51 weeks⁵, or a fine not exceeding level 4 on the standard scale⁶, or both⁷.

1 See PARA 1386 note 1.

2 Tribunals, Courts and Enforcement Act 2007 s 62(1), Sch 12 para 68(1). As to the meaning of 'enforcement agent' see PARA 1386 note 5.

3 As to the meaning of 'controlled goods' see PARA 1396 note 20.

4 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 68(2).

5 In relation to an offence committed before the commencement of the Criminal Justice Act 2003 s 281(5), the reference to 51 weeks is to be read as a reference to six months: Tribunals, Courts and Enforcement Act 2007 Sch 12 para 68(4).

6 As to the meaning of 'standard scale' see PARA 63 note 3.

7 Tribunals, Courts and Enforcement Act 2007 Sch 12 para 68(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/A. INTRODUCTION/1411. Meaning of 'third party debt order'.

(3) OTHER METHODS OF ENFORCEMENT

(i) Third Party Debt Orders

A. INTRODUCTION

1411. Meaning of 'third party debt order'.

Part 72 of the Civil Procedure Rules¹ contains rules which provide for a judgment creditor² to obtain an order for the payment to him of money which a third party who is within the jurisdiction³ owes to a judgment debtor⁴.

Third party debt orders, formerly known as 'garnishee orders'⁵, are one of the methods of enforcing a money judgment⁶. Upon the application of the judgment creditor⁷, the court⁸ may make an order (a 'final third party debt order') requiring a third party to pay to the judgment creditor (1) the amount of any debt due or accruing due to the judgment debtor from the third party⁹; or (2) as much of it as may be sufficient to satisfy the judgment debt and the judgment creditor's costs of the application¹⁰.

The court will not make a final third party debt order without first making an interim third party debt order¹¹.

¹ ie CPR Pt 72: see the text and notes 2-10; and PARA 1417 et seq. As to the application of the CPR see PARA 32.

² As to the meaning of 'judgment creditor' see PARA 1236.

³ As to the meaning of 'jurisdiction' see PARA 117 note 6. It has been held that voluntary submission to the jurisdiction subsequent to the making of the order renders the third party a person within the jurisdiction: see *SCF Finance Co Ltd v Masri (No 3)* [1987] QB 1028, [1987] 1 All ER 194, CA. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

⁴ CPR 72.1(1). As to the meaning of 'judgment debtor' see PARA 1236. A separate, though somewhat similar, procedure is provided where the third party indebted to the judgment debtor is the Crown: see PARAS 1428-1429.

A third party debt order can only be made where it discharges the third party's debt to the judgment debtor pro tanto under the law governing that debt: *Société Eram Shipping Co Ltd v Compagnie Internationale de Navigation* [2003] UKHL 30, [2003] 3 All ER 465, [2003] 2 All ER (Comm) 65. The relation of creditor and debtor must exist between the judgment debtor and the third party (see eg *Webb v Stenton* (1883) 11 QBD 518, CA; *Wells v Wells* [1914] P 157, CA (barrister's fees)). A third party debt order cannot therefore be made (1) in respect of dividends payable to the judgment debtor by a trustee in bankruptcy (*Prout v Gregory* (1889) 24 QBD 281; *Re Greensill* (1872) LR 8 CP 24; *Boyse v Simpson* (1859) 8 ICLR 523; *Gilmour v Simpson* (1859) 8 ICLR, App xxxviii), or by the liquidator of a company (*Mack v Ward* [1884] WN 16; cf *Spence v Coleman* [1901] 2 KB 199, CA; but see *Klauber v Weill* (1901) 17 TLR 344 (where, however, the liquidator did not object to the order)); nor (2) in respect of money which has been attached at the suit of the judgment debtor (*Cooper v Lawson* (1889) 6 TLR 34), or money which has been ordered to be paid into court (*Re Greer, Napper v Fanshawe* [1895] 2 Ch 217; *Howell v Metropolitan District Rly Co* (1881) 19 ChD 508; *Stevens v Phelps* (1875) 10 Ch App 417; *Adams v Gillen* (1875) IR 9 CL 148; *Grant v Harding* (1767) 4 Term Rep 313n; *Coppell v Smith* (1791) 4 Term Rep 312; cf *Dolphin v Layton* (1879) 4 CPD 130 (payment into county court)), or which is in the hands of an officer of the court (*Re Greensill* (1872) LR 8 CP 24 (surplus assets of bankrupt in hands of official receiver); cf *Spence v Coleman* [1901] 2 KB 199, CA (unclaimed share of company's assets paid into companies liquidation account)), and contrast *Re Warwick and Worcester Rly Co, Prichard's Claim, ex p Turner, ex p Smith* (1860) 2 De GF & J

354; *Re Jervis* (1885) 1 TLR 306 (money in hands of police found on prisoner)). Such an order may, however, be made where the officer in whose hands the money is is an enforcement officer (*Re Greer, Napper v Fanshawe*[1895] 2 Ch 217; *Murray v Simpson* (1858) 8 ICLR App xlv; *O'Neill v Cunningham*(1872) IR 6 CL 503) or receiver (*Re Cowans' Estate, Rapier v Wright*(1880) 14 ChD 638; and see *Webb v Stenton*(1883) 11 QBD 518, CA, and *De Winton v Brecon Corpn (No 2)* (1860) 28 Beav 200). The debt must be one which the judgment debtor could himself enforce within the jurisdiction for his own benefit (see eg *Webster v Webster* (1862) 31 Beav 393; *Swiss Bank Corpn v Boehmische Industrial Bank*[1923] 1 KB 673, CA; *Richardson v Richardson*[1927] P 228; *Martin v Nadel*[1906] 2 KB 26, CA; *Bouch v Sevenoaks Rly Co* (1879) 4 Ex D 133; *Cohen v Cohen*(1982) 4 FLR 451; cf *Chapman v Callis* (1862) 6 LT 282; *Westoby v Day* (1853) 2 E & B 605), for the creditor acquires no greater rights than those of the debtor. As to payment out of money paid into court see PARA 1568 et seq; and as to the effect of the judgment debtor's insolvency see PARAS 1354-1356. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

5 See PARA 1225. Before 1854 there was no method, either at common law or in equity, to enable debts owing to the judgment debtor to be taken in execution: see *Horsley v Cox*(1869) 4 Ch App 92. The Common Law Procedure Act 1854 ss 60-67 (repealed), created the machinery for attaching the debts due or accruing due to the judgment debtor 'to answer the judgment', and this machinery was further developed by the Common Law Procedure Act 1860 ss 29, 30 (repealed). This process, however, was only available in respect of money judgments obtained in the superior common law courts: see *Financial Corpn Ltd v Price*(1869) LR 4 CP 155. These statutory provisions were replaced by the rules of court scheduled to the Supreme Court of Judicature Act 1875 (repealed): see the former RSC Ord 45 (revoked), which regulated the practice of the attachment of debts and made it applicable to all the divisions of the High Court. This order, which was entitled 'Attachment of Debts', was replaced by RSC Ord 49 (revoked subject to transitional provisions), with the title 'Garnishee Proceedings', which regulated the practice of the attachment of debts in all divisions of the High Court (including the Family Division: see *W v W (Barclays Bank Ltd, Garnishee)*[1961] P 113, [1961] 2 All ER 56, CA). The procedure for obtaining third party debt orders in both the High Court and county courts is now governed by CPR Pt 72 and its accompanying practice direction: see the text and notes 1-4, 7-11; and PARA 1417 et seq.

6 See PARA 1245.

7 As to making the application see PARA 1417.

8 As to the meaning of 'court' see PARA 22.

9 CPR 72.2(1)(a).

10 CPR 72.2(1)(b). As to the third party's expenses see PARA 1422.

11 CPR 7.2(2). As to interim third party debt orders see CPR 72.4(2); and PARA 1418.

UPDATE

1411 Meaning of 'third party debt order'

NOTE 4--See also *Continental Transfert Technique Ltd v Federal Government of Nigeria*[2009] EWHC 2898 (Comm), [2009] All ER (D) 239 (Nov).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/B. DEBTS WHICH MAY BE MADE SUBJECT TO THIRD PARTY DEBT ORDER/1412. Considerations applying to bank accounts etc.

B. DEBTS WHICH MAY BE MADE SUBJECT TO THIRD PARTY DEBT ORDER

1412. Considerations applying to bank accounts etc.

In determining whether, for the purposes of the jurisdiction of the High Court or a county court to attach debts¹ for the purpose of satisfying judgments or orders for the payment of money, a sum standing to the credit of a person in any deposit account and any withdrawable share account with a deposit-taker² is a sum due or accruing to that person and, as such, attachable in accordance with rules of court³, any condition mentioned below which applies to the account must be disregarded⁴. Those conditions are:

- 966 (1) any condition that notice is required before any money or share is withdrawn;
- 967 (2) any condition that a personal application must be made before any money or share is withdrawn;
- 968 (3) any condition that a deposit book or share-account book must be produced before any money or share is withdrawn; or
- 969 (4) any other prescribed condition⁵.

In deciding whether money standing to the credit of the judgment debtor in an account to which the above provisions relate may be made the subject of a third party debt order, any condition applying to the account that a receipt for money deposited in the account must be produced before any money is withdrawn will be disregarded⁶.

Foreign currency in an English deposit account may be made the subject of a third party debt order⁷.

1 le the jurisdiction to make third party debt orders: see PARAS 1411, 1417 et seq.

2 For these purposes, 'deposit-taker' means a person who may, in the course of his business, lawfully accept deposits in the United Kingdom; and this must be read with the Financial Services and Markets Act 2000 s 22, with Sch 2, and with any relevant order under s 22 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 791); Supreme Court Act 1981 s 40(6), (7); County Courts Act 1984 s 147(1), (1A) (definitions respectively substituted, and the Supreme Court Act 1981 s 40(7) and the County Courts Act 1984 s 147(1A) respectively added, by SI 2001/3649). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

The provisions set out in the text apply to the accounts described in the text subject to any order for the time being in force under the Supreme Court Act 1981 s 40(4) or the County Courts Act 1984 s 108(4): Supreme Court Act 1981 s 40(1); County Courts Act 1984 s 108(1) (amended by SI 2001/3649). The Lord Chancellor may by order make such provision as he thinks fit, by way of amendment of those provisions or otherwise, for all or any of the following purposes, namely: (1) including in, or excluding from, the accounts to which those provisions apply accounts of any description specified in the order; (2) excluding from the accounts to which those provisions apply all accounts with any particular deposit-taker so specified or with any deposit-taker of a description so specified: Supreme Court Act 1981 s 40(4) (amended by SI 2001/3649); County Courts Act 1984 s 108(4) (amended by SI 2001/3649). Any such order must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Supreme Court Act 1981 s 40(5); County Courts Act 1984 s 108(5). At the date at which this title states the law, no such order had been made.

3 le in accordance with the Civil Procedure Rules: see CPR Pt 72; and PARAS 1411, 1417 et seq.

4 Supreme Court Act 1981 s 40(1), (2) (s 40(1) amended by SI 2001/3649); County Courts Act 1984 s 108(1), (2) (s 108(1) amended by SI 2001/3649; the County Courts Act 1984 s 108(2) amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(1), (2)).

5 Supreme Court Act 1981 s 40(3); County Courts Act 1984 s 108(3). 'Prescribed' means prescribed by rules of court: Supreme Court Act 1981 s 151(1)(a); County Courts Act 1984 s 147(1) (amended by the Civil Procedure Act 1997 Sch 2 para 2(1), (2)). For the prescribed condition see the text and note 6.

6 CPR 72.2(3) (amended, as from a day to be appointed, by virtue of the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2) to refer to the Senior Courts Act 1981 instead of the Supreme Court Act 1981; at the date at which this title states the law, no such day had been appointed).

7 *Choice Investments Ltd v Jeromnimon (Midland Bank Ltd, Garnishee)*[1981] QB 149, [1981] 1 All ER 225 (decided under the Administration of Justice Act 1956 s 18 (repealed)).

UPDATE

1412 Considerations applying to bank accounts etc

NOTE 6--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/B. DEBTS WHICH MAY BE MADE SUBJECT TO THIRD PARTY DEBT ORDER/1413. Salaries and periodic payments.

1413. Salaries and periodic payments.

Although a salary or other periodic payment of a similar nature¹ may, as a general rule, be made subject to a third party debt order² when it becomes a debt but not before³, certain payments of this class are protected. These payments are (1) wages of seamen⁴; (2) pay of officers in the public service⁵, including possibly members of Parliament⁶; (3) certain pensions payable out of public funds⁷; and (4) periodical payments under a court order in matrimonial proceedings⁸.

A separate procedure exists for the attachment of current earnings as a means of enforcing the discharge of monetary obligations⁹.

1 A garnishee order (now known as a third party debt order: see PARA 1411) attaching accrued income in the hands of trustees was held not to operate as a forfeiture where by the terms of the trust the income was given until the recipient attempted to charge or anticipate it: *Re Greenwood, Sutcliffe v Gledhill* [1901] 1 Ch 887, following *Sutton, Carden & Co v Goodrich* (1899) 80 LT 765; and dissenting from *Bates v Bates* [1884] WN 129; see also *Re Stulz's Trusts, ex p Kingsford and Stulz* (1853) 4 De GM & G 404, CA; *Re Sampson, Sampson v Sampson* [1896] 1 Ch 630. See further **WILLS** vol 50 (2005 Reissue) PARA 749. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

2 As to the meaning of 'third party debt order' see PARA 1411.

3 *Jones v Thompson* (1858) EB & E 63; *Hall v Pritchett* (1877) 3 QBD 215 (medical officer); *Mapleson v Sears* (1911) 105 LT 639 (music hall artiste); see, however, *Nash v Pease* (1878) 47 LJB 766 (where an annuity was held (wrongly, it is submitted) attachable); but fees payable to a public vaccinator under contract were held to be debts accruing due so as to be attachable as soon as the work was performed, even though the time of payment had not arrived (*Edmunds v Edmunds* [1904] P 362), and so were fees payable to a panel doctor, if the money had been received by the insurance committee from the National Insurance Commissioners (*O'Driscoll v Manchester Insurance Committee* [1915] 3 KB 499, CA). As to the attachment of earnings see PARA 1431 et seq. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

4 See the Merchant Shipping Act 1995 s 34(1)(a); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 471.

5 See **CHOSES IN ACTION** vol 13 (2009) PARA 94. For the procedure analogous to third party debt orders in respect of debts due from the Crown see PARAS 1428-1429.

6 See *Hollinshead v Hazelton* [1916] 1 AC 428 at 439, 461, HL, where it is doubted whether such salary is assignable.

7 See **CHOSES IN ACTION** vol 13 (2009) PARA 96. The privilege, however, extends only to the pension as such. Where, therefore, the amount of the pension due has been paid into a bank to the pensioner's account, it may be attached (*Jones & Co v Coventry* [1909] 2 KB 1029, DC), although a mere crediting of the pensioner's account with the amount by the bank is not sufficient (*Jones & Co v Coventry* [1909] 2 KB 1029, DC); and when the pension is commuted, the commutation money is apparently attachable (*Crowe v Price* (1889) 22 QBD 429, CA).

8 *Re Robinson* (1884) 27 ChD 160, CA; *Watkins v Watkins* [1896] P 222, CA; *Paquine v Snary* [1909] 1 KB 688, CA. The position as to a lump sum ordered within ancillary relief proceedings is, however, less clear: see *Sears Tooth (a firm) v Payne Hicks Beach (a firm)* [1998] 1 FCR 231, [1997] 2 FLR 116. See also **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

9 See PARA 1431 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/B. DEBTS WHICH MAY BE MADE SUBJECT TO THIRD PARTY DEBT ORDER/1414. Unliquidated damages.

1414. Unliquidated damages.

A claim for unliquidated damages cannot, in general, be made the subject of a third party debt order until the amount of the damages has been ascertained¹. If the third party does not dispute the order where the claim against him is one for unliquidated damages only, and his liability subsequently becomes a liability for a debt, he may be precluded from then contending that the order should not stand².

¹ *Randall v Lithgow* (1884) 12 QBD 525; *Johnson v Diamond* (1855) 11 Exch 73; *Dresser v Johns* (1859) 6 CBNS 429; *Jones v Thompson* (1858) EB & E 63; *Shaw v Shaw* (1868) 18 LT 420; but see *O'Driscoll v Manchester Insurance Committee* [1915] 3 KB 499, CA; *Dawson v Preston* [1955] 3 All ER 314, [1955] 1 WLR 1219, DC. See also *Fitzpatrick v Waring* (1883) 13 LR IR 2 (attachment of costs ordered to be taxed). As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

² *Randall v Lithgow* (1884) 12 QBD 525. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

UPDATE

1414 Unliquidated damages

NOTE 1--See *Beechwood Construction Ltd v AFZA* [2008] EWHC 2671 (Ch), [2009] BPIR 7.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/B. DEBTS WHICH MAY BE MADE SUBJECT TO THIRD PARTY DEBT ORDER/1415. Money payable by the Crown.

1415. Money payable by the Crown.

No order for the attachment of debts under Part 72 of the Civil Procedure Rules may be made or have effect in respect of any money due or accruing due, or alleged to be due or accruing due, from the Crown¹. The analogous procedure under the Crown Proceedings Act 1947 is discussed elsewhere in this title².

1 CPR 66.7(1)(a), (2).

2 See PARAS 1428-1429.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/B. DEBTS WHICH MAY BE MADE SUBJECT TO THIRD PARTY DEBT ORDER/1416. Money in court.

1416. Money in court.

A third party debt order¹ may not be made in respect of money standing to the credit of the judgment debtor² in court³. Application may be made for an alternative order which is discussed elsewhere in this title⁴.

1 As to the meaning of 'third party debt order' see PARA 1411.

2 As to the meaning of 'judgment debtor' see PARA 1236.

3 See CPR 72.10(1)(a); and PARA 1427.

4 See PARA 1427.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/C. PROCEDURE FOR MAKING THIRD PARTY DEBT ORDER/1417. Application for third party debt order.

C. PROCEDURE FOR MAKING THIRD PARTY DEBT ORDER

1417. Application for third party debt order.

An application for a third party debt order¹ may be made without notice². It must be issued in the court³ which made the judgment or order⁴ which it is sought to enforce, except that if the proceedings have since been transferred to a different court⁵, it must be issued in that court⁶. The application notice must be in the form⁷ and contain the information required by the relevant practice direction⁸.

The application notice must contain the following information:

- 970 (1) the name and address of the judgment debtor⁹;
- 971 (2) details of the judgment or order sought to be enforced;
- 972 (3) the amount of money remaining due under the judgment or order;
- 973 (4) if the judgment debt is payable by instalments, the amount of any instalments which have fallen due and remain unpaid;
- 974 (5) the name and address of the third party;
- 975 (6) if the third party is a bank or building society¹⁰, its name and the address of the branch at which the judgment debtor's account is believed to be held and the account number, or, if the judgment creditor¹¹ does not know all or part of this information, that fact;
- 976 (7) confirmation that to the best of the judgment creditor's knowledge or belief the third party is within the jurisdiction¹² and owes money to or holds money to the credit of the judgment debtor;
- 977 (8) if the judgment creditor knows or believes that any person other than the judgment debtor has any claim to the money owed by the third party, his name and (if known) his address and such information as is known to the judgment creditor about his claim;
- 978 (9) details of any other applications for third party debt orders issued by the judgment creditor in respect of the same judgment debt; and
- 979 (10) the sources or grounds of the judgment creditor's knowledge or belief of the matters referred to in heads (7), (8) and (9) above¹³.

The application notice must be verified by a statement of truth¹⁴.

The court will not grant speculative applications for third party debt orders, and will only make an interim third party debt order¹⁵ against a bank or building society if the judgment creditor's application notice contains evidence to substantiate his belief that the judgment debtor has an account with the bank or building society in question¹⁶.

1 As to the meaning of 'third party debt order' see PARA 1411.

2 CPR 72.3(1)(a). The application is made by filing a notice in the appropriate form (see note 7): *Practice Direction--Third Party Debt Orders* PD 72 para 1.1. As to the meaning of 'filing' see PARA 1832 note 8.

3 As to the meaning of 'court' see PARA 22.

- 4 As to the meaning of 'judgment or order' see PARA 1226.
- 5 As to the transfer of proceedings for enforcement see PARA 1228; and see generally PARAS 66-74.
- 6 CPR 72.3(1)(b).
- 7 The notice must be in Practice Form N349: *Practice Direction--Third Party Debt Orders* PD 72 para 1.1; and see *The Civil Court Practice*. As to the use of the Practice Forms listed in *Practice Direction--Forms* PD 4 para 3.1, Table 1 see PARA 14.
- 8 CPR 72.3(2)(a).
- 9 As to the meaning of 'judgment debtor' see PARA 1236.
- 10 For these purposes, 'bank or building society' includes any person carrying on a business in the course of which he lawfully accepts deposits in the United Kingdom: CPR 72.1(2). As to bank and building society accounts see further PARA 1412.
- 11 As to the meaning of 'judgment creditor' see PARA 1236.
- 12 As to the meaning of 'jurisdiction' see PARA 117 note 6.
- 13 *Practice Direction--Third Party Debt Orders* PD 72 para 1.2. Quaere whether the reference in para 1.2(10) (see head (10) in the text) to para 1.2(7), (8), and (9) (see heads (7)-(9) in the text) should be read as a reference to para 1.2(6), (7) and (8) (see heads (6)-(8) in the text).
- 14 CPR 72.3(2)(b). As to statements of truth see PARA 613.
- 15 As to interim third party debt orders see PARA 1418.
- 16 *Practice Direction--Third Party Debt Orders* PD 72 para 1.3. The fact that a judgment debtor previously had an account with the bank, and the account had been in credit, will usually suffice: *Alawiye v Mahmood (t/a Amsons)*[2005] EWHC 277 (Ch), [2006] 3 All ER 668, [2007] 1 WLR 79.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/C. PROCEDURE FOR MAKING THIRD PARTY DEBT ORDER/1418. Interim third party debt order.

1418. Interim third party debt order.

An application for a third party debt order¹ will initially be dealt with by a judge² without a hearing³. The judge may make an interim third party debt order fixing a hearing to consider whether to make a final third party debt order⁴ and directing that until that hearing the third party must not make any payment which reduces the amount he owes the judgment debtor⁵ to less than the amount specified in the order⁶.

An interim third party debt order will specify the amount of money which the third party must retain, which will be the total of (1) the amount of money remaining due to the judgment creditor⁷ under the judgment or order⁸; and (2) an amount for the judgment creditor's fixed costs⁹ of the application, as specified in the relevant practice direction¹⁰.

An interim third party debt order becomes binding on a third party when it is served¹¹ on him¹².

The date of the hearing to consider the application must be not less than 28 days after the interim third party debt order is made¹³.

1 As to the meaning of 'third party debt order' see PARA 1411; and as to making the application see PARA 1417.

2 As to the meaning of 'judge' see PARA 49.

3 CPR 72.4(1).

4 As to the meaning of 'final third party debt order' see PARA 1411; and as to making such an order see PARA 1424.

5 As to the meaning of 'judgment debtor' see PARA 1236.

6 CPR 72.4(2). Where an order made under CPR 72.4(2) requires a partnership to appear before the court, it will be sufficient for a partner to appear before the court: *Direction--Third Party Debt Orders* PD 72 para 3A.3.

7 As to the meaning of 'judgment creditor' see PARA 1236.

8 CPR 72.4(3)(a). As to the meaning of 'judgment or order' see PARA 1226.

9 In respect of the judgment creditor's fixed costs of the application, the amount of money which the third party must retain is the amount which would be allowed to the judgment creditor under CPR 45.6 (see PARA 1768) if the whole balance of the judgment debt were recovered: *Practice Direction--Third Party Debt Orders* PD 72 para 2.

10 CPR 72.4(3)(b); and see note 9.

11 As to the meaning of 'service' see PARA 138 note 2.

12 CPR 72.4(4). As to service of the order see PARA 1419.

13 CPR 72.4(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/C. PROCEDURE FOR MAKING THIRD PARTY DEBT ORDER/1419. Service of interim order.

1419. Service of interim order.

Copies of an interim third party debt order¹, the application notice² and any documents filed³ in support of it must be served⁴:

- 980 (1) on the third party, not less than 21 days before the date fixed for the hearing⁵; and
- 981 (2) on the judgment debtor⁶ not less than seven days after a copy has been served on the third party and seven days before the date fixed for the hearing⁷.

If the judgment creditor⁸ serves the order, he must either file a certificate of service⁹ not less than two days before the hearing or produce a certificate of service at the hearing¹⁰.

An interim third party debt order relating to debts due or accruing due to a judgment creditor from a partnership must be served on a member of the partnership within the jurisdiction¹¹, a person authorised by a partner or some other person having the control or management of the partnership business¹².

- 1 As to interim third party debt orders see PARA 1418.
- 2 As to the application notice see PARA 1417.
- 3 As to the meaning of 'filing' see PARA 1832 note 8.
- 4 As to the meaning of 'service' see PARA 138 note 2.
- 5 CPR 72.5(1)(a). As to the date fixed for the hearing see CPR 72.4(5); and PARA 1418.
- 6 As to the meaning of 'judgment debtor' see PARA 1236.
- 7 CPR 72.5(1)(b).
- 8 As to the meaning of 'judgment creditor' see PARA 1236.
- 9 As to certificates of service see PARA 154.
- 10 CPR 72.5(2).
- 11 As to the meaning of 'jurisdiction' see PARA 117 note 6.
- 12 *Practice Direction--Third Party Debt Orders* PD 72 paras 3A.1, 3A.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/C. PROCEDURE FOR MAKING THIRD PARTY DEBT ORDER/1420. Transfer of proceedings.

1420. Transfer of proceedings.

The court¹ may, on an application by a judgment debtor² who wishes to oppose an application for a third party debt order³, transfer it to the court for the district where the judgment debtor resides or carries on business, or to another court⁴.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'judgment debtor' see PARA 1236.

3 As to the meaning of 'third party debt order' see PARA 1411; and as to the application for such an order see PARA 1417.

4 *Practice Direction--Third Party Debt Orders* PD 72 para 4. As to the transfer of enforcement proceedings see further PARA 1228; and as to the transfer of proceedings generally see PARAS 66-74.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/C. PROCEDURE FOR MAKING THIRD PARTY DEBT ORDER/1421. Obligations of third parties served with interim order.

1421. Obligations of third parties served with interim order.

A bank or building society¹ served² with an interim third party debt order³ must carry out a search to identify all accounts held with it by the judgment debtor⁴. The bank or building society must disclose to the court⁵ and the judgment creditor⁶ within seven days of being served with the order, in respect of each account held by the judgment debtor:

- 982 (1) the number of the account⁷;
- 983 (2) whether the account is in credit⁸; and
- 984 (3) if the account is in credit:

23

- 39. (a) whether the balance of the account is sufficient to cover the amount specified in the order;
- 40. (b) the amount of the balance at the date it was served with the order, if it is less than the amount specified in the order; and;
- 41. (c) whether the bank or building society asserts any right to the money in the account, whether pursuant to a right of set-off or otherwise, and if so giving details of the grounds for that assertion⁹.

24

If the judgment debtor does not hold an account with the bank or building society, or the bank or building society is unable to comply with the order for any other reason¹⁰, the bank or building society must inform the court and the judgment creditor of that fact within seven days of being served with the order¹¹.

Unless the order states otherwise, a bank or building society served with an interim third party debt order is only required by these provisions to retain money in accounts held solely by the judgment debtor (or, if there are joint judgment debtors, accounts held jointly by them or solely by either or any of them) and to search for and disclose information about such accounts¹². It is not, for example, required to retain money in, or disclose information about, accounts in the joint names of the judgment debtor and another person or, if the interim order has been made against a firm, accounts in the names of individual members of that firm¹³.

Any third party other than a bank or building society served with an interim third party debt order must notify the court and the judgment creditor in writing within seven days of being served with the order, if he claims not to owe any money to the judgment debtor or to owe less than the amount specified in the order¹⁴.

1 As to the meaning of 'bank or building society' for these purposes see PARA 1417 note 10.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to interim third party debt orders see PARA 1418; and as to service of the order see PARA 1419.

4 CPR 72.6(1). As to the meaning of 'judgment debtor' see PARA 1236. For particular provisions relating to bank accounts etc held by the judgment debtor see PARA 1412.

5 As to the meaning of 'court' see PARA 22.

- 6 As to the meaning of 'judgment creditor' see PARA 1236.
- 7 CPR 72.6(2)(a).
- 8 CPR 72.6(2)(b).
- 9 CPR 72.6(2)(c). As to set-off see PARA 634 et seq.
- 10 Eg, because it has more than one account holder whose details match the information contained in the order, and cannot identify which account the order applies to: CPR 72.6(3)(b).
- 11 CPR 72.6(3).
- 12 *Practice Direction--Third Party Debt Orders* PD 72 para 3.1.
- 13 *Practice Direction--Third Party Debt Orders* PD 72 para 3.2.
- 14 CPR 72.6(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/C. PROCEDURE FOR MAKING THIRD PARTY DEBT ORDER/1422. Administrative and clerical expenses of third parties.

1422. Administrative and clerical expenses of third parties.

Where an interim third party debt order¹ made in the exercise of the jurisdiction to make third party debt orders² is served on a deposit-taker³, the deposit-taker may, subject to the following provisions, deduct from the relevant debt or debts⁴ an amount not exceeding the prescribed sum⁵ towards its administrative and clerical expenses in complying with the order⁶. The right of a deposit-taker to make such a deduction is exercisable as from the time the interim third party debt order is served⁷ on it⁸.

A deduction may be so made in a case where the amount of the debt or debts of which the whole or a part is expressed to be attached by the order⁹ is insufficient to cover both the amount of the deduction and the amount of the judgment debt and costs in respect of which the order was made, notwithstanding that the benefit of the attachment to the creditor is reduced as a result of the deduction¹⁰. An amount may not, however, be deducted or, as the case may be, retained in pursuance of these provisions in a case where, by virtue of the specified provisions of the Insolvency Act 1986¹¹ or otherwise, the creditor is not entitled to retain the benefit of the attachment¹².

1 As to interim third party debt orders see PARA 1418.

2 I.e. the jurisdiction mentioned in the Supreme Court Act 1981 s 40(2) and the County Courts Act 1984 s 108(2): see PARA 1412. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

3 As to the meaning of 'deposit-taker' see PARA 1412 note 2 (definition applied, in the case of the High Court jurisdiction, by the Supreme Court Act 1981 s 40A(3) (s 40A added by the Administration of Justice Act 1982 s 55, Sch 4 Pt I; the Supreme Court Act 1981 s 40A(3) (as so added) amended by SI 2001/3649)).

4 For these purposes, 'relevant debt or debts', in relation to a third party debt order served on a deposit-taker, means the amount, as at the time the order is served on it, of the debt or debts of which the whole or a part is expressed to be attached by the order: Supreme Court Act 1981 s 40A(1A); County Courts Act 1984 s 109(1A) (both added by the Administration of Justice Act 1985 ss 52, 69(5), Sch 9 para 11(2) and amended by SI 2001/3649 and SI 2002/439).

5 For these purposes, 'prescribed' means prescribed by an order made by the Lord Chancellor: Supreme Court Act 1981 s 40A(3) (as added: see note 3); County Courts Act 1984 s 109(3). Such an order (1) may make different provision for different cases; (2) without prejudice to the generality of head (1), may prescribe sums differing according to the amount due under the judgment or order to be satisfied; (3) may provide for the provisions set out in the text not to apply to deposit-takers of any prescribed description: Supreme Court Act 1981 s 40A(4) (as added: see note 3); County Courts Act 1984 s 109(4) (both amended by the Administration of Justice Act 1985 ss 52, 67(2), 69(5), Sch 8 Pt II, Sch 9 para 11(2); and by SI 2001/3649). Any such order must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Supreme Court Act 1981 s 40A(5) (as so added); County Courts Act 1984 s 109(5). In exercise of the power so conferred, the Lord Chancellor made the Attachment of Debts (Expenses) Order 1996, SI 1996/3098, which came into force on 1 January 1997: art 1(1). The sum which any deposit-taker may deduct in accordance with the Supreme Court Act 1981 s 40A or the County Courts Act 1984 s 109 is £55: see the Attachment of Debts (Expenses) Order 1996, SI 1996/3098, art 2 (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2) to substitute a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981; at the date at which this title states the law, no such day had been appointed).

6 Supreme Court Act 1981 s 40A(1) (as added: see note 3); County Courts Act 1984 s 109(1) (both substituted by the Administration of Justice Act 1985 ss 52, 69(5), Sch 9 para 11(2); and amended by SI 2001/3649 and SI 2002/439).

7 As to service of the interim order see PARA 1419.

8 See note 6.

9 Ie the amount referred to in the Supreme Court Act 1981 s 40A(1A) or the County Courts Act 1984 s 109(1A): see note 4.

10 Supreme Court Act 1981 s 40A(1B); County Courts Act 1984 s 109(1B) (both added by the Administration of Justice Act 1985 ss 52, 69(5), Sch 9 para 11(2)).

11 Ie the Insolvency Act 1986 s 183 or s 346: see PARAS 1354-1355.

12 Supreme Court Act 1981 s 40(2) (as added (see note 3); amended by the Administration of Justice Act 1985 ss 52, 69(5), Sch 9 para 11(2); the Companies Consolidation (Consequential Provisions) Act 1985 s 30, Sch 2; and the Insolvency Act 1986 s 439(2), Sch 14); County Courts Act 1984 s 109(2) (amended by the Administration of Justice Act 1985 s 52; the Insolvency Act 1985 s 235, Sch 8 para 38; and the Insolvency Act 1986 s 439(2), Sch 14).

UPDATE

1422 Administrative and clerical expenses of third parties

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/C. PROCEDURE FOR MAKING THIRD PARTY DEBT ORDER/1423. Arrangements for debtors in hardship.

1423. Arrangements for debtors in hardship.

If (1) a judgment debtor¹ is an individual; (2) he is prevented from withdrawing money from his account with a bank or building society² as a result of an interim third party debt order³; and (3) he or his family is suffering hardship in meeting ordinary living expenses as a result, the court⁴ may, on an application by the judgment debtor, make an order permitting the bank or building society to make a payment or payments out of the account (a 'hardship payment order')⁵.

An application for a hardship payment order may be made in High Court proceedings, at the Royal Courts of Justice or to any district registry⁶ and, in county court proceedings, to any county court⁷. It will be dealt with by the court to which it is made⁸. A judgment debtor may only apply to one court for a hardship payment order⁹. If the application is made to a different court from that dealing with the application for a third party debt order¹⁰, the application for a third party debt order will not be transferred¹¹ but the court dealing with that application will send copies of the application notice¹² and the interim third party debt order to the court hearing the application for a hardship payment order¹³.

An application notice seeking a hardship payment order must include detailed evidence¹⁴ explaining why the judgment debtor needs a payment of the amount requested and must be verified by a statement of truth¹⁵. Unless the court orders otherwise, the application notice must be served¹⁶ on the judgment creditor¹⁷ at least two days before the hearing but does not need to be served on the third party¹⁸. In cases of exceptional urgency the judgment debtor may apply for a hardship payment order without notice to the judgment creditor and a judge¹⁹ will decide whether to deal with the application without it being served on the judgment creditor or direct it to be served²⁰. If the judge decides to deal with the application without it being served on the judgment creditor, where possible he will normally direct that the judgment creditor be informed of the application and give him the opportunity to make representations, by telephone, fax or other appropriate method of communication²¹.

A hardship payment order may permit the third party to make one or more payments out of the account and specify to whom the payments may be made²².

1 As to the meaning of 'judgment debtor' see PARA 1236.

2 As to the meaning of 'bank or building society' for these purposes see PARA 1417 note 10.

3 As to interim third party debt orders see PARA 1418.

4 As to the meaning of 'court' see PARA 22.

5 CPR 72.7(1).

6 As to district registries see **COURTS** vol 10 (Reissue) PARA 646.

7 CPR 72.7(2). As to county courts see **COURTS** vol 10 (Reissue) PARA 701 et seq.

8 *Practice Direction--Third Party Debt Orders* PD 72 para 5.2. The court will, however, treat an application for a hardship payment order as being made in the proceedings in which the interim third party debt order was made and under the same claim number, regardless of where the judgment debtor makes the application: para 5.1.

9 CPR 72.7(3).

10 As to the meaning of 'third party debt order' see PARA 1411; and as to applications for such an order see PARA 1417.

11 As to the transfer of proceedings for a third party debt order see PARA 1420; as to the transfer of proceedings for enforcement see PARA 1228; and as to the transfer of proceedings generally see PARAS 66-74.

12 As to the application notice see PARA 1417.

13 *Practice Direction--Third Party Debt Orders* PD 72 para 5.3.

14 The evidence filed by a judgment debtor in support of an application for a hardship payment order must include documentary evidence, eg (if appropriate) bank statements, wage slips and mortgage statements, to prove his financial position and need for the payment: *Practice Direction--Third Party Debt Orders* PD 72 para 5.6. As to the meaning of 'filing' see PARA 1832 note 8.

15 CPR 72.7(4). As to statements of truth see PARA 613.

16 As to the meaning of 'service' see PARA 138 note 2.

17 As to the meaning of 'judgment creditor' see PARA 1236.

18 CPR 72.7(5).

19 As to the meaning of 'judge' see PARA 49.

20 *Practice Direction--Third Party Debt Orders* PD 72 para 5.4.

21 *Practice Direction--Third Party Debt Orders* PD 72 para 5.5.

22 CPR 72.7(6).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/C. PROCEDURE FOR MAKING THIRD PARTY DEBT ORDER/1424. Further consideration of the application.

1424. Further consideration of the application.

If the judgment debtor¹ or the third party objects to the court² making a final third party debt order³, he must file⁴ and serve⁵ written evidence stating the grounds for his objections⁶.

If the judgment debtor or the third party knows or believes that a person other than the judgment debtor has any claim to the money specified in the interim order⁷, he must file and serve written evidence stating his knowledge of that matter⁸.

If the third party has given notice⁹ that he does not owe any money to the judgment debtor, or that the amount which he owes is less than the amount specified in the interim order, and the judgment creditor¹⁰ wishes to dispute this, the judgment creditor must file and serve written evidence setting out the grounds on which he disputes the third party's case¹¹.

Written evidence under any of the above provisions must be filed and served on each other party as soon as possible, and in any event not less than three days before the hearing¹². If the court is notified that some person other than the judgment debtor may have a claim to the money specified in the interim order, it will serve on that person notice of the application and the hearing¹³.

At the hearing the court may:

- 985 (1) make a final third party debt order;
- 986 (2) discharge the interim third party debt order and dismiss the application;
- 987 (3) decide any issues in dispute between the parties, or between any of the parties and any other person who has a claim to the money specified in the interim order; or
- 988 (4) direct a trial of any such issues, and if necessary give directions¹⁴.

1 As to the meaning of 'judgment debtor' see PARA 1236.

2 As to the meaning of 'court' see PARA 22.

3 As to the meaning of 'final third party debt order' see PARA 1411.

4 As to the meaning of 'filing' see PARA 1832 note 8.

5 As to the meaning of 'service' see PARA 138 note 2.

6 CPR 72.8(1). As to the transfer of proceedings where the judgment debtor objects to the application see PARA 1420. Where the third party argues that an interim order should not be made final because of the risk of double jeopardy, he must show that, if the final order is made, there is a real and substantial risk that he will be compelled to pay the attached debt a second time: *Soinco SACI v Novokuznetsk Aluminium Plant (No 2)* [1998] 2 Lloyd's Rep 346, CA (decided under the previous rules). See also *Martin v Nadel* [1906] 2 KB 26, CA, (where the garnishee (now known as the third party) was a foreigner and payment under the garnishee order (now known as the third party debt order) might not be a sufficient discharge, if he were sued for the debt in his own country); *Re Clatton, Richardson v Greaves* (1861) 10 WR 45 (where the garnishee (now known as the third party) was being sued for the debt); *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH v Shell International Petroleum Co Ltd* [1990] 1 AC 295, sub nom *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH v Ras Al Khaimah National Oil Co* [1988] 2 All ER 833, HL (foreign judgment for debt sought to be attached). The court cannot make a third party debt order unless such an order discharges the third party's debt to the judgment debtor pro tanto under the law governing that debt: *Société Eram Shipping Co Ltd v Compagnie Internationale*

de Navigation [2003] UKHL 30, [2003] 3 All ER 465, [2003] 2 All ER (Comm) 65, reversing [2001] EWCA Civ 1317, [2001] 2 All ER (Comm) 721. See also *Kuwait Oil Tanker Co SAK v Al Bader* [2003] UKHL 31, [2003] 3 All ER 501, [2003] 2 All ER (Comm) 101. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

7 As to interim third party debt orders see PARA 1418.

8 CPR 72.8(2).

9 le under CPR 72.6: see PARA 1421.

10 As to the meaning of 'judgment creditor' see PARA 1236.

11 CPR 72.8(3).

12 CPR 72.8(4).

13 CPR 72.8(5).

14 CPR 72.8(6). Where an order made under CPR 72.4(2) (see PARA 1418) requires a partnership to appear before the court, it will be sufficient for a partner to appear before the court: *Direction--Third Party Debt Orders* PD 72 para 3A.3. As to the conduct of hearings and trials see generally PARAS 6, 1109 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/C. PROCEDURE FOR MAKING THIRD PARTY DEBT ORDER/1425. Effect of final third party debt order.

1425. Effect of final third party debt order.

A final third party debt order¹ is enforceable² as an order to pay money³.

If the third party pays money to the judgment creditor⁴ in compliance with a third party debt order, or the order is enforced against him, the third party is discharged from his debt to the judgment debtor⁵ to the extent of the amount paid by him or realised by enforcement against him⁶; and this applies even if the third party debt order, or the original judgment or order⁷ against the judgment debtor, is later set aside⁸.

A final third party debt order will not require a payment which would reduce to less than £1 the amount in a judgment debtor's account with a building society or credit union⁹.

1 As to the meaning of 'final third party debt order' see PARA 1411.

2 As to methods of enforcement see generally PARA 1244 et seq.

3 CPR 72.9(1). The order is a final order (*Randall v Lithgow* (1884) 12 QBD 525), and cannot normally be discharged except with the consent of the parties. On the other hand, such an order made under a mistake, whether mutual or not, may be set aside, and any money paid under it by the third party will then be ordered to be repaid (*Marshall v James* [1905] 1 Ch 432, following *Moore v Peachey* (1892) 8 TLR 406, CA; and see *Burrell & Sons v Read* (1894) 11 TLR 36, CA; *O'Brien v Killeen* [1914] 2 IR 63); and such an order may be set aside following the determination of an issue between the parties which shows that it ought not to have been made (*Burrell & Sons v Read* (1894) 11 TLR 36, CA). See also *FG Hemisphere Associates LLC v Republic of Congo* (2006) Times, 27 February (second judgment creditor sought to have order set aside so that both creditors would have equal priority; no exceptional reason for order to be set aside). As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2.

4 As to the meaning of 'judgment creditor' see PARA 1236.

5 As to the meaning of 'judgment debtor' see PARA 1236.

6 CPR 72.9(2).

7 As to the meaning of 'judgment or order' see PARA 1226.

8 CPR 72.9(3). As to the meaning of 'set aside' see PARA 197 note 6.

9 *Practice Direction--Third Party Debt Orders* PD 72 para 6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/C. PROCEDURE FOR MAKING THIRD PARTY DEBT ORDER/1426. Costs.

1426. Costs.

If the judgment creditor¹ is awarded costs on an application for a third party debt order², he must, unless the court³ otherwise directs, retain those costs out of the money recovered by him under the order⁴ and the costs are deemed to be paid first out of the money he recovers, in priority to the judgment debt⁵.

1 As to the meaning of 'judgment creditor' see PARA 1236.

2 As to the meaning of 'third party debt order' see PARA 1411.

3 As to the meaning of 'court' see PARA 22.

4 CPR 72.11(a).

5 CPR 72.11(b). As to the fixed costs of the application see PARA 1418. As to costs generally see PARA 1729 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/D. ANALOGOUS PROCEDURES WHERE THIRD PARTY DEBT ORDER UNAVAILABLE/1427. Money in court.

D. ANALOGOUS PROCEDURES WHERE THIRD PARTY DEBT ORDER UNAVAILABLE

1427. Money in court.

If money is standing to the credit of the judgment debtor¹ in court², the judgment creditor³ may not apply for a third party debt order⁴ in respect of that money⁵, but he may apply for an order that the money in court, or so much of it as is sufficient to satisfy the judgment or order⁶ and the costs of the application, be paid to him⁷. An application notice seeking such an order must be served⁸ on the judgment debtor and the Accountant General⁹ at the Court Funds Office¹⁰.

If such an application notice has been issued, the money in court must not be paid out¹¹ until the application has been disposed of¹².

If the judgment creditor is awarded costs on an application for such an order, he must, unless the court¹³ otherwise directs, retain those costs out of the money recovered by him under the order¹⁴ and the costs are deemed to be paid first out of the money he recovers, in priority to the judgment debt¹⁵.

1 As to the meaning of 'judgment debtor' see PARA 1236.

2 As to money in court see generally PARA 1553 et seq.

3 As to the meaning of 'judgment creditor' see PARA 1236.

4 As to the meaning of 'third party debt order' see PARA 1411.

5 CPR 72.10(1)(a).

6 As to the meaning of 'judgment or order' see PARA 1226.

7 CPR 72.10(1)(b).

8 As to the meaning of 'service' see PARA 138 note 2.

9 As to the Accountant General see **COURTS** vol 10 (Reissue) PARA 663; PARA 1549.

10 CPR 72.10(2).

11 As to payment out see generally PARA 1568 et seq.

12 CPR 72.10(3).

13 As to the meaning of 'court' see PARA 22.

14 CPR 72.11(a).

15 CPR 72.11(b). As to costs generally see PARA 1729 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/D. ANALOGOUS PROCEDURES WHERE THIRD PARTY DEBT ORDER UNAVAILABLE/1428. Money payable by the Crown; in general.

1428. Money payable by the Crown; in general.

Where any money is payable by the Crown to some person who, under any order of any court¹, is liable to pay any money to any other person, and that other person would, if the money so payable by the Crown were money payable by a subject, be entitled under rules of court² to obtain an order for the attachment of it as a debt due or accruing due³, or an order for the appointment of a sequestrator⁴ or receiver⁵ to receive the money on his behalf, the High Court or, where it has jurisdiction to do so, a county court⁶ may⁷ make an order restraining the first-mentioned person from receiving that money and directing payment of it to that other person, or to the sequestrator or receiver⁸.

No such order must, however, be made in respect of (1) any wages or salary payable to any officer of the Crown as such⁹; (2) any money which is subject to the provisions of any enactment prohibiting or restricting assignment or charging or taking in execution¹⁰.

The Lord Chancellor may by order direct that the provisions set out above are not to apply in relation to any money payable by the Crown to any person on account of any deposit in the National Savings Bank or a deposit in that Bank of any description specified in the order¹¹. Those provisions have effect subject to any such order for the time being in force¹².

1 Ie including a county court: see note 6.

2 Ie under the Civil Procedure Rules: see PARA 32.

3 Ie a third party debt order under CPR Pt 72: see PARA 1411 et seq.

4 As to sequestration see PARA 1380 et seq.

5 As to receivers see PARA 1497 et seq; and **RECEIVERS**.

6 The provisions of the Crown Proceedings Act 1947 s 27(1) have effect, so far as they relate to forms of relief falling within the jurisdiction of a county court, in relation to county courts as they have effect in relation to the High Court: see s 27(2) (amended by SI 2005/2712). A county court has no jurisdiction to appoint sequestrators.

7 Ie subject to the provisions of the Crown Proceedings Act 1947 and to rules of court: Crown Proceedings Act 1947 s 27(1). See generally **CROWN PROCEEDINGS AND CROWN PRACTICE**.

8 Crown Proceedings Act 1947 s 27(1).

9 Crown Proceedings Act 1947 s 27(1) proviso (a). This may not apply to pensions: see eg *Willcock v Terrell* (1878) 3 ExD 323, CA (order sequestering the pension of a county court judge, decided before the Crown Proceedings Act 1947). Some pensions are, however, now inalienable by statute: see note 10.

10 Crown Proceedings Act 1947 s 27(1) proviso (b) (amended by the Supreme Court Act 1981 ss 152(4), 153, Sch 7). For an example of a statutory restriction such as is referred to in the text see the Police Pensions Act 1976 s 9; and as to the inalienability of social security payments, pensions and analogous benefits see generally **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 216 note 33.

11 Supreme Court Act 1981 s 139(2). Any such order must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 139(3). At the date at which this title states the law, no such order had been made. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

12 Crown Proceedings Act 1947 s 27(3) (added by the Supreme Court Act 1981 s 139(1); amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2) to substitute a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981; at the date at which this title states the law, no such day had been appointed).

UPDATE

1428 Money payable by the Crown; in general

NOTE 12--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/D. ANALOGOUS PROCEDURES WHERE THIRD PARTY DEBT ORDER UNAVAILABLE/1429. High Court procedure for obtaining order restraining person from receiving money payable to him by the Crown.

1429. High Court procedure for obtaining order restraining person from receiving money payable to him by the Crown.

In the High Court, an application for an order¹ restraining a person from receiving money payable to him by the Crown and directing payment of the money to the applicant or another person, may be made by an application under Part 23 of the Civil Procedure Rules². The application must be supported by written evidence setting out the facts on which it is based, and in particular identifying the debt from the Crown³. Where the debt from the Crown is money in a National Savings Bank account, the evidence must if possible identify the number of the account and the name and address of the branch where it is held⁴. Notice of the application, with a copy of the written evidence, must be served⁵ on the Crown and on the person to be restrained at least seven days before the hearing⁶.

The rules contained in Part 72 of the Civil Procedure Rules in relation to further consideration of the application⁷ apply in relation to such an application for an order restraining a person from receiving money payable to him by the Crown as they apply to an application⁸ for a third party debt order⁹, except that the court¹⁰ does not have power to order enforcement to issue against the Crown¹¹.

1 Ie an order under the Crown Proceedings Act 1947 s 27(1): see PARA 1428.

2 CPR 66.7(3). As to the procedure under CPR Pt 23 see PARA 303 et seq.

3 CPR 66.7(4).

4 CPR 66.7(5). The text of CPR 66.7(5) reads 'the witness must . . .', but it is submitted that this should read 'the witness statement must . . .'. As to witness statements and affidavits see PARA 981 et seq.

5 As to the meaning of 'service' see PARA 138 note 2.

6 CPR 66.7(6). As to service on the Crown see **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 124; and PARA 145.

7 Ie CPR 72.8: see PARA 1424.

8 Ie an application under CPR 72.2: see PARA 1411.

9 As to the meaning of 'third party debt order' see PARA 1411.

10 As to the meaning of 'court' see PARA 22.

11 CPR 66.7(7).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(i) Third Party Debt Orders/E. APPEALS/1430. In general.

E. APPEALS

1430. In general.

Rights of appeal against both interim and final orders, and the procedure on such appeals, are discussed elsewhere in this title¹.

¹ See PARA 1657 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/A. JURISDICTION TO ATTACH EARNINGS/1431. Courts with power to attach earnings.

(ii) Attachment of Earnings

A. JURISDICTION TO ATTACH EARNINGS

1431. Courts with power to attach earnings.

The High Court may make an attachment of earnings¹ order to secure payments under a High Court maintenance order².

A county court may make an attachment of earnings order to secure:

- 989 (1) payments under a High Court or a county court maintenance order³;
- 990 (2) the payment of a judgment debt⁴, other than a debt of less than £50 or such other sum as may be prescribed by rules of court⁵; or
- 991 (3) payments under an administration order⁶.

A magistrates' court may make an attachment of earnings order to secure:

- 992 (a) payments under a magistrates' court maintenance order⁷; or
- 993 (b) the payment of any sum required to be paid by an order⁸ requiring a defendant in criminal proceedings to pay some or all of the cost of any representation funded for him as part of the Criminal Defence Service⁹.

The power of a county court to make an attachment of earnings order to secure a judgment debt is discussed in the following paragraphs¹⁰. The other powers mentioned above are discussed elsewhere in this work¹¹.

Under the Council Tax (Administration and Enforcement) Regulations 1992¹², a billing authority has power to make an attachment of earnings order to secure the payment of any outstanding sum which is or forms part of an amount in respect of which a liability order relating to council tax has been made by a magistrates' court¹³. This power and the procedure for making such orders under the 1992 Regulations are discussed elsewhere in this work¹⁴.

1 As to the meaning of 'earnings' for this purpose see PARA 1432.

2 Attachment of Earnings Act 1971 s 1(1). 'Maintenance order' means any order specified in s 2(a), Sch 1 and includes such an order which has been discharged if any arrears are recoverable thereunder; and 'High Court maintenance order', 'county court maintenance order' and 'magistrates' court maintenance order' mean respectively a maintenance order enforceable by the High Court, a county court and a magistrates' court: s 2(a), (b). See further **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 627 et seq.

The provisions of the Attachment of Earnings Act 1971 apply, except where otherwise stated, to attachment of earnings orders made, or to be made, by any court under that Act or under the Courts Act 2003 s 97, Sch 5 (which makes provision for payment and enforcement of fines, costs and compensation imposed after criminal proceedings: see **MAGISTRATES**), or by a fines officer under that Schedule: Attachment of Earnings Act 1971 s 1A (added by SI 2006/1737).

3 Attachment of Earnings Act 1971 s 1(2)(a); and see note 2.

4 'Judgment debt' means a sum payable under (1) a judgment or order enforceable by a court in England and Wales (not being a magistrates' court); (2) an order of a magistrates' court for the payment of money recoverable summarily as a civil debt; or (3) an order of any court which is enforceable as if it were for the payment of money so recoverable, but does not include any sum payable under a maintenance order or an administration order: Attachment of Earnings Act 1971 s 2(c). 'Administration order' means an order made under, and so referred to in, the County Courts Act 1984 Pt VI (ss 12-117) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 893 et seq); Attachment of Earnings Act 1971 s 25(1) (definition amended by the County Courts Act 1984 s 148(1), Sch 2 para 42). Any reference in the Attachment of Earnings Act 1971 to sums payable under a judgment or order, or to the payment of such sums, includes a reference to costs and the payment of them: s 25(2).

5 Attachment of Earnings Act 1971 s 1(2)(b) (amended by virtue of the Civil Procedure Act 1997 Sch 2 para 2(1), (2); and of CPR Sch 2 CCR Ord 27 r 7(9), prescribing the sum of £50; the statutory wording is '£5 or such other sum as may be prescribed by county court rules'). As to the exercise of this jurisdiction see PARA 1431 et seq.

6 Attachment of Earnings Act 1971 s 1(2)(c). See further ss 4, 5; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 894-895.

7 Attachment of Earnings Act 1971 s 1(3)(a) (amended by SI 2006/1737); and see note 2.

8 Ie an order under the Access to Justice Act 1999 s 17(2) or under regulations under s 17A(1): see **LEGAL AID** vol 65 (2008) PARAS 174, 178.

9 Attachment of Earnings Act 1971 s 1(3)(c) (amended by the Access to Justice Act 1999 s 24, Sch 4 para 8; and the Criminal Defence Service Act 2006 s 4(1)).

10 See PARA 1432 et seq.

11 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 894-895; **MAGISTRATES** vol 29(2) (Reissue) PARA 837 et seq; **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 627 et seq.

12 Ie under the Council Tax (Administration and Enforcement) Regulations 1992, SI 1992/613, reg 37: see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 324 et seq.

13 See the Council Tax (Administration and Enforcement) Regulations 1992, SI 1992/613, reg 37(1) (amended by SI 1998/295; and by SI 2004/785 (Wales) and SI 2004/927 (England)); and **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 325.

14 See **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 324 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/A. JURISDICTION TO ATTACH EARNINGS/1432. Meaning of 'earnings'.

1432. Meaning of 'earnings'.

For the purposes of the Attachment of Earnings Act 1971¹, but subject to the exclusions set out below, 'earnings' are any sums payable to a person:

- 994 (1) by way of wages or salary (including any fees, bonus, commission, overtime pay or other emoluments payable in addition to wages or salary or payable under a contract of service);
- 995 (2) by way of pension (including an annuity in respect of past services, whether or not rendered to the person paying the annuity, and including periodical payments by way of compensation for the loss, abolition or relinquishment, or diminution in the emoluments, of any office or employment);
- 996 (3) by way of statutory sick pay².

The following are not to be treated as earnings:

- 997 (a) sums payable by any public department of the Government of Northern Ireland or of a territory outside the United Kingdom;
- 998 (b) pay or allowances payable to the debtor³ as a member of Her Majesty's forces other than pay or allowances payable by his employer to him as a special member of a reserve force⁴;
- 999 (c) a tax credit⁵;
- 1000 (d) pension, allowances or benefit payable under any enactment relating to social security;
- 1001 (e) pension or allowances payable in respect of disablement or disability⁶;
- 1002 (e) except in relation to a maintenance order⁷, wages⁸ payable to a person as a seaman⁹, other than wages payable to him as a seaman of a fishing boat¹⁰;
- 1003 (f) guaranteed minimum pension within the meaning of the Pension Schemes Act 1993¹¹.

The court has power to obtain a statement of earnings¹² and to determine whether particular payments are earnings¹³.

1 As to the jurisdiction of county courts under the Attachment of Earnings Act 1971 to make attachment of earnings orders in respect of judgment debts see PARAS 1431, 1433 et seq.

2 Attachment of Earnings Act 1971 s 24(1) (amended by the Social Security Act 1985 s 21, Sch 4 para 1). As to statutory sick pay see **EMPLOYMENT** vol 39 (2009) PARA 498 et seq. See Case C-224/02 *Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö* [2004] All ER (EC) 797, ECJ (deduction of income tax from attached invalidity pension contrary to Community law where recipient resident in and taxed in another member state).

3 'Debtor', in relation to an attachment of earnings order, or to proceedings in which a court has power to make an attachment of earnings order, or to proceedings arising out of such an order, means the person by whom payment is required by the relevant adjudication to be made: Attachment of Earnings Act 1971 s 2(e). 'Relevant adjudication', in relation to any payment secured or to be secured by an attachment of earnings order, means the conviction, judgment, order or other adjudication from which there arises the liability to make the payment: s 2(d).

4 le a reserve force within the meaning of the Reserve Forces Act 1996: see **ARMED FORCES**.

5 le within the meaning of the Tax Credits Act 2002: see **SOCIAL SECURITY AND PENSIONS**.

6 A fireman's ill-health pension which was calculated solely by reference to the length of his pensionable service and took no account of the extent or degree of his disablement was held not to come within this exclusion in *Miles v Miles* [1979] 1 All ER 865, [1979] 1 WLR 371, CA.

7 As to the meaning of 'maintenance order' see PARA 1431 note 2. As to the attachment of earnings in relation to maintenance orders see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 627 et seq.

8 For these purposes, 'wages' includes emoluments: Attachment of Earnings Act 1971 s 24(3) (definitions in s 24(3) substituted by the Merchant Shipping Act 1995 s 314(2), Sch 13 para 46).

9 For these purposes, 'seaman' includes every person (except masters and pilots) employed or engaged in any capacity on board any ship: Attachment of Earnings Act 1971 s 24(3) (definition as substituted: see note 8).

10 For these purposes, 'fishing boat' means a vessel of whatever size, and in whatever way propelled, which is for the time being employed in sea fishing or in the sea-fishing service: Attachment of Earnings Act 1971 s 24(3) (definition as substituted: see note 8).

11 Attachment of Earnings Act 1971 s 24(2) (amended by the Social Security Pensions Act 1975 s 65(1), Sch 4 para 15; the Merchant Shipping Act 1979 s 39(1); the Social Security Act 1986 s 86, Sch 10 para 102; the Pension Schemes Act 1993 s 190, Sch 8 para 4; the Merchant Shipping Act 1995 s 314(2), Sch 13 para 46; the Tax Credits Act 2002 s 47, Sch 3 para 1; and by SI 1998/3086). As to guaranteed minimum pension see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 878.

12 See the Attachment of Earnings Act 1971 s 14; and PARA 1437.

13 See the Attachment of Earnings Act 1971 s 16; and PARA 1456.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/B. APPLICATION FOR ATTACHMENT ORDER TO SECURE PAYMENT OF JUDGMENT DEBT/1433. Person who may apply for order and conditions of court's power to make it.

B. APPLICATION FOR ATTACHMENT ORDER TO SECURE PAYMENT OF JUDGMENT DEBT

1433. Person who may apply for order and conditions of court's power to make it.

The person to whom payment under the relevant adjudication¹ is required to be made, whether directly or through an officer of any court, may apply for an attachment of earnings order to secure the payment of a judgment debt². It must appear to the court that the debtor has failed to make one or more payments required by the relevant adjudication³.

Where proceedings are brought in a county court for an order of committal⁴ in respect of a judgment debt for any of the specified taxes, contributions, premiums or liabilities⁵, the court⁶ may, in any circumstances in which it has power to make such an order, make instead an attachment of earnings order to secure the payment of the judgment debt⁷.

A county court must not make an attachment of earnings order to secure the payment of a judgment debt if there is in force an order or warrant for the debtor's committal⁸ in respect of that debt; but in any such case the court may discharge the order or warrant with a view to making an attachment of earnings order instead⁹.

1 As to the meaning of 'relevant adjudication' see PARA 1432 note 3.

2 See the Attachment of Earnings Act 1971 s 3(1)(a). The judgment debt must be for £50 or more: see PARA 1431 note 5. As to the meaning of 'judgment debt' see PARA 1431 note 4. Section 3 does not apply to an attachment of earnings order to be made under the Courts Act 2003 s 97, Sch 5: Attachment of Earnings Act 1971 s 3(A1) (added by SI 2006/1737).

3 Attachment of Earnings Act 1971 s 3(3) (amended by the Maintenance Enforcement Act 1991 s 11, Sch 2 para 1, Sch 3).

4 I.e. under the Debtors Act 1869 s 5: see PARA 1515.

5 I.e. the taxes, contributions etc specified in the Attachment of Earnings Act 1971 s 3(6), Sch 2: s 3(6) (amended by the Social Security Act 1973 s 100, Sch 27 Pt I para 88). The specified taxes, contributions etc are (1) income tax or any other tax or liability recoverable under the Taxes Management Act 1970 s 65, 66 or 68 (see **INCOME TAXATION**); (2) contributions equivalent premiums under the Pension Schemes Act 1993 Pt III (ss 7-68) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 922); (3) Class 1, 2 and 4 contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 34 et seq); Attachment of Earnings Act 1971 Sch 2 (amended by the Social Security Act 1973 s 100, Sch 28 Pt I; the Social Security Pensions Act 1975 s 65(1), Sch 4 para 16; the Social Security (Consequential Provisions) Act 1975 s 1(3), Sch 2 para 42; the Statute Law (Repeals) Act 1989; the Social Security (Consequential Provisions) Act 1992 s 4, Sch 3 para 6; the Pension Schemes Act 1993 s 190, Sch 8 para 4; and the Pensions Act 1995 s 151, Sch 5 para 3).

6 'Court', in relation to an attachment of earnings order, means the court which made the order, subject to rules of court as to the venue for, and the transfer of, proceedings in county courts and magistrates' courts: Attachment of Earnings Act 1971 s 25(1). As to the transfer of enforcement proceedings in county courts see PARA 1228; and as to the transfer of proceedings see generally PARAS 66-74. As to magistrates' courts see generally **MAGISTRATES**.

7 Attachment of Earnings Act 1971 s 3(6) (as amended: see note 5).

- 8 See note 4.
- 9 Attachment of Earnings Act 1971 s 3(7).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/B. APPLICATION FOR ATTACHMENT ORDER TO SECURE PAYMENT OF JUDGMENT DEBT/1434. Court to which application must be made.

1434. Court to which application must be made.

An application for an attachment of earnings order may be made to the court¹ for the district² in which the debtor³ resides⁴. If, however, the debtor does not reside within England or Wales, or the creditor does not know where he resides, the application may be made to the court in which, or for the district in which, the judgment or order⁵ sought to be enforced was obtained⁶.

Where the creditor applies for attachment of earnings orders in respect of two or more debtors jointly liable under a judgment or order, the application may be made to the court for the district in which any of the debtors resides, so however that if the judgment or order was given or made by any such court, the application must be made to that court⁷.

1 As to the meaning of 'court' see PARA 22.

2 As to county court districts see **COURTS** vol 10 (Reissue) PARAS 707-708.

3 As to the meaning of 'debtor' see PARA 1432 note 3 (definition applied by CPR Sch 2 CCR Ord 27 r 1).

4 CPR Sch 2 CCR Ord 27 r 3(1).

5 As to the meaning of 'judgment or order' see PARA 1226.

6 CPR Sch 2 CCR Ord 27 r 3(2).

7 CPR Sch 2 CCR Ord 27 r 3(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/B. APPLICATION FOR ATTACHMENT ORDER TO SECURE PAYMENT OF JUDGMENT DEBT/1435. Mode of applying.

1435. Mode of applying.

A judgment creditor¹ who desires to apply for an attachment of earnings order must file² his application certifying the amount of money remaining due under the judgment or order³ and that the whole or part of any instalment due remains unpaid⁴. Where it is sought to enforce an order of a magistrates' court, he must also file a certified copy of the order and a witness statement or affidavit⁵ verifying the amount due under the order or, if payments under the order are required to be made to the designated officer for the magistrates' court, a certificate by that designated officer to the same effect⁶.

1 As to the meaning of 'judgment creditor' see PARA 1236.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 As to the meaning of 'judgment or order' see PARA 1226.

4 CPR Sch 2 CCR Ord 27 r 4(1).

5 As to witness statements and affidavits see PARA 981 et seq.

6 See note 4. On the filing of the documents mentioned in the text the court officer must, where the order to be enforced is a maintenance order, fix a day for the hearing of the application: CPR Sch 2 CCR Ord 27 r 4(2). As to the enforcement of maintenance orders by an attachment of earnings order see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 627 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/B. APPLICATION FOR ATTACHMENT ORDER TO SECURE PAYMENT OF JUDGMENT DEBT/1436. Service and reply.

1436. Service and reply.

Notice of the application together with a form of reply in the appropriate form must be served¹ on the debtor² in the prescribed manner³.

Within eight days after service on him of the documents mentioned above, the debtor must file⁴ a reply in the form provided⁵. The instruction to that effect in the notice to the debtor constitutes a statutory requirement⁶ but no proceedings may be taken for an offence alleged to have been committed⁷ in relation to the requirement unless the documents have been served on the debtor personally⁸ or the court⁹ is satisfied that they came to his knowledge in sufficient time for him to comply with the requirement¹⁰. Nothing in these provisions requires a defendant to file a reply if, within the eight-day period, he pays to the judgment creditor¹¹ the money remaining due under the judgment or order¹². Where such payment is made, the judgment creditor must so inform the court officer¹³.

On receipt of a reply the court officer must send a copy to the applicant¹⁴.

1 As to the meaning of 'service' see PARA 138 note 2.

2 As to the meaning of 'debtor' see PARA 1432 note 3 (definition applied by CPR Sch 2 CCR Ord 27 r 1).

3 CPR Sch 2 CCR Ord 27 r 5(1). The prescribed manner of service is that set out in CPR 6.20 (see PARA 139); CPR Sch 2 CCR Ord 27 r 5(1).

4 As to the meaning of 'filing' see PARA 1832 note 8.

5 CPR Sch 2 CCR Ord 27 r 5(2).

6 It is a requirement imposed by virtue of the Attachment of Earnings Act 1971 s 14(4): see PARA 1437. Subject to CPR Sch 2 CCR Ord 27 r 5(2) proviso (see the text and notes 7-10), CPR Sch 2 CCR Ord 34 r 2 (see PARA 1513) applies, with the necessary modifications, in relation to any penalty for failure to comply with such a requirement, as it applies in relation to a fine under the County Courts Act 1984 s 55 (penalty for neglecting or refusing to give evidence: see PARA 1016); CPR Sch 2 CCR Ord 27 r 15(2).

7 It is an offence under the Attachment of Earnings Act 1971 s 23(2)(c) or (f): see PARA 1466.

8 As to personal service see PARA 142.

9 As to the meaning of 'court' see PARA 22.

10 CPR Sch 2 CCR Ord 27 r 5(2).

11 As to the meaning of 'judgment creditor' see PARA 1236.

12 CPR Sch 2 CCR Ord 27 r 5(2A).

13 CPR Sch 2 CCR Ord 27 r 5(2A). As to county court officers see **COURTS** vol 10 (Reissue) PARA 726 et seq.

14 CPR Sch 2 CCR Ord 27 r 5(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/B. APPLICATION FOR ATTACHMENT ORDER TO SECURE PAYMENT OF JUDGMENT DEBT/1437. Court's power to obtain statement of earnings etc.

1437. Court's power to obtain statement of earnings etc.

Where in any proceedings a court has power to make an attachment of earnings order, it may:

- 1004 (1) order the debtor¹ to give to the court², within a specified period, a statement signed by him of:
- 25
42. (a) the name and address of any person by whom earnings³ are paid to him;
43. (b) specified particulars as to his earnings and anticipated earnings, and as to his resources and needs⁴; and
44. (c) specified particulars for the purpose of enabling the debtor to be identified by any employer of his⁵;
- 26
- 1005 (2) order any person appearing to the court to have the debtor in his employment to give to the court, within a specified period, a statement signed by him or on his behalf of specified particulars of the debtor's earnings and anticipated earnings⁶.

The order must be indorsed with or incorporate a notice warning the person to whom it is directed of the consequences of disobedience to the order and must be served on him personally⁷.

Without prejudice to these provisions, rules of court may provide that where notice of an application for an attachment of earnings order is served on the debtor, it must include a requirement that he must give to the court, within such period and in such manner as may be prescribed, a statement in writing of the matters specified in head (1) above and of any other prescribed matters which are, or may be, relevant⁸ to the determination of the normal deduction rate and the protected earnings rate to be specified in any order made on the application⁹. The provision so made is discussed elsewhere in this title¹⁰. If the debtor has failed to comply with this requirement, or to make payment to the judgment creditor¹¹, the court officer¹² may issue an order under heads (1) and (2) above which must be indorsed with or incorporate a notice warning the debtor of the consequences of disobedience to the order, be served on the debtor personally and direct that any payments made thereafter must be paid into the court and not direct to the judgment creditor¹³. If the person served with such an order fails to obey it or to file¹⁴ a statement of his means¹⁵ or to make payment, the court officer must issue a notice calling on that person to show good reason why he should not be imprisoned. Any such notice must be served on the debtor personally not less than five days before the hearing¹⁶.

In any proceedings in which a court has power to make an attachment of earnings order, and in any proceedings for the making, variation or discharge of such an order, a document purporting to be a statement given to the court in compliance with an order under head (1) or head (2) above, or with any such requirement of a notice of application for an attachment of earnings order as is mentioned above, is to be deemed, in the absence of proof to the contrary, to be a statement so given and to be evidence of the facts stated therein¹⁷.

The court officer may¹⁸, at any stage of the proceedings, send to any person appearing to have the debtor in his employment a notice requesting him to give to the court, within such period as may be specified in the notice, a statement of the debtor's earnings and anticipated earnings with such particulars as may be so specified¹⁹.

1 As to the meaning of 'debtor' see PARA 1432 note 3.

2 As to the meaning of 'court' for these purposes see PARA 1433 note 6.

3 As to the meaning of 'earnings' see PARA 1432.

4 This reference to the debtor's needs includes a reference to the needs of any person for whom he must, or reasonably may, provide: Attachment of Earnings Act 1971 s 25(3).

5 Attachment of Earnings Act 1971 s 14(1)(a). Section 14 also applies where the court or a fines officer has power to make an attachment of earnings order under the Courts Act 2003 s 97, Sch 5: Attachment of Earnings Act 1971 s 14(1) (amended by SI 2006/1737). As from a day to be appointed, the Attachment of Earnings Act 1971 s 14(1) is further amended by the Tribunals, Courts and Enforcement Act 2007 s 91, Sch 15 Pt 1 para 1, Pt 2 para 9, to substitute for the reference to an attachment of earnings order a reference to a Schedule 3 deductions order. 'Schedule 3 deductions order' means an attachment of earnings order under which periodical deductions are to be made in accordance with the Attachment of Earnings Act 1971 Sch 3 Pt 1: s 25(1) (definition added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 Sch 15 Pt 1 paras 1, 6). At the date at which this title states the law, no day had been appointed for these purposes.

6 Attachment of Earnings Act 1971 s 14(1)(b).

As from a day to be appointed, where in any proceedings a county court has power to make a fixed deductions order, the court may order the debtor to give to the court, within a specified period, a statement signed by him of (1) the name and address of any person by whom earnings are paid to him; and (2) specified particulars for enabling the debtor to be identified by any employer of his: s 14(1A) (added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 Sch 15 Pt 1 para 1, Pt 2 para 10). 'Fixed deductions order' means an attachment of earnings order under which periodical deductions are to be made in accordance with the fixed deductions scheme; and 'fixed deductions scheme' has the meaning given by the Attachment of Earnings Act 1971 s 6A(1): s 25(1) (definitions added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 Sch 15 Pt 1 paras 1, 6). At the date at which this title states the law, no day had been appointed for bringing any of these provisions into force. As to the fixed deductions scheme see PARA 1442.

7 CPR Sch 2 CCR Ord 27 r 15(1). As to the meaning of 'service' see PARA 138 note 2; and as to personal service see PARA 142. CPR Sch 2 CCR Ord 34 r 2 applies, with the necessary modifications, in relation to any penalty for failure to comply with such an order, as it applies in relation to a fine under the County Courts Act 1984 s 55 (penalty for neglecting or refusing to give evidence: see PARA 1016): CPR Sch 2 CCR Ord 27 r 15(2). As to failure to comply see also CPR Sch 2 CCR Ord 27 r 7A; and the text and notes 11-16.

8 le relevant under the Attachment of Earnings Act 1971 s 6: see PARA 1441.

9 Attachment of Earnings Act 1971 s 14(4). As from a day to be appointed, s 14(4) is amended by the Tribunals, Courts and Enforcement Act 2007 Sch 15 Pt 1 para 1, Pt 2 para 13, to provide that rules of court may provide that where notice of an application for an attachment of earnings order is served on the debtor, it must include a requirement that he must, within such period and in such manner as may be prescribed, give the court a statement in accordance with the Attachment of Earnings Act 1971 s 14(4A) or (4B). In a case where the attachment of earnings order would, if made, be a Schedule 3 deductions order, the debtor must give a statement in writing of the matters specified in s 14(1)(a) (see note 6), and of any other prescribed matters which are, or may be, relevant under s 6 to the determination of the normal deduction rate and the protected earnings rate to be specified in any attachment of earnings order made on the application: s 14(4A) (s 14(4A), (4B) added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 Sch 15 Pt 1 para 1, Pt 2 para 14). In a case where the attachment of earnings order would, if made, be a fixed deductions order, the debtor must give a statement in writing of the matters specified in the Attachment of Earnings Act 1971 s 14(1A) (see note 6): s 14(4B) (as so added). At the date at which this title states the law, no day had been appointed for the bringing into force of these provisions.

10 See CPR Sch 2 CCR Ord 27 r 5(2); and PARA 1436.

11 As to the meaning of 'judgment creditor' see PARA 1236.

12 As to the meaning of 'court officer' see PARA 49 note 3. As to county court officers see **COURTS** vol 10 (Reissue) PARA 726 et seq.

13 CPR Sch 2 CCR Ord 27 r 7A(1).

14 As to the meaning of 'filing' see PARA 1832 note 8.

15 For these purposes, 'statement of means' means a statement given under the Attachment of Earnings Act 1971 s 14(1) (see heads (1)-(2) in the text); CPR Sch 2 CCR Ord 27 r 7A(4).

16 CPR Sch 2 CCR Ord 27 r 7A(2). This is without prejudice to CPR Sch 2 CCR Ord 27 r 16 (see PARA 1466): CPR Sch 2 CCR Ord 27 r 7A(2). CPR Sch 2 CCR Ord 29 r 1 (see PARA 1514) applies, with the necessary modifications and with the substitution of references to the district judge for references to the judge, where a notice is issued under CPR Sch 2 CCR Ord 29 r 1(2) or (4) (see PARA 1249; and **CONTEMPT OF COURT**): CPR Sch 2 CCR Ord 27 r 7A(3).

17 Attachment of Earnings Act 1971 s 14(5). As to the variation or discharge of an attachment of earnings order see PARA 1446.

18 Ie without prejudice to the powers conferred by the Attachment of Earnings Act 1971 s 14(1) (see the text and notes 1-4): CPR Sch 2 CCR Ord 27 r 6.

19 CPR Sch 2 CCR Ord 27 r 6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/B. APPLICATION FOR ATTACHMENT ORDER TO SECURE PAYMENT OF JUDGMENT DEBT/1438. Making attachment of earnings order.

1438. Making attachment of earnings order.

An attachment of earnings order may be made to secure the payment of a judgment debt¹ if the debt is of not less than £50, or for the amount remaining payable under a judgment for a sum of not less than £50². On receipt of the debtor's³ reply⁴, the court officer⁵ may, if he has sufficient information to do so, make an attachment of earnings order⁶. A copy of the order must be sent to the parties and to the debtor's employer⁷.

Where an order is so made, the judgment creditor⁸ or the debtor may, within 14 days of service⁹ of the order on him and giving his reasons, apply on notice for the order to be reconsidered. The court officer must fix a day for the hearing of the application and give to the judgment creditor and the debtor not less than two days' notice of the day so fixed¹⁰. On hearing such an application, the district judge¹¹ may confirm the order or set it aside¹² and make such new order as he thinks fit¹³. The order so made must be entered in the records of the court¹⁴.

Where an order is not made by the court officer¹⁵, he must refer the application to the district judge who must, if he considers that he has sufficient information to do so without the attendance of the parties, determine the application¹⁶. Where he does not determine the application, he must direct that a day be fixed for the hearing of the application, whereupon the court officer must fix such a day and give to the judgment creditor and the debtor not less than eight days' notice of the day so fixed¹⁷. If the creditor does not appear at the hearing of the application but the court has received a witness statement or affidavit of evidence¹⁸ from him, or the creditor requests the court in writing to proceed in his absence, the court may proceed to hear the application and to make an order thereon¹⁹.

Where an order is made by the district judge without the attendance of the parties²⁰, the judgment creditor or the debtor may, within 14 days of service of the order on him and giving his reasons, apply on notice for the order to be reconsidered. The court officer must fix a day for the hearing of the application and give to the judgment creditor and the debtor not less than two days' notice of the day so fixed²¹. On hearing such an application, the district judge may confirm the order or set it aside and make such new order as he thinks fit. The order so made must be entered in the records of the court²².

¹ As to the meaning of 'judgment debt' see PARA 1431 note 4 (definition applied by CPR Sch 2 CCR Ord 27 r 1).

² CPR Sch 2 CCR Ord 27 r 7(9).

³ As to the meaning of 'debtor' see PARA 1432 note 3 (definition applied by CPR Sch 2 CCR Ord 27 r 1).

⁴ As to the debtor's reply see PARA 1436.

⁵ As to the meaning of 'court officer' see PARA 49 note 3. As to county court officers see **COURTS** vol 10 (Reissue) PARA 726 et seq.

⁶ CPR Sch 2 CCR Ord 27 r 7(1). As to the effect and contents of the order see PARA 1441.

⁷ CPR Sch 2 CCR Ord 27 r 7(1). 'Employer', in relation to an attachment of earnings order, means the person who is required by the order to make deductions from earnings paid by him to the debtor: Attachment of

Earnings Act 1971 s 25(1) (definition applied by CPR Sch 2 CCR Ord 27 r 1). As to service of the order see further PARA 1439.

8 As to the meaning of 'judgment creditor' see PARA 1236.

9 As to the meaning of 'service' see PARA 138 note 2.

10 CPR Sch 2 CCR Ord 27 r 7(2).

11 As to county court district judges see **COURTS** vol 10 (Reissue) PARA 728 et seq.

12 As to the meaning of 'set aside' see PARA 197 note 6.

13 CPR Sch 2 CCR Ord 27 r 7(3).

14 See note 13. As to the meaning of 'court' see PARA 22. As to county court records see generally **COURTS** vol 10 (Reissue) PARA 729; and PARA 1147. As to the index of attachment of earnings orders see PARA 1457.

15 *le* under CPR Sch 2 CCR Ord 27 r 7(1): see the text and notes 1-6.

16 CPR Sch 2 CCR Ord 27 r 7(4).

17 CPR Sch 2 CCR Ord 27 r 7(5).

18 As to witness statements and affidavits see PARA 981 et seq.

19 CPR Sch 2 CCR Ord 27 r 7(8).

20 *le* an order is made under CPR Sch 2 CCR Ord 27 r 7(4): see the text and notes 15-16.

21 CPR Sch 2 CCR Ord 27 r 7(6).

22 CPR Sch 2 CCR Ord 27 r 7(7).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/B. APPLICATION FOR ATTACHMENT ORDER TO SECURE PAYMENT OF JUDGMENT DEBT/1439. Service of the order.

1439. Service of the order.

An attachment of earnings order and any order varying or discharging such an order¹ must be served² on the debtor³ and on the person to whom the order is directed⁴. The normal rules for service⁵ apply with the further modification that where the order is directed to a corporation which has requested the court⁶ that any communication relating to the debtor or to the class of persons to whom he belongs is to be directed to the corporation at a particular address, service may, if the district judge⁷ thinks fit, be effected on the corporation at that address⁸.

Where an attachment of earnings order is made to enforce a judgment or order⁹ of the High Court or a magistrates' court, a copy of the attachment of earnings order and of any order discharging it must be sent by the court officer¹⁰ of the county court¹¹ to the court officer of the High Court, or, as the case may be, the designated officer for the magistrates' court¹².

1 As to making an attachment of earnings order see PARA 1438; as to the effect and contents of the order see PARA 1441; and as to the variation or discharge of such orders see PARA 1446.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'debtor' see PARA 1432 note 3 (definition applied by CPR Sch 2 CCR Ord 27 r 1).

4 CPR Sch 2 CCR Ord 27 r 10(2).

5 Ie CPR Pt 6 (see PARA 138 et seq) and CPR 40.4, 40.5 (see PARA 1140): CPR Sch 2 CCR Ord 27 r 10(2).

6 As to the meaning of 'court' see PARA 22.

7 As to county court district judges see **COURTS** vol 10 (Reissue) PARA 728 et seq.

8 See note 4.

9 As to the meaning of 'judgment or order' see PARA 1226.

10 As to the meaning of 'court officer' see PARA 49 note 3.

11 As to county court officers see **COURTS** vol 10 (Reissue) PARA 726 et seq.

12 CPR Sch 2 CCR Ord 27 r 10(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/B. APPLICATION FOR ATTACHMENT ORDER TO SECURE PAYMENT OF JUDGMENT DEBT/1440. Costs of the application.

1440. Costs of the application.

Where costs are allowed to the judgment creditor¹ on an application for an attachment of earnings order², there may be allowed:

- 1006 (1) a charge of a solicitor for attending the hearing³ and, if the court⁴ so directs, for serving⁵ the application;
- 1007 (2) if the court certifies that the case is fit for counsel, a fee to counsel; and
- 1008 (3) the court fee on the issue of the application⁶.

The costs may be fixed⁷ and allowed without detailed assessment under Part 47 of the Civil Procedure Rules⁸.

1 As to the meaning of 'judgment creditor' see PARA 1236.

2 As to application for an attachment of earnings order see PARA 1433 et seq.

3 For these purposes, a solicitor who has prepared on behalf of the judgment creditor a witness statement or affidavit or request under CPR Sch 2 CCR Ord 27 r 7(8) (see PARA 1438) is to be treated as having attended the hearing: CPR Sch 2 CCR Ord 27 r 9(2). As to witness statements and affidavits see PARA 981 et seq.

4 As to the meaning of 'court' see PARA 22.

5 As to the meaning of 'service' see PARA 138 note 2.

6 CPR Sch 2 CCR Ord 27 r 9(1). As to county court fees see PARA 87; and see *The Civil Court Practice*.

7 As to fixed enforcement costs see PARA 1768.

8 CPR Sch 2 CCR Ord 27 r 9(3). As to detailed assessment under CPR Pt 47 see PARA 1779 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/C. CONSEQUENCES OF ATTACHMENT ORDER/1441. Effect and contents of order.

C. CONSEQUENCES OF ATTACHMENT ORDER

1441. Effect and contents of order.

An attachment of earnings order¹ is an order directed to a person who appears to the court² to have the debtor³ in his employment⁴ and operates as an instruction to that person (1) to make periodical deductions from the debtor's earnings⁵; and (2) at such times as the order may require, or as the court may allow, to pay the amounts deducted to the collecting officer of the court⁶, as specified in the order⁷.

An attachment of earnings order must contain prescribed particulars enabling the debtor to be identified by the employer⁸. Those particulars are such of the following particulars relating to the debtor as are known to the court, namely his full name and address, his place of work and the nature of his work and his works number, if any⁹. The order must specify¹⁰:

- 1009 (a) the whole amount payable under the relevant adjudication¹¹, or so much of that amount as remains unpaid, including any relevant costs¹²;
- 1010 (b) the normal deduction rate, that is to say, the rate (expressed as a sum of money per week, month or other period) at which the court thinks it reasonable for the debtor's earnings to be applied to meeting his liability under the relevant adjudication¹³; and
- 1011 (c) the protected earnings rate, that is to say the rate (so expressed) below which, having regard to the debtor's resources and needs¹⁴, the court thinks it reasonable that the earnings actually paid to him should not be reduced¹⁵.

It has been held that an attachment of earnings order does not effect an assignment to the judgment creditor of the moneys to which the order refers¹⁶.

1 As to the jurisdiction to make an attachment of earnings order to secure payment of a judgment debt see PARA 1431; and as to the procedure on an application for such an order see PARA 1433 et seq.

2 As to the meaning of 'court' for these purposes see PARA 1433 note 6.

3 As to the meaning of 'debtor' see PARA 1432 note 3.

4 For these purposes, the relationship of employer and employee is to be treated as subsisting between two persons if one of them, as a principal and not as a servant or agent, pays to the other any sums defined as earnings by the Attachment of Earnings Act 1971 s 24 (see PARA 1432): s 6(2).

5 In accordance with the Attachment of Earnings Act 1971 s 6(1), Sch 3 Pt I (paras 1-6): see PARA 1443. As from a day to be appointed, the instruction is to make periodical deductions from the debtor's earnings, as specified in the order: s 6(1)(a) (substituted by the Tribunals, Courts and Enforcement Act 2007 s 91, Sch 15 Pt 1 paras 1, 2(1)). At the date at which this title states the law, no such day had been appointed.

6 For the purposes of an attachment of earnings order, the collecting officer of the court is to be (subject to later variation of the order under the Attachment of Earnings Act 1971 s 9 (see PARA 1446)), in the case of an order made by a county court, the appropriate officer of that court: s 6(7)(b) (s 6(7) amended, and s 6(8) added, by the Administration of Justice Act 1977 s 19(5)). 'Appropriate officer' means an officer designated by the Lord Chancellor: Attachment of Earnings Act 1971 s 6(8) (as so added). The Lord Chancellor may by order make such provision as he considers expedient (including transitional provision) with a view to providing for the payment of amounts deducted under attachment of earnings orders to be made to such officers as may be designated by

the order rather than to collecting officers of the court: s 6(9) (s 6(9)-(12) added, as from a day to be appointed, by the Courts and Legal Services Act 1990 s 125(2), Sch 17 para 5). Any such order may make such amendments in the Attachment of Earnings Act 1971, in relation to functions exercised by or in relation to collecting officers of the court as he considers expedient in consequence of the provision made by virtue of s 6(9): s 6(10) (as so added). The power to make such an order is exercisable by statutory instrument, subject to annulment in pursuance of a resolution of either House of Parliament: s 6(11), (12) (as so added). At the date at which this title states the law, no such order had been made.

7 Attachment of Earnings Act 1971 s 6(1). Section 6 also applies where the court or a fines officer has power to make an attachment of earnings order under the Courts Act 2003 s 97, Sch 5: Attachment of Earnings Act 1971 s 6(1) (amended by SI 2006/1737).

As from a day to be appointed, if a county court makes an attachment of earnings order to secure payment of a judgment debt, the order must specify that periodical deductions are to be made in accordance with the fixed deductions scheme: Attachment of Earnings Act 1971 s 6(1A) (s 6(1A), (1B) added by the Tribunals, Courts and Enforcement Act 2007 Sch 15 Pt 1 paras 1, 2(2)). As to the meaning of 'fixed deductions order' see PARA 1437 note 6. As to the fixed deductions scheme see PARA 1442. If a court (whether a county court or another court) makes any other attachment of earnings order, the order must specify that periodical deductions are to be made in accordance with the Attachment of Earnings Act 1971 Sch 3 Pt 1: s 6(1B) (as so added). At the date at which this title states the law, no day had been appointed for bringing these provisions into force.

8 Attachment of Earnings Act 1971 s 6(3).

9 CPR Sch 2 CCR Ord 27 r 10(1).

10 Attachment of Earnings Act 1971 s 6(5). As from a day to be appointed, for 'The order' there is substituted 'A Schedule 3 deductions order': s 6(5) (amended, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 Sch 15 Pt 1 paras 1, 2(3); at the date at which this title states the law, no such day had been appointed). As to the meaning of 'Schedule 3 deductions order' see PARA 1437 note 5.

11 As to the meaning of 'relevant adjudication' see PARA 1432 note 3.

12 Attachment of Earnings Act 1971 s 6(4). This does not apply to an order made to secure maintenance payments: s 6(4). As to orders to secure maintenance payments see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 627 et seq.

The reference to relevant costs is to any costs of the proceedings in which the attachment of earnings order in question was made, being costs which the debtor is liable to pay: s 25(2).

13 Attachment of Earnings Act 1971 s 6(5)(a).

14 This reference to the debtor's needs includes a reference to the needs of any person for whom he must, or reasonably may, provide: Attachment of Earnings Act 1971 s 25(3).

15 Attachment of Earnings Act 1971 s 6(5)(b).

16 *Re Green (a bankrupt), ex p Official Receiver v Cutting* [1979] 1 All ER 832, [1979] 1 WLR 1211.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/C. CONSEQUENCES OF ATTACHMENT ORDER/1442. Fixed deductions scheme.

1442. Fixed deductions scheme.

The following provisions are not yet in force¹. A 'fixed deductions scheme' means any scheme that the Lord Chancellor makes which specifies the rates and frequencies at which deductions are to be made under attachment of earnings orders so as to secure the repayment of judgment debts². The Lord Chancellor is to make the fixed deductions scheme by regulations³, the power to make which is exercisable by statutory instrument⁴. The Lord Chancellor may not make a statutory instrument containing the first such regulations unless a draft of the instrument has been laid before, and approved by resolution of, each House of Parliament⁵. A statutory instrument containing any subsequent regulations is subject to annulment in pursuance of a resolution of either House of Parliament⁶.

1 The Attachment of Earnings Act 1971 s 6A is added by the Tribunals, Courts and Enforcement Act 2007 s 91, Sch 15 Pt 1 paras 1, 3, as from a day to be appointed. At the date at which this title states the law, no such day had been appointed.

2 Attachment of Earnings Act 1971 s 6A(1) (as added: see note 1). As to the meaning of 'judgment debt' see PARA 1431 note 4. As to variation of a fixed deductions order see PARA 1449; and as to suspension of a fixed deductions order see PARA 1447.

3 Attachment of Earnings Act 1971 s 6A(2) (as added: see note 1).

4 Attachment of Earnings Act 1971 s 6A(3) (as added: see note 1).

5 Attachment of Earnings Act 1971 s 6A(4) (as added: see note 1).

6 Attachment of Earnings Act 1971 s 6A(5) (as added: see note 1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/C. CONSEQUENCES OF ATTACHMENT ORDER/1443. Compliance with order by employer.

1443. Compliance with order by employer.

Where an attachment of earnings order has been made¹, the employer² must, if he has been served³ with the order, comply with it; but he is under no liability for non-compliance before seven days have elapsed since the service⁴.

Where a person is served with an attachment of earnings order directed to him and he has not the debtor⁵ in his employment, or the debtor subsequently ceases to be in his employment, he must in either case, within ten days from the date of service or, as the case may be, the cesser, give notice of that fact to the court⁶.

On any occasion when the employer makes, in compliance with the order, a deduction from the debtor's earnings⁷ he is entitled to deduct, in addition, £1, or such other sum as may be prescribed by order made by the Lord Chancellor⁸, towards his clerical and administrative costs⁹. He must also give to the debtor a statement in writing of the total amount of the deduction¹⁰.

In the case of an attachment of earnings order made to secure the payment of a judgment debt¹¹, the employer must on any pay-day¹²:

1012 (1) if the attachable earnings¹³ exceed the protected earnings¹⁴, deduct from the attachable earnings the amount of the excess or the normal deduction¹⁵, whichever is the less¹⁶;

1013 (2) make no deduction if the attachable earnings are equal to, or less than, the protected earnings¹⁷.

Where the employer is required to comply with two or more attachment of earnings orders in respect of the same debtor, all or none of which orders are made to secure either the payment of judgment debts or payments under an administration order¹⁸, then on any pay-day the employer must, for the purpose of complying with the obligations set out in heads (1) and (2) above, deal with the orders according to the respective dates on which they were made, disregarding any later order until an earlier one has been dealt with, and deal with any later order as if the earnings to which it relates were the residue of the debtor's earnings after the making of any deduction to comply with any earlier order¹⁹. Where, however, the employer is required to comply with two or more attachment of earnings orders, and one or more (but not all) of those orders are made to secure either the payment of judgment debts or payments under an administration order, then on any pay-day the employer must, for the purpose of complying with the obligations set out in heads (1) and (2) above:

1014 (a) deal first with any order which is not made to secure the payment of a judgment debt or payments under an administration order, complying with the provision set out above²⁰ if there are two or more such orders²¹;

1015 (b) deal thereafter with any order which is made to secure the payment of a judgment debt or payments under an administration order as if the earnings to which it relates were the residue of the debtor's earnings after the making of any deduction to comply with an order having priority by virtue of head (a) above²²; and

1016 (c) if there are two or more orders to which head (b) above applies, comply with the provision set out above²³ in respect of those orders²⁴.

- 1 As to the jurisdiction to make an attachment of earnings order to secure payment of a judgment debt see PARA 1431; and as to the procedure on an application for such an order see PARA 1433 et seq.
- 2 As to the meaning of 'employer' see PARA 1438 note 7.
- 3 As to the meaning of 'service' see PARA 138 note 2. As to service of the order see PARA 1439.
- 4 Attachment of Earnings Act 1971 s 7(1).
- 5 As to the meaning of 'debtor' see PARA 1432 note 3.
- 6 Attachment of Earnings Act 1971 s 7(2). As to the meaning of 'court' for these purposes see PARA 1433 note 6.
- 7 As to the meaning of 'earnings' see PARA 1432.
- 8 An order of the Lord Chancellor under the Attachment of Earnings Act 1971 s 7(4)(a) may prescribe different sums in relation to different classes of cases, may be varied or revoked by a subsequent order so made and must be made by statutory instrument subject to annulment by resolution of either House of Parliament: s 7(5). In the exercise of this power the Lord Chancellor has made the Attachment of Earnings (Employer's Deduction) Order 1991, SI 1991/356, which came into force on 1 April 1991: see art 1.
- 9 Attachment of Earnings Act 1971 s 7(4)(a) (amended by SI 1991/356).
- 10 Attachment of Earnings Act 1971 s 7(4)(b).
- 11 As to the meaning of 'judgment debt' see PARA 1431 note 4.
- 12 'Pay-day', in relation to earnings paid to a debtor, means an occasion on which they are paid: Attachment of Earnings Act 1971 s 6(1)(a), Sch 3 paras 1, 2.
- 13 'Attachable earnings', in relation to a pay-day, are the earnings which remain payable to the debtor on that day after deduction by the employer of (1) income tax; (2) primary Class 1 contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 34); (3) amounts deductible under any enactment, or in pursuance of a request in writing by the debtor, for the purposes of a superannuation scheme, namely any enactment, rules, deed or other instrument providing for payment of annuities or lump sums (a) to the persons with respect to whom the instrument has effect on their retirement at a specified age or on becoming incapacitated at some earlier age; or (b) to the personal representatives or the widows, relatives or dependants of such persons on their death or otherwise, whether with or without any further or other benefits: Attachment of Earnings Act 1971 Sch 3 para 3 (amended by the Social Security Pensions Act 1975 s 65(3), Sch 5; the Social Security (Consequential Provisions) Act 1975 s 1(3), Sch 2 para 43; the Wages Act 1986 s 32(1), Sch 4 para 4; and by virtue of the Social Security (Consequential Provisions) Act 1992 s 2; and the Employment Rights Act 1996 s 240, Sch 1 para 3). See Case C-224/02 *Pusa v Osuuspankkiin Keskinäinen Vakuutusyhtiö* [2004] All ER (EC) 797, ECJ (deduction of income tax from attached invalidity pension contrary to Community law where recipient resident in and taxed in another member state).
- 14 On any pay-day, the 'protected earnings' are arrived at by applying the protected earnings rate (as specified in the attachment of earnings order) with respect to the relevant period: Attachment of Earnings Act 1971 Sch 3 para 4(1)(b) (Sch 3 para 4 substituted by the Administration of Justice Act 1982 s 54). The 'relevant period' in relation to any pay-day is the period beginning (1) if it is the first pay-day of the debtor's employment with the employer, with the first day of the employment; or (2) if on the last pay-day earnings were paid in respect of a period falling wholly or partly after that pay-day, with the first day after the end of that period; or (3) in any other case, with the first day after the last pay-day, and ending (a) where earnings are paid in respect of a period falling wholly or partly after the pay-day, with the last day of that period; or (b) in any other case, with the pay-day: Attachment of Earnings Act 1971 Sch 3 para 4(2) (as so substituted).
- 15 On any pay-day, the 'normal deduction' is arrived at by applying the normal deduction rate (as specified in the relevant attachment of earnings order) with respect to the relevant period: Attachment of Earnings Act 1971 Sch 3 para 4(1)(a) (as substituted: see note 14).
- 16 Attachment of Earnings Act 1971 Sch 3 para 5(a).
- 17 Attachment of Earnings Act 1971 Sch 3 para 5(b).

18 As to the meaning of 'administration order' see PARA 1431 note 4. As to attachment of earnings orders made to secure payments under an administration order see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 894-895.

19 Attachment of Earnings Act 1971 s 7(3), Sch 3 para 7.

20 In complying with the Attachment of Earnings Act 1971 Sch 3 para 7: see the text to note 19.

21 Attachment of Earnings Act 1971 Sch 3 para 8(a).

22 Attachment of Earnings Act 1971 Sch 3 para 8(b).

23 In comply with the Attachment of Earnings Act 1971 Sch 3 para 7: see the text to note 19.

24 Attachment of Earnings Act 1971 Sch 3 para 8(c).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/C. CONSEQUENCES OF ATTACHMENT ORDER/1444. Interrelation with alternative remedies open to creditors.

1444. Interrelation with alternative remedies open to creditors.

Where a county court has made an attachment of earnings order¹ to secure the payment of a judgment debt², no order or warrant of commitment³ must be issued in consequence of any proceedings for the enforcement of the debt begun before the making of the attachment of earnings order⁴. So long as the order is in force, no execution⁵ for the recovery of the debt may issue against any property of the debtor without the leave of the county court⁶.

An attachment of earnings order made to secure the payment of a judgment debt ceases to have effect on the making of an order of commitment or the issue of a warrant of commitment for the enforcement of the debt⁷. Where an attachment of earnings order ceases to have effect under this provision, the court officer⁸ of the court⁹ in which the matter is proceeding must give notice of the cesser to the person to whom the order was directed¹⁰.

1 As to the jurisdiction to make an attachment of earnings order to secure payment of a judgment debt see PARA 1431; and as to the procedure on an application for such an order see PARA 1433 et seq.

2 As to the meaning of 'judgment debt' see PARA 1431 note 4.

3 As to commitment see PARA 1522.

4 Attachment of Earnings Act 1971 s 8(2)(a).

5 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.

6 Attachment of Earnings Act 1971 s 8(2)(b).

7 Attachment of Earnings Act 1971 s 8(4).

8 As to the meaning of 'court officer' see PARA 49 note 3. As to county court officers see **COURTS** vol 10 (Reissue) PARA 726 et seq.

9 As to the meaning of 'court' see PARA 22.

10 CPR Sch 2 CCR Ord 27 r 12.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/C. CONSEQUENCES OF ATTACHMENT ORDER/1445. Operation of order where person employed by the Crown.

1445. Operation of order where person employed by the Crown.

The fact that an attachment of earnings order is made¹ at the suit of the Crown² does not prevent its operation at any time when the debtor³ is in the employment of the Crown⁴. Where a debtor is in the employment of the Crown and an attachment of earnings order is made in respect of him, then for the purposes of the Attachment of Earnings Act 1971, the chief officer for the time being of the department, office or other body in which the debtor is employed is treated as having the debtor in his employment⁵ and any earnings⁶ paid by the Crown or a minister of the Crown, or out of the public revenue of the United Kingdom, are treated as paid by that chief officer⁷. If any question arises, in proceedings for or arising out of an attachment of earnings order, as to what department, office or other body is concerned for these purposes, or as to who for those purposes is the chief officer thereof, the question must be referred to and determined by the Minister for the Civil Service⁸; but that minister is not under any obligation to consider such a reference unless it is made by the court⁹.

1 As to making an attachment of earnings order see PARA 1438.

2 As to the taxes etc for whose recovery an attachment of earnings order may be made see PARA 1433.

3 As to the meaning of 'debtor' see PARA 1432 note 3.

4 Attachment of Earnings Act 1971 s 22(1). The Attachment of Earnings Act 1971 has effect notwithstanding any enactment passed before 29 May 1970 and preventing or avoiding the attachment or diversion of sums due to a person in respect of service under the Crown, whether by way of remuneration, pension or otherwise: s 22(5). See generally the Crown Proceedings Act 1947 s 27; and PARA 1428.

5 Attachment of Earnings Act 1971 s 22(2)(a). Any transfer of the debtor from one department, officer or body to another is treated for these purposes as a change of employment: s 22(2)(a). As to the obligation to notify the court of a change of employment see PARA 1454.

6 As to the meaning of 'earnings' see PARA 1432.

7 Attachment of Earnings Act 1971 s 22(2)(b).

8 As to the Minister for the Civil Service see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 427.

9 Attachment of Earnings Act 1971 s 22(3). A document purporting to set out a determination of the minister under this provision and to be signed by an official of the Office of Public Service is to be admissible in evidence in any such proceedings as are mentioned in the text and is to be deemed to contain an accurate statement of such a determination unless the contrary is shown: s 22(4) (amended by SI 1992/1296; and SI 1995/2985).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/D. SUBSEQUENT PROCEEDINGS/1446. Variation and discharge of orders.

D. SUBSEQUENT PROCEEDINGS

1446. Variation and discharge of orders.

The court¹ may make an order discharging or varying an attachment of earnings order². Where an order is varied, the employer³ must, if he has been served⁴ with notice of the variation, comply with the order as varied⁵; but he is under no liability for non-compliance before seven days have elapsed since the service⁶.

Rules of court may make provision as to the circumstances in which an attachment of earnings order may be varied or discharged by the court of its own initiative⁷. This power may be exercised in the following circumstances⁸:

- 1017 (1) where it appears to the court that a person served with an attachment of earnings order directed to him has not the debtor⁹ in his employment, the court may discharge the order¹⁰;
- 1018 (2) where an attachment of earnings order which has lapsed¹¹ is again directed to a person who appears to the court to have the debtor in his employment, the court may make such consequential variations in the order as it thinks fit¹²;
- 1019 (3) where, after making an attachment of earnings order, the court makes or is notified of the making of another such order in respect of the same debtor which is not to secure the payment of a judgment debt¹³ or payments under an administration order¹⁴, the court may discharge or vary the first-mentioned order having regard to the priority accorded¹⁵ to the other order¹⁶;
- 1020 (4) where, after making an attachment of earnings order, the court makes an order that the debtor furnish a list of all his creditors and liabilities to the court¹⁷ or makes an administration order, the court may discharge the attachment of earnings order or may¹⁸ vary the order in such manner as it thinks fit¹⁹;
- 1021 (5) on making a consolidated attachment of earnings order²⁰ the court may discharge any earlier attachment of earnings order made to secure the payment of a judgment debt by the same debtor²¹;
- 1022 (6) where it appears to the court that a bankruptcy order has been made against a person in respect of whom an attachment of earnings order is in force to secure the payment of a judgment debt, the court may discharge the attachment of earnings order²²;
- 1023 (7) where an attachment of earnings order has been made to secure the payment of a judgment debt and the court grants permission to issue execution²³ for the recovery of the debt, the court may discharge the order²⁴.

Before varying or discharging an attachment of earnings order of its own initiative²⁵ under any of heads (1) to (7) above, the court must, unless it thinks it unnecessary in the circumstances to do so, give the debtor and the person on whose application the order was made an opportunity of being heard on the question whether the order should be varied or discharged²⁶. For that purpose the court officer²⁷ may give them notice of a date, time and place at which the question will be considered²⁸.

- 1 As to the meaning of 'court' for these purposes see PARA 1433 note 6.
- 2 Attachment of Earnings Act 1971 s 9(1). Section 9 also applies where the court or a fines officer has power to make an attachment of earnings order under the Courts Act 2003 s 97, Sch 5: Attachment of Earnings Act 1971 s 9(1) (amended by SI 2006/1737). As from a day to be appointed, the Attachment of Earnings Act 1971 s 9(1) is subject to Sch 3A (which deals with the variation of certain attachment of earnings orders by changing the basis of deductions: see PARA 1448): s 9(1A) (added by the Tribunals, Courts and Enforcement Act 2007 s 91, Sch 15 Pt 1 paras 1, 4). At the date at which this title states the law, no such day had been appointed.
- 3 As to the meaning of 'employer' see PARA 1438 note 7.
- 4 As to the meaning of 'service' see PARA 138 note 2.
- 5 Attachment of Earnings Act 1971 s 9(2). As to the employer's obligations see PARA 1443.
- 6 Attachment of Earnings Act 1971 s 9(2).
- 7 Attachment of Earnings Act 1971 s 9(3)(a). The statutory wording is 'of its own motion' but the terminology generally used in the Civil Procedure Rules is 'of its own initiative'.
- 8 CPR Sch 2 CCR Ord 27 r 13(1).
- 9 As to the meaning of 'debtor' see PARA 1432 note 3 (definition applied by CPR Sch 2 CCR Ord 27 r 1).
- 10 CPR Sch 2 CCR Ord 27 r 13(2).
- 11 Ie under the Attachment of Earnings Act 1971 s 9(4): see PARA 1450.
- 12 CPR Sch 2 CCR Ord 27 r 13(3).
- 13 As to the meaning of 'judgment debt' see PARA 1431 note 4.
- 14 As to the meaning of 'administration order' see PARA 1431 note 4. As to attachment of earnings orders to secure payments under administration orders see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 894-895.
- 15 Ie by the Attachment of Earnings Act 1971 s 7(3), Sch 3 para 8: see PARA 1443.
- 16 CPR Sch 2 CCR Ord 27 r 13(4).
- 17 Ie an order under the Attachment of Earnings Act 1971 s 4(1)(b): see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 894.
- 18 Ie if it exercises the power conferred by the Attachment of Earnings Act 1971 s 5(3): see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 895.
- 19 CPR Sch 2 CCR Ord 27 r 13(5).
- 20 As to consolidated orders see PARAS 1459-1464.
- 21 CPR Sch 2 CCR Ord 27 r 13(6).
- 22 CPR Sch 2 CCR Ord 27 r 13(7).
- 23 As to the issue of warrants of execution see PARAS 1283-1284; and as to when permission is required see PARA 1285.
- 24 CPR Sch 2 CCR Ord 27 r 13(8).
- 25 See note 7.
- 26 CPR Sch 2 CCR Ord 27 r 13(9).
- 27 As to the meaning of 'court officer' see PARA 49 note 3. As to county court officers see **COURTS** vol 10 (Reissue) PARA 726 et seq.
- 28 CPR Sch 2 CCR Ord 27 r 13(9).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/D. SUBSEQUENT PROCEEDINGS/1447. Suspension of fixed deductions orders.

1447. Suspension of fixed deductions orders.

The following provisions are not yet in force¹. A county court must make an order suspending a fixed deductions order² if the court is satisfied of either or both of the following: (1) that the fixed deductions order requires periodical deductions to be made at a rate which is not appropriate; (2) that the fixed deductions order requires periodical deductions to be made at times which are not appropriate³.

The county court is to make the suspension order on the following terms:

- 1024 (a) if the condition in head (1) is met: on terms specifying the rate at which the debtor⁴ must make repayments⁵ (whether higher or lower than the rate at which the order requires the deductions to be made);
- 1025 (b) if the condition in head (2) is met: on terms specifying the times at which the debtor must make repayments;
- 1026 (c) if either or both conditions are met: on any additional terms that the court thinks appropriate⁶.

If the employer⁷ is given notice of the suspension order, the employer must cease to make the deductions required by the fixed deductions order; but the employer is under no liability for non-compliance before seven days have elapsed since service of the notice⁸.

A county court (i) must revoke the suspension order if any of the terms of the suspension order are broken; (ii) may revoke the suspension order in any other circumstances if the court thinks that it is appropriate to do so⁹.

Rules of court may make provision as to the circumstances in which a county court may of its own motion make a suspension order or revoke a suspension order¹⁰.

The suspension of a fixed deductions order does not prevent the order from being treated as remaining in force subject to the provisions discussed in this paragraph¹¹.

1 The Attachment of Earnings Act 1971 s 9A is added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 91, Sch 15 Pt 1 paras 1, 5. At the date at which this title states the law, no such day had been appointed.

2 As to the meaning of 'fixed deductions order' see PARA 1437 note 6. As to the fixed deductions scheme see PARA 1442.

3 Attachment of Earnings Act 1971 s 9A(1) (as added: see note 1).

4 As to the meaning of 'debtor' see PARA 1432 note 3.

5 In the Attachment of Earnings Act 1971 s 9A, in relation to a fixed deductions order, 'repayments' means repayments of the judgment debt to which the order relates: s 9A(8) (as added: see note 1).

6 Attachment of Earnings Act 1971 s 9A(2) (as added: see note 1).

7 As to the meaning of 'employer' see PARA 1438 note 7.

8 Attachment of Earnings Act 1971 s 9A(3) (as added: see note 1).

9 Attachment of Earnings Act 1971 s 9A(4) (as added: see note 1).

10 Attachment of Earnings Act 1971 s 9A(5) (as added: see note 1).

11 Attachment of Earnings Act 1971 s 9A(6) (as added: see note 1). Section 9A is without prejudice to any other powers of a court to suspend attachment of earnings orders or to revoke the suspension of such orders: s 9A(7) (as so added).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/D. SUBSEQUENT PROCEEDINGS/1448. Variation of Schedule 3 judgment debt orders.

1448. Variation of Schedule 3 judgment debt orders.

The following provisions are not yet in force¹. A county court may vary a Schedule 3 judgment debt order² by changing the basis of deductions³. The county court may make the variation either in consequence of an application made to the court or of its own motion⁴. The variation takes effect on the date that it is made⁵.

A county court must vary a Schedule 3 judgment debt order by changing the basis of deductions if the order lapses⁶ and the county court directs the order again to a person who appears to have the debtor in his employment⁷. The variation must be made at the same time as the county court directs the order to such person⁸. The variation takes effect on the date that it is made⁹.

On the changeover date¹⁰, all Schedule 3 judgment debt orders are to be treated as if a county court had varied them by changing the basis of deductions¹¹, and the variation takes effect on the changeover date¹².

Where an order is varied, the employer¹³ must, if he has been served with notice of the variation, comply with the order as varied; but he is under no liability for non-compliance before seven days have elapsed since the service¹⁴.

1 The Attachment of Earnings Act 1971 Sch 3A is added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 91, Sch 15 Pt 1 paras 1, 7. At the date at which this title states the law, no such day had been appointed.

2 A Schedule 3 judgment debt order is a Schedule 3 deductions order made by a county court to secure payment of a judgment debt: Attachment of Earnings Act 1971 Sch 3A Pt 1 para 2 (as added: see note 1). As to the meaning of 'Schedule 3 deductions order' see PARA 1437 note 5.

3 Attachment of Earnings Act 1971 Sch 3A Pt 1 paras 1, 4(1) (as added: see note 1). References to variation of a Schedule 3 judgment debt order by changing the basis of deductions are references to the variation of the order so that it specifies that periodical deductions are to be made in accordance with the fixed deductions scheme: Sch 3A Pt 1 para 3 (as so added). As to the fixed deductions scheme see PARA 1442.

4 Attachment of Earnings Act 1971 Sch 3A Pt 1 para 4(2) (as added: see note 1).

5 Attachment of Earnings Act 1971 Sch 3A Pt 1 para 4(3) (as added: see note 1).

6 It is in accordance with the Attachment of Earnings Act 1971 s 9(4): see PARA 1450.

7 Attachment of Earnings Act 1971 Sch 3A Pt 1 para 5(1) (as added: see note 1).

8 Attachment of Earnings Act 1971 Sch 3A Pt 1 para 5(2) (as added: see note 1).

9 Attachment of Earnings Act 1971 Sch 3A Pt 1 para 5(3) (as added: see note 1).

10 The changeover date is the date which the Lord Chancellor specifies for the purposes of the Attachment of Earnings Act 1971 Sch 3A Pt 1 para 6: Sch 3A para 6(3) (as added: see note 1). The Lord Chancellor is to specify the changeover date in an order made by statutory instrument: Sch 3A Pt 1 para 6(4) (as so added). A statutory instrument containing such an order is subject to annulment in pursuance of a resolution of either House of Parliament: Sch 3A Pt 1 para 6(5) (as so added).

11 Attachment of Earnings Act 1971 Sch 3A Pt 1 para 6(1) (as added: see note 1).

12 Attachment of Earnings Act 1971 Sch 3A Pt 1 para 6(2) (as added: see note 1).

13 As to the meaning of 'employer' see PARA 1438 note 7.

14 See the Attachment of Earnings Act 1971 s 9(2), which applies to the variation of an order under Sch 3A Pt 1 (including variation in accordance with Sch 3A Pt 1 para 6) as it applies to any other variation of an attachment of earnings order (Sch 3A Pt 1 para 7 (as added: see note 1)); and PARA 1446.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/D. SUBSEQUENT PROCEEDINGS/1449. Variation of fixed deductions orders.

1449. Variation of fixed deductions orders.

The following provisions are not yet in force¹. A court may not vary a fixed deductions order² by changing the basis of deductions³ unless the variation is in accordance with the following provisions⁴. A county court must vary a fixed deductions order by changing the basis of deductions if the county court directs⁵ the order to take effect as an order to secure payments required by an administration order⁶. The variation must be made at the same time as the county court gives that direction⁷. The variation takes effect on the date that it is made⁸.

Where an order is varied, the employer⁹ must, if he has been served with notice of the variation, comply with the order as varied; but he is under no liability for non-compliance before seven days have elapsed since the service¹⁰.

1 The Attachment of Earnings Act 1971 Sch 3A is added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 91, Sch 15 Pt 1 paras 1, 7. At the date at which this title states the law, no such day had been appointed.

2 As to the meaning of 'fixed deductions order' see PARA 1437 note 6. As to the fixed deductions scheme see PARA 1442.

3 References to variation of a fixed deductions order by changing the basis of deductions are references to the variation of the order so that it specifies that periodical deductions are to be made in accordance with the Attachment of Earnings Act 1971 Sch 3 Pt 1: Sch 3A Pt 2 para 9 (as added: see note 1).

4 Attachment of Earnings Act 1971 Sch 3A Pt 2 paras 8, 10 (as added: see note 1).

5 Ie under the Attachment of Earnings Act 1971 s 5: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 895.

6 Attachment of Earnings Act 1971 Sch 3A Pt 2 para 11(1) (as added: see note 1).

7 Attachment of Earnings Act 1971 Sch 3A Pt 2 para 11(2) (as added: see note 1).

8 Attachment of Earnings Act 1971 Sch 3A Pt 2 para 11(3) (as added: see note 1).

9 As to the meaning of 'employer' see PARA 1438 note 7.

10 See the Attachment of Earnings Act 1971 s 9(2), which applies to the variation of an order under Sch 3A Pt 2 para 11 as it applies to any other variation of an attachment of earnings order: Sch 3A Pt 2 para 11(4) (as added: see note 1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/D. SUBSEQUENT PROCEEDINGS/1450. Lapse of order.

1450. Lapse of order.

Where an attachment of earnings order has been made¹ and the person to whom it is directed ceases to have the debtor² in his employment, the order lapses, except as respects deduction from earnings³ paid after the cesser and payment to the collecting officer⁴ of amounts deducted at any time, and is of no effect unless and until the court⁵ again directs it to a person (whether the same as before or another) who appears to the court to have the debtor in his employment⁶.

The lapse of an order under the above provision does not prevent its being treated as remaining in force for other purposes⁷.

1 As to the making of an attachment of earnings order see PARA 1438.

2 As to the meaning of 'debtor' see PARA 1432 note 3.

3 As to the meaning of 'earnings' see PARA 1432.

4 As to the collecting officer see PARA 1441.

5 As to the meaning of 'court' for these purposes see PARA 1433 note 6.

6 Attachment of Earnings Act 1971 s 9(4).

7 Attachment of Earnings Act 1971 s 9(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/D. SUBSEQUENT PROCEEDINGS/1451. Termination of employer's liability to make deductions.

1451. Termination of employer's liability to make deductions.

Where an attachment of earnings order ceases to have effect¹, the proper officer of the prescribed court must give notice of the cesser to the person to whom the order was directed².

Where, in the case of an attachment of earnings order made otherwise than to secure maintenance payments³, the whole amount payable under the relevant adjudication⁴ has been paid, and also any relevant costs⁵, the court⁶ must give notice to the employer⁷ that no further compliance with the order is required⁸.

Where an attachment of earnings order ceases to have effect⁹ or is discharged¹⁰, the person to whom the order has been directed is under no liability in consequence of his treating the order as still in force at any time before the expiration of seven days from the date on which the required notice¹¹ or, as the case may be, a copy of the discharging order is served¹² on him¹³.

1 Ie under the Attachment of Earnings Act 1971 s 8: see PARA 1444.

2 Attachment of Earnings Act 1971 s 12(1). See CPR Sch 2 CCR Ord 27 r 12; and PARA 1444.

3 As to orders to secure maintenance payments see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 627 et seq.

4 As to the meaning of 'relevant adjudication' see PARA 1432 note 3.

5 The reference to relevant costs is to any costs of the proceedings in which the attachment of earnings order in question was made, being costs which the debtor is liable to pay: Attachment of Earnings Act 1971 s 25(2).

6 As to the meaning of 'court' for these purposes see PARA 1433 note 6.

7 As to the meaning of 'employer' see PARA 1438 note 7.

8 Attachment of Earnings Act 1971 s 12(2).

9 See note 1.

10 Ie under the Attachment of Earnings Act 1971 s 9: see PARA 1446.

11 Ie the notice required by the Attachment of Earnings Act 1971 s 12(1): see the text and notes 1-2.

12 As to the meaning of 'service' see PARA 138 note 2.

13 Attachment of Earnings Act 1971 s 12(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/E. ADMINISTRATIVE PROVISIONS/1452. Application of sums received by collecting officer.

E. ADMINISTRATIVE PROVISIONS

1452. Application of sums received by collecting officer.

The collecting officer¹ to whom a person makes payments in compliance with an attachment of earnings order² must, after deducting such court fees³, if any, in respect of proceedings for or arising out of the order as are deductible from those payments, deal with the sums paid in the same way as he would if they had been paid by the debtor⁴ to satisfy the relevant adjudication⁵. Where, however, a county court makes an attachment of earnings order to secure the payment of a judgment debt⁶ and also orders⁷ the debtor to furnish to the court⁸ a list of all his creditors, sums paid to the collecting officer in compliance with the attachment of earnings order must not be dealt with by him as described above, but must be retained by him pending the decision of the court whether or not to make an administration order⁹ and must then be dealt with by him as the court may direct¹⁰.

1 As to the collecting officer see PARA 1441.

2 As to the employer's liability to make payments in compliance with an attachment of earnings order see PARA 1443.

3 As to county court fees see PARA 87; and see *The Civil Court Practice*.

4 As to the meaning of 'debtor' see PARA 1432 note 3.

5 Attachment of Earnings Act 1971 s 13(1). An alternative procedure applies in the case of payments under a consolidated attachment order: see CPR Sch 2 CCR Ord 27 r 22: and PARA 1464.

6 As to the meaning of 'judgment debt' see PARA 1431 note 4.

7 I.e. under the Attachment of Earnings Act 1971 s 4(1): see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 894.

8 As to the meaning of 'court' for these purposes see PARA 1433 note 6.

9 As to county court administration orders see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 893 et seq.

10 Attachment of Earnings Act 1971 s 13(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/E. ADMINISTRATIVE PROVISIONS/1453. Power to obtain statement of earnings etc while attachment of earnings order in force.

1453. Power to obtain statement of earnings etc while attachment of earnings order in force.

Where an attachment of earnings order has been made¹, the court² may at any time thereafter while the order is in force:

- 1027 (1) order the debtor³ to give to the court, within a specified period, a statement signed by him of the name and address of any person by whom earnings⁴ are paid to him, specified particulars as to his earnings and anticipated earnings, and as to his resources and needs and specified particulars for the purpose of enabling the debtor to be identified by any employer of his⁵;
- 1028 (2) order any person appearing to the court to have the debtor in his employment to give to the court, within a specified period, a statement signed by him or on his behalf of specified particulars of the debtor's earnings and anticipated earnings⁶; and
- 1029 (3) order the debtor to attend before the court on a day and at a time specified in the order to give the information described in head (1) above⁷.

1 As to making an attachment of earnings order see PARA 1438. As from a day to be appointed, the provisions discussed in this paragraph are amended by the Tribunals, Courts and Enforcement Act 2007 s 91, Sch 15 Pt 1 para 1, Sch 15 Pt 2 paras 9-15 so as to refer to a Schedule 3 deductions order instead of an attachment of earnings order. At the date at which this title states the law, no such day had been appointed. As to the meaning of 'Schedule 3 deductions order' see PARA 1437 note 5.

2 As to the meaning of 'court' for these purposes see PARA 1433 note 6.

3 As to the meaning of 'debtor' see PARA 1432 note 3.

4 As to the meaning of 'earnings' see PARA 1432.

5 Attachment of Earnings Act 1971 s 14(1)(a), (2)(a) (s 14(2)(a) substituted by the Administration of Justice Act 1982 s 53(1)). As to the application of the Attachment of Earnings Act 1971 s 14 see PARA 1437 note 5. As to the power to make such an order in the proceedings for an attachment of earnings order see PARA 1436; and as to the admissibility in evidence of a document purporting to be a statement given to the court in compliance with such an order see the Attachment of Earnings Act 1971 s 14(5); and PARA 1437.

6 Attachment of Earnings Act 1971 s 14(1)(b), (2)(a) (as amended: see note 5). As to the power to make such an order in the proceedings for an attachment of earnings order see PARA 1436; and as to the admissibility in evidence of a document purporting to be a statement given to the court in compliance with such an order see the Attachment of Earnings Act 1971 s 14(5); and PARA 1437.

7 Attachment of Earnings Act 1971 s 14(2)(b) (substituted by the Administration of Justice Act 1982 s 53(1); and amended by SI 2006/1737).

As from a day to be appointed, at any time when a fixed deductions order is in force, the court may (1) make such an order as is described in the Attachment of Earnings Act 1971 s 14(1A) (see PARA 1437 note 6); and (2) order the debtor to attend before it on a day and at a time specified in the order to give the information described in s 14(1A): s 14(2A) (added by the Tribunals, Courts and Enforcement Act 2007 Sch 15 Pt 1 para 1, Pt 2 para 12). At the date at which this title states the law, no such day had been appointed. As to the meaning of 'fixed deductions order' see PARA 1437 note 6. As to the fixed deductions scheme see PARA 1442.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/E. ADMINISTRATIVE PROVISIONS/1454. Debtor's and employer's obligation to notify changes of employment and earnings.

1454. Debtor's and employer's obligation to notify changes of employment and earnings.

While an attachment of earnings order is in force¹, the debtor² must from time to time notify the court³ in writing of every occasion on which he leaves any employment, or becomes employed or re-employed, not later in each case than seven days from the date on which he did so⁴. He must, on any occasion when he becomes employed or re-employed, include in his notification under this provision particulars of his earnings⁵ and anticipated earnings from the relevant employment⁶.

While an attachment of earnings order is in force, any person who becomes the debtor's employer⁷ and knows that the order is in force and by what court it was made must, within seven days of his becoming the debtor's employer or of acquiring that knowledge, whichever is the later, notify that court in writing that he is the debtor's employer, and include in his notification a statement of the debtor's earnings and anticipated earnings⁸.

1 As to making an attachment of earnings order see PARA 1438; and as to the variation, lapse or discharge of such an order see PARAS 1446-1450.

2 As to the meaning of 'debtor' see PARA 1432 note 3.

3 As to the meaning of 'court' for these purposes see PARA 1433 note 6.

4 Attachment of Earnings Act 1971 s 15(1)(a) (s 15(1) renumbered as such by SI 2006/1737).

5 As to the meaning of 'earnings' see PARA 1432.

6 Attachment of Earnings Act 1971 s 15(1)(b) (as renumbered: see note 4). As from a day to be appointed, this applies only if the order is a Schedule 3 deductions order: s 15(1)(b) (amended by the Tribunals, Courts and Enforcement Act 2007 s 91, Sch 15 Pt 1 para 1, Pt 2 para 16(1), (2)). At the date at which this title states the law, no such day had been appointed. As to the meaning of 'Schedule 3 deductions order' see PARA 1437 note 5.

7 As to the meaning of 'employer' see PARA 1438 note 7.

8 Attachment of Earnings Act 1971 s 15(1)(c) (as renumbered: see note 4). As from a day to be appointed, a statement of the debtor's earnings and anticipated earnings is required only if the order is a Schedule 3 deductions order: s 15(1)(c) (amended by the Tribunals, Courts and Enforcement Act 2007 Sch 15 Pt 1 para 1, Pt 2 para 16(3)). At the date at which this title states the law, no such day had been appointed.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/E. ADMINISTRATIVE PROVISIONS/1455. Finding debtor's current employer.

1455. Finding debtor's current employer.

The following provisions are not yet in force¹. If an attachment of earnings order lapses², the proper authority³ may request the Commissioners⁴ to disclose whether it appears to the Commissioners that the debtor⁵ has a current employer⁶ and, if it appears to the Commissioners that the debtor has a current employer, to disclose the name and address of that employer⁷.

The proper authority may make such a request only for the purpose of enabling the lapsed order to be directed to the debtor's current employer⁸, and the proper authority may not make such a request unless regulations⁹ are in force¹⁰. The proper authority may disclose such information¹¹ (including information identifying the debtor) as it considers necessary to assist the Commissioners to comply with a request¹² and the Commissioners may disclose to the proper authority any information (whether held by the Commissioners or on their behalf) that the Commissioners consider is necessary to comply with a request¹³. Nothing in these provisions is to be taken to prejudice any power to request or disclose information that exists apart from these provisions¹⁴.

If the Commissioners make a disclosure of information ('debtor information') under the above provisions¹⁵, a person to whom the debtor information is disclosed commits an offence if he uses or discloses the debtor information and the use or disclosure is not authorised¹⁶ by the relevant provisions¹⁷. The use or disclosure of the debtor information is authorised (1) if it is for a purpose connected with the enforcement of the lapsed order (including the direction of the order to the debtor's current employer) and with the consent of the Commissioners¹⁸; (2) if it is in accordance with an enactment or an order of court or for the purposes of any proceedings before a court, and it is in accordance with regulations¹⁹; (3) if the information has previously been lawfully disclosed to the public²⁰; (4) if it is in accordance with rules of court that comply with regulations²¹.

It is a defence for a person charged with an offence of unauthorised disclosure to prove that he reasonably believed that the disclosure was lawful²².

1 The Attachment of Earnings Act 1971 ss 15A-15D are added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 92(1). At the date at which this title states the law, no such day had been appointed.

2 As to lapse of such an attachment of earnings order see PARA 1450.

3 The 'proper authority' if the lapsed order was made by a county court, is a county court: Attachment of Earnings Act 1971 s 15D(1), (3) (as added: see note 1). 'Lapsed order' means the attachment of earnings order referred to in s 15A(1): s 15D(1) (as so added).

4 'Commissioners' means the Commissioners for Her Majesty's Revenue and Customs: Attachment of Earnings Act 1971 s 15D(1) (as added: see note 1).

5 As to the meaning of 'debtor' see PARA 1432 note 3.

6 As to the meaning of 'employer' see PARA 1438 note 7.

7 Attachment of Earnings Act 1971 s 15A(1) (as added: see note 1).

8 Attachment of Earnings Act 1971 s 15A(2) (as added: see note 1).

9 le under the Attachment of Earnings Act 1971 s 15B(5) and (8): see the text and note 19 and note 21.

10 Attachment of Earnings Act 1971 s 15A(3) (as added: see note 1).

11 'Information' means information held in any form: Attachment of Earnings Act 1971 s 15D(1) (as added: see note 1).

12 Attachment of Earnings Act 1971 s 15A(4) (as added: see note 1).

13 Attachment of Earnings Act 1971 s 15A(5) (as added: see note 1). The reference to information held on behalf of the Commissioners includes a reference to any information which (1) is held by a person who provides services to the Commissioners; and (2) is held by that person in connection with the provision of those services: s 15A(8) (as so added). A disclosure under s 15A(4) or (5) is not to be taken to breach any restriction on the disclosure of information (however imposed): s 15A(6) (as so added). As to restrictions on the disclosure of information under the Attachment of Earnings Act 1971 s 15B see the text and notes 15-21.

14 Attachment of Earnings Act 1971 s 15A(7) (as added: see note 1).

15 le under the Attachment of Earnings Act 1971 s 15A(5): see the text and note 13.

16 le the Attachment of Earnings Act 1971 s 15B(3), (5), (6) or (7): see the text and notes 18-21.

17 Attachment of Earnings Act 1971 s 15B(1), (2) (as added: see note 1). A person guilty of an offence under s 15B(2) is liable, on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine, or to both; and, on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum, or to both: s 15B(10) (as so added). With reference to a fine or penalty on summary conviction for an offence triable either way, 'statutory maximum' means the prescribed sum within the meaning of the Magistrates' Courts Act 1980: Interpretation Act 1978 s 5, Sch 1 (amended by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58(b)). 'Prescribed sum' means £5,000 or such sum as is for the time being substituted by an order in force under the Magistrates' Courts Act 1980: Magistrates' Courts Act 1980 s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)(c)).

18 Attachment of Earnings Act 1971 s 15B(3) (as added: see note 1). Consent for the purposes of s 15B(3) may be given (1) in relation to particular use or a particular disclosure; or (2) in relation to use, or a disclosure made, in such circumstances as may be specified or described in the consent: s 15B(4) (as so added).

19 Attachment of Earnings Act 1971 s 15B(5) (as added: see note 1).

20 Attachment of Earnings Act 1971 s 15B(6) (as added: see note 1).

21 Attachment of Earnings Act 1971 s 15B(7) (as added: see note 1). The regulations referred to in the text are regulations made under s 15B(8). Regulations may make provision about the circumstances, if any, in which rules of court may allow any of the following: (1) access to, or the supply of, debtor information; (2) access to, or the supply of copies of, any attachment of earnings order which has been directed to an employer using debtor information: s 15B(8) (as so added). It is for the Lord Chancellor to make regulations under s 15B: s 15C(1) (as added: see note 1). But the Lord Chancellor may make regulations under ss 15B only with the agreement of the Commissioners: s 15C(2) (as so added). Regulations under s 15B are to be made by statutory instrument (s 15C(3) (as so added)), and a statutory instrument containing such regulations may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament (s 15C(D) (as so added)).

22 Attachment of Earnings Act 1971 s 15B(9) (as added: see note 1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/E. ADMINISTRATIVE PROVISIONS/1456. Power to determine whether particular payments are earnings.

1456. Power to determine whether particular payments are earnings.

Where an attachment of earnings order is in force¹, the court² must, on the application of a person specified below, determine whether payments to the debtor³ of a particular class or description specified by the application are earnings⁴ for the purposes of the order⁵. The specified persons are the employer⁶, the debtor and the person to whom payment under the relevant adjudication⁷ is required to be made, whether directly or through an officer of any court⁸. An application to the court under this provision may be made to the district judge⁹ in writing¹⁰. The court officer¹¹ must thereupon fix a date and time for the hearing of the application by the court and give notice thereof to the specified¹² persons¹³.

Where such an application is made by the employer, he is not to incur any liability for non-compliance with the order as respects any payments of the class or description specified by the application which are made by him to the debtor while the application, or any appeal in consequence thereof, is pending¹⁴; but unless the court otherwise orders, this does not apply as respects such payments if the employer subsequently withdraws the application or, as the case may be, abandons the appeal¹⁵.

The employer is entitled to give effect to any determination for the time being in force under these provisions¹⁶.

1 As to making an attachment of earnings order see PARA 1438; and as to the variation, lapse or discharge of such an order see PARAS 1446-1450.

2 As to the meaning of 'court' for these purposes see PARA 1433 note 6.

3 As to the meaning of 'debtor' see PARA 1432 note 3.

4 As to the meaning of 'earnings' see PARA 1432.

5 Attachment of Earnings Act 1971 s 16(1).

6 As to the meaning of 'employer' see PARA 1438 note 7.

7 As to the meaning of 'relevant adjudication' see PARA 1432 note 3.

8 Attachment of Earnings Act 1971 s 16(2)(a)-(c). Without prejudice to s 16(2)(c), where the application is in respect of an attachment of earnings order made to secure payments under a magistrates' court maintenance order, the collecting officer is a specified person for these purposes: see s 16(2)(d). As to the meaning of 'magistrates' court maintenance order' see PARA 1431 note 2; and as to attachment of earnings orders made by magistrates' courts see **MAGISTRATES** vol 29(2) (Reissue) PARA 837 et seq.

9 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

10 CPR Sch 2 CCR Ord 27 r 11.

11 As to county court officers see **COURTS** vol 10 (Reissue) PARA 726 et seq.

12 Ie the persons mentioned in the Attachment of Earnings Act 1971 s 16(2)(a)-(c): see the text and notes 6-8.

13 See note 10.

- 14 Attachment of Earnings Act 1971 s 16(3). As to the employer's liability to make payments see PARA 1443. As to rights of appeal see generally PARA 1657 et seq.
- 15 Attachment of Earnings Act 1971 s 16(3) proviso.
- 16 Attachment of Earnings Act 1971 s 16(1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/E. ADMINISTRATIVE PROVISIONS/1457. Index of orders.

1457. Index of orders.

The court officer¹ of every court² must keep a nominal index of the debtors³ residing within the district of his court⁴ in respect of whom there are in force attachment of earnings orders⁵ which have been made by that court or of which the court officer has received notice from another court⁶. Where a debtor in respect of whom a court has made an attachment of earnings order resides within the district of another court, the court officer of the first-mentioned court must send a copy of the order to the court officer of the other court for entry in his index⁷.

The court officer must, on the request of any person having a judgment or order⁸ against a person believed to be residing within the district of the court, cause a search to be made in the index of the court and issue a certificate of the result of the search⁹.

1 As to the meaning of 'court officer' see PARA 49 note 3.

2 As to the meaning of 'court' see PARA 22.

3 As to the meaning of 'debtor' see PARA 1432 note 3 (definition applied by CPR Sch 2 CCR Ord 27 r 1).

4 As to county court districts see **COURTS** vol 10 (Reissue) PARAS 707-708.

5 As to making an attachment of earnings order see PARA 1438; and as to the variation, lapse or discharge of such an order see PARAS 1446-1450.

6 CPR Sch 2 CCR Ord 27 r 2(1).

7 CPR Sch 2 CCR Ord 27 r 2(2).

8 As to the meaning of 'judgment or order' see PARA 1226.

9 CPR Sch 2 CCR Ord 27 r 2(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/E. ADMINISTRATIVE PROVISIONS/1458. Transfer of attachment order.

1458. Transfer of attachment order.

If in the opinion of the judge¹ or district judge² of any court by which an attachment of earnings order has been made³, the matter could more conveniently proceed in some other court, whether by reason of the debtor⁴ having become resident in the district of that court⁵ or otherwise, he may order the matter to be transferred to that court⁶. The court to which proceedings arising out of an attachment of earnings are so transferred has the same jurisdiction in relation to the order as if it has been made by that court⁷.

1 As to the meaning of 'judge' see PARA 49.

2 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

3 As to making an attachment of earnings order see PARA 1438.

4 As to the meaning of 'debtor' see PARA 1432 note 3 (definition applied by CPR Sch 2 CCR Ord 27 r 1).

5 As to county court districts see **COURTS** vol 10 (Reissue) PARAS 707-708.

6 CPR Sch 2 CCR Ord 27 r 14(2). This is without prejudice to CPR Sch 2 CCR Ord 27 r 14(1) (power to transfer where court is considering the question of making a consolidated attachment order: see PARA 1461); CPR Sch 2 CCR Ord 27 r 14(2).

7 CPR Sch 2 CCR Ord 27 r 14(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/F. CONSOLIDATED ATTACHMENT ORDERS/1459. Power to make consolidated attachment order.

F. CONSOLIDATED ATTACHMENT ORDERS

1459. Power to make consolidated attachment order.

The powers of a county court to make an attachment of earnings order¹ include power to make an attachment of earnings order to secure the payment of any number of judgment debts². An attachment of earnings order made by virtue of this provision is known as a consolidated attachment order³.

The power to make a consolidated attachment order must be exercised subject to and in accordance with rules of court⁴. Rules made for these purposes may provide:

- 1030 (1) for the transfer from one court to another of an attachment of earnings order, or any proceedings for or arising out of such an order, and of functions relating to the enforcement of any liability capable of being secured by attachment of earnings⁵;
- 1031 (2) for enabling a court to which any order, proceedings or functions have been transferred under the rules to vary or discharge an attachment of earnings order made by another court and to replace it (if the court thinks fit) with a consolidated attachment order⁶;
- 1032 (3) for the cases in which any power exercisable under these provisions or the rules may be exercised by a court of its own initiative⁷ or on the application of a prescribed person⁸;
- 1033 (4) for requiring the officer of a court who receives payments made to him in compliance with an attachment of earnings order to deal with them as directed by the court⁹ or the rules instead of complying with the normal statutory provisions¹⁰ for their application¹¹; and
- 1034 (5) for modifying or excluding provisions of the Attachment of Earnings Act 1971, but only so far as may be necessary or expedient for securing conformity with the operation of rules made by virtue of heads (1) to (4) above¹².

Subject to the provisions of the relevant rules¹³, the court¹⁴ may make a consolidated attachment order where:

- 1035 (a) two or more attachment of earnings orders are in force to secure the payment of judgment debts by the same debtor¹⁵; or
- 1036 (b) on an application for an attachment of earnings order to secure the payment of a judgment debt, or for a consolidated attachment order to secure the payment of two or more judgment debts, it appears to the court that an attachment of earnings order is already in force to secure the payment of a judgment debt by the same debtor¹⁶.

1 le the powers under the Attachment of Earnings Act 1971 ss 1, 3: see PARAS 1431, 1433.

2 Attachment of Earnings Act 1971 s 17(1). As to the meaning of 'judgment debt' see PARA 1431 note 4. As to the power of a magistrates' court to make an attachment of earnings order to secure the discharge of any number of such liabilities as are specified in s 1(3) see **MAGISTRATES** vol 29(2) (Reissue) PARA 842. Section 15

also applies where the court or a fines officer has power to make an attachment of earnings order under the Courts Act 2003 s 97, Sch 5: see the Attachment of Earnings Act 1971 s 17 (amended by SI 2006/1737).

3 Attachment of Earnings Act 1971 s 17(2). As from a day to be appointed, the requirement that the order must specify that periodical deductions are to be made in accordance with the fixed deductions scheme (s 6(1A): see PARA 1441 note 7) applies to a consolidated attachment order which a county court makes to secure the payment of two or more judgment debts even if, immediately before the order is made, one or more of those debts is secured by a Schedule 3 deductions order: s 17(4) (added by the Tribunals, Courts and Enforcement Act 2007 s 91, Sch 15 Pt 1 para 1, Pt 2 para 18). At the date at which this title states the law, no such day had been appointed. As to the meaning of 'Schedule 3 deductions order' see PARA 1437 note 5.

4 Attachment of Earnings Act 1971 s 17(3).

5 Attachment of Earnings Act 1971 s 17(3)(a). See CPR Sch 2 CCR Ord 27 r 14(1); and PARA 1461.

6 Attachment of Earnings Act 1971 s 17(3)(b) (substituted by SI 2006/1737). As from a day to be appointed, rules may additionally provide for a court to suspend an attachment of earnings order transferred to it: Attachment of Earnings Act 1971 s 17(3)(b) (amended by the Tribunals, Courts and Enforcement Act 2007 Sch 15 Pt 1 para 1, Pt 2 para 17(1), (2)). At the date at which this title states the law, no such day had been appointed.

7 The statutory wording is 'of its own motion'; but the terminology now generally used under the Civil Procedure Rules is 'of its own initiative'.

8 Attachment of Earnings Act 1971 s 17(3)(c). See CPR Sch 2 CCR Ord 27 r 20; and PARA 1462.

9 As to the meaning of 'court' for these purposes see PARA 1433 note 6.

10 Ie the Attachment of Earnings Act 1971 s 13: see PARA 1452.

11 Attachment of Earnings Act 1971 s 17(3)(d) (amended by the Access to Justice Act 1999 s 90(1), Sch 13 paras 64, 67). See CPR Sch 2 CCR Ord 27 r 22; and PARA 1464.

12 Attachment of Earnings Act 1971 s 17(3)(e). As from a day to be appointed, rules may additionally provide for modifying or excluding provisions of the fixed deductions scheme: Attachment of Earnings Act 1971 s 17(3)(e) (amended by the Tribunals, Courts and Enforcement Act 2007 Sch 15 Pt 1 para 1, Pt 2 para 17(1), (3)). At the date at which this title states the law, no such day had been appointed. As to the fixed deductions scheme see PARA 1442.

13 Ie subject to CPR Sch 2 CCR Ord 27 rr 19-21: see PARAS 1460-1463.

14 As to the meaning of 'court' in the Civil Procedure Rules see PARA 22.

15 CPR Sch 2 CCR Ord 27 r 18(a).

16 CPR Sch 2 CCR Ord 27 r 18(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/F. CONSOLIDATED ATTACHMENT ORDERS/1460. Application for consolidated order.

1460. Application for consolidated order.

An application for a consolidated attachment order¹ may be made by the debtor² in respect of whom the order is sought or by any person who has obtained or is entitled to apply for an attachment of earnings order to secure the payment of a judgment debt³ by that debtor⁴. In the latter case, the application must certify the amount of money remaining due under the judgment or order⁵ and that the whole or part of any instalment due remains unpaid⁶. Where the judgment which it is sought to enforce was not given by the court which made the attachment of earnings order, the judgment must be automatically transferred to the court which made that order⁷.

Where an application for a consolidated attachment of earnings order is made, the court officer⁸ must notify any party who may be affected by the application⁹ of its terms¹⁰ and require him to notify the court in writing, within 14 days of service¹¹ of notification upon him, giving his reasons for any objection he may have to the granting of the application¹². If notice of any objection is not given within the time stated, the court officer must make a consolidated attachment of earnings order¹³. If any party objects to the making of a consolidated attachment of earnings order, the court officer must refer the application to the district judge¹⁴ who may grant the application after considering the objection made and the reasons given¹⁵.

A person to whom two or more attachment of earnings orders are directed¹⁶ to secure the payment of judgment debts by the same debtor may request the court in writing to make a consolidated attachment order to secure the payment of those debts¹⁷. On receipt of such a request the above procedure¹⁸ applies with the necessary modifications as if the request were an application by the judgment creditor¹⁹.

1 As to the power to make a consolidated attachment order see PARA 1459.

2 As to the meaning of 'debtor' see PARA 1432 note 3 (definition applied by CPR Sch 2 CCR Ord 27 r 1).

3 As to the meaning of 'judgment debt' see PARA 1431 note 4 (definition applied by CPR Sch 2 CCR Ord 27 r 1).

4 CPR Sch 2 CCR Ord 27 r 19(1). Such an application may be made in the proceedings in which any attachment of earnings order (other than a priority order) is in force and CPR Sch 2 CCR Ord 27 rr 3, 4 and 5 (see PARAS 1434-1436) do not apply: CPR Sch 2 CCR Ord 27 r 19(2).

5 As to the meaning of 'judgment or order' see PARA 1226.

6 CPR Sch 2 CCR Ord 27 r 19(3A).

7 CPR Sch 2 CCR Ord 27 r 19(3).

8 As to the meaning of 'court officer' see PARA 49 note 3. As to county court officers see **COURTS** vol 10 (Reissue) PARA 726 et seq.

9 For these purposes, 'party affected by the application' means (1) where the application is made by the debtor, the creditor in the proceedings in which the application is made and any other creditor who has obtained an attachment of earnings order which is in force to secure the payment of a judgment debt by the debtor; (2) where the application is made by the judgment creditor, the debtor and every person who, to the knowledge of the applicant, has obtained an attachment of earnings order which is in force to secure the payment of a judgment debt by the debtor: CPR Sch 2 CCR Ord 27 r 19(3E).

- 10 CPR Sch 2 CCR Ord 27 r 19(3B)(a).
- 11 As to the meaning of 'service' see PARA 138 note 2.
- 12 CPR Sch 2 CCR Ord 27 r 19(3B)(b).
- 13 CPR Sch 2 CCR Ord 27 r 19(3C).
- 14 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.
- 15 CPR Sch 2 CCR Ord 27 r 19(3D).
- 16 As to persons to whom attachment of earnings orders may be directed see PARA 1441.
- 17 CPR Sch 2 CCR Ord 27 r 19(4).
- 18 Ie CPR Sch 2 CCR Ord 27 r 19(3B)-(3E): see the text and notes 8-15.
- 19 CPR Sch 2 CCR Ord 27 r 19(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/F. CONSOLIDATED ATTACHMENT ORDERS/1461. Transfer of attachment order.

1461. Transfer of attachment order.

Where the court¹ by which the question of making a consolidated attachment order falls to be considered² is not the court by which any attachment of earnings order has been made³ to secure the payment of a judgment debt⁴ by the debtor⁵, the district judge⁶ of the last-mentioned court must, at the request of the district judge of the first-mentioned court, transfer to that court the matter in which the attachment of earnings order was made⁷. The court to which proceedings arising out of an attachment of earnings are so transferred has the same jurisdiction in relation to the order as if it had been made by that court⁸.

1 As to the meaning of 'court' see PARA 22.

2 See PARAS 1460, 1462.

3 As to making an attachment of earnings order see PARA 1438.

4 As to the meaning of 'judgment debt' see PARA 1431 note 4 (definition applied by CPR Sch 2 CCR Ord 27 r 1).

5 As to the meaning of 'debtor' see PARA 1432 note 3 (definition applied by CPR Sch 2 CCR Ord 27 r 1).

6 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

7 CPR Sch 2 CCR Ord 27 r 14(1).

8 CPR Sch 2 CCR Ord 27 r 14(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/F. CONSOLIDATED ATTACHMENT ORDERS/1462. Making of consolidated attachment order of court's own initiative.

1462. Making of consolidated attachment order of court's own initiative.

Where an application is made for an attachment of earnings order¹ to secure the payment of a judgment debt² by a debtor³ in respect of whom an attachment of earnings order is already in force to secure the payment of another judgment debt and no application is made for a consolidated attachment order⁴, the court officer⁵ may make such an order of his own initiative⁶ after giving all persons concerned an opportunity of submitting written objections⁷.

1 See PARA 1433.

2 As to the meaning of 'judgment debt' see PARA 1431 note 4 (definition applied by CPR Sch 2 CCR Ord 27 r 1).

3 As to the meaning of 'debtor' see PARA 1432 note 3 (definition applied by CPR Sch 2 CCR Ord 27 r 1).

4 See PARA 1460.

5 As to the meaning of 'court officer' see PARA 49 note 3.

6 The wording in the rule is 'of his own motion'; but the terminology now generally used under the Civil Procedure Rules is 'of his [or its] own initiative'.

7 CPR Sch 2 CCR Ord 27 r 20.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/F. CONSOLIDATED ATTACHMENT ORDERS/1463. Extension of consolidated attachment order.

1463. Extension of consolidated attachment order.

Where a consolidated attachment order¹ is in force to secure the payment of two or more judgment debts², any creditor to whom another judgment debt is owed by the same judgment debtor³ may apply to the court⁴ by which the order was made for it to be extended so as to secure the payment of that debt as well as the first-mentioned debts⁵. If the application⁶ is granted, the court may either vary the order accordingly or may discharge it and make a new consolidated attachment order to secure payment of all the above-mentioned judgment debts⁷.

1 As to the meaning of 'consolidated attachment order' see PARA 1459.

2 As to the meaning of 'judgment debt' see PARA 1431 note 4 (definition applied by CPR Sch 2 CCR Ord 27 r 1).

3 As to the meaning of 'debtor' see PARA 1432 note 3 (definition applied by CPR Sch 2 CCR Ord 27 r 1).

4 As to the meaning of 'court' see PARA 22.

5 CPR Sch 2 CCR Ord 27 r 21(1).

6 An application under CPR Sch 2 CCR Ord 27 r 21 is treated for the purposes of CPR Sch 2 CCR Ord 27 rr 19, 20 (see PARAS 1460, 1462) as an application for a consolidated attachment order: CPR Sch 2 CCR Ord 27 r 21(2).

7 See note 5.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/F. CONSOLIDATED ATTACHMENT ORDERS/1464. Payments under consolidated attachment order.

1464. Payments under consolidated attachment order.

Instead of complying with the normal statutory procedure for applying sums received by him¹, a court officer² who receives payments made to him in compliance with a consolidated attachment order³ must, after deducting such court fees⁴, if any, in respect of proceedings for or arising out of the order as are deductible from those payments, deal with the sums paid as he would if they had been paid by the debtor⁵ to satisfy the relevant adjudications⁶ in proportion to the amounts payable under them⁷. For that purpose dividends may from time to time be declared and distributed among the creditors entitled to them⁸.

1 Ie the Attachment of Earnings Act 1971 s 13: see PARA 1452.

2 As to the meaning of 'court officer' see PARA 49 note 3.

3 As to the meaning of 'consolidated attachment order' see PARA 1459.

4 As to county court fees see PARA 87; and see *The Civil Court Practice*.

5 As to the meaning of 'debtor' see PARA 1432 note 3 (definition applied by CPR Sch 2 CCR Ord 27 r 1).

6 As to the meaning of 'relevant adjudication' see PARA 1432 note 3 (definition applied by CPR Sch 2 CCR Ord 27 r 1).

7 CPR Sch 2 CCR Ord 27 r 22.

8 See note 7.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/G. ENFORCEMENT OF ATTACHMENT ORDER/1465. Debtor's failure to attend hearing.

G. ENFORCEMENT OF ATTACHMENT ORDER

1465. Debtor's failure to attend hearing.

If, after being served¹ with notice of an application to a county court for an attachment of earnings order² or for the variation of such an order³, or with an order made under the court's power to obtain the specified information⁴, the debtor⁵ fails to attend on the day and at the time specified for any hearing of the application or specified in the order, the court⁶ may adjourn the hearing and order him to attend at a specified time on another day⁷. If the debtor fails to attend at that time on that day or attends, but refuses to be sworn or give evidence, he may be ordered by the judge⁸ to be imprisoned for not more than 14 days⁹. The judge¹⁰ may at any time revoke the order and, if the debtor is already in custody, order his discharge¹¹.

If the debtor fails to attend at an adjourned hearing of an application for an attachment of earnings order and a committal order is made, the judge or district judge may direct that the committal order is to be suspended so long as the debtor attends at the time and place specified in the committal order¹². Where a committal order is so suspended and the debtor fails to attend at the time and place specified under this provision, a certificate to that effect given by the court officer¹³ is sufficient authority for the issue of a warrant of committal¹⁴.

In any case where the judge¹⁵ has power to make an order of imprisonment under the above provisions for failure to attend, he may, in lieu of or in addition to making that order, order the debtor to be arrested and brought before the court either forthwith or at such time as the judge may direct¹⁶.

1 As to the meaning of 'service' see PARA 138 note 2.

2 See PARA 1433.

3 See PARA 1446.

4 I.e. an order made under the Attachment of Earnings Act 1971 s 14(2): see PARA 1453.

5 As to the meaning of 'debtor' see PARA 1432 note 3.

6 As to the meaning of 'court' for these purposes see PARA 1433 note 6.

7 Attachment of Earnings Act 1971 s 23(1) (amended by the Administration of Justice Act 1982 s 53(2)). As from a day to be appointed, for 'notice of an application to a county court for an attachment of earnings order for the variation of such an order' there is substituted 'relevant notice', and for 'the time specified for any hearing of the application' there is substituted 'the time specified in the notice for any hearing': see the Attachment of Earnings Act 1971 s 23(1) (amended, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 91, Sch 15 Pt 1 para 1, Pt 2 paras 19, 20). For these purposes, 'relevant notice' means any of the following: (1) notice of an application to a county court to make, vary or suspend an attachment of earnings order; (2) notice that a county court is, of its own motion, to consider making, varying or suspending an attachment of earnings order: Attachment of Earnings Act 1971 s 23(1ZA) (added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 91, Sch 15 Pt 1 para 1, Pt 2 paras 19, 21). At the date at which this title states the law, no day had been appointed for bringing these provisions into force.

8 A district judge or deputy district judge has the same powers under the Attachment of Earnings Act 1971 s 23 as a judge of a county court: s 23(11) (added by the Courts and Legal Services Act 1990 s 125(2), Sch 17 para 6). As to district judges and deputy district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

9 Attachment of Earnings Act 1971 s 23(1).

10 See note 8.

11 Attachment of Earnings Act 1971 s 23(7).

12 CPR Sch 2 CCR Ord 27 r 7B(1). CPR Sch 2 CCR Ord 28 r 7(2), (4), (5) (see PARA 1519) applies, with the necessary modifications, where such a direction is given as it applies where a direction is given under CPR Sch 2 CCR Ord 28 r 7(1): CPR Sch 2 CCR Ord 27 r 7B(1).

13 As to the meaning of 'court officer' see PARA 49 note 3.

14 CPR Sch 2 CCR Ord 27 r 7B(2). As to warrants of committal see PARA 1522; and **CONTEMPT OF COURT**.

15 See note 8.

16 Attachment of Earnings Act 1971 s 23(1A) (added by the Contempt of Court Act 1981 s 14(5), Sch 2 Pt III para 6).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(ii) Attachment of Earnings/G. ENFORCEMENT OF ATTACHMENT ORDER/1466. Offences.

1466. Offences.

Subject to the following provisions, a person commits an offence if:

- 1037 (1) being required¹ to comply with an attachment of earnings order, he fails to do so²; or
- 1038 (2) being required³ to give a notice that he has not the debtor in his employment or that the debtor has subsequently ceased to be in his employment, he fails to give it, or fails to give it within the time required⁴; or
- 1039 (3) he fails to comply with an order to give a statement of earnings and related matters⁵ or with any requirement of a notice of application for an attachment of earnings order that he must give the court such a statement⁶, or fails in either case to comply within the time required by the order or notice⁷; or
- 1040 (4) he fails to comply with the statutory obligation⁸ to notify the court of changes of employment and earnings⁹; or
- 1041 (5) he gives a notice for the purposes mentioned in head (2) above¹⁰, or a notification for the purposes mentioned in head (4) above¹¹, which he knows to be false in a material particular, or recklessly gives such a notice or notification which is false in a material particular¹²; or
- 1042 (6) in purported compliance with the statutory requirements mentioned in head (2) or head (4) above, or with an order such as is mentioned in head (3) above¹³, or with any such requirement of a notice of application for an attachment of earnings order as is mentioned in that head¹⁴, he makes any statement which he knows to be false in a material particular, or recklessly makes any statement which is false in a material particular¹⁵.

Where a person commits such an offence in relation to proceedings in¹⁶, or to an attachment of earnings order made by, a county court, he is liable on summary conviction to a fine of not more than level 2 on the standard scale¹⁷. Alternatively, he may be ordered by the county court judge¹⁸ to pay a fine of not more than £250 or, in the case of an offence specified below, to be imprisoned for not more than 14 days¹⁹. The specified offences for which a judge²⁰ may impose imprisonment are an offence under head (3) or head (4) above, if committed by the debtor²¹ and an offence under head (5) or head (6) above whether committed by the debtor or by any other person²². Where under these provisions a person is ordered by a county court judge²³ to be imprisoned, the judge may at any time revoke the order and, if the person is already in custody, order his discharge²⁴.

Where it is alleged that a person has committed any offence mentioned in head (1), (2), (4), (5) or (6) above in relation to proceedings in, or to an attachment of earnings order made by, a county court, then unless it is decided to proceed against the alleged offender summarily the district judge must issue a summons calling upon him to show cause why he should not be punished for the alleged offence²⁵. The summons must be served²⁶ on the alleged offender personally²⁷ not less than 14 days before the return day²⁸.

It is a defence:

- 1043 (a) for a person charged with an offence under head (1) above to prove that he took all reasonable steps to comply with the attachment of earnings order in question²⁹;
- 1044 (b) for a person charged with an offence under head (2) above to prove that he did not know, and could not reasonably be expected to know, that the debtor was not in his employment, or, as the case may be, had ceased to be so, and that he gave the required notice as soon as reasonably practicable after the fact came to his knowledge³⁰.

Where a person is convicted or dealt with for an offence under head (1) above, the court³¹ may order him to pay, to whoever is the collecting officer of the court for the purposes of the attachment of earnings order in question³², any sums deducted by that person from the debtor's earnings and not already paid to the collecting officer³³.

1 Ie by the Attachment of Earnings Act 1971 s 7(1) (see PARA 1443) or s 9(2) (see PARA 1446): s 23(2)(a).

2 Attachment of Earnings Act 1971 s 23(2)(a).

3 Ie by the Attachment of Earnings Act 1971 s 7(2): see PARA 1443.

4 Attachment of Earnings Act 1971 s 23(2)(b).

5 Ie an order under the Attachment of Earnings Act 1971 s 14(1) or, as from a day to be appointed an order to give specified particulars under s 14(1A): see PARA 1437.

6 Ie any such requirement of a notice as is mentioned in the Attachment of Earnings Act 1971 s 14(4): see PARA 1437. As from a day to be appointed, the requirements of a notice of application for a suspension order are included.

7 Attachment of Earnings Act 1971 s 23(2)(c) (amended, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 91, Sch 15 Pt 1 para 1, Pt 2 paras 19, 22; at the date at which this title states the law, no such day had been appointed).

8 Ie the Attachment of Earnings Act 1971 s 15: see PARA 1454.

9 Attachment of Earnings Act 1971 s 23(2)(d).

10 Ie for the purposes of the Attachment of Earnings Act 1971 s 7(2): see PARA 1443.

11 Ie for the purposes of the Attachment of Earnings Act 1971 s 15: see PARA 1454.

12 Attachment of Earnings Act 1971 s 23(2)(e).

13 See note 5.

14 Ie a requirement such as is mentioned in the Attachment of Earnings Act 1971 s 14(4): see PARA 1437. As from a day to be appointed, the requirements of a notice of application for a suspension order are included.

15 Attachment of Earnings Act 1971 s 23(2)(f) (amended, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 91, Sch 15 Pt 1 para 1, Pt 2 paras 19, 22; at the date at which this title states the law, no such day had been appointed).

16 For these purposes, references to proceedings in a court are to proceedings in which that court has power to make an attachment of earnings order or has made such an order: Attachment of Earnings Act 1971 s 23(10).

17 Attachment of Earnings Act 1971 s 23(3) (amended by virtue of the Criminal Justice Act 1982 ss 37, 38). As to the standard scale see PARA 63 note 3.

18 A district judge or deputy district judge has the same powers under the Attachment of Earnings Act 1971 s 23 as a judge of a county court: s 23(11) (added by the Courts and Legal Services Act 1990 s 125(2), Sch 17 para 6). As to district judges and deputy district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

19 Attachment of Earnings Act 1971 s 23(3) (amended by the Criminal Justice Act 1991 ss 17(3), 101(1), Sch 4 Pt I, Sch 12 para 6). For the purposes of the Administration of Justice Act 1960 s 13 (appeal in cases of contempt of court: see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 515), the Attachment of Earnings Act 1971 s 23(3) (as so amended) is to be treated as an enactment enabling a county court to deal with an offence under s 23(2) as if it were contempt of court: s 23(9). The County Courts Act 1984 s 129 (enforcement of fines: see PARA 1513; and **COURTS** vol 10 (Reissue) PARA 704) applies to payment of a fine imposed by a county court judge under the Attachment of Earnings Act 1971 s 23(3) and of any sums ordered by a county court judge to be paid under s 23(6) (see the text and notes 31-33): s 23(8) (amended by the County Courts Act 1984 s 148(1), Sch 2 para 41). See also note 18.

20 See note 18.

21 As to the meaning of 'debtor' see PARA 1432 note 3.

22 Attachment of Earnings Act 1971 s 23(4).

23 See note 18.

24 Attachment of Earnings Act 1971 s 23(7).

25 CPR Sch 2 CCR Ord 27 r 16(1).

26 As to the meaning of 'service' see PARA 138 note 2.

27 As to personal service see PARA 142.

28 CPR Sch 2 CCR Ord 27 r 16(1). CPR Sch 2 CCR Ord 34 rr 3, 4 (see PARA 1513) apply, with the necessary modifications, to proceedings for an offence under the Attachment of Earnings Act 1971 s 23(2) as they apply to proceedings for offences under the County Courts Act 1984: CPR Sch 2 CCR Ord 27 r 16(2).

29 Attachment of Earnings Act 1971 s 23(5)(a).

30 Attachment of Earnings Act 1971 s 23(5)(b).

31 As to the meaning of 'court' for these purposes see PARA 1433 note 6.

32 As to the collecting officer see PARA 1441.

33 Attachment of Earnings Act 1971 s 23(6). As to the enforcement of such payments see s 23(8), cited in note 19.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/A. JURISDICTION/1467. Power to impose charging order on debtor's property.

(iii) Charging Orders

A. JURISDICTION

1467. Power to impose charging order on debtor's property.

Where, under a judgment or order of the High Court or a county court¹, a person (the 'debtor') is required to pay a sum of money to another person (the 'creditor') then, for the purpose of enforcing that judgment or order, the appropriate court² may make an order in accordance with the provisions of the Charging Orders Act 1979 imposing on any such property³ of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order⁴. Such an order is referred to as a 'charging order'⁵.

A charging order may be made either absolutely or subject to conditions as to notifying the debtor or as to the time when the charge is to become enforceable, or as to other matters⁶.

A charging order may also be made under the Council Tax (Administration and Enforcement) Regulations 1992⁷ by application to a county court where a magistrates' court has made a liability order or more than one liability order in relation to council tax⁸, the amount in respect of which the liability order was made, or the aggregate if more than one order has been made, is an amount the debtor is liable to pay⁹ and at the time that the application is made at least £1,000 of the amount or aggregate of the amounts in respect of which the liability order was made remains outstanding¹⁰. Charging orders in respect of council tax are discussed in detail elsewhere in this work¹¹.

Under the Solicitors Act 1974, a solicitor may apply for a charging order on a client's property in order to enforce the payment of his costs. Such charging orders are discussed elsewhere in this work¹².

1 For these purposes, references to a judgment or order of the High Court or a county court are to be taken to include references to a judgment, order, decree or award (however called) of any court or arbitrator (including any foreign court or arbitrator) which is or has become enforceable (whether wholly or to a limited extent) as if it were a judgment or order of the High Court or a county court: Charging Orders Act 1979 s 6(2) (amended, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 93(1), (4); at the date at which this title states the law, no such day had been appointed). As to arbitration awards see **ARBITRATION**; and as to the enforcement of foreign judgments etc see generally **CONFLICT OF LAWS**.

2 As to the appropriate court see PARA 1469.

3 As to the property that may be charged see PARA 1468.

4 Charging Orders Act 1979 s 1(1). A charging order or interim charging order may be made against any property, within the jurisdiction, belonging to a judgment debtor that is a partnership: see *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 4A.1.

As from a day to be appointed, the Lord Chancellor may by regulations provide that a charge may not be imposed by a charging order for securing the payment of money of an amount below that determined in accordance with the regulations: Charging Orders Act 1979 s 3A(1) (s 3A prospectively added by the Tribunals, Courts and Enforcement Act 2007 s 94). The Lord Chancellor may by regulations provide that a charge imposed by a charging order may not be enforced by way of order for sale to recover money of an amount below that determined in accordance with the regulations: Charging Orders Act 1979 s 3A(2) (as so prospectively added). Such regulations may make different provision for different cases and include such transitional provision as the

Lord Chancellor thinks fit: s 3A(3) (as so prospectively added). The power to make regulations under s 3A is exercisable by statutory instrument: s 3A(4) (as so prospectively added). The Lord Chancellor may not make the first regulations under s 3A(1) or (2) unless (in each case) a draft of the statutory instrument containing the regulations has been laid before, and approved by a resolution of, each House of Parliament: s 3A(5) (as so prospectively added). A statutory instrument containing any subsequent regulations under those subsections is subject to annulment in pursuance of a resolution of either House of Parliament: s 3A(6) (as so prospectively added).

5 Charging Orders Act 1979 s 1(3).

6 Charging Orders Act 1979 s 3(1).

7 Ie under the Council Tax (Administration and Enforcement) Regulations 1992, SI 1992/613, reg 50: see the text and notes 8-11; and **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 321.

8 Ie a liability order pursuant to the Council Tax (Administration and Enforcement) Regulations 1992, SI 1992/613, reg 34(6) or reg 36A(5): see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 315.

9 Ie under the Council Tax (Administration and Enforcement) Regulations 1992, SI 1992/613, Pt V (regs 17-31): see reg 50(1)(b) (reg 50(1) substituted, in relation to England, by SI 2004/927; and, in relation to Wales, by SI 2004/785).

10 Council Tax (Administration and Enforcement) Regulations 1992, SI 1992/613, reg 50(1) (as substituted: see note 9).

11 See **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 321.

12 See the Solicitors Act 1974 s 73; and **LEGAL PROFESSIONS**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/A. JURISDICTION/1468. Property which may be charged.

1468. Property which may be charged.

A charge may be imposed¹ by a charging order² only on:

- 1045 (1) any interest held by the debtor³ beneficially in any asset of a kind mentioned below⁴ or under any trust⁵; or
- 1046 (2) any interest held by a person as trustee of a trust (the 'trust'), if the interest is in such an asset or is an interest under another trust and:
- 27
- 45. (a) the judgment or order⁶ in respect of which a charge is to be imposed was made against that person as trustee of the trust⁷; or
- 46. (b) the whole beneficial interest under the trust is held by the debtor unencumbered and for his own benefit⁸; or
- 47. (c) in a case where there are two or more debtors all of whom are liable to the creditor⁹ for the same debt, they together hold the whole beneficial interest under the trust unencumbered and for their own benefit¹⁰.
- 28

The assets referred to in head (1) above are land¹¹ and securities¹² of any of the following kinds:

- 1047 (i) government stock¹³;
- 1048 (ii) stock¹⁴ of any body (other than a building society¹⁵) incorporated within England and Wales¹⁶;
- 1049 (iii) stock of any body incorporated outside England and Wales or of any state or territory outside the United Kingdom, being stock registered in a register kept at any place within England and Wales¹⁷;
- 1050 (iv) units of any unit trust¹⁸ in respect of which a register of the unit holders is kept at any place within England and Wales¹⁹,

or funds in court²⁰.

In any case where a charge is imposed by a charging order on any interest in such an asset²¹ other than an asset consisting of land, the court making the order may provide for the charge to extend to any interest or dividend²² payable in respect of the asset²³.

A debtor's interest in a partnership²⁴ and the main or only dwelling of an individual who has funding under the Access to Justice Act 1999 and against whom an order for costs has been made²⁵ may also be charged.

1 le subject to the Charging Orders Act 1979 s 2(3): see the text and notes 20-21.

2 As to the meaning of 'charging order' see PARA 1467.

3 As to the meaning of 'debtor' for these purposes see PARA 1467. See *Nelson v Greening & Sykes (Builders) Ltd* [2007] EWCA Civ 1358, (2008) 10 ITELR 689 (charging order made against debtor's beneficial interest in property held on trust for third party).

4 le any asset of a kind mentioned in the Charging Orders Act 1979 s 2(2): see the text and notes 11-20.

5 Charging Orders Act 1979 s 2(1)(a). See *National Westminster Bank v Stockman* [1981] 1 All ER 800, [1981] 1 WLR 67; *Clark v Chief Land Registrar* [1993] Ch 294, [1993] 2 All ER 936 (affd [1994] Ch 370, [1994] 4 All ER 96, CA).

6 See PARA 1467 note 1.

7 Charging Orders Act 1979 s 2(1)(b)(i).

8 Charging Orders Act 1979 s 2(1)(b)(ii).

9 As to the meaning of 'creditor' for these purposes see PARA 1467.

10 Charging Orders Act 1979 s 2(1)(b)(iii).

11 Charging Orders Act 1979 s 2(2)(a). 'Land' includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land: Interpretation Act 1978 s 5, Sch 1. As to the registration of a charge over land see PARAS 1250, 1481; and **LAND CHARGES; LAND REGISTRATION**.

12 For these purposes, references to any securities include references to any such securities standing in the name of the Accountant General: Charging Orders Act 1979 s 6(3). As to the Accountant General see **COURTS** vol 10 (Reissue) PARA 663; PARA 1548 et seq.

13 Charging Orders Act 1979 s 2(2)(b)(i). 'Government stock' means any stock issued by Her Majesty's government in the United Kingdom or any funds of, or annuity granted by, that government: s 6(1).

14 'Stock' includes shares, debentures and any securities of the body concerned, whether or not constituting a charge on the assets of that body: Charging Orders Act 1979 s 6(1).

15 For these purposes, 'building society' has the same meaning as in the Building Societies Act 1986 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1856): Charging Orders Act 1979 s 6(1) (definition amended by the Building Societies Act 1986 s 120, Sch 18 para 14).

16 Charging Orders Act 1979 s 2(2)(b)(ii).

17 Charging Orders Act 1979 s 2(2)(b)(iii).

18 'Unit trust' means any trust established for the purpose, or having the effect, of providing, for persons having funds available for investment, facilities for the participation by them, as beneficiaries under the trust, in any profits or income arising from the acquisition, holding, management or disposal of any property whatsoever: Charging Orders Act 1979 s 6(1).

19 Charging Orders Act 1979 s 2(2)(b)(iv).

20 Charging Orders Act 1979 s 2(2)(c). As to funds in court see PARA 1548 et seq.

The Lord Chancellor may by order made by statutory instrument amend s 2(2) by adding to, or removing from, the kinds of asset for the time being referred to there, any asset of a kind which in his opinion ought to be so added or removed: s 3(7). Any such order is subject to annulment in pursuance of a resolution of either House of Parliament: s 3(8). At the date at which this title states the law, no such order had been made.

21 Is any asset of a kind mentioned in the Charging Orders Act 1979 s 2(2)(b) or (c): see the text and notes 12-20.

22 'Dividend' includes any distribution in respect of any unit of a unit trust: Charging Orders Act 1979 s 6(1).

23 Charging Orders Act 1979 s 2(3).

24 See the Partnership Act 1890 s 23; and **PARTNERSHIP** vol 79 (2008) PARA 95.

25 The first £100,000 of the value of the Legal Services Commission ('LSC') funded client's interest in the main or only home cannot be the subject of any enforcement process by the receiving party under the costs order. The receiving party cannot apply for an order to sell the LSC funded client's home, but could secure the debt against any value exceeding £100,000 by way of a charging order: see the Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 4; *Practice Direction about Costs* PD 43-48 para 21.12; and PARA 1814. See further **LEGAL AID**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/A. JURISDICTION/1469. The appropriate court.

1469. The appropriate court.

For the purposes of the jurisdiction to make a charging order under the Charging Orders Act 1979¹, the appropriate court is:

- 1051 (1) in a case where the property to be charged² is a fund in court, the court in which that fund is lodged³;
- 1052 (2) in a case where head (1) above does not apply and the order to be enforced is a maintenance order of the High Court⁴, the High Court or a county court⁵;
- 1053 (3) in a case where neither head (1) nor head (2) above applies and the judgment or order⁶ to be enforced is a judgment or order of the High Court for a sum exceeding the county court limit⁷, the High Court or a county court⁸; and
- 1054 (4) in any other case, a county court⁹.

Where a person applies to the High Court for a charging order to enforce more than one judgment or order, that court is the appropriate court in relation to the application if it would otherwise be the appropriate court on an application relating to one or more of the judgments or orders concerned¹⁰.

1 le under the Charging Orders Act 1979 s 1: see PARA 1467.

2 As to the property which may be charged see PARA 1468.

3 Charging Orders Act 1979 s 1(2)(a). As to funds in court see PARA 1548 et seq.

4 For these purposes, 'maintenance order' has the same meaning as in the Attachment of Earnings Act 1971 s 2(a) (see PARA 1431 note 2): Charging Orders Act 1979 s 1(2). As to the enforcement of maintenance orders by means of a charging order see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 627 et seq.

5 Charging Orders Act 1979 s 1(2)(b).

6 See PARA 1467 note 1.

7 For these purposes, 'county court limit' means the county court limit for the time being specified in an Order in Council under the County Courts Act 1984 s 145 as the county court limit for the Charging Orders Act 1979 s 1: s 1(2) (amended for these purposes by the Administration of Justice Act 1982 ss 34, 37, Sch 3 Pt II paras 2, 3, 6; and by the County Courts Act 1984 s 148(1), Sch 2 para 71). At the date at which this title states the law, no such Order had been made but, by virtue of the Interpretation Act 1978 s 17(2)(b), the County Courts Jurisdiction Order 1981, SI 1981/1123, has effect for certain purposes (see **COURTS** vol 10 (Reissue) PARA 710) and it is apprehended that the relevant limit is £5,000, as specified by art 2, Table.

8 Charging Orders Act 1979 s 1(2)(c) (as amended: see note 7).

9 Charging Orders Act 1979 s 1(2)(d).

10 Charging Orders Act 1979 s 1(4). As to the procedure on an application see PARA 1471 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/A. JURISDICTION/1470. Principles to be applied.

1470. Principles to be applied.

In deciding whether to make a charging order¹ the court must consider all the circumstances of the case and, in particular, any evidence before it as to the personal circumstances of the debtor² and whether any other creditor³ of the debtor would be likely to be unduly prejudiced by the making of the order⁴. The same principles apply with regard to a charging order made to secure the payment of a council tax liability⁵.

In the case of residential property, the court must consider whether the making of a charging order would, if unjustified, infringe the right to respect for private and family life under article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms⁶ and, if so, whether the making of the order is justified under article 8(2)⁷ and in particular whether it is necessary for the protection of the rights of the judgment creditor. Special considerations apply where an application for a charging order is made against a matrimonial home which is or may be the subject of proceedings for ancillary relief⁸. The protection afforded to a person's home when the court is considering whether to make a charging order to recover costs against a party in receipt of funding from the Legal Services Commission is discussed elsewhere in this title⁹.

1 As to the meaning of 'charging order' see PARA 1467.

2 As to the meaning of 'debtor' see PARA 1467.

3 As to the meaning of 'creditor' see PARA 1467.

4 Charging Orders Act 1979 s 1(5). These principles were considered in *Roberts Petroleum Ltd v Bernard Kenny Ltd (in liquidation)* [1982] 1 All ER 685 at 690, [1982] 1 WLR 301 at 307, CA, per Lord Brandon of Oakbrook; and approved [1983] 2 AC 192 at 207, [1983] 1 All ER 564 at 571-572, HL, per Lord Brightman. See also eg *Ropaigealach v Allied Irish Bank* [2001] EWCA Civ 1790, [2001] All ER (D) 174 (Nov); *Re Goldspan Ltd* [2003] BPIR 93, [2001] All ER (D) 412 (Oct).

As from a day to be appointed, where, under a judgment or order of the High Court or a county court, a debtor is required to pay a sum of money by instalments, the fact that there has been no default in payment of the instalments does not prevent a charging order from being made in respect of that sum: Charging Orders Act 1979 s 1(6), (7) (s 1(6)-(8) added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 93(1), (2)). However, if there has been no default, the court must take that into account when considering the circumstances of the case under the Charging Orders Act 1979 s 1(5): s 1(8) (as so added). At the date at which this title states the law, no such day had been appointed.

5 See the Council Tax (Administration and Enforcement) Regulations 1992, SI 1992/613, reg 51(1); and **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 321.

6 I.e. the right under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) art 8(1), now incorporated into domestic law by the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 8(1): see PARA 1235.

7 I.e. under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 8(2), now incorporated into domestic law by the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 8(2): see PARA 1235.

8 See eg *Harman v Glencross* [1986] Fam 81, [1986] 1 All ER 545, CA (application for order over husband's interest in matrimonial home; wife who was joint owner entitled to be heard; guidance given in relation to the making of charging orders and orders for sale; sale of the matrimonial home postponed); *Austin-Fell v Austin-Fell* [1990] Fam 172, [1990] 2 All ER 455 (postponed enforcement order held to represent fairest balance between competing claims of wife and creditor).

9 See PARA 1468 note 25.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/B. PROCEDURE ON APPLICATION FOR CHARGING ORDER/1471. Scope and application of Part 73 of the Civil Procedure Rules.

B. PROCEDURE ON APPLICATION FOR CHARGING ORDER

1471. Scope and application of Part 73 of the Civil Procedure Rules.

Part 73 of the Civil Procedure Rules¹ contains rules which provide for a judgment creditor² to enforce a judgment by obtaining a charging order³, a stop order⁴ or a stop notice⁵ over or against a judgment debtor's⁶ interest in an asset⁷. The first section of that Part⁸ applies to an application by a judgment creditor for a charging order under the Charging Orders Act 1979⁹ or under the Council Tax (Administration and Enforcement) Regulations 1992¹⁰. Charging orders in respect of council tax are discussed in detail elsewhere in this work¹¹.

Separate provision is made with respect to the procedure on an application for a charging order against a partner's interest in partnership property¹².

1 Ie CPR Pt 73: see the text and notes 2-10; and PARA 1472 et seq. As to the application of the CPR see further PARAS 32, 1225.

2 As to the meaning of 'judgment creditor' see PARA 1236.

3 See CPR Pt 73 Section I (CPR 73.2-73.10); and PARA 1472 et seq.

4 See CPR Pt 73 Section II (CPR 73.11-73.15); and PARA 1488 et seq.

5 See CPR Pt 73 Section III (CPR 73.16-73.21); and PARA 1492 et seq.

6 As to the meaning of 'judgment debtor' see PARA 1236.

7 CPR 73.1(1).

8 Ie CPR 73.2-73.10: see PARA 1472 et seq.

9 Ie under the Charging Orders Act 1979 s 1: see PARAS 1467, 1469.

10 CPR 73.2. As to charging orders under the Council Tax (Administration and Enforcement) Regulations 1992, SI 1992/613, reg 50, see PARA 1467 text and notes 8-11; and **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 321.

11 See **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 321.

12 See CPR 73.22; and *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73. An application to the court by a judgment creditor of a partner for an order under the Partnership Act 1890 s 23 (which authorises the High Court or a judge thereof to make certain orders on the application of a judgment creditor of a partner, including an order charging the partner's interest in the partnership property: see **PARTNERSHIP** vol 79 (2008) PARA 95) and an application to the court by a partner of the judgment debtor made in consequence of the first mentioned application must be made in accordance with CPR Pt 23 (see PARA 303 et seq): *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 6.2. The powers conferred on a judge by the Partnership Act 1890 s 23 may be exercised by a master or the Admiralty Registrar or a district judge: *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 6.3. Every application notice so filed by a judgment creditor, and every order made on such an application, must be served on the judgment debtor and on any of the other partners who are within the jurisdiction: PD 73 para 6.4. Every application notice filed by a partner of a judgment debtor, and every order made on such an application, must be served on the judgment creditor and the judgment debtor, and on the other partners of the judgment debtor who are not joined in the application and who are within the jurisdiction: para 6.5. An application notice or order served in accordance with para 6 on one or more, but not all, of the partners of a partnership is deemed to have

been served on all the partners of that partnership: para 6.6. See further **PARTNERSHIP** vol 79 (2008) PARA 95. As to the meaning of 'service' see PARA 138 note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/B. PROCEDURE ON APPLICATION FOR CHARGING ORDER/1472. Making the application.

1472. Making the application.

An application for a charging order¹ may be made without notice². The application must be issued in the court³ which made the judgment or order⁴ which it is sought to enforce, unless:

- 1055 (1) the proceedings have since been transferred to a different court⁵, in which case the application must be issued in that court⁶;
- 1056 (2) the application is made under the Council Tax (Administration and Enforcement) Regulations 1992⁷, in which case it must be issued in the county court for the district⁸ in which the relevant dwelling⁹ is situated¹⁰;
- 1057 (3) the application is for a charging order over an interest in a fund in court¹¹, in which case it must be issued in the court in which the claim relating to that fund is or was proceeding¹²; or
- 1058 (4) the application is to enforce a judgment or order of the High Court and it is required¹³ to be made to a county court¹⁴.

Subject to these provisions, a judgment creditor may apply for a single charging order in respect of more than one judgment or order against the same debtor¹⁵.

1 le an application for a charging order under the Charging Orders Act 1979 s 1 or under the Council Tax (Administration and Enforcement) Regulations 1992, SI 1992/613, reg 50: see PARA 1471.

2 CPR 73.3(1).

3 As to the meaning of 'court' see PARA 22.

4 As to the meaning of 'judgment or order' see PARA 1226.

5 As to the transfer of proceedings generally see PARAS 66-73; as to the transfer of enforcement proceedings generally see PARA 1228; and as to the transfer of proceedings on the application see PARA 1478.

6 CPR 73.3(2)(a).

7 le under the under the Council Tax (Administration and Enforcement) Regulations 1992, SI 1992/613, reg 50: see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 321.

8 As to county court districts see **COURTS** vol 10 (Reissue) PARAS 707-708.

9 le the relevant dwelling as defined in the Council Tax (Administration and Enforcement) Regulations 1992, SI 1992/613, reg 50(3)(b): see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 321.

10 CPR 73.3(2)(b).

11 For these purposes, 'funds in court' includes securities held in court; and 'securities' means securities of any of the kinds specified in the Charging Orders Act 1979 s 2(2)(b) (see PARA 1468): CPR 73.1(2). 'Securities' as specified in the Charging Orders Act 1979 means (1) government stock; (2) stock of any body (other than a building society) incorporated within England and Wales; (3) stock of any body incorporated outside England and Wales or of any state or territory outside the United Kingdom, being stock registered in a register kept at any place within England and Wales; (4) units of any unit trust in respect of which a register of the unit holders is kept at any place within England and Wales: Charging Orders Act 1979 s 2(2)(b).

12 CPR 73.3(2)(c). As to funds in court see PARA 1548 et seq.

- 13 le by the Charging Orders Act 1979 s 1(2): see PARA 1469.
- 14 CPR 73.3(2)(d).
- 15 CPR 73.3(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/B. PROCEDURE ON APPLICATION FOR CHARGING ORDER/1473. Form and content of application notice.

1473. Form and content of application notice.

The application notice¹ must be in the form² and contain the information required by the relevant practice direction³. The application notice must contain the following information:

- 1059 (1) the name and address of the judgment debtor⁴;
- 1060 (2) details of the judgment or order⁵ sought to be enforced;
- 1061 (3) the amount of money remaining due under the judgment or order;
- 1062 (4) if the judgment debt is payable by instalments, the amount of any instalments which have fallen due and remain unpaid;
- 1063 (5) if the judgment creditor⁶ knows of the existence of any other creditors of the judgment debtor, their names and (if known) their addresses;
- 1064 (6) identification of the asset or assets⁷ which it is intended to charge;
- 1065 (7) details of the judgment debtor's interest in the asset; and
- 1066 (8) the names and addresses of the persons on whom an interim charging order must⁸ be served⁹.

The application notice must be verified by a statement of truth¹⁰.

1 As to issuing the application see PARA 1472.

2 An application for a charging order must be made by filing an application notice in Practice Form N379 if the application relates to land, or N380 if the application relates to securities: *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 1.1; and see *The Civil Court Practice*. As to the use of the forms listed in *Practice Direction--Forms* PD 4 para 3, Table 1 see PARA 14.

3 CPR 73.3(4)(a).

4 As to the meaning of 'judgment debtor' see PARA 1236.

5 As to the meaning of 'judgment or order' see PARA 1226.

6 As to the meaning of 'judgment creditor' see PARA 1236.

7 A judgment creditor may apply in a single application notice for charging orders over more than one asset, but if the court makes interim charging orders over more than one asset, it will draw up a separate order relating to each asset: *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 1.3. As to interim charging orders see PARA 1474.

8 I.e. under CPR 73.5(1): see PARA 1475.

9 *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 1.2. As to the meaning of 'service' see PARA 138 note 2.

10 CPR 73.3(4)(b). As to statements of truth see PARA 613.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/B. PROCEDURE ON APPLICATION FOR CHARGING ORDER/1474. Making of interim charging order.

1474. Making of interim charging order.

An application for a charging order¹ will initially be dealt with by a judge² without a hearing³. The judge may make an order (an 'interim charging order') imposing a charge over the judgment debtor's⁴ interest in the asset to which the application relates⁵ and fixing a hearing to consider whether to make a final charging order⁶.

1 As to issuing the application see PARA 1472.

2 As to the meaning of 'judge' see PARA 49.

3 CPR 73.4(1).

4 As to the meaning of 'judgment debtor' see PARA 1236.

5 If the court makes interim charging orders over more than one asset, it will draw up a separate order relating to each asset: see *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 1.3; and PARA 1473 note 7.

6 CPR 73.4(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/B. PROCEDURE ON APPLICATION FOR CHARGING ORDER/1475. Service of interim order.

1475. Service of interim order.

Copies of the interim charging order¹, the application notice² and any documents filed³ in support of it must, not less than 21 days before the hearing, be served⁴ on the following persons⁵:

- 1067 (1) the judgment debtor⁶;
- 1068 (2) such other creditors as the court⁷ directs⁸;
- 1069 (3) if the order relates to an interest under a trust, such of the trustees as the court directs⁹;
- 1070 (4) if the interest charged is in securities¹⁰ other than securities held in court, then:
29
- 48. (a) in the case of stock for which the Bank of England keeps the register, the Bank of England;
- 49. (b) in the case of government stock to which head (a) above does not apply, the keeper of the register;
- 50. (c) in the case of stock of any body incorporated within England and Wales, that body;
- 51. (d) in the case of stock of any body incorporated outside England and Wales or of any state or territory outside the United Kingdom, which is registered in a register kept in England and Wales, the keeper of that register;
- 52. (e) in the case of units of any unit trust¹¹ in respect of which a register of the unit holders is kept in England and Wales, the keeper of that register¹²; and
30
- 1071 (5) if the interest charged is in funds in court¹³, the Accountant General at the Court Funds Office¹⁴.

If the judgment creditor¹⁵ serves the order, he must either file a certificate of service¹⁶ not less than two days before the hearing or produce a certificate of service at the hearing¹⁷.

1 As to making the interim charging order see PARA 1474.

2 As to the form and contents of the application notice see PARA 1473.

3 As to the meaning of 'filing' see PARA 1832 note 8.

4 As to the meaning of 'service' see PARA 138 note 2.

5 CPR 73.5(1).

6 CPR 73.5(1)(a). As to the meaning of 'judgment debtor' see PARA 1236. Where the judgment debtor is a partnership, the specified documents must be served on (1) a member of the partnership within the jurisdiction; (2) a person authorised by a partner; or (3) some other person having the control or management of the partnership business: *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 4A.2.

7 As to the meaning of 'court' see PARA 22.

8 CPR 73.5(1)(b).

- 9 CPR 73.5(1)(c).
- 10 As to the meaning of 'securities' see PARA 1472 note 11.
- 11 'Unit trust' is not defined for these purposes; but cf PARA 1468 note 18.
- 12 CPR 73.5(1)(d).
- 13 As to the meaning of 'funds in court' see PARA 1472 note 11.
- 14 CPR 73.5(1)(e). As to the Accountant General and the Court Funds Office see **COURTS** vol 10 (Reissue)
PARAS 643, 663; PARA 1548 et seq.
- 15 As to the meaning of 'judgment creditor' see PARA 1236.
- 16 As to certificates of service see PARA 154.
- 17 CPR 73.5(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/B. PROCEDURE ON APPLICATION FOR CHARGING ORDER/1476. Effect of interim order in relation to securities.

1476. Effect of interim order in relation to securities.

If a judgment debtor¹ disposes of his interest in any securities², while they are subject to an interim charging order³ which has been served⁴ on him, then so long as that order remains in force that disposition is not valid as against the judgment creditor⁵.

A person served with an interim charging order relating to securities which are not held in court⁶ must not, unless the court⁷ gives permission, permit any transfer of any of the securities or pay any dividend, interest or redemption payment relating to them⁸. If a person acts in breach of this prohibition, he will be liable to pay to the judgment creditor either the value of the securities transferred or the amount of the payment made (as the case may be) or, if less, the amount necessary to satisfy the debt in relation to which the interim charging order was made⁹.

1 As to the meaning of 'judgment debtor' see PARA 1236.

2 As to the meaning of 'securities' see PARA 1472 note 11.

3 As to making an interim charging order see PARA 1474.

4 As to service of the interim order see PARA 1475. As to the meaning of 'service' see PARA 138 note 2.

5 CPR 73.6(1).

6 I.e a person served under CPR 73.5(1)(d): see PARA 1475 head (4).

7 As to the meaning of 'court' see PARA 22.

8 CPR 73.6(2).

9 CPR 73.6(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/B. PROCEDURE ON APPLICATION FOR CHARGING ORDER/1477. Effect of interim order in relation to funds in court.

1477. Effect of interim order in relation to funds in court.

If a judgment debtor¹ disposes of his interest in funds in court² while they are subject to an interim charging order³ which has been served⁴ on him and on the Accountant General⁵, then so long as that order remains in force that disposition is not valid as against the judgment creditor⁶.

1 As to the meaning of 'judgment debtor' see PARA 1236.

2 As to the meaning of 'funds in court' see PARA 1472 note 11. As to funds in court see PARA 1548 et seq.

3 As to making an interim charging order see PARA 1474.

4 Ie served under CPR 73.5(1): see PARA 1475. As to the meaning of 'service' see PARA 138 note 2.

5 As to the Accountant General see **COURTS** vol 10 (Reissue) PARA 663; PARA 1548 et seq.

6 CPR 73.7.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/C. FURTHER CONSIDERATION OF THE APPLICATION/1478. Objection to the making of a final charging order.

C. FURTHER CONSIDERATION OF THE APPLICATION

1478. Objection to the making of a final charging order.

If any person objects to the court¹ making a final charging order², he must file³ and serve⁴ on the applicant written evidence stating the grounds of his objections, not less than seven days before the hearing⁵.

On an application by a judgment debtor⁶ who wishes to oppose an application for a charging order, the court may transfer it to the court for the district⁷ where the judgment debtor resides or carries on business, or to another court⁸.

1 As to the meaning of 'court' see PARA 22.

2 As to making a final charging order see PARA 1479.

3 As to the meaning of 'filing' see PARA 1832 note 8.

4 As to the meaning of 'service' see PARA 138 note 2.

5 CPR 73.8(1).

6 As to the meaning of 'judgment debtor' see PARA 1236.

7 As to county court districts see **COURTS** vol 10 (Reissue) PARAS 707-708.

8 *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/C. FURTHER CONSIDERATION OF THE APPLICATION/1479. Procedure at the hearing.

1479. Procedure at the hearing.

At the hearing the court¹ may:

- 1072 (1) make a final charging order confirming that the charge imposed by the interim charging order² is to continue, with or without modification;
- 1073 (2) discharge the interim charging order and dismiss the application;
- 1074 (3) decide any issues in dispute between the parties, or between any of the parties and any other person who objects to the court making a final charging order³; or
- 1075 (4) direct a trial of any such issues, and if necessary give directions⁴.

If the court makes a final charging order which charges securities⁵ other than securities held in court, the order will include a stop notice⁶ unless the court otherwise orders⁷.

Any order made at the hearing must be served⁸ on all the persons on whom the interim charging order was required to be served⁹.

The principles to be applied when the court is considering whether to make a charging order are discussed elsewhere in this title¹⁰.

1 As to the meaning of 'court' see PARA 22.

2 As to making the interim charging order see PARA 1474; and as to the effect of such an order see PARAS 1476-1477.

3 As to objecting to the making of a final order see PARA 1478.

4 CPR 73.8(2). As to the trial process see generally PARA 1109 et seq.

In determining whether the judgment debtor has a beneficial interest in property subject to an interim charging order, the initial burden of proof is on the judgment creditor; thereafter the burden rests with whichever side would lose on the basis of the weight of the evidence before the court: see *Nightingale Mayfair Ltd v Mehta* [1999] All ER (D) 1501 (second and third defendants claiming that they had acquired property for valuable consideration and that debtor had no beneficial interest in the property).

5 As to the meaning of 'securities' see PARA 1472 note 11.

6 As to stop notices see PARA 1492 et seq.

7 CPR 73.8(3).

8 As to the meaning of 'service' see PARA 138 note 2.

9 CPR 73.8(4). As to service of the interim order see PARA 1475.

10 See PARA 1470.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/D. ENFORCEMENT OF CHARGING ORDER/1480. Effect of charging order; in general.

D. ENFORCEMENT OF CHARGING ORDER

1480. Effect of charging order; in general.

Subject to the provisions of the Charging Orders Act 1979¹, a charge imposed by a charging order² has the like effect and is enforceable in the same courts and in the same manner as an equitable charge created by the debtor³ by writing under his hand⁴. The same principles apply with regard to a charging order made to secure the payment of council tax⁵.

The enforcement of a charging order by sale of the property is considered subsequently⁶.

Execution against land by a charging order is not complete until the interim order has become final⁷.

The holder of a charging order over a tenant's interest in land can apply for relief from forfeiture of the lease⁸.

1 See PARA 1467 et seq, PARA 1481 et seq.

2 As to the meaning of 'charging order' see PARA 1467.

3 As to the meaning of 'debtor' see PARA 1467.

4 Charging Orders Act 1979 s 3(4).

5 See the Council Tax (Administration and Enforcement) Regulations 1992, SI 1992/613, reg 51(3); and **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 321.

6 See PARA 1482.

7 See PARAS 1354-1355; and see *Coutts & Co v Clarke*[2002] BPIR 762, [2001] All ER (D) 385 (Dec); revsd in part [2002] EWCA Civ 943, [2002] BPIR 916, [2002] All ER (D) 98 (Jun).

8 See *Croydon (Unique) Ltd v Wright (Crombie intervening)* [2001] Ch 318, [1999] 4 All ER 257, CA; and **COURTS** vol 10 (Reissue) PARA 716. See further **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 619 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/D. ENFORCEMENT OF CHARGING ORDER/1481. Registration of charging orders affecting land.

1481. Registration of charging orders affecting land.

The Land Charges Act 1972 and the Land Registration Act 2002 apply in relation to charging orders¹ as they apply in relation to other orders or writs issued or made for the purpose of enforcing judgments². The registration of charges over land is discussed elsewhere in this work³.

1 As to the meaning of 'charging order' see PARA 1467.

2 Charging Orders Act 1979 s 3(2) (amended by the Land Registration Act 2002 s 133, Sch 11 para 15). Similar provision is made with regard to charging orders over land made to enforce the payment of a council tax liability: see the Council Tax (Administration and Enforcement) Regulations 1992, SI 1992/613, reg 51(5); and **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 321. As to the registration of writs and orders affecting land see generally PARA 1250.

3 See **LAND CHARGES**. As to constructive notice of a charging order see eg *Lloyds TSB Bank plc v Mesologgides (a bankrupt)* [1999] All ER (D) 1460.

Where an order under the Charging Orders Act 1979 s 1 imposing a charge for the purpose of enforcing a judgment, order or award has been, or has effect as if, registered under the Land Charges Act 1972 s 6, s 6(4) (effect of non-registration of writs and orders registrable under that section) does not apply to an order appointing a receiver made either (1) in proceedings for enforcing the charge; or (2) by way of equitable execution of the judgment, order or award or, as the case may be, of so much of it as requires payment of moneys secured by the charge: Supreme Court Act 1981 s 37(5); and see the County Courts Act 1984 s 107(3). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to receivers see generally **RECEIVERS**; and as to receivers by way of equitable execution see PARA 1497 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/D. ENFORCEMENT OF CHARGING ORDER/1482. Enforcement by sale.

1482. Enforcement by sale.

Subject to the provisions of any enactment, the court¹ may, upon a claim by a person who has obtained a charging order² over an interest in property³, order the sale of the property to enforce the charging order⁴. A claim for an order for sale under these provisions must be made to the court which made the charging order, unless that court does not have jurisdiction⁵ to make an order for sale⁶. A claim in the High Court for an order for sale of land to enforce a charging order must be started in Chancery Chambers at the Royal Courts of Justice or at a Chancery district registry⁷.

The claimant must use the procedure under Part 8 of the Civil Procedure Rules⁸. A copy of the charging order must be filed⁹ with the claim form¹⁰ and the claimant's written evidence must include the information required by the relevant practice direction¹¹. That written evidence must:

- 1076 (1) identify the charging order and the property sought to be sold;
- 1077 (2) state the amount in respect of which the charge was imposed and the amount due at the date of issue of the claim;
- 1078 (3) verify, so far as known, the debtor's title to the property charged;
- 1079 (4) state, so far as the claimant is able to identify¹², the names and addresses of any other creditors who have a prior charge or other security over the property and the amount owed to each such creditor;
- 1080 (5) give an estimate of the price which would be obtained on sale of the property;
- 1081 (6) if the claim relates to land, give details of every person who to the best of the claimant's knowledge is in possession of the property; and
- 1082 (7) if the claim relates to residential property, state whether a land charge of Class F¹³ or a notice of home rights¹⁴, has been registered and, if so, state on whose behalf the land charge or notice has been registered and that the claimant will serve notice of the claim on that person¹⁵.

A claim to enforce a charging order is not a claim to enforce a judgment but a claim to recover a sum due to the claimant as a secured creditor and, as such, the claimant is not restricted to recovering only six years' interest out of the proceeds of enforcing his security¹⁶. The costs of proceedings to enforce a charging order are payable out of the proceeds of sale of the property charged¹⁷. A prescribed sum may be allowed by way of fixed costs on the making of a final charging order and the court may also allow reasonable disbursements in respect of search fees and registration of the order¹⁸.

In the case of residential property occupied as a home, the court must consider whether the sale is justified under article 8(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms¹⁹ and in particular whether it is necessary for the protection of the rights of the judgment creditor. Special considerations apply with regard to a matrimonial home which is or may be the subject of proceedings for ancillary relief²⁰. The protection afforded to a person's home when a charging order is made to recover costs against a party in receipt of funding from the Legal Services Commission is discussed elsewhere in this title²¹.

- 1 As to the meaning of 'court' see PARA 22.
- 2 As to obtaining a charging order see PARA 1471 et seq.
- 3 As to the property which may be charged see PARA 1468.
- 4 CPR 73.10(1). For sample forms of orders for sale see *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 Appendix A. These are not prescribed forms of order and may be adapted or varied by the court to meet the requirements of individual cases: para 4.5. A charging order will be enforced notwithstanding that it is expressed in a foreign currency: *Carnegie v Giessen* [2005] EWCA Civ 191, [2005] 1 WLR 2511.
- 5 A claim under CPR 73.10 is a proceeding for the enforcement of a charge, and the County Courts Act 1984 s 23(c) (see **COURTS** vol 10 (Reissue) PARA 719) provides the extent of the county court's jurisdiction to hear and determine such proceedings: CPR 73.10(2) note; and see *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 4.1. The county court limit for the purposes of jurisdiction under s 23 is £30,000: see the County Courts Jurisdiction Order 1981, SI 1981/1123; and **COURTS** vol 10 (Reissue) PARA 710.
- 6 CPR 73.10(2).
- 7 *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 4.2. As to Chancery Chambers see PARA 53; and as to Chancery district registries see **COURTS** vol 10 (Reissue) PARA 646.
- 8 CPR 73.10(3). As to the 'Part 8 procedure' (ie the procedure under CPR Pt 8) see PARA 127 et seq.
- 9 As to the meaning of 'filing' see PARA 1832 note 8.
- 10 CPR 73.10(4).
- 11 CPR 73.10(5).
- 12 The claimant must take all reasonable steps to obtain this information before issuing the claim: *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 4.4.
- 13 As to Class F land charges see **LAND CHARGES** vol 26 (2004 Reissue) PARA 638.
- 14 Ie under the Family Law Act 1996 s 31(10), or under any provision of an Act which preceded that section: see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARAS 286-287.
- 15 *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 4.3.
- 16 See *Ezekiel v Orakpo* [1997] 1 WLR 340, CA; and **LIMITATION PERIODS** vol 68 (2008) PARA 1111.
- 17 See *Holder v APC Supperstone* [2000] 1 All ER 473, [1999] 47 LS Gaz R 34.
- 18 See CPR 45.6, Table 5; and PARA 1768.
- 19 Ie under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) art 8(2), now incorporated into domestic law by the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 8(2): see PARAS 5, 1235. See eg *Pickering v Wells* [2002] EWHC 273 (Ch), [2002] 2 FLR 798, [2002] All ER (D) 281 (May) (unless the situation falls within the Trusts of Land and Appointment of Trustees Act 1996 ss 14, 15 (see **TRUSTS** vol 48 (2007 Reissue) PARA 1038), the welfare and the needs of minors resident in the property need not be taken into account in deciding whether to enforce the charging order); *Mortgage Corp v Shaire* [2001] Ch 743, [2000] 2 FCR 222, [2000] 1 FLR 973 (the court now has greater flexibility than formerly as to how it exercises its jurisdiction on an application for an order for sale; it is not simply bound to order a sale in the absence of exceptional circumstances).
- 20 See eg *Harman v Glencross* [1986] Fam 81, [1986] 1 All ER 545, CA; *Austin-Fell v Austin-Fell* [1990] Fam 172, [1990] 2 All ER 455; and PARA 1470 note 8. The chargee is entitled to apply for a sale of the entire property, not merely of the debtor's beneficial interest: *Midland Bank plc v Pike* [1988] 2 All ER 434.
- 21 See PARA 1468 note 25.

UPDATE

1482 Enforcement by sale

NOTE 16--See *Yorkshire Bank Finance Ltd v Mulhall* [2008] EWCA Civ 1156, [2009] 2 All ER (Comm) 164.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/D. ENFORCEMENT OF CHARGING ORDER/1483. Enforcement of instalments order.

1483. Enforcement of instalments order.

The following provisions are not yet in force¹. Where (1) a debtor² is required to pay a sum of money in instalments under a judgment or order of the High Court or a county court (an 'instalments order'); and (2) a charge has been imposed by a charging order³ in respect of that sum, the charge may not be enforced⁴ unless there has been default in payment of an instalment under the instalments order⁵.

Rules of court may provide that, if there has been default in payment of an instalment, the charge may be enforced only in prescribed cases, and may limit the amounts for which, and the times at which, the charge may be enforced⁶. Except so far as otherwise provided by such rules of court, (a) the charge may be enforced, if there has been default in payment of an instalment, for the whole of the sum of money secured by the charge and the costs then remaining unpaid, or for such part as the court may order; but (b) the charge may not be enforced unless, at the time of enforcement, the whole or part of an instalment which has become due under the instalments order remains unpaid⁷.

1 The Charging Orders Act 1979 s 3(4A)-(4E) is added, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 s 93(1), (3). At the date at which this title states the law, no such day had been appointed.

2 As to the meaning of 'debtor' see PARA 1467.

3 As to obtaining a charging order see PARA 1471 et seq.

4 In the Charging Orders Act 1979 s 3(4C)-(4E) references to the enforcement of a charge are to the making of an order for the enforcement of the charge: s 3(4B) (as added: see note 1).

5 Charging Orders Act 1979 s 3(4A), (4C) (as added: see note 1).

6 Charging Orders Act 1979 s 3(4D) (as added: see note 1).

7 Charging Orders Act 1979 s 3(4E) (as added: see note 1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/E. DISCHARGE OR VARIATION OF CHARGING ORDER/1484. Power to discharge or vary order.

E. DISCHARGE OR VARIATION OF CHARGING ORDER

1484. Power to discharge or vary order.

The court by which a charging order¹ was made may at any time, on the application of the debtor² or of any person interested in any property³ to which the order relates, make an order discharging or varying the charging order⁴. Where a charging order has been protected by an entry registered under the Land Charges Act 1972 or the Land Registration Act 1925 (prospectively repealed and replaced by the Land Registration Act 2002)⁵, an order discharging the charging order may direct that the entry be cancelled⁶.

Similar provision is made with respect to the discharge or variation of a charging order made to enforce the payment of a council tax liability⁷.

1 As to the meaning of 'charging order' see PARA 1467.

2 As to the meaning of 'debtor' see PARA 1467.

3 The interested persons have to have some form of interest, such as a proprietary right or something akin to that, whereby legal rights and liabilities are directly affected by the charging order: *Banque Nationale de Paris plc v Montman Ltd*[2000] 1 BCLC 576, [1999] All ER (D) 837 (unsecured creditor had no interest in the property for these purposes, not even a contingent right, and thus no standing to bring an application). As to property that may be charged see PARA 1468.

4 Charging Orders Act 1979 s 3(5).

5 As to the registration of charging orders affecting land see PARA 1481.

6 Charging Orders Act 1979 s 3(6) (amended by the Land Registration Act 2002 s 133, Sch 11 para 15).

7 See the Council Tax (Administration and Enforcement) Regulations 1992, SI 1992/613, reg 51(4), (6); and **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 321.

UPDATE

1484 Power to discharge or vary order

NOTE 4--Where a creditor has completed execution before a bankruptcy order is made is not to be deprived of his security by reason of the bankruptcy order: *Nationwide Building Society v Wright*[2009] EWCA Civ 811, [2010] 2 WLR 1097, [2009] All ER (D) 305 (Jul).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iii) Charging Orders/E. DISCHARGE OR VARIATION OF CHARGING ORDER/1485. Procedure on application to discharge or vary order.

1485. Procedure on application to discharge or vary order.

Any application to discharge or vary a charging order¹ must be made to the court² which made the charging order³. The court may direct that any interested person should be joined as a party to such an application or that the application should be served⁴ on any such person⁵.

An order discharging or varying a charging order must be served on all the persons on whom the charging order was required to be served⁶.

1 As to the court's power to discharge or vary a charging order see PARA 1484.

2 As to the meaning of 'court' see PARA 22.

3 CPR 73.9(1).

4 As to the meaning of 'service' see PARA 138 note 2.

5 CPR 73.9(2).

6 CPR 73.9(3). As to service of the charging order see PARA 1479.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iv) Stop Orders and Stop Notices/A. IN GENERAL/1486. Power to make relevant rules.

(iv) Stop Orders and Stop Notices

A. IN GENERAL

1486. Power to make relevant rules.

The power to make rules of court under the Civil Procedure Act 1997¹ includes power by any such rules to make provision for the High Court to make a stop order² on the application of any person claiming to be entitled to an interest in prescribed securities³ and for the service of a stop notice⁴ by any person claiming to be entitled to an interest in prescribed securities⁵. Rules of court made by virtue of this provision must prescribe the person or body on whom a copy of any stop order or a stop notice is to be served⁶. Any rules of court so made may include such incidental, supplemental and consequential provisions as the authority making them considers necessary or expedient, and may make different provision in relation to different cases or classes of case⁷.

Part 73 of the Civil Procedure Rules is partly made in the exercise of this power⁸.

1 le under the Civil Procedure Act 1997 s 1, Sch 1: see PARA 24.

2 As to the meaning of 'stop order' see PARA 1487.

3 'Prescribed securities' means securities (including funds in court) of a kind prescribed by rules of court made under the Charging Orders Act 1979 s 5: s 5(1). As to funds in court see PARA 1548 et seq. As to the securities in respect of which a stop order may be made see PARA 1472 note 11.

4 As to the meaning of 'stop notice' see PARA 1487.

5 Charging Orders Act 1979 s 5(2) (s 5(2) substituted, and s 5(4) amended, by SI 2002/439).

6 Charging Orders Act 1979 s 5(4) (as amended: see note 5).

7 Charging Orders Act 1979 s 5(5).

8 As to the scope and application of CPR Pt 73 see PARA 1471; and see PARA 1487 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iv) Stop Orders and Stop Notices/A. IN GENERAL/1487. Meaning of 'stop order' and 'stop notice'.

1487. Meaning of 'stop order' and 'stop notice'.

A 'stop order' means an order of the court prohibiting the taking, in respect of any of the securities specified in the order, of any of the steps mentioned below¹. Those steps are:

- 1083 (1) the registration of any transfer of the securities;
- 1084 (2) in the case of funds in court², the transfer, sale, delivery out, payment or other dealing with the funds, or of the income on them;
- 1085 (3) the making of any payment by way of dividend³, interest or otherwise in respect of the securities; and
- 1086 (4) in the case of a unit trust⁴, any acquisition of or other dealing with the units by any person or body exercising functions under the trust⁵.

A 'stop notice' means a notice requiring any person or body on whom it is duly served to refrain from taking, in respect of any of the securities specified in the notice, any of those steps without first notifying the person by whom, or on whose behalf, the notice was served⁶.

1 Charging Orders Act 1979 s 5(1).

2 As to funds in court see PARA 1548 et seq.

3 As to the meaning of 'dividend' see PARA 1468 note 22.

4 As to the meaning of 'unit trust' see PARA 1468 note 18.

5 Charging Orders Act 1979 s 5(5); and see CPR 73.11 ('stop order' means an order of the High Court not to take, in relation to funds in court or securities specified in the order, any of the steps listed in the Charging Orders Act 1979 s 5(5)). As to the meaning of 'securities' see PARA 1472 note 11.

6 Charging Orders Act 1979 s 5(1); and see CPR 73.16(a) ('stop notice' means a notice issued by the court which requires a person or body not to take, in relation to securities specified in the notice, any of the steps listed in the Charging Orders Act 1979 s 5(5), without first giving notice to the person who obtained the notice).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iv) Stop Orders and Stop Notices/B. STOP ORDERS/1488. Application for stop order.

B. STOP ORDERS

1488. Application for stop order.

The High Court may make a stop order¹ relating to funds in court², on the application of any person:

- 1087 (1) who has a mortgage or charge on the interest of any person in the funds;
or
- 1088 (2) to whom that interest has been assigned; or
- 1089 (3) who is a judgment creditor³ of the person entitled to that interest⁴,

or may make a stop order relating to securities⁵ other than securities held in court, on the application of any person claiming to be beneficially entitled to an interest in the securities⁶.

An application for a stop order must be made either by application notice⁷ in existing proceedings or by Part 8 claim form⁸ if there are no existing proceedings in the High Court⁹. The application notice or claim form must be served¹⁰ on every person whose interest may be affected by the order applied for and on either the Accountant General at the Court Funds Office¹¹, if the application relates to funds in court, or on the specified person¹², if the application relates to securities other than securities held in court¹³.

1 As to the meaning of 'stop order' see PARA 1487.

2 As to the meaning of 'funds in court' see PARA 1472 note 11.

3 As to the meaning of 'judgment creditor' see PARA 1236.

4 CPR 73.12(1)(a).

5 As to the meaning of 'securities' see PARA 1472 note 11.

6 CPR 73.12(1)(b).

7 As to proceedings by application notice see CPR Pt 23; and PARA 303 et seq.

8 As to proceedings by Part 8 claim form see CPR Pt 8; and PARA 127 et seq.

9 CPR 73.13(2).

10 As to the meaning of 'service' see PARA 138 note 2.

11 As to the Accountant General and the Court Funds Office see **COURTS** vol 10 (Reissue) PARAS 643, 663; and PARA 1548 et seq.

12 Ie the person specified in CPR 73.5(1)(d): see PARA 1475 head (4) in the text.

13 CPR 73.12(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iv) Stop Orders and Stop Notices/B. STOP ORDERS/1489. Stop order relating to funds in court.

1489. Stop order relating to funds in court.

A stop order¹ relating to funds in court² must prohibit the transfer, sale, delivery out, payment or other dealing with the funds or any part of them or any income on the funds³.

1 As to the meaning of 'stop order' see PARA 1487.

2 As to the meaning of 'funds in court' see PARA 1472 note 11.

3 CPR 73.13.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iv) Stop Orders and Stop Notices/B. STOP ORDERS/1490. Stop order relating to securities.

1490. Stop order relating to securities.

A stop order¹ relating to securities² other than securities held in court may prohibit all or any of the following steps:

- 1090 (1) the registration of any transfer of the securities;
- 1091 (2) the making of any payment by way of dividend, interest or otherwise in respect of the securities; and
- 1092 (3) in the case of units of a unit trust³, any acquisition of or other dealing with the units by any person or body exercising functions under the trust⁴.

The order must specify the securities to which it relates, the name in which the securities stand, the steps which may not be taken and whether the prohibition applies to the securities only or to the dividends or interest as well⁵.

1 As to the meaning of 'stop order' see PARA 1487.

2 As to the meaning of 'securities' see PARA 1472 note 11.

3 'Unit trust' is not defined for these purposes, but cf PARA 1468 note 18.

4 CPR 73.14(1).

5 CPR 73.14(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iv) Stop Orders and Stop Notices/B. STOP ORDERS/1491. Variation or discharge of order.

1491. Variation or discharge of order.

The court¹ may, on the application of any person claiming to have a beneficial interest in the funds or securities² to which a stop order³ relates, make an order discharging or varying the order⁴.

An application notice seeking the variation or discharge of a stop order must be served⁵ on the person who obtained the order⁶.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'securities' see PARA 1472 note 11.

3 As to the meaning of 'stop order' see PARA 1487.

4 CPR 73.15(1).

5 As to the meaning of 'service' see PARA 138 note 2.

6 CPR 73.15(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iv) Stop Orders and Stop Notices/C. STOP NOTICES/1492. Request for stop notice.

C. STOP NOTICES

1492. Request for stop notice.

The High Court may, on the request of any person claiming to be beneficially entitled to an interest in securities¹, issue a stop notice². A stop notice may also be included in a final charging order³, by either the High Court or a county court⁴.

A request for a stop notice must be made by filing⁵ a draft stop notice⁶ and written evidence which identifies the securities in question, describes the applicant's interest in the securities and gives an address for service⁷ for the applicant⁸. If a court officer⁹ considers that the request complies with these requirements, he will issue a stop notice¹⁰.

The applicant must serve copies of the stop notice and his written evidence on the person to whom the stop notice is addressed¹¹.

1 For these purposes, 'securities' does not include securities held in court (CPR 73.16(b)) but otherwise includes securities of any of the kinds specified in the Charging Orders Act 1979 s 2(2)(b) (see PARA 1468) (CPR 73.1(2)(d)).

2 CPR 73.17(1). As to the meaning of 'stop notice' see PARA 1487.

3 As to final charging orders see PARA 1479.

4 See CPR 73.8(3); and PARA 1479.

5 As to the meaning of 'filing' see PARA 1832 note 8.

6 For a sample form of stop notice see *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD 73 para 5, Appendix B.

7 As to the meaning of 'service' see PARA 138 note 2.

8 CPR 73.17(2).

9 As to the meaning of 'court officer' see PARA 49 note 3.

10 CPR 73.17(3).

11 CPR 73.17(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iv) Stop Orders and Stop Notices/C. STOP NOTICES/1493. Effect of stop notice.

1493. Effect of stop notice.

A stop notice¹ takes effect when it is duly served² and remains in force unless it is withdrawn³ or discharged⁴.

While a stop notice is in force, the person on whom it is served must not register a transfer of the securities⁵ described in the notice or take any other step restrained by the notice, without first giving 14 days' notice to the person who obtained the stop notice⁶. He must not, however, by reason only of the notice, refuse to register a transfer or to take any other step after he has given the 14 days' notice and that period has expired⁷.

1 As to the meaning of 'stop notice' see PARA 1487.

2 Is served in accordance with CPR 73.17(4): see PARA 1492. As to the meaning of 'service' see PARA 138 note 2.

3 Is withdrawn in accordance with CPR 73.20: see PARA 1495.

4 CPR 73.18(1). As to the discharge of a stop notice see CPR 73.21; and PARA 1496.

5 As to the meaning of 'securities' for these purposes see PARA 1492 note 1.

6 CPR 73.18(2)(a).

7 CPR 73.18(2)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iv) Stop Orders and Stop Notices/C. STOP NOTICES/1494. Amendment of stop notice.

1494. Amendment of stop notice.

If any securities¹ are incorrectly described in a stop notice² which has been obtained and served³, the applicant may request⁴ an amended stop notice⁵. The amended stop notice takes effect when it is served⁶.

1 As to the meaning of 'securities' for these purposes see PARA 1492 note 1.

2 As to the meaning of 'stop notice' see PARA 1487.

3 Ie in accordance with CPR 73.17: see PARA 1492. As to the meaning of 'service' see PARA 138 note 2.

4 Ie in accordance with CPR 73.17: see PARA 1492.

5 CPR 73.19(1).

6 CPR 73.19(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iv) Stop Orders and Stop Notices/C. STOP NOTICES/1495. Withdrawal of stop notice.

1495. Withdrawal of stop notice.

A person who has obtained a stop notice¹ may withdraw it by serving² a request for its withdrawal on the person or body on whom the stop notice was served and the court³ which issued the stop notice⁴. The request must be signed by the person who obtained the stop notice, and his signature must be witnessed by a practising solicitor⁵.

1 As to the meaning of 'stop notice' see PARA 1487.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'court' see PARA 22.

4 CPR 73.20(1).

5 CPR 73.20(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(iv) Stop Orders and Stop Notices/C. STOP NOTICES/1496. Discharge or variation of stop notice.

1496. Discharge or variation of stop notice.

The court¹ may, on the application of any person claiming to be beneficially entitled to an interest in the securities² to which a stop notice³ relates, make an order discharging or varying the notice⁴.

An application to discharge or vary a stop notice must be made to the court which issued the notice⁵. The application notice must be served⁶ on the person who obtained the stop notice⁷.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'securities' for these purposes see PARA 1492 note 1.

3 As to the meaning of 'stop notice' see PARA 1487.

4 CPR 73.21(1).

5 CPR 73.21(2).

6 As to the meaning of 'service' see PARA 138 note 2.

7 CPR 73.21(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(v) Appointment of Receiver by way of Equitable Execution/A. JURISDICTION TO GRANT REMEDY/1497. The nature of equitable execution.

(v) Appointment of Receiver by way of Equitable Execution

A. JURISDICTION TO GRANT REMEDY

1497. The nature of equitable execution.

Equitable execution originated in the old practice of the Court of Chancery to assist in enforcing a judgment for the recovery of money of a court of ordinary jurisdiction by entertaining an application for the appointment of a receiver of such of the interests in the judgment debtor's property as could not, owing to their nature, be taken under a common law writ of execution¹.

Jurisdiction was given by the Supreme Court of Judicature Act 1873² to all Divisions of the High Court³ to appoint a receiver in all cases in which it appeared just or convenient to do so; but this jurisdiction was in practice limited by the former practice of the Court of Chancery, and before the Administration of Justice Act 1956⁴, as a general rule, a receiver was only appointed by way of equitable execution in such circumstances as would have enabled the Court of Chancery before the Judicature Acts to have interfered by way of injunction or receiver at the suit of a judgment creditor⁵. Equitable execution is not, strictly speaking, execution at all, but is a mode of equitable relief⁶. It is, however, a method of enforcing a judgment or order and so leave is necessary before applying for equitable execution if the case comes within the provisions of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951⁷.

1 See the observations of Jessel MR in *Anglo-Italian Bank v Davies* (1878) 9 ChD 275 at 283 et seq, CA, and in *Salt v Cooper* (1880) 16 ChD 544 at 552, CA; and of Davey LJ in *Harris v Beauchamp Bros* [1894] 1 QB 801 at 807 et seq, CA. Whenever equitable interests in property could not be reached by writs of execution issuable by the courts of common law by reason of prior or outstanding legal estates or interests, such as satisfied terms (*Kirby v Dillon* (1824) 2 LJOS Ch 140), courts of equity gave relief by regarding those prior or outstanding estates or interests as incumbrances which a judgment creditor had the right to institute a suit to remove (*Neate v Duke of Marlborough* (1838) 3 My & Cr 407; *Anglo-Italian Bank v Davies* (1878) 9 ChD 275, CA). This suit was one for redemption, and in it the court could appoint a receiver and grant injunctions by way of ancillary relief. It may be advisable still in cases where the prior or outstanding legal incumbrancers are numerous or their accounts intricate, or it is desired to challenge them, to have recourse to such an action (now known as a 'claim'): *Beckett v Buckley* (1874) LR 17 Eq 435; *Wells v Kilpin* (1874) LR 18 Eq 298; and see *Proskauer v Siebe* [1885] WN 159.

2 Supreme Court of Judicature Act 1873 s 25(8) (repealed and replaced by the Supreme Court of Judicature (Consolidation) Act 1925 s 45(1), itself now repealed and replaced by the Supreme Court Act 1981 s 37(1): see PARA 1498). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

3 Jurisdiction was also given to county courts: *R v Lincolnshire County Court Judge* (1887) 20 QBD 167, DC; *R v Selfe* [1908] 2 KB 121. See now the County Courts Act 1984 s 38; and **COURTS** vol 10 (Reissue) PARA 711. As to the general jurisdiction to appoint receivers see **RECEIVERS**. As to receivers of partnership property see **PARTNERSHIP** vol 79 (2008) PARA 162 et seq; **RECEIVERS**. As to receivers appointed under debentures see **COMPANIES** vol 15 (2009) PARA 1340 et seq.

4 The Administration of Justice Act 1956 s 36 (repealed). See now the Supreme Court Act 1981 s 37(4); the County Courts Act 1984 s 107(1), (2); and PARA 1498.

5 *Aslatt v Southampton Corpn* (1880) 16 ChD 143; *Manchester and Liverpool District Banking Co v Parkinson* (1888) 22 QBD 173, CA; *Holmes v Millage* [1893] 1 QB 551, CA; *Harris v Beauchamp Bros* [1894] 1 QB

801, CA; *Cadogan v Lyric Theatre Ltd*[1894] 3 Ch 338, CA; *Edwards & Co Ltd v Picard*[1909] 2 KB 903, CA (Fletcher Moulton LJ dissenting); *Morgan v Hart*[1914] 2 KB 183, CA.

6 *Re Shephard, Atkins v Shephard*(1889) 43 ChD 131, CA; *Norburn v Norburn*[1894] 1 QB 448, DC; *Thompson v Gill*[1903] 1 KB 760, CA; *Wills v Luff*(1888) 38 ChD 197; *Levasseur v Mason and Barry*[1891] 2 QB 73, CA; *Holmes v Millage*[1893] 1 QB 551, CA; *Morgan v Hart*[1914] 2 KB 183, CA; *Re A Company*[1915] 1 Ch 520, CA; and see *Allied Irish Bank v Ashford Hotels Ltd, Ashford Hotels Ltd v Higgins*[1997] 3 All ER 309, CA. The appointment of a receiver, however, may be a 'taking in execution' within the meaning of a forfeiture clause (*Blackman v Fysh*[1892] 3 Ch 209, CA), and was a 'delivery in execution' of land within the Judgments Act 1864 (repealed). See also *Hatton v Haywood*(1874) 9 Ch App 229.

7 See PARA 1241.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(v) Appointment of Receiver by way of Equitable Execution/A. JURISDICTION TO GRANT REMEDY/1498. Equitable execution against land and interests in land.

1498. Equitable execution against land and interests in land.

The power of the High Court to appoint a receiver by way of equitable execution¹ operates in relation to all legal estates and interests in land². That power may be exercised in relation to an estate or interest in land whether or not a charge has been imposed on that land under the Charging Orders Act 1979³ for the purpose of enforcing the judgment, order or award in question⁴ and is in addition to, and not in derogation of, any power of any court to appoint a receiver in proceedings for enforcing such a charge⁵.

Similarly, the power of a county court to appoint a receiver by way of equitable execution⁶ operates in relation to all legal estates and interests in land⁷. That power may be exercised in relation to an estate or interest in land whether or not a charge has been imposed on that land under the Charging Orders Act 1979⁸ for the purpose of enforcing the judgment, decree, order or award in question, and is in addition to and not in derogation of any power of any court to appoint a receiver in proceedings for enforcing such a charge⁹.

An order appointing a receiver by way of equitable execution may be registered as a land charge¹⁰. Where, however, a charging order in respect of the land has been registered¹¹, an order appointing a receiver by way of equitable execution which has not been registered will not be avoided against the purchaser so far as the order requires payment of the money secured by the charge¹².

1 See the Supreme Court Act 1981 s 37(1), (2); and PARA 1501. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 Supreme Court Act 1981 s 37(4). As to receivers by way of equitable execution see PARA 1499 et seq.

3 Ie under the Charging Orders Act 1979 s 1: see PARAS 1467-1470.

4 Supreme Court Act 1981 s 37(4)(a).

5 Supreme Court Act 1981 s 37(4)(b).

6 As to the power of a county court to grant this and other equitable remedies see the County Courts Act 1984 s 38; and **COURTS** vol 10 (Reissue) PARA 711.

7 County Courts Act 1984 s 107(1).

8 See note 3.

9 County Courts Act 1984 s 107(2).

10 See the Land Charges Act 1972 s 6(1)(b); and **LAND CHARGES** vol 26 (2004 Reissue) PARA 654.

11 Ie under the Land Charges Act 1972 s 6: see **LAND CHARGES** vol 26 (2004 Reissue) PARA 654 et seq.

12 See the Supreme Court Act 1981 s 37(5); the County Courts Act 1984 s 107(3); and PARA 1481 note 3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(v) Appointment of Receiver by way of Equitable Execution/A. JURISDICTION TO GRANT REMEDY/1499. Equitable execution against other property.

1499. Equitable execution against other property.

The former practice was that equitable execution would only issue where there was no remedy by execution at law or such remedy was likely to be ineffective. There therefore had to be some impediment to the issue of execution in the ordinary course of law, whether by writ of fieri facias or warrant of execution, or by means of a third party debt order or charging order¹; but, subject to this, the remedy was available in the case of a judgment or order for the payment of a sum of money², or, in lieu of sequestration, to enforce an order for payment of money into court³, and was not necessarily confined to the equitable interests of the judgment debtor⁴. In a proper case the court might appoint a receiver even though the legal remedy against the judgment debtor's legal property had not been exhausted⁵, but as a general rule a receiver would not be appointed if a method of legal execution was available⁶.

A receiver may now be appointed in all cases in which it appears to the court to be just and convenient to do so⁷.

1 See the cases cited in PARA 1497 notes 1, 5.

2 *Oliver v Lowther* (1880) 42 LT 47 (alimony). No money was payable under an order for foreclosure absolute: *Wills v Luff* (1888) 38 ChD 197.

3 In notwithstanding that sequestration was the appropriate remedy: *Stanger Leathes v Stanger Leathes* [1882] WN 71; *Re Whiteley, Whiteley v Learoyd* (1887) 56 LT 846; *Re Coney, Coney v Bennett* (1885) 29 ChD 993; *Re Pemberton, Pemberton v Royal Hospital for Incurables* [1907] WN 118. As to sequestration see PARAS 1269, 1313, 1380 et seq.

4 A receiver has been appointed of a legal interest in land which could not conveniently be taken under a writ of elegit (now abolished) (*Re Pope* (1886) 17 QBD 743, CA); see also *Orr v Grierson* (1890) 28 LR Ir 20, CA (gales or head rents); *Pease v Fletcher* (1875) 1 ChD 273.

5 *Hills v Webber* (1901) 17 TLR 513, CA. It appears to have been held that the fact that there was other property of the judgment debtor which might be taken in legal execution was immaterial in regard to the granting of equitable execution by the appointment of a receiver over property which could not be reached by legal execution: *Willis v Cooper, Slattery v Cooper* (1900) 44 Sol Jo 698; but see *Manchester and Liverpool District Banking Co v Parkinson* (1888) 22 QBD 173, CA. When judgment debtors were out of the jurisdiction, and it was impossible to prove the amounts of debts due to them in order to found garnishee proceedings (now proceedings for a third party debt order: see PARA 1411 et seq), the court appointed a receiver by way of equitable execution: *Goldschmidt v Oberrheinische Metallwerke* [1906] 1 KB 373, CA.

6 See *Harris v Beauchamp Bros* [1894] 1 QB 801, CA; *Willis v Cooper, Slattery v Cooper* (1900) 44 Sol Jo 698; *Manchester and Liverpool District Banking Co v Parkinson* (1888) 22 QBD 173, CA; *Re Shephard, Atkins v Shephard* (1889) 43 ChD 131, CA; *Goldschmidt v Oberrheinische Metallwerke* [1906] 1 KB 373, CA; *Holmes v Millage* [1893] 1 QB 551, CA; *Edwards & Co Ltd v Picard* [1909] 2 KB 903, CA; *Hills v Webber* (1901) 17 TLR 513, CA; *Morgan v Hart* [1914] 2 KB 183, CA.

7 See PARA 1501.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(v) Appointment of Receiver by way of Equitable Execution/A. JURISDICTION TO GRANT REMEDY/1500. Receiver of salaries and pensions.

1500. Receiver of salaries and pensions.

A receiver may be appointed of the salary of a public servant which is actually due¹, but not of salary which is not due, when the salary cannot be assigned². Where a pension has been made inalienable, either by statute or the voluntary act of the pensioner, a receiver of it cannot be appointed³, but where the pension is not inalienable a receiver may be appointed⁴.

1 *Picton v Cullen* [1900] 2 IR 612, CA.

2 Cf PARA 1411 et seq, where a similar problem in relation to third party debt orders is discussed. Salaries which cannot be assigned and the reasons for restrictions are discussed in **CHOSER IN ACTION** vol 13 (2009) PARA 94 et seq; and see *Re Huggins, ex p Huggins* (1882) 21 ChD 85, CA; *Re Mirams* [1891] 1 QB 594. It has been held that the salary of a clerk of petty sessions in Ireland, who was a public and judicial officer (*M'Creery v Bennett* [1904] 2 IR 69), and the salary of an assistant parliamentary counsel to the Treasury (*Cooper v Reilly* (1829) 2 Sim 560), and the salary of a clerk of the peace (*Palmer v Bate* (1821) 2 Brod & Bing 673) could be assigned. A pension granted partly for some continuing duty or service cannot be assigned: *Wells v Foster* (1841) 8 M & W 149. It is doubtful whether the salary of a member of Parliament can be taken in equitable execution: *Hollinshead v Hazleton* [1916] 1 AC 428, HL. See also **RECEIVERS**.

3 *Lucas v Harris* (1886) 18 QBD 127, CA; *Crowe v Price* (1889) 22 QBD 429, CA. A receiver may be appointed in respect of a sum arising from commutation of an officer's retired pay (*Crowe v Price* (1889) 22 QBD 429, CA), but not of a purely voluntary gratuity from the employer (*Timothy v Day* [1908] 2 IR 26).

4 *Manning v Mullins* [1898] 2 IR 34, CA; *Molony v Cruise* (1892) 30 LR Ir 99.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(v) Appointment of Receiver by way of Equitable Execution/A. JURISDICTION TO GRANT REMEDY/1501. Where a receiver may be appointed.

1501. Where a receiver may be appointed.

The High Court or a county court¹ may by order² appoint a receiver in all cases in which it appears to the court to be just and convenient to do so³. Any such order may be made either unconditionally or on such terms and conditions as the court thinks just⁴.

The court has jurisdiction to appoint a receiver for the purposes of enforcing a judgment in cases other than those in which it was the practice of the Court of Chancery before the Judicature Acts to appoint a receiver by way of equitable execution, and may appoint a receiver in respect of future debts not yet accrued⁵. However, it has been stated that the jurisdiction to grant the remedy should be exercised with additional caution following the coming into force of the Human Rights Act 1998⁶.

A receiver must be an individual⁷. A receiver will not be appointed over another receiver: the proper order in such a case would seem to be for the extension of the power of the receiver already appointed⁸. The court may at any time terminate the appointment of a receiver and appoint another receiver in his place⁹.

1 As to the remedies available in county courts see the County Courts Act 1984 s 38, which provides that subject to certain exceptions and to provision made by regulations, a county court may make any order which could be made by the High Court if the proceedings in question were in the High Court; and **COURTS** vol 10 (Reissue) PARA 711.

2 The order may be interim or final: see the Supreme Court Act 1981 s 37(1). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. The statutory wording is 'interlocutory' but the Civil Procedure Rules refer to 'interim' rather than 'interlocutory' orders. As to the application of the CPR see PARAS 32, 1225.

3 Supreme Court Act 1981 s 37(1). CPR Pt 69 contains provisions about the court's power to appoint a receiver (CPR 69.1(1)); and 'receiver' includes a manager (CPR 69.1(2)). The court may appoint a receiver (1) before proceedings have started; (2) in existing proceedings; or (3) on or after judgment: CPR 69.2(1). As to application for the appointment of a receiver before proceedings are started see *Practice Direction--Court's Power to Appoint a Receiver* PD 69 paras 2.1, 2.2; and see generally **RECEIVERS**. As to the meaning of 'court' see PARA 22.

4 Supreme Court Act 1981 s 37(2).

5 For recent examples see *Soinco SACI v Novokuznetsk Aluminium Plant* [1998] QB 406, [1997] 3 All ER 523; affd [1998] 2 Lloyd's Rep 337, CA; and *Masri v Consolidated Contractors International Co SAL* [2008] EWCA Civ 303, [2008] 2 Lloyd's Rep 128, [2008] All ER (D) 69 (Apr).

6 See *Ranson v Ranson* [2001] EWCA Civ 1929 at [39], [2002] 1 FCR 261, [2001] All ER (D) 166 (Dec) per Thorpe LJ, in the context of matrimonial proceedings where there had not been any previous failure to comply with a court order ('Post the advent of the Human Rights Act 1998 I consider that additional restraint has been imposed on the use of an equitable power the simultaneous adoption of which seems to assume defiance before any opportunity is given for compliance').

7 CPR 69.2(2).

8 *Valle v O'Reilly* (1824) 1 Hog 199. See also **RECEIVERS**.

9 CPR 69.2(3).

UPDATE

1501 Where a receiver may be appointed

NOTE 5--*Masri*, cited, reported at [2009] QB 450.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(v) Appointment of Receiver by way of Equitable Execution/B. PROCEDURE ON APPLICATION/1502. Application for appointment of receiver by way of equitable execution.

B. PROCEDURE ON APPLICATION

1502. Application for appointment of receiver by way of equitable execution.

An application for the appointment of a receiver may be made without notice and must be supported by written evidence¹. If a person applies at the same time for the appointment of a receiver and a related injunction², he must use the same claim form or application notice for both applications³.

The written evidence in support of an application for the appointment of a receiver must explain the reasons why the appointment is required⁴ and give details of the property which it is proposed that the receiver should get in or manage, including estimates of the value of the property and the amount of income it is likely to produce⁵. Additionally, the evidence in support of an application for the appointment of a receiver by way of equitable execution must give details of:

- 1093 (1) the judgment which the applicant is seeking to enforce;
- 1094 (2) the extent to which the debtor has failed to comply with the judgment;
- 1095 (3) the result of any steps already taken to enforce the judgment; and
- 1096 (4) why the judgment cannot be enforced by any other method⁶.

If the applicant is asking the court⁷ to allow the receiver to act without giving security⁸ or before he has given security or satisfied the court that he has security in place, the written evidence in support of the application must explain the reasons why that is necessary⁹.

In addition, the written evidence should normally identify an individual whom the court is to be asked to appoint as receiver (the 'nominee'), and should:

- 1097 (a) state the name, address and position of the nominee;
- 1098 (b) include written evidence by a person who knows the nominee, stating that he believes the nominee is a suitable person to be appointed as receiver, and the basis of that belief; and
- 1099 (c) be accompanied by written consent, signed by the nominee, to act as receiver if appointed¹⁰.

If the applicant does not nominate a person to be appointed as receiver, or if the court decides not to appoint the nominee, the court may order that a suitable person be appointed as receiver and direct any party to nominate a suitable individual to be appointed¹¹.

1 CPR 69.3(a), (b).

2 As to the meaning of 'injunction' see PARA 315 note 2.

3 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 3.1. A master or district judge may grant an injunction related to an order appointing a receiver by way of equitable execution: see para 3.2; *Practice Direction--Allocation of Cases to Levels of Judiciary* PD 2B paras 2.3(c), 8.1(c); and see PARAS 50, 62. As

to High Court masters see **COURTS** vol 10 (Reissue) PARAS 654-657; and as to district judges see **COURTS** vol 10 (Reissue) PARA 661 (High Court), PARA 728 et seq (county courts).

4 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 4.1(1).

5 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 4.1(2).

6 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 4.1(3).

7 As to the meaning of 'court' see PARA 22.

8 As to giving security see PARA 1504.

9 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 4.1(4).

10 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 4.2.

11 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 4.3. A party directed to nominate a person to be appointed as receiver must file written evidence containing the information required by para 4.2 (see heads (a)-(c) in the text) and accompanied by the written consent of the nominee: para 4.4. As to the meaning of 'filing' see PARA 1832 note 8.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(v) Appointment of Receiver by way of Equitable Execution/B. PROCEDURE ON APPLICATION/1503. Considerations governing appointment.

1503. Considerations governing appointment.

Where a judgment creditor applies for the appointment of a receiver as a method of enforcing a judgment¹, in considering whether to make the appointment the court² will have regard to (1) the amount claimed by the judgment creditor; (2) the amount likely to be obtained by the receiver; and (3) the probable costs of his appointment³.

The court may give directions to the receiver when it appoints him or at any time afterwards⁴. When it appoints a receiver, the court will normally give directions in relation to security⁵. Other matters about which the court may give directions include:

- 1100 (a) whether, and on what basis, the receiver is to be remunerated for carrying out his functions⁶;
- 1101 (b) the preparation and service of accounts⁷;
- 1102 (c) the payment of money into court; and
- 1103 (d) authorising the receiver to carry on an activity or incur an expense⁸.

A foreign judgment cannot be enforced by the appointment of a receiver unless an English judgment against the defendant has been obtained on the basis of it or it has been registered under the provisions referred to, and in accordance with the procedure set out, in Part 74 of the Civil Procedure Rules⁹.

1 As to making the application see PARA 1502.

2 As to the meaning of 'court' see PARA 22.

3 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 5.

4 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 6.1. Additionally, the receiver may apply to the court at any time for directions to assist him in carrying out his function as a receiver: CPR 69.6(1). As to the method of making such application see *Practice Direction--Court's Power to Appoint a Receiver* PD 69 paras 8.1-8.3; and see further **RECEIVERS**. The court, when it gives directions, may also direct the receiver to serve on any person the directions and the application for directions: CPR 69.6(2). As to the meaning of 'service' see PARA 138 note 2.

5 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 6.2. As to giving security see PARA 1504.

6 As to the remuneration of a receiver see PARA 1506.

7 As to accounts see PARA 1509.

8 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 6.3.

9 See *Perry v Zissis* [1977] 1 Lloyd's Rep 607, CA. As to the caution to be exercised in applying pre-CPR authorities see PARA 33 text and note 2. As to the registration of foreign judgments see PARA 1233; and **CONFLICT OF LAWS**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(v) Appointment of Receiver by way of Equitable Execution/B. PROCEDURE ON APPLICATION/1504. Giving of security by receiver.

1504. Giving of security by receiver.

The court¹ may direct that before a receiver begins to act or within a specified time he must either give such security as the court may determine² or file³ and serve⁴ on all parties to the proceedings evidence that he already has in force sufficient security⁵ to cover his liability for his acts and omissions as a receiver⁶. An order appointing a receiver will normally specify the date by which the receiver must give security or file and serve evidence to satisfy the court that he already has security in force⁷.

Unless the court directs otherwise, security will be given (1) if the receiver is an authorised insolvency practitioner, by the bond provided by him⁸ extended to cover appointment as a court appointed receiver; or (2) in any other case, by a guarantee⁹. Where the court has given directions about giving security, then either written evidence of the bond, the sufficiency of its cover and that it includes appointment as a court appointed receiver must be filed at court¹⁰ or a guarantee must be prepared in a form approved by the court and entered into with a clearing bank or insurance company so approved¹¹.

The court may terminate the appointment of the receiver if he fails to give the security or satisfy the court as to the security he has in force by the date specified¹².

1 As to the meaning of 'court' see PARA 22.

2 CPR 69.5(1)(a).

3 As to the meaning of 'filing' see PARA 1832 note 8.

4 As to the meaning of 'service' see PARA 138 note 2.

5 CPR 69.5(1)(b).

6 CPR 69.5(1).

7 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 7.1.

8 I.e. under the Insolvency Practitioners Regulations 1990, SI 1990/439 (revoked), or the Insolvency Practitioners Regulations 2005, SI 2005/524: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**.

9 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 7.2.

10 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 7.3(1).

11 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 7.3(2).

12 CPR 69.5(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(v) Appointment of Receiver by way of Equitable Execution/B. PROCEDURE ON APPLICATION/1505. Service of order appointing receiver.

1505. Service of order appointing receiver.

An order appointing a receiver must be served¹ by the party who applied for it² on the person appointed as receiver³. Unless the court⁴ orders otherwise, it must also be served on every other party to the proceedings⁵. Additionally, it must be served on such other persons as the court may direct⁶.

1 As to the meaning of 'service' see PARA 138 note 2.

2 As to application for the order see PARA 1502.

3 CPR 69.4(a).

4 As to the meaning of 'court' see PARA 22.

5 CPR 69.4(b).

6 CPR 69.4(c).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(v) Appointment of Receiver by way of Equitable Execution/B. PROCEDURE ON APPLICATION/1506. Remuneration of receiver.

1506. Remuneration of receiver.

A receiver may only charge for his services if the court¹ so directs and specifies the basis on which the receiver is to be remunerated². The court may specify who is to be responsible for paying the receiver and the fund or property from which the receiver is to recover his remuneration³. If the court directs that the amount of a receiver's remuneration is to be determined by the court, the receiver may not recover any remuneration for his services without such a determination⁴ and the receiver or any party may apply at any time for such a determination to take place⁵. An application by a receiver for the amount of his remuneration to be determined must be supported by:

- 1104 (1) written evidence showing on what basis the remuneration is claimed and that it is justified and in accordance with Part 69 of the Civil Procedure Rules; and
- 1105 (2) a certificate signed by the receiver that he considers that the remuneration he claims is reasonable and proportionate⁶.

Unless the court orders otherwise, in determining the remuneration of a receiver the court must award such sum as is reasonable and proportionate in all the circumstances and which takes into account:

- 1106 (a) the time properly given by him and his staff to the receivership;
- 1107 (b) the complexity of the receivership;
- 1108 (c) any responsibility of an exceptional kind or degree which falls on the receiver in consequence of the receivership;
- 1109 (d) the effectiveness with which the receiver appears to be carrying out, or to have carried out, his duties; and
- 1110 (e) the value and nature of the subject matter of the receivership⁷.

Before determining the amount of a receiver's remuneration, the court may require him to provide further evidence in support of his claim and may appoint an assessor⁸ to assist the court⁹. The court may also refer the determination of a receiver's remuneration to a costs judge¹⁰.

The provisions set out above¹¹ do not apply to expenses incurred by a receiver in carrying out his functions. These are accounted for as part of his account for the assets he has recovered, and not dealt with as part of the determination of his remuneration¹².

1 As to the meaning of 'court' see PARA 22.

2 CPR 69.7(1); and see *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 9.1.

3 CPR 69.7(2).

4 CPR 69.7(3)(a); and see *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 9.3.

5 CPR 69.7(3)(b).

6 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 9.4.

7 CPR 69.7(4). The court will normally determine the amount of the receiver's remuneration on the basis of the criteria in CPR 69.7(4). CPR Pts 43-48 (costs: see PARA 1729 et seq) do not apply to the determination of the remuneration of a receiver: *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 9.2.

8 Ie under CPR 35.15: see PARA 863.

9 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 9.5.

10 CPR 69.7(5).

11 Ie *Practice Direction--Court's Power to Appoint a Receiver* PD 69 paras 9.1-9.5: see the text and notes 1-9.

12 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 9.6. As to the receiver's accounts see PARA 1509.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(v) Appointment of Receiver by way of Equitable Execution/C. EFFECT OF RECEIVER'S APPOINTMENT/1507. Effect of a receivership order.

C. EFFECT OF RECEIVER'S APPOINTMENT

1507. Effect of a receivership order.

The appointment of a receiver of personal estate does not interfere with the possession of the trustees or other persons in whom the property is vested: it simply puts the receiver in the place of the judgment debtor to receive the money¹. It does not create a charge on the property², nor does notice of the appointment confer any priority³; but the order has the effect of an injunction and prevents the judgment debtor from receiving the property or from dealing with it to the prejudice of the judgment creditor⁴. Having appointed a receiver, the court will grant whatever injunction is necessary to prevent the debtor's property being received by a subsequent assignee to the prejudice of the judgment creditor⁵. An order appointing a receiver may effect a forfeiture of an interest under a will if the terms of the will so provide⁶.

The appointment of a receiver does not operate as a stay of execution, and if the judgment debtor is not thereby prevented from paying the judgment debt, the judgment creditor may issue a bankruptcy notice in respect of his debt⁷. The receiver's title to receive money issuing out of personal estate is not complete until he has given the security, if any, ordered by the court⁸. The judgment creditor's title to money or goods in the receiver's hands accrues from the date of the order appointing the receiver⁹. The appointment of a receiver of personal estate by way of equitable execution gives no power to sell the personal property in order to satisfy the judgment debt¹⁰.

A judgment creditor who wishes to obtain a charge on land as well as the appointment of a receiver should apply for an order for both¹¹. Under the Land Registration Act 2002, no notice may be entered on the register in respect of an order appointing a receiver or sequestrator¹².

1 *Re Peace and Waller*(1883) 24 ChD 405, CA; *Arden v Arden*(1885) 29 ChD 702. As to the general effect of the appointment of a receiver see **RECEIVERS**.

2 *Re Dickinson, ex p Charrington & Co*(1888) 22 QBD 187, CA; *Re Potts, ex p Taylor*[1893] 1 QB 648, CA; *Flegg v Prentis*[1892] 2 Ch 428; *Croshaw v Lyndhurst Ship Co*[1897] 2 Ch 154; *Re Pearce, ex p Official Receiver, The Trustee*[1919] 1 KB 354, CA; *Giles v Kruyer*[1921] 3 KB 23. Cf *Re Gershon and Levy, ex p Coote and Richards, ex p Westcott & Sons*[1915] 2 KB 527, where the order appointing a receiver also contained a direction to pay the creditor. A judgment creditor who has obtained an order for a receiver is not a secured creditor for the purposes of the Insolvency Act 1986: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**.

3 *Arden v Arden*(1885) 29 ChD 702.

4 *Re Marquis of Anglesey, Countess De Galve v Gardner*[1903] 2 Ch 727; *Tyrrell v Painton*[1895] 1 QB 202, CA; *Levasseur v Mason and Barry Ltd*[1891] 2 QB 73, CA; *Re Harrison and Bottomley*[1899] 1 Ch 465, CA; *Re Debtor, ex p Peak Hill Goldfield Ltd*[1909] 1 KB 430, CA; *Singer & Co v Fry* (1915) 84 LJKB 2025.

5 *Ideal Bedding Co Ltd v Holland*[1907] 2 Ch 157 at 169-170 per Kekewich J; *Stevens v Hutchinson*[1953] Ch 299, [1953] 1 All ER 699, in which the dictum of Kekewich J was approved.

6 *Blackman v Fysh*[1892] 3 Ch 209, CA. Cf *Re Beaumont, Woods v Beaumont* (1910) 79 LJ Ch 744.

7 *Re Bond, ex p Capital and Counties Bank Ltd*[1911] 2 KB 988.

8 *Edwards v Edwards*(1876) 2 ChD 291, CA; *Ridout v Fowler*[1904] 2 Ch 93, CA. The receiver's title, however, relates back to the date when the order for his appointment was made: *Levasseur v Mason and Barry Ltd*[1891] 2 QB 73, CA. See also *Re Stanhope Silkstone Collieries Co*(1879) 11 ChD 160, CA; *Croshaw v Lyndhurst Ship Co*[1897] 2 Ch 154.

9 *Levasseur v Mason and Barry Ltd*[1891] 2 QB 73, CA.

10 *De Peyrecave v Nicholson* (1894) 71 LT 255; *Flegg v Prentis*[1892] 2 Ch 428. See also *Re Jones and Judgments Act 1864* (1895) 39 Sol Jo 671.

11 See PARA 1498.

12 See the Land Registration Act 2002 s 87(2)(a); PARA 1250; and **LAND REGISTRATION**. As to sequestration see PARAS 1249, 1269, 1380 et seq.

UPDATE

1507 Effect of a receivership order

NOTE 7--As to the effect of a foreign judgment on an English receivership order see *Masri v Consolidated Contractors (Oil and Gas) Co SAL*[2009] EWCA Civ 36, [2009] All ER (D) 56 (Feb).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(v) Appointment of Receiver by way of Equitable Execution/C. EFFECT OF RECEIVER'S APPOINTMENT/1508. Receiver's priority.

1508. Receiver's priority.

A receivership order only affects the debtor's interest at the date of the order, so a previous assignment by the debtor, whether legal or equitable, will take priority¹. The appointment of a receiver, whether of real or personal property, is always expressed in the order to be without prejudice to the rights of prior incumbrancers to remain in possession or to take possession of the property affected². The appointment of a receiver does not have the effect of putting the property received in the custody of the law³, so that, apart from this provision in the order, a prior incumbrancer would have no right to what the receiver obtains⁴.

A person obtaining a charging order on a fund in court has priority over a receiver if the party on whose behalf the receiver was appointed has not otherwise protected his interest⁵.

1 *Re Bristow* [1906] 2 IR 215.

2 If the prior incumbrancers are not in possession, however, they must obtain the leave of the court to interfere with the receiver by taking possession: *Ames v Birkenhead Docks Trustees* (1885) 20 Beav 332; *Searle v Choat* (1884) 25 ChD 723, CA. The question of the validity of the incumbrance can be gone into on the application, and if it is upheld the receiver may be ordered to pay what he has received to the incumbrancer and be discharged: *Walmsley v Mundy* (1884) 13 QBD 807, CA.

3 *Re Hoare, Hoare v Owen* [1892] 3 Ch 94. A receiver is, however, a trustee of money received by him in that capacity for those entitled: *Seagram v Tuck* (1881) 18 ChD 296.

4 See *Re Sutton's Estate, Sutton v Rees* (1863) 32 LJ Ch 437.

5 *Fahey v Tobin* [1901] 1 IR 511, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(v) Appointment of Receiver by way of Equitable Execution/C. EFFECT OF RECEIVER'S APPOINTMENT/1509. Receiver's accounts.

1509. Receiver's accounts.

The court¹ may order a receiver to prepare and serve accounts². Where it gives directions for him to do so, it may direct him to prepare and serve accounts either by a specified date or at specified intervals and specify the persons on whom he must serve the accounts³.

A party served with such accounts may apply for an order permitting him to inspect any document in the possession of the receiver relevant to those accounts⁴. A party should not, however, apply for such an order without first asking the receiver to permit such inspection⁵. Where the court makes such an order, it will normally direct that the receiver must permit inspection within seven days after being served with the order and must provide a copy of any documents the subject of the order within seven days after receiving a request for a copy from the party permitted to inspect them, provided that party has undertaken to pay the reasonable cost of making and providing the copy⁶.

Any party may, within 14 days of being served with the accounts, serve notice on the receiver:

- 1111 (1) specifying any item in the accounts to which he objects;
- 1112 (2) giving the reason for such objection; and
- 1113 (3) requiring the receiver, within 14 days of receipt of the notice, either to notify all the parties who were served with the accounts that he accepts the objection or, if he does not accept the objection, to apply for an examination of the accounts in relation to the contested item⁷.

When the receiver applies for the examination of the accounts he must at the same time file⁸ the accounts and a copy of the notice served on him as described above⁹. If the receiver fails to comply with head (3) above, any party may apply to the court for an examination of the accounts in relation to the contested item¹⁰. At the conclusion of its examination of the accounts the court will certify the result¹¹.

1 As to the meaning of 'court' see PARA 22.

2 CPR 69.8(1). As to the meaning of 'service' see PARA 138 note 2.

3 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 10.1.

4 CPR 69.8(2).

5 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 10.2.

6 *Practice Direction--Court's Power to Appoint a Receiver* PD 69 para 10.3.

7 CPR 69.8(3).

8 As to the meaning of 'filing' see PARA 1832 note 8.

9 CPR 69.8(4).

10 CPR 69.8(5).

11 CPR 69.8(6). As to inquiries into accounts see further *Practice Direction--Accounts, Inquiries etc* PD 40; and PARA 1524 et seq. As to receivers' accounts see further **RECEIVERS**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(v) Appointment of Receiver by way of Equitable Execution/C. EFFECT OF RECEIVER'S APPOINTMENT/1510. Non-compliance by receiver.

1510. Non-compliance by receiver.

If a receiver fails to comply with any rule, practice direction or direction of the court¹ the court may order him to attend a hearing to explain his non-compliance². At the hearing the court may make any order it considers appropriate, including:

- 1114 (1) terminating the appointment of the receiver³;
- 1115 (2) reducing the receiver's remuneration⁴ or disallowing it altogether; and
- 1116 (3) ordering the receiver to pay the costs of any party⁵.

Where the court has ordered a receiver to pay a sum of money into court and the receiver has failed to do so, the court may order him to pay interest on that sum for the time he is in default at such rate as it considers appropriate⁶.

1 As to the meaning of 'court' see PARA 22.

2 CPR 69.9(1).

3 As to terminating the receiver's appointment see PARA 1511.

4 As to the receiver's remuneration see PARA 1506.

5 CPR 69.9(2). As to costs see PARA 1729 et seq.

6 CPR 69.9(3). As to payments into court see generally PARA 1548 et seq; and see further **RECEIVERS**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(v) Appointment of Receiver by way of Equitable Execution/C. EFFECT OF RECEIVER'S APPOINTMENT/1511. Discharge of receiver and termination of appointment.

1511. Discharge of receiver and termination of appointment.

A receiver or any party may apply for the receiver to be discharged on completion of his duties¹. The court² may terminate the appointment of a receiver at any time³.

An order discharging or terminating the appointment of a receiver may:

- 1117 (1) require him to pay into court any money held by him; or
- 1118 (2) specify the person to whom he must pay any money or transfer any assets still in his possession; and
- 1119 (3) make provision for the discharge or cancellation of any guarantee given by the receiver as security⁴.

The order must be served⁵ on the persons who were required⁶ to be served with the order appointing the receiver⁷.

1 CPR 69.10(1). The application notice must be served on the persons who were required under CPR 69.4 to be served with the order appointing the receiver (see PARA 1505): CPR 69.10(2).

2 As to the meaning of 'court' see PARA 22.

3 See CPR 69.2(3)(a); and PARA 1501. See also CPR 69.5(2) (termination of appointment where receiver fails to give, or satisfy the court as to, security); and PARA 1504; CPR 69.9(2)(a) (termination of appointment where receiver is in default); and PARA 1510.

4 CPR 69.11(1). As to security given by a receiver see PARA 1504.

5 As to the meaning of 'service' see PARA 138 note 2.

6 Ie required under CPR 69.4: see PARA 1505.

7 CPR 69.11(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(vi) Penal Provisions/A. ENFORCEMENT OF FINES ETC/1512. Enforcement of fines and forfeited recognisances; High Court and Court of Appeal.

(vi) Penal Provisions

A. ENFORCEMENT OF FINES ETC

1512. Enforcement of fines and forfeited recognisances; High Court and Court of Appeal.

Payment of a fine¹ imposed, or sum due under a recognisance forfeited, by the High Court or the Civil Division of the Court of Appeal may be enforced upon the order of the court in like manner as a judgment of the High Court for the payment of money² or in like manner as a fine imposed by the Crown Court³.

Where payment of a fine or other sum falls to be enforced in like manner as a judgment of the High Court for the payment of money⁴ upon an order of the High Court or the Civil Division of the Court of Appeal, the court must, if the fine or other sum is not paid in full forthwith or within such time as the court may allow, certify to Her Majesty's Remembrancer⁵ the sum payable⁶. Her Majesty's Remembrancer must thereupon proceed to enforce payment of that sum as if it were due to him as a judgment debt⁷. Any payment received by him in respect of that fine or other sum must be dealt with by him in such manner as the Lord Chancellor may direct⁸.

1 For these purposes, and in the Powers of Criminal Courts (Sentencing) Act 2000 ss 139, 140 as extended by the Supreme Court Act 1981 s 140, 'fine' includes a penalty imposed in civil proceedings: Supreme Court Act 1981 s 140(5) (s 140(3), (5) amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 88). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 Supreme Court Act 1981 s 140(1)(a). As to methods of enforcing judgements or orders for the payment of money see PARA 1245.

3 Supreme Court Act 1981 s 140(1)(b). Where payment of a fine or other sum falls to be enforced as mentioned in s 140(1)(b) upon an order of the High Court or the Civil Division of the Court of Appeal thereunder, the provisions of the Powers of Criminal Courts (Sentencing) Act 2000 ss 139, 140 apply to that fine or other sum as they apply to a fine imposed by the Crown Court: Supreme Court Act 1981 s 140(3) (as amended: see note 1). As to enforcement of fines imposed by the Crown Court see **MAGISTRATES; SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 420 et seq.

4 *Ie* as mentioned in the Supreme Court Act 1981 s 140(1)(a): see the text and notes 1-2.

5 As to the office of Queen's Remembrancer, the duties of which are performed by the Senior Master of the Queen's Bench Division, see **COURTS** vol 10 (Reissue) PARA 654.

6 Supreme Court Act 1981 s 140(2)(a).

7 Supreme Court Act 1981 s 140(2)(b).

8 Supreme Court Act 1981 s 140(4). Section 140(4) also applies where payment of a fine or other sum has become enforceable by Her Majesty's Remembrancer by virtue of the Contempt of Court Act 1981 s 16 (see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARAS 504, 508): Supreme Court Act 1981 s 140(4). The Lord Chancellor's function under the Supreme Court Act 1981 s 140(4) is a protected function for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(vi) Penal Provisions/A. ENFORCEMENT OF FINES ETC/1513. Enforcement of fines imposed by county courts.

1513. Enforcement of fines imposed by county courts.

Payment of any fine imposed by any county court¹ may be enforced upon the order of the judge² in like manner as payment of a debt adjudged by the court to be paid may be enforced³ under the County Courts Act 1984⁴ or as payment of a sum adjudged to be paid by a conviction of a magistrates' court may be enforced⁵ under the Magistrates' Courts Act 1980⁶.

If a fine is not paid in accordance with the order imposing it, the court officer⁷ must forthwith report the matter to the judge⁸. Where by an order imposing a fine, the amount of the fine is directed to be paid by instalments and default is made in the payment of any instalment, the same proceedings may be taken as if default had been made in payment of the whole of the fine⁹. If the judge makes an order for payment of a fine to be enforced by warrant of execution¹⁰, the order is to be treated as an application made to the district judge for the issue of the warrant at the time when the order was received by him¹¹.

If, after a fine has been paid, the person on whom it was imposed shows cause sufficient to satisfy the judge that, if it had been shown at an earlier date, he would not have imposed a fine or would have imposed a smaller fine or would not have ordered payment to be enforced, the judge may order the fine or any part thereof to be repaid¹².

All fees, forfeitures and fines payable under the County Courts Act 1984 and any penalty to an officer of a county court under any other Act must be paid to officers designated by the Lord Chancellor¹³ and dealt with by them in such manner as the Lord Chancellor, after consultation with the Treasury, may direct¹⁴. The Lord Chancellor, with the concurrence of the Treasury, must from time to time make such rules as he thinks fit for securing the balances and other sums of money in the hands of any officers of a county court, and for the due accounting for and application of those balances and sums¹⁵. The Court Funds Rules 1987¹⁶ have been made by the Lord Chancellor with Treasury concurrence to provide for the payment of interest on funds in court and their administration and management¹⁷. These rules, which apply to any county court, including a judge or district judge not exercising his powers in open court¹⁸, are discussed elsewhere in this title¹⁹.

1 Ie under the County Courts Act 1984: s 129.

2 As to county court judges see **COURTS** vol 10 (Reissue) PARA 724 et seq.

3 As to the methods by which judgments for the payment of money may be enforced see PARA 1245.

4 County Courts Act 1984 s 129(a).

5 Ie under the Magistrates' Courts Act 1980 (disregarding s 81(1)) (see **MAGISTRATES**): County Courts Act 1984 s 129(b).

6 County Courts Act 1984 s 129(b).

7 As to county court officers see **COURTS** vol 10 (Reissue) PARA 726 et seq.

8 CPR Sch 2 CCR Ord 34 r 3(1).

9 CPR Sch 2 CCR Ord 34 r 3(2).

10 As to the issue of warrants of execution see PARAS 1283-1284.

11 CPR Sch 2 CCR Ord 34 r 3(3).

12 CPR Sch 2 CCR Ord 34 r 4.

13 The Lord Chancellor may appoint auditors and other officers to control the accounts of county courts: see **COURTS** vol 10 (Reissue) PARA 501.

14 County Courts Act 1984 s 130(1). This does not apply to fines imposed on summary conviction or to so much of a fine as is applicable under s 55(4) (penalty for neglecting or refusing to give evidence: see PARA 1016) to indemnify a party injured: s 130(2).

15 County Courts Act 1984 s 130(3).

16 Ie the Court Funds Rules 1987, SI 1987/821: see PARA 1548 et seq.

17 See PARA 1550.

18 See the Court Funds Rules 1987, SI 1987/821, r 2(2) (amended by SI 1997/177) and PARA 1550.

19 See PARA 1548 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(vi) Penal Provisions/B. COMMITTAL/(A) Jurisdiction/1514. Committal as a method of enforcement; in general.

B. COMMITTAL

(A) JURISDICTION

1514. Committal as a method of enforcement; in general.

Both the High Court and county courts have power to commit a person to prison for contempt of court where he is in breach of a court order or of an undertaking given to the court¹. This power and the caution with which it should be exercised are discussed in detail elsewhere in this work². In all cases the Convention rights³ of those involved should particularly be borne in mind and it should be noted that the standard of proof, having regard to the possibility that a person may be sent to prison, is that the allegation be proved beyond reasonable doubt⁴. It is impossible to state as a general proposition whether or not a statement by a defendant in open court that he will not comply with a court order amounts to contempt of court⁵.

Specific statutory powers are given:

- 1120 (1) to the High Court and county courts to commit a person to prison under the Debtors Act 1869 if he fails to attend court on a judgment summons⁶;
- 1121 (2) to county courts to commit a person to prison for rescuing or attempting to rescue any goods seized in execution⁷;
- 1122 (3) to county courts to commit a person to prison if he fails to attend court after being served with notice of an application for an attachment of earnings order or, having attended, refuses to be sworn or to give evidence on the hearing of such an application⁸.

The like standard of proof beyond reasonable doubt applies to any allegation to be made out under heads (1) to (3) above as applies to any allegation to be made out on an application for committal under the general power to imprison for contempt discussed above⁹.

1 CPR Sch 1 RSC Ord 52 r 1(1); CPR Sch 2 CCR Ord 29 r 1(1). The High Court has power to commit for civil contempt in the exercise of its inherent jurisdiction; while a county court's power to commit for contempt is regulated by the County Courts Act 1984 s 118: see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 454. As to the procedure on committal applications see CPR Sch 1 RSC Ord 52; CPR Sch 2 CCR Ord 29; *Practice Direction--Committal Applications* PD RSC O 52; and **CONTEMPT OF COURT**. Care must be taken to ensure that any committal proceedings comply with the relevant requirements; but it is wrong simply to conclude that because there are defects in the application it is not safe to commit the defendant to prison; the proper approach is to consider each of the defects relied on, and to decide whether they cause any prejudice or unfairness to the defendant, taken separately or together: *Bell v Tuohy*[2002] EWCA Civ 423, [2002] 3 All ER 975, [2002] All ER (D) 449 (Mar).

2 See generally **CONTEMPT OF COURT**. See also CPR 71.8(2) (power of High Court judge or circuit judge to make committal order where debtor does not comply with order to attend court and give information); and PARA 1257.

3 Ie the rights set out in the Human Rights Act 1998 s 1(3), Sch 1: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. See also PARAS 5, 1235.

4 See *Practice Direction--Committal Applications* PD RSC O 52 para 1.4.

5 *Bell v Tuohy*[2002] EWCA Civ 423, [2002] 3 All ER 975, [2002] All ER (D) 449 (Mar) (a decision on the County Courts Act 1984 s 118, and whether such a statement amounts to 'wilfully insulting the judge of a county court' for the purposes of s 118(1)(a)).

6 See PARA 1515 et seq; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 642 et seq.

7 See the County Courts Act 1984 s 92(1)(b); and PARA 1335.

8 See the Attachment of Earnings Act 1971 s 23(1); and PARA 1465.

9 See eg *Quinn v Cuff*[2001] EWCA Civ 36, [2001] All ER (D) 49 (Jan) (it is now settled law that proceedings under the Debtors Act 1869 constitute criminal proceedings for the purposes of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)) and the right to a fair trial under art 6 (now incorporated into domestic law: see the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 6; and PARAS 5, 1235)).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(vi) Penal Provisions/B. COMMITTAL/(B) Committal for Non-payment of Judgment Debts/1515. Committal for non-payment of judgment debts; in general.

(B) COMMITTAL FOR NON-PAYMENT OF JUDGMENT DEBTS

1515. Committal for non-payment of judgment debts; in general.

The High Court may commit to prison for a fixed term not exceeding six weeks, or until payment of the sum due, any person who makes default in the payment of a debt or instalment of a debt due from him under a High Court maintenance order¹. A county court may similarly commit a person who makes default in the payment of a debt or instalment of a debt due from him under a High Court or county court maintenance order² or under a judgment or order, enforceable by a court in England and Wales, for the payment of any of certain taxes, contributions or liabilities³.

The imprisonment is a punishment for contempt and the suffering of imprisonment in no way discharges the debt⁴.

The procedure on an application for committal in respect of default in the payment of debts due under maintenance orders is discussed elsewhere in this work⁵. The procedure on other applications in a county court is discussed below⁶.

The jurisdiction to commit a person to prison as described above may only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay that sum⁷. Proof of the means of the person making default may be given in such manner as the court thinks just⁸.

For the purpose of considering whether to commit the debtor to prison, he may be summoned in accordance with the prescribed rules⁹.

1 See the Debtors Act 1869 s 5 (amended by the Bankruptcy Act 1883 s 169(1), Sch 5; the Statute Law (Repeals) Act 2004; and SI 2002/439); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 642 et seq.

2 See the Debtors Act 1869 s 5 (modified by the Administration of Justice Act 1970 s 11(a)); the Administration of Justice Act 1970 s 11(b)(i); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 642 et seq.

3 See the Debtors Act 1869 s 5 (as modified: see note 2); the Administration of Justice Act 1970 s 11(b)(ii), Sch 4 (s 11(b)(ii) amended so as to also refer to premiums, as from a day to be appointed, by the Social Security Act 1973 ss 100, 101, Sch 27 para 85; at the date at which this title states the law, no such day had been appointed); and **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 486. The relevant taxes etc are: (1) income tax or any other tax or liability recoverable under the Taxes Management Act 1970 s 65, 66 or 68 (see **INCOME TAXATION**); (2) contributions equivalent premiums under the Pension Schemes Act 1993 Pt III (ss 7-68) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 922); and (3) Class 1, 2 and 4 contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 34 et seq); Administration of Justice Act 1970 Sch 4 (amended by the Social Security Act 1973 s 100, Sch 28 Pt I; the Social Security (Consequential Provisions) Act 1975 ss 1(3), 5, Sch 2 para 40; the Social Security Pensions Act 1975 s 65(1), Sch 4 para 13; the Statute Law (Repeals) Act 1989; the Social Security (Consequential Provisions) Act 1992 s 4, Sch 2 para 6; the Pension Schemes Act 1993 s 190, Sch 8 para 2; and the Pensions Act 1995 s 151, Sch 5 para 2). Cf the Attachment of Earnings Act 1971 s 3, Sch 2; and PARA 1433.

4 See the Debtors Act 1869 s 5 (as amended: see note 1); and *Re Edgcombe, ex p Edgcombe*[1902] 2 KB 403, CA.

5 See **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 945.

6 See PARA 1516 et seq.

7 Debtors Act 1869 s 5 proviso (2).

8 Debtors Act 1869 s 5 proviso (2) (amended by SI 2002/439).

9 Debtors Act 1869 s 5 proviso (2) (as amended: see note 8). 'Prescribed rules' means rules of court: s 10 (definition substituted by SI 2002/439). As to application for a judgment summons see PARA 1516 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(vi) Penal Provisions/B. COMMITTAL/(B) Committal for Non-payment of Judgment Debts/1516. County court application for judgment summons.

1516. County court application for judgment summons.

An application for the issue of a judgment summons¹ may be made to the court² for the district³ in which the debtor resides or carries on business or, if the summons is to issue against two or more persons jointly liable under the judgment or order sought to be enforced, in the court for the district in which any of the debtors resides or carries on business⁴. The judgment creditor must make his application by filing⁵ a request in that behalf certifying the amount of money remaining due under the judgment or order, the amount in respect of which the judgment summons is to issue and that the whole or part of any instalment due remains unpaid⁶. He must file with the request all written evidence on which he intends to rely⁷.

A judgment summons must be served personally⁸ on every debtor against whom it is issued⁹ except that where the judgment creditor or the judgment creditor's solicitor gives a certificate for postal service in respect of a debtor residing or carrying on business within the district of the court, the judgment summons will, unless the district judge¹⁰ otherwise directs, be served on that debtor by sending it to the debtor by first-class post at the address stated in the request for the judgment summons¹¹. The written evidence on which the judgment creditor intends to rely must be served with the judgment summons¹². Where a judgment summons has been served on a debtor by first-class post as described above, no order of commitment may be made against him unless he appears at the hearing or it is made by the judge¹³ under the relevant statutory powers¹⁴.

1 'Judgment summons' means a summons issued on the application of a person entitled to enforce a judgment or order under the Debtors Act 1869 s 5 (see PARA 1515) requiring a person, or, where two or more persons are liable under the judgment or order, requiring any one or more of them, to attend court: County Courts Act 1984 s 147(1) (amended by SI 2002/439). As to the description of parties in a request for a judgment summons see CPR Sch 2 CCR Ord 25 r 6, cited in PARA 1283 note 11.

2 As to the meaning of 'court' see PARA 22.

3 As to county court districts see **COURTS** vol 10 (Reissue) PARAS 707-708.

4 CPR Sch 2 CCR Ord 28 r 1(1).

5 As to the meaning of 'filing' see PARA 1832 note 8.

6 CPR Sch 2 CCR Ord 28 r 1(2).

7 CPR Sch 2 CCR Ord 28 r 1(3).

8 As to the meaning of 'service' see PARA 138 note 2; and as to personal service see PARA 142.

9 CPR Sch 2 CCR Ord 28 r 2(1). The judgment summons and written evidence (see the text and note 13) must be served not less than 14 days before the day fixed for the hearing: CPR Sch 2 CCR Ord 28 r 3(1). CPR 7.5, 7.6 (time for service and extension of time: see PARAS 120-121) apply with the necessary modifications to a judgment summons as they apply to a claim form: CPR Sch 2 CCR Ord 28 r 3(3).

10 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

11 CPR Sch 2 CCR Ord 28 r 2(2). Unless the contrary is shown, the date of service is deemed to be the seventh day after the date on which the judgment summons was sent to the debtor: CPR Sch 2 CCR Ord 28 r 2(2). A notice of non-service will be sent pursuant to CPR 6.18 (see PARA 155) in respect of a judgment summons

which has been sent by under CPR Sch 2 CCR Ord 28 r 2(2) and has been returned to the court undelivered:
CPR Sch 2 CCR Ord 28 r 3(2).

12 CPR Sch 2 CCR Ord 28 r 2(4).

13 le made under the County Courts Act 1984 s 110(2): see PARA 1518. As to the meaning of 'judge' see PARA 49.

14 CPR Sch 2 CCR Ord 28 r 2(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(vi) Penal Provisions/B. COMMITTAL/(B) Committal for Non-payment of Judgment Debts/1517. Enforcement of debtor's attendance.

1517. Enforcement of debtor's attendance.

If a debtor summoned to attend a county court by a judgment summons¹ fails to attend on the day and at the time fixed for any hearing of the summons, the judge² may adjourn or further adjourn the summons to a specified time on a specified day and order the debtor to attend at that time on that day³. An order so made must be served personally⁴ on the judgment debtor⁵ and copies of the judgment summons and the written evidence⁶ must be served with the order⁷.

At the time of service of the order there must be paid or tendered to the debtor a sum reasonably sufficient to cover his expenses in travelling to and from the court, unless such a sum was paid to him at the time of service of the judgment summons⁸.

If the debtor fails to attend at the adjourned hearing and a committal order is made, the judge or district judge⁹ may direct that the committal order be suspended so long as the debtor attends at the time and place specified in the committal order¹⁰.

1 As to the meaning of 'judgment summons' see PARA 1516 note 1.

2 As to the meaning of 'judge' for these purposes see PARA 1335 note 3.

3 County Courts Act 1984 s 110(1). Section 55 (penalty for non-attendance by witness: see PARA 1016) does not apply to a debtor summoned to attend by a judgment summons: s 55(5).

4 As to the meaning of 'service' see PARA 138 note 2; and as to personal service see PARA 142.

5 CPR Sch 2 CCR Ord 28 r 4(1A). As to the meaning of 'judgment debtor' see PARA 1236.

6 As to the requirement for written evidence see PARA 1516. See also CPR Sch 2 CCR Ord 28 r 5; and PARA 1518.

7 CPR Sch 2 CCR Ord 28 r 4(1B).

8 CPR Sch 2 CCR Ord 28 r 4(2).

9 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

10 CPR Sch 2 CCR Ord 27 r 7B(1) (applied by CPR Sch 2 CCR Ord 28 r 4(1)). Where a committal order is so suspended and the debtor fails to attend at the time and place so specified, a certificate to that effect given by the court officer is sufficient authority for the issue of a warrant of committal: CPR Sch 2 CCR Ord 27 r 7B(2) (as so applied). As to warrants of committal see PARA 1522; and **CONTEMPT OF COURT**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(vi) Penal Provisions/B. COMMITTAL/(B) Committal for Non-payment of Judgment Debts/1518. Making of committal order.

1518. Making of committal order.

If a debtor, having been ordered to attend an adjourned hearing of a judgment summons¹ at a specified time on a specified day, fails to do so, the judge² may make an order committing him to prison for a period not exceeding 14 days in respect of the failure or refusal³. A debtor must not, however, be committed to prison under this provision for having failed to attend as required by an order of the court⁴ unless there was paid to him at the time of the service⁵ of the judgment summons, or paid or tendered to him at the time of the service of the order, such sum in respect of his expenses as may be prescribed for these purposes⁶.

In any case where the judge has power to make an order of committal under these provisions for failure to attend, he may in lieu of or in addition to making that order, order the debtor to be arrested and brought before the court either forthwith or at such time as the judge may direct⁷.

No person may be committed on an application for a judgment summons unless the order is made under the provisions set out above, or the judgment creditor⁸ proves that the debtor has or has had since the date of the judgment or order⁹ the means to pay the sum in respect of which he has made default and has refused or neglected or refuses or neglects to pay that sum¹⁰.

The debtor may not be compelled to give evidence¹¹.

Notice of the result of the hearing of a judgment summons on a judgment or order of the High Court¹² must be sent by the county court to the High Court¹³.

1 Ie under the County Courts Act 1984 s 110(1); see PARA 1517. As to the meaning of 'judgment summons' see PARA 1516 note 1.

2 As to the meaning of 'judge' for these purposes see PARA 1335 note 3.

3 County Courts Act 1984 s 110(2) (amended by SI 2002/439).

4 Ie an order under the County Courts Act 1984 s 110(1); see PARA 1517.

5 As to the meaning of 'service' see PARA 138 note 2.

6 County Courts Act 1984 s 110(4). The prescribed sum is a sum reasonably sufficient to cover his travel expenses: see CPR Sch 2 CCR Ord 28 r 4(2); and PARA 1517.

7 County Courts Act 1984 s 110(3).

8 As to the meaning of 'judgment creditor' see PARA 1236.

9 As to the meaning of 'judgment or order' see PARA 1226.

10 CPR Sch 2 CCR Ord 28 r 5(1). The standard of proof is proof beyond reasonable doubt: see PARA 1515.

11 CPR Sch 2 CCR Ord 28 r 5(2).

12 Ie a judgment summons on a High Court maintenance order: see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 945 et seq.

13 CPR Sch 2 CCR Ord 28 r 9(1). If a committal order or a new order for payment (see PARA 1520) is made on the hearing, the office copy of the judgment or order filed in the county court is deemed to be a judgment or order of the court in which the judgment summons is heard: CPR Sch 2 CCR Ord 28 r 9(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(vi) Penal Provisions/B. COMMITTAL/(B) Committal for Non-payment of Judgment Debts/1519. Suspension of committal order.

1519. Suspension of committal order.

If on the hearing of a judgment summons¹ a committal order is made, the judge² may direct execution of the order to be suspended to enable the debtor to pay the amount due³. A note of any direction so given must be entered in the records of the court⁴ and notice of the suspended committal order must be sent to the debtor⁵.

Where a judgment summons is issued in respect of one or more but not all of the instalments payable under a judgment or order⁶ for payment by instalments and a committal order is made and suspended under the above provisions, the judgment or order is, unless the judge otherwise orders, to be suspended for so long as the execution of the committal order is suspended⁷.

Where execution of a committal order is suspended under the above provisions and the debtor subsequently desires to apply for a further suspension, the debtor must attend at or write to the court office and apply for the suspension he desires, stating the reasons for his inability to comply with the terms of the original suspension. The court must fix a day for the hearing of the application by the judge and give at least three days' notice of it to the judgment creditor⁸ and the debtor⁹. The district judge¹⁰ may suspend execution of the committal order pending the hearing of the application¹¹.

1 As to the meaning of 'judgment summons' see PARA 1516 note 1; and as to the hearing of a judgment summons see PARA 1518.

2 As to the meaning of 'judge' see PARA 49.

3 CPR Sch 2 CCR Ord 28 r 7(1). As to the execution of a committal order see PARA 1522.

4 As to the meaning of 'court' see PARA 22. As to county court records of judgment summonses and orders of committal see **COURTS** vol 10 (Reissue) PARA 729.

5 CPR Sch 2 CCR Ord 28 r 7(2).

6 As to the meaning of 'judgment or order' see PARA 1226.

7 CPR Sch 2 CCR Ord 28 r 7(3).

8 As to the meaning of 'judgment creditor' see PARA 1236.

9 CPR Sch 2 CCR Ord 28 r 7(4).

10 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

11 CPR Sch 2 CCR Ord 28 r 7(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(vi) Penal Provisions/B. COMMITTAL/(B) Committal for Non-payment of Judgment Debts/1520. New order on judgment summons.

1520. New order on judgment summons.

Where on the hearing of a judgment summons¹ the judge² makes a new order for payment of the amount of the judgment debt remaining unpaid, there must be included in the amount payable under the order for the purpose of any enforcement proceedings³, otherwise than by judgment summons, any amount in respect of which a committal order has already been made and the debtor imprisoned⁴. No judgment summons under the new order must include any amount in respect of which the debtor was imprisoned before the new order was made, and any amount subsequently paid must be appropriated in the first instance to the amount due under the new order⁵.

1 As to the meaning of 'judgment summons' see PARA 1516 note 1; and as to the hearing of a judgment summons see PARA 1518.

2 As to the meaning of 'judge' see PARA 49.

3 As to methods of enforcing a money judgment see PARA 1245.

4 CPR Sch 2 CCR Ord 28 r 8(1). As to notification of such an order to the High Court where appropriate see CPR Sch 2 CCR Ord 28 r 9, cited in PARA 1518.

5 CPR Sch 2 CCR Ord 28 r 8(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(vi) Penal Provisions/B. COMMITTAL/(B) Committal for Non-payment of Judgment Debts/1521. Costs on judgment summons.

1521. Costs on judgment summons.

No costs are to be allowed to the judgment creditor¹ on the hearing of a judgment summons² unless either a committal order is made³ or the sum in respect of which the judgment summons was issued is paid before the hearing⁴.

Where costs are allowed to the judgment creditor, there may be allowed:

- 1123 (1) a charge of the judgment creditor's solicitor for attending the hearing and, if the judge so directs, for serving the judgment summons;
- 1124 (2) a fee to counsel if the court certifies that the case is fit for counsel;
- 1125 (3) any travelling expenses paid to the debtor; and
- 1126 (4) the court fee⁵ on the issue of the judgment summons⁶.

The costs may be fixed⁷ and allowed without detailed assessment⁸.

1 As to the meaning of 'judgment creditor' see PARA 1236.

2 As to the meaning of 'judgment summons' see PARA 1516 note 1; and as to the hearing of a judgment summons see PARA 1518.

3 As to making a committal order see PARA 1518.

4 CPR Sch 2 CCR Ord 28 r 10(1).

5 As to county court fees see PARA 87; and see *The Civil Court Practice*.

6 CPR Sch 2 CCR Ord 28 r 10(2)(a).

7 As to fixed enforcement costs see PARA 1768.

8 CPR Sch 2 CCR Ord 28 r 10(2)(b). As to detailed assessment see CPR Pt 47; and PARA 1779 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(vi) Penal Provisions/B. COMMITTAL/(B) Committal for Non-payment of Judgment Debts/1522. Execution of committal order.

1522. Execution of committal order.

A judgment creditor¹ desiring a warrant to be issued pursuant to a committal order² must file³ a request in that behalf⁴. Where two or more debtors are to be committed in respect of the same judgment or order⁵, a separate warrant of committal must be issued for each of them⁶. Whenever any order or warrant for the committal of any person to prison is made or issued by a county court⁷ the order or warrant must be directed to the district judge⁸ of the court, who is thereby empowered to take the body of the person against whom the order is made or warrant issued⁹. It is the duty of every constable¹⁰ within his jurisdiction to assist in the execution of every such order or warrant¹¹. The governor of the prison mentioned in any such order or warrant is bound to receive and keep the person mentioned in it until he is lawfully discharged¹². Any person committed to prison by the judge of any county court¹³ must be committed to such prison as may from time to time be directed in the case of that court by order of the Secretary of State¹⁴.

A warrant of committal must not, without further order of the court, be enforced more than two years after the date on which the warrant is issued¹⁵. A warrant for the arrest of a person against whom an order of committal has been made must not, without further order of the court, be enforced more than two years after the date on which the warrant is issued¹⁶.

Where any order or warrant for the committal of any person to prison has been made or issued¹⁷ by a county court (a 'home court') and that person is out of the jurisdiction of that court¹⁸, the district judge may send the order or warrant to the district judge of any other county court within the jurisdiction of which that person is or is believed to be (a 'foreign court'), with a warrant indorsed on it or annexed to it requiring execution of the original order or warrant¹⁹. On receipt of the warrant, the district judge of the other county court must act in all respects as if the original order or warrant had been issued by the court of which he is district judge and must within the prescribed time report to the district judge of the home court what he has done in the execution of the order or warrant and pay over all moneys received in pursuance of the order or warrant²⁰. Where a person is apprehended under the order or warrant, he must be forthwith conveyed, in custody of the officer apprehending him, to the prison of the court within the jurisdiction of which he was apprehended and kept there, unless sooner discharged by law²¹, until the expiration of the period mentioned in the order or warrant²². It is the duty of every constable within his jurisdiction to assist in the execution of every such order or warrant²³. Where, after a warrant of committal made on an application for a judgment summons has been sent to a foreign court for execution but before the debtor is lodged in prison, the home court is notified that an amount which is less than the sum on payment of which the debtor is to be discharged has been paid, the home court must send notice of the payment to the foreign court²⁴.

1 As to the meaning of 'judgment creditor' see PARA 1236.

2 As to making a committal order see PARA 1518.

3 As to the meaning of 'filing' see PARA 1832 note 8.

4 CPR Sch 2 CCR Ord 28 r 11(1). As to the description of parties in a request for a warrant of committal see CPR Sch 2 CCR Ord 25 r 6, cited in PARA 1283 note 11.

5 As to the meaning of 'judgment or order' see PARA 1226.

6 CPR Sch 2 CCR Ord 28 r 11(2).

7 Ie whether in pursuance of the County Courts Act 1984 or any other Act or of rules of court: County Courts Act 1984 s 119(1) (amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(1), (2); and by virtue of the Courts and Legal Services Act 1990 s 74(1), (3)).

8 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.

9 County Courts Act 1984 s 119(1) (as amended: see note 7).

10 As to the meaning of 'constable' see PARA 1283 note 18.

11 County Courts Act 1984 s 119(2). As to the protection of court officers executing warrants see ss 125, 127; and PARA 1314.

12 County Courts Act 1984 s 119(3).

13 Ie in pursuance of the County Courts Act 1984 or any other Act or of rules of court: County Courts Act 1984 s 120 (amended by the Civil Procedure Act 1997 Sch 2 para 2(1), (2)).

14 County Courts Act 1984 s 120 (as amended: see note 13). The Secretary of State here concerned is the Home Secretary.

15 CPR Sch 2 CCR Ord 29 r 1(5A).

16 CPR Sch 1 RSC Ord 52 r 7A.

17 Ie whether in pursuance of the County Courts Act 1984 or any other Act or of rules of court: County Courts Act 1984 s 122(1) (amended by the Civil Procedure Act 1997 Sch 2 para 2(1), (2)).

18 As to county court districts see **COURTS** vol 10 (Reissue) PARAS 707-708.

19 County Courts Act 1984 s 122(1) (s 122 amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3)).

20 County Courts Act 1984 s 122(2) (as amended: see note 17). Where a warrant of committal has been received from another court (a 'foreign court'), the foreign court must, on the execution of the warrant, send notice of it to the home court: CPR Sch 2 CCR Ord 25 r 7(6).

21 As to the discharge of a debtor see PARA 1523.

22 County Courts Act 1984 s 122(3) (as amended: see note 17). Where a warrant of committal made on an application for a judgment summons is sent to a foreign court for execution (ie to a court which is not the home court), that court must indorse on it a notice as to the effect of the County Courts Act 1984 s 122(3) addressed to the governor of the prison of that court: CPR Sch 2 CCR Ord 28 r 11(3).

23 County Courts Act 1984 s 122(4).

24 CPR Sch 2 CCR Ord 28 r 12.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/23. ENFORCEMENT OF JUDGMENTS AND ORDERS/(3) OTHER METHODS OF ENFORCEMENT/(vi) Penal Provisions/B. COMMITTAL/(B) Committal for Non-payment of Judgment Debts/1523. Revocation of committal order or discharge of debtor.

1523. Revocation of committal order or discharge of debtor.

The judge¹ may at any time revoke an order committing a person to prison made on an application for a judgment summons² and, if he is already in custody, order his discharge³.

Where, after the debtor has been lodged in prison under a warrant of committal⁴, payment is made of the sum on payment of which the debtor is to be discharged, then if the payment is made to the court responsible for the execution of the warrant⁵, the court officer⁶ must make and sign a certificate of payment and send it by post or otherwise to the gaoler⁷. If the payment is made to the court which issued the warrant of committal after the warrant has been sent to a foreign court for execution⁸, the home court must send notice of the payment to the foreign court, and the court officer at the foreign court must make and sign a certificate of payment and send it by post or otherwise to the gaoler⁹. Finally, if the payment is made to the gaoler, he must sign a certificate of payment and send the amount to the court which made the committal order¹⁰. These provisions apply with modifications where payment is made of an amount less than the sum on payment of which the debtor is to be discharged¹¹. Where, after the making of such a lesser payment, the balance of the sum on payment of which the debtor is to be discharged is paid, the above provisions apply without those modifications¹².

If at any time it appears to the satisfaction of a judge of a county court that any debtor arrested or confined in prison by order of the court is unable from any cause to pay any sum recovered against him¹³ or any instalment thereof and ought to be discharged, the judge may order his discharge upon such terms, including liability to re-arrest if the terms are not complied with, as the judge thinks fit¹⁴.

Where the judgment creditor¹⁵ lodges with the district judge¹⁶ a request that a debtor lodged in prison under a warrant of committal may be discharged from custody, the district judge must make an order for the discharge of the debtor in respect of the warrant of committal and the court¹⁷ must send the gaoler a certificate of discharge¹⁸.

Where a debtor who has been lodged in prison under a warrant of committal desires to apply for his discharge¹⁹, the application must be made to the judge in writing and without notice showing the reasons why the debtor alleges that he is unable to pay the sum in respect of which he has been committed and ought to be discharged and stating any offer which he desires to make as to the terms on which his discharge is to be ordered²⁰. If in such a case the debtor is ordered to be discharged from custody on terms which include liability to re-arrest if the terms are not complied with, the judge may, on the application of the judgment creditor if the terms are not complied with, order the debtor to be re-arrested and imprisoned for such part of the term of imprisonment as remained unserved at the time of discharge²¹. Where such an order is made, a duplicate warrant of committal must be issued, indorsed with a certificate signed by the court officer as to the order of the judge²².

Where an order of committal under the Debtors Act 1869²³, or an order of committal made on the hearing of a judgment summons²⁴, is sent by the district judge of a home court to the district judge of another court for execution²⁵, the judge of that other court has all the same powers to order the debtor's discharge as the judge of the home court would have under the provisions set out above²⁶.

- 1 As to the meaning of 'judge' for these purposes see PARA 49.
- 2 Ie under the County Courts Act 1984 s 110: see PARA 1518. As to the meaning of 'judgment summons' see PARA 1516 note 1.
- 3 County Courts Act 1984 s 110(5).
- 4 As to the issue of a warrant of committal see PARA 1522.
- 5 As to the court responsible for the execution of the warrant see PARA 1522.
- 6 As to the meaning of 'court officer' see PARA 49 note 3.
- 7 CPR Sch 2 CCR Ord 28 r 13(1)(a).
- 8 See the County Courts Act 1984 s 122; and PARA 1522.
- 9 CPR Sch 2 CCR Ord 28 r 13(1)(b).
- 10 CPR Sch 2 CCR Ord 28 r 13(1)(c).
- 11 Where, after the debtor has been lodged in prison under a warrant of committal, payment is made of an amount less than the sum on payment of which the debtor is to be discharged, then subject to CPR Sch 2 CCR Ord 28 r 13(3) (see the text and note 12), CPR Sch 2 CCR Ord 28 r 13(1)(a) and (b) apply with the substitution of references to a notice of payment for the references to a certificate of payment and CPR Sch 2 CCR Ord 28 r 13(1)(c) applies with the omission of the requirement to make and sign a certificate of payment: CPR Sch 2 CCR Ord 28 r 13(2).
- 12 CPR Sch 2 CCR Ord 28 r 13(3).
- 13 Ie whether by way of satisfaction of a claim or counterclaim or by way of costs or otherwise: County Courts Act 1984 s 121.
- 14 County Courts Act 1984 s 121.
- 15 As to the meaning of 'judgment creditor' see PARA 1236.
- 16 As to district judges in county courts see **COURTS** vol 10 (Reissue) PARA 728 et seq.
- 17 As to the meaning of 'court' see PARA 22.
- 18 CPR Sch 2 CCR Ord 28 r 14(1).
- 19 Ie under the County Courts Act 1984 s 121: see the text and notes 13-14.
- 20 CPR Sch 2 CCR Ord 28 r 14(2). The application must be attested by the governor of the prison, or any other officer of the prison not below the rank of prison officer; and before dealing with it the judge or district judge may, if he thinks fit, cause notice to be given to the judgment creditor that the application has been made and of a day and hour when he may attend and be heard: CPR Sch 2 CCR Ord 27 r 8(3), (4) (applied by CPR Sch 2 CCR Ord 28 r 14(2)).
- 21 CPR Sch 2 CCR Ord 28 r 14(3).
- 22 CPR Sch 2 CCR Ord 28 r 14(4).
- 23 See PARA 1515.
- 24 Ie under the County Courts Act 1984 s 110: see PARA 1518.
- 25 Ie under the County Courts Act 1984 s 122: see PARA 1522.
- 26 County Courts Act 1984 s 122(5) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3)).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(1) ACCOUNTS AND INQUIRIES/1524. Summary order for accounts and inquiries.

24. MISCELLANEOUS PROCEEDINGS

(1) ACCOUNTS AND INQUIRIES

1524. Summary order for accounts and inquiries.

If a remedy sought by a claimant¹ in his claim form includes, or necessarily involves, taking an account or making an inquiry², an application³ may be made to the court⁴ by any party to the proceedings for an order directing any accounts or inquiries to be taken or made⁵.

1 As to the meaning of 'claimant' see PARA 18.

2 Whilst accounts are commonly required in proceedings relating to the administration of estates (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 726, 729), partnerships (see **PARTNERSHIP** vol 79 (2008) PARAS 97, 150 et seq) and trusts (see **TRUSTS**), this section of this title is concerned with the situation where the substantive relief sought in the proceedings is the taking of an account and the payment of the amount found due on the taking of an account, or where the taking of accounts or the making of inquiries is a necessary ingredient in the progress of the proceedings. As to the remedy of account generally see **EQUITY** vol 16(2) (Reissue) PARA 449 et seq.

3 The application is made under CPR Pt 24: see PARA 524 et seq.

4 As to the meaning of 'court' see PARA 22. Proceedings for accounts are normally assigned to the Chancery Division: see the Supreme Court Act 1981 s 61(1), Sch 1 para 1(f); and PARA 44. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. A claim relating to Chancery business may, subject to any enactment, rule or practice direction, be dealt with in the High Court or in a county court: see *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 2.5; and PARA 116 note 7. However, simple accounts may be claimed and ordered to be taken in the Queen's Bench Division, although the proceedings may be transferred to the Chancery Division: see *Leslie v Clifford* (1884) 50 LT 590, DC. As to the transfer of proceedings see CPR Pt 30; and PARA 66 et seq.

5 See *Practice Direction--the Summary Disposal of Claims* PD 24 para 6; and PARA 524 text and note 13. This provision replaces RSC Ord 43 r 1 (revoked), but applies to county court proceedings as well as High Court proceedings. Unless the court orders otherwise, an account or inquiry will be taken or made by a master or district judge (if the proceedings are in the High Court) or by a district judge (if the proceedings are in the county court): see *Practice Direction--Accounts, Inquiries etc* PD 40 para 9. *Practice Direction--Accounts, Inquiries etc* PD 40 contains further provisions as to orders for accounts and inquiries: see PARA 1525 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(1) ACCOUNTS AND INQUIRIES/1525. Order for accounts.

1525. Order for accounts.

In addition to its power to make a summary order for an account¹, the court may grant an order directing a party to prepare and file accounts relating to the dispute². The application³ for such an order may be made at any time⁴.

1 See *Practice Direction--the Summary Disposal of Claims* PD 24 para 6; and PARA 1524.

2 See CPR 25.1(1)(n); and PARA 315 head (14) in the text. This provision replaces RSC Ord 43 r 2 (revoked), and applies to county court proceedings as well as High Court proceedings, but does not apply to inquiries, unlike the power to grant a summary process governed by *Practice Direction--the Summary Disposal of Claims* PD 24 para 6. Unless the court orders otherwise, an account or inquiry will be taken or made by a master or district judge (if the proceedings are in the High Court) or by a district judge (if the proceedings are in the county court): see *Practice Direction--Accounts, Inquiries etc* PD 40 para 9. This procedure is often employed where it is desirable that particular accounts be taken before the actual trial of the cause or matter. *Practice Direction--Accounts, Inquiries etc* PD 40 contains further provisions as to orders for accounts: see PARA 1526 et seq.

3 An application for an order directing a party to file accounts is made under CPR Pt 25 (see PARA 315 et seq), which modifies and amplifies the provisions of CPR Pt 23 (see PARA 303 et seq): see PARA 315 note 28.

4 See CPR 25.2; and PARA 320.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(1) ACCOUNTS AND INQUIRIES/1526. Practice on taking accounts.

1526. Practice on taking accounts.

Where the court orders any account¹ to be taken or any inquiry to be made, it may, by the same or a subsequent order, give directions as to the manner in which the account is to be taken and verified or the inquiry is to be conducted². In particular, the court may direct that in taking an account, the relevant books of account are to be evidence of their contents but that any party may take such objections to the contents as he may think fit³.

Any party may apply⁴ to the court for directions as to the taking of an account or the conduct of an inquiry or for the variation of directions already made⁵. Every direction for the taking of an account or the making of an inquiry must be numbered in the order so that, as far as possible, each distinct account and inquiry is given its own separate number⁶.

Subject to any order to the contrary the accounting party must make out his account and verify it by an affidavit or witness statement to which the account is exhibited⁷. The accounting party must file the account with the court and at the same time notify the other parties that he has done so and of the filing of any affidavit or witness statement verifying or supporting the account⁸.

Any party who wishes to contend:

- 1127 (1) that an accounting party has received more than the amount shown by the account to have been received; or
- 1128 (2) that the accounting party should be treated as having received more than he has actually received; or
- 1129 (3) that any item in the account is erroneous in respect of amount; or
- 1130 (4) that in any other respect the account is inaccurate,

must, unless the court directs otherwise, give written notice to the accounting party of his objections⁹. The written notice containing the objecting party's objections must, so far as the objecting party is able to do so:

- 1131 (a) state the amount by which it is contended that the account understates the amount received by the accounting party;
- 1132 (b) state the amount which it is contended that the accounting party should be treated as having received in addition to the amount he actually received;
- 1133 (c) specify the respects in which it is contended that the account is inaccurate; and
- 1134 (d) in each case, give the grounds on which the contention is made¹⁰.

The contents of the written notice must, unless the notice contains a statement of truth¹¹, be verified by either an affidavit or a witness statement to which the notice is an exhibit¹².

In taking any account all just allowances must be made without any express direction to that effect¹³.

The court may at any stage in the taking of an account or in the course of an inquiry direct a hearing in order to resolve an issue that has arisen and for that purpose may order that points of claim and points of defence be served and give any necessary directions¹⁴.

If it appears to the court that there is undue delay in the taking of any account or the progress of any inquiry the court may require the accounting party or the party with the conduct of the inquiry, as the case may be, to explain the delay and may then make such order for the management of the proceedings (including a stay¹⁵) and for costs as the circumstances may require¹⁶. In making an order for the management of the proceedings and for costs where it appears to the court that there is undue delay, the directions which the court may give include a direction that the Official Solicitor take over the conduct of the proceedings and directions providing for the payment of the Official Solicitor's costs¹⁷.

The court may make an order for an interim payment where it has ordered an account to be taken¹⁸.

1 As to orders for an account see PARAS 1524-1525.

2 See *Practice Direction--Accounts, Inquiries etc* PD 40 para 1.1. Where all the parties affected are sui juris and before the court, verification is dealt with out of court so far as possible, with those items as to which the parties do not agree being verified in chambers. Where a party is not sui juris the account must be verified to the court's satisfaction.

3 *Practice Direction--Accounts, Inquiries etc* PD 40 para 1.2.

4 An application for directions as to the taking of an account or the conduct of an inquiry or for the variation of directions already made must be made in accordance with CPR Pt 23: see PARA 303 et seq.

5 *Practice Direction--Accounts, Inquiries etc* PD 40 para 1.3.

6 *Practice Direction--Accounts, Inquiries etc* PD 40 para 1.4.

7 *Practice Direction--Accounts, Inquiries etc* PD 40 para 2(1). For forms of account and supporting affidavit or witness statement see Chancery Masters' Practice Forms 30, 31, 39, 40. The nature of the account may well make it impracticable for it to be presented on A4 paper, but the requirements of *Practice Direction--Court Documents* PD 5A para 2.2(1) as to margins should be complied with if possible: see PARA 78. The items on each side of the account must be numbered consecutively: see *Practice Direction--Accounts, Inquiries etc* PD 40 para 1.4; and the text to note 6. As to the meaning of 'affidavit' see PARA 540 note 5; and as to the meaning of 'witness statement' see PARA 751 note 1.

8 *Practice Direction--Accounts, Inquiries etc* PD 40 para 2(2). As to the meaning of 'filing' see PARA 1832 note 8. In the Chancery Division the account is lodged in the appropriate chambers; in the Queen's Bench Division it is lodged with the master or the masters' secretary.

9 *Practice Direction--Accounts, Inquiries etc* PD 40 para 3.1.

10 *Practice Direction--Accounts, Inquiries etc* PD 40 para 3.2.

11 As to statements of truth see CPR Pt 22; and PARA 613.

12 *Practice Direction--Accounts, Inquiries etc* PD 40 para 3.3.

13 *Practice Direction--Accounts, Inquiries etc* PD 40 para 4; and see **EQUITY** vol 16(2) (Reissue) PARA 455.

14 *Practice Direction--Accounts, Inquiries etc* PD 40 para 5. As to the meaning of 'service' see PARA 138 note 2.

15 As to the meaning of 'stay' see PARA 233 note 11.

16 *Practice Direction--Accounts, Inquiries etc* PD 40 para 6.1. As to costs generally see also PARA 1729 et seq.

17 *Practice Direction--Accounts, Inquiries etc* PD 40 para 6.2. As to the assessment of the costs of the Official Solicitor see *Eady v Elsdon* [1901] 2 KB 460, CA. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see, however, PARA 33 text and note 2.

18 See CPR 25.7(1)(b); *Practice Direction--Interim Payments* PD 25B para 2A.1; and PARA 325. If the evidence on the application for an interim payment shows that the account is bound to result in a payment to the applicant the court will, before making an order for an interim payment, order that the liable party pay to the applicant 'the amount shown by the account to be due': see para 2A.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(1) ACCOUNTS AND INQUIRIES/1527. Payment of amount found due.

1527. Payment of amount found due.

The order directing the taking of an account may also direct payment of the amount found due on the taking of the account within a specified time after the court certifies the account. If it does not, it will be necessary to obtain an order for payment. The party seeking an order for payment should file an application notice¹ upon which the court may make the necessary order.

¹ The application must be made in accordance with CPR Pt 23: see PARA 303 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(1) ACCOUNTS AND INQUIRIES/1528. Distribution of fund before all persons entitled are ascertained.

1528. Distribution of fund before all persons entitled are ascertained.

Where some of the persons entitled to share in a fund are known but there is, or is likely to be, difficulty or delay in ascertaining other persons so entitled, the court¹ may direct², or allow, immediate payment of their shares to the known persons without reserving any part of those shares to meet the subsequent costs of ascertaining the other persons³.

1 As to the meaning of 'court' see PARA 22.

2 As to the court's power to order an interim payment where an account is ordered to be taken see CPR 25.7(1)(b); *Practice Direction--Interim Payments* PD 25B para 2A.1; and PARA 325. If the evidence on the application for an interim payment shows that the account is bound to result in a payment to the applicant the court will, before making an order for an interim payment, order that the liable party pay to the applicant 'the amount shown by the account to be due': see *Practice Direction--Interim Payments* PD 25B para 2A.2.

3 *Practice Direction--Accounts, Inquiries etc* PD 40 para 7.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(1) ACCOUNTS AND INQUIRIES/1529. Guardian's accounts.

1529. Guardian's accounts.

The accounts of a person appointed guardian of the property of a child¹ must be verified and approved in such manner as the court² may direct³.

1 As to the meaning of 'child' see PARA 222 note 3.

2 As to the meaning of 'court' see PARA 22.

3 *Practice Direction--Accounts, Inquiries etc* PD 40 para 8. As to guardianship see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 144 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(2) JUDICIAL REVIEW/1530. Judicial review; in general.

(2) JUDICIAL REVIEW

1530. Judicial review; in general.

Judicial review is the process by which the High Court exercises its supervisory jurisdiction to review the lawfulness of an enactment or a decision, action or failure to act in relation to the exercise of a public function.

Claims for judicial review come within the jurisdiction of the Administrative Court¹. Where the claim involves a devolution issue arising out of the Government of Wales Act 2006 or an issue concerning the National Assembly of Wales, the Welsh Ministers, or any Welsh public body (including a Welsh local authority) whether or not it involves a devolution issue, the claim may be issued in either the Administrative Court in the Royal Courts of Justice or in the Administrative Court in Wales².

The Civil Procedure Rules govern claims for judicial review³.

The judicial review procedure must be used in a claim for judicial review where the claimant is seeking a mandatory, quashing or prohibiting order or an injunction restraining a person from acting in any office in which he is not entitled to act⁴. In addition, the court has power, in specified circumstances, to grant a declaration or an injunction⁵ or to award damages, restitution or the recovery of a sum due, but it cannot entertain a claim for damages alone⁶.

A claim for judicial review must be commenced promptly and not later than three months after the basis of the claim first arose⁷.

The judicial review procedure is discussed in detail elsewhere in this work⁸.

1 See *Practice Direction--Judicial Review* PD 54 para 2.1; and **JUDICIAL REVIEW** vol 61 (2010) PARA 662. As to the establishment of the Administrative Court see PARA 219 text and note 8.

2 See *Practice Direction--Judicial Review* PD 54 paras 3.1, 3.2; and **JUDICIAL REVIEW** vol 61 (2010) PARA 662.

3 See **JUDICIAL REVIEW**. The 'judicial review procedure' means CPR Pt 8 (see PARA 127 et seq) as modified by CPR Pt 54 Section I (see the text and notes 4-7; and **JUDICIAL REVIEW**): CPR 54.1(e). CPR 8.4 (consequence of not filing an acknowledgment of service: see PARA 131) does not apply: CPR 54.9(3). As to failure to file an acknowledgment of service see, instead, CPR 54.9(1), (2); and **JUDICIAL REVIEW** vol 61 (2010) PARA 665.

4 See CPR 54.2(a)-(d); and **JUDICIAL REVIEW** vol 61 (2010) PARA 662. As to the meaning of 'injunction' see PARA 315 note 2.

5 CPR 54.3. See also the Supreme Court Act 1981 s 31(2). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. Where the claimant is seeking a declaration or injunction in addition to one of the remedies listed in CPR Pt 54.2(a)-(d), the judicial review procedure must be used: see CPR 54.3(1); and **JUDICIAL REVIEW** vol 61 (2010) PARA 662.

6 CPR 54.3(2).

7 See CPR 54.5(1); and **JUDICIAL REVIEW** vol 61 (2010) PARA 658.

8 See **JUDICIAL REVIEW** vol 61 (2010) PARA 662.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(3) HABEAS CORPUS PROCEEDINGS/1531. Habeas corpus proceedings; in general.

(3) HABEAS CORPUS PROCEEDINGS

1531. Habeas corpus proceedings; in general.

The writ of habeas corpus ad subjiciendum¹ is a prerogative process for securing a person's liberty by affording an effective means of immediate release from unlawful or unjustifiable detention whether in prison or in private custody. The right to the writ of habeas corpus is a common law right existing independently of statute².

The practice and procedure relating to applications for habeas corpus and appeals in habeas corpus proceedings are discussed in detail elsewhere in this work³.

1 The writ of habeas corpus ad subjiciendum is the writ popularly known simply as 'habeas corpus', but there are other forms of writ of habeas corpus. These are (1) the writ of habeas corpus ad testificandum, issued to bring up a prisoner to give evidence in court (see PARA 1009; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 250); (2) the writ of habeas corpus ad respondendum, issued to bring up a prisoner to answer a criminal charge (see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 250); (3) the writ of habeas corpus cepi corpus, issued on a sheriff's return that he has in his custody a person required to answer proceedings for his committal; and (4) the writ of habeas corpus ad deliberandum et recipiendum, issued to remove a prisoner from one custody to another for the purposes of trial. These last two forms of writ are obsolete and have been replaced by other process: see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 207 note 1.

2 The effectiveness of the writ was increased by the Habeas Corpus Act 1679 (criminal cases) and the Habeas Corpus Act 1816 (non criminal cases): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 213. However, the writ is almost invariably issued by virtue of the common law jurisdiction: see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 213 note 1.

3 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 207 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(4) PROCEEDINGS RELATING TO CRIMINAL MATTERS/1532. Proceedings relating to anti-social behaviour and harassment.

(4) PROCEEDINGS RELATING TO CRIMINAL MATTERS

1532. Proceedings relating to anti-social behaviour and harassment.

Under the Civil Procedure Rules, the civil courts are given jurisdiction to deal with proceedings relating to anti-social behaviour and harassment, which are basically criminal in nature¹. The jurisdiction covers injunctions under the Housing Act 1996²; applications by local authorities under the Anti-social Behaviour Act 2003 or the Police and Justice Act 2006³ for a power of arrest to be attached to an injunction⁴; claims for demotion orders under the Housing Act 1985 and Housing Act 1988, proceedings relating to demoted tenancies and applications to suspend the right to buy⁵; anti-social behaviour orders under the Crime and Disorder Act 1998⁶; claims under the Protection from Harassment Act 1997⁷; applications for drinking banning orders and interim drinking banning orders under the Violent Crime Reduction Act 2006⁸; and parenting orders under the Anti-social Behaviour Act 2003⁹.

1 See CPR Pt 65.

2 See CPR Pt 65 Section I (CPR 65.1-65.7); and **HOUSING** vol 22 (2006 Reissue) PARA 268 et seq.

3 Ie under the Anti-social Behaviour Act 2003 s 91(3) (repealed) or the Police and Justice Act 2006 s 27: see **LOCAL GOVERNMENT** vol 69 (2009) PARA 573; **STATUTES**.

4 See CPR Pt 65 Section II (CPR 65.8-65.10).

5 See CPR Pt 65 Section III (CPR 65.11-65.20); and **HOUSING** vol 22 (2006 Reissue) PARA 273; **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 1376 et seq.

6 See CPR Pt 65 Section IV (CPR 65.21-65.26); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 496.

7 Ie under the Protection from Harassment Act 1997 s 3: see CPR Pt 65 Section V (CPR 65.27-65.30); and **TORT** vol 45(2) (Reissue) PARA 457.

8 Ie under the Violent Crime Reduction Act 2006 ss 4, 9: see CPR Pt 65 Section VI (CPR 65.31-65.36); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 319 et seq.

9 Ie under the Anti-social Behaviour Act 2003 ss 26A, 26B: see CPR Pt 65 Section VII (CPR 65.37-65.41); and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARAS 1329-1333.

UPDATE

1532 Proceedings relating to anti-social behaviour and harassment

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(4) PROCEEDINGS RELATING TO CRIMINAL MATTERS/1533. Proceedings under the Prevention of Terrorism Act 2005.

1533. Proceedings under the Prevention of Terrorism Act 2005.

Jurisdiction is conferred on the civil courts in relation to proceedings under the Prevention of Terrorism Act 2005¹. Part 76 of the Civil Procedure Rules contains rules about control order proceedings in the High Court² and appeals to the Court of Appeal against an order of the High Court in such proceedings³. In relation to such proceedings, the overriding objective⁴, and so far as relevant any other rule, must be read and given effect in a way which is compatible with the duty of the court in such proceedings to ensure that information is not disclosed contrary to the public interest⁵. Subject to that duty, however, the court must satisfy itself that the material available to it enables it properly to determine proceedings⁶. A special procedure is introduced for applications⁷, and the rules as to appeals⁸ are modified in relation to appeals to the Court of Appeal⁹.

1 See CPR Pt 76.

2 See CPR 76 Section 2 (CPR 76.3-76.6) (applications to the High Court relating to derogating control orders); CPR 76 Section 3 (CPR 76.7-76.15) (permission applications, references and appeals to the High Court relating to non-derogating control orders); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 506 et seq. As to the meaning of 'closed order proceedings' see the Prevention of Terrorism Act 2005 s 11(6); definition applied by CPR 76.1(3)(c).

3 CPR 76.1(1). See CPR Pt 76 Section 4 (CPR 76.16); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 506 seq.

4 As to the overriding objective see PARA 33.

5 CPR 76.2(1), (2).

6 CPR 76.2(3).

7 See CPR 76 Sections 2, 3, 5 (CPR 76.3-76.15, 76.17-76.34). CPR Pt 23 (see PARA 303 et seq) does not apply to an application made under CPR 76 Section 1: CPR 76.3(2).

8 Ie CPR Pt 52: see PARA 1657 et seq.

9 See CPR 76.12, 76.16; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 513.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(4) PROCEEDINGS RELATING TO CRIMINAL MATTERS/1534. Financial restrictions proceedings under the Counter-Terrorism Act 2008.

1534. Financial restrictions proceedings under the Counter-Terrorism Act 2008.

The Counter-Terrorism Act 2008 makes provision for financial restrictions proceedings¹. Part 79 of the Civil Procedure Rules sets out the procedure for applications to the High Court to set aside financial restrictions decisions² and for subsequent appeals to the Court of Appeal³. In relation to such proceedings, the overriding objective⁴, and so far as relevant any other rule, must be read and given effect in a way which is compatible with the duty of the court in such proceedings to ensure that information is not disclosed contrary to the public interest⁵. Subject to that duty, however, the court must satisfy itself that the material available to it enables it properly to determine proceedings⁶.

1 See the Counter-Terrorism Act 2008 Pt 6 (ss 63-73); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. 'Financial restrictions proceedings' means proceedings in the High Court on an application under s 63 (application to set aside financial restrictions decision: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**) or on a claim arising from any matter to which such an application relates: s 65.

2 See CPR 79.1(1)(a). As to such applications see CPR 79 Section 2 (CPR 79.3-79.12), Section 4 (CPR 79.15-79.30); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. 'Financial restrictions decision' means a decision to which the Counter-Terrorism Act 2008 s 63(1) applies: CPR 79.1(2)(b). The Counter-Terrorism Act 2008 s 63 applies to any decision of the Treasury in connection with any of its functions under: (1) the UN terrorism orders (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**); (2) the Anti-terrorism, Crime and Security Act 2001 Pt 2 (ss 4-16) (freezing orders) (see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 549); or (3) the Counter-Terrorism Act 2008 Sch 7 (terrorist financing, money laundering, and certain other activities: financial restrictions) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**): s 63(1). See further **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

3 See CPR 79.1(1)(b). As to such appeals see CPR Section 3 (CPR 79.13-79.14), Section 4 (CPR 79.15-79.30); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

4 As to the overriding objective see PARA 33.

5 CPR 79.2(1), (2).

6 CPR 79.2(3).

UPDATE

1534 Financial restrictions proceedings under the Counter-Terrorism Act 2008

TEXT AND NOTES 2, 3--CPR 79.1(1) amended: SI 2009/1092.

NOTES 2, 3--CPR 79 Section 4 amended, CPR Section 5 (CPR 79.31) (notification orders) added: SI 2009/2092.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(4) PROCEEDINGS RELATING TO CRIMINAL MATTERS/1535. Applications for serious crime prevention order etc.

1535. Applications for serious crime prevention order etc.

Provision is made by Part 77 of the Civil Procedure Rules for the civil courts to act in support of criminal justice. That Part contains rules about applications for a serious crime prevention order ('SCPO') under the Serious Crime Act 2007¹ and related applications² under that Act³. An application for a SCPO must be started in accordance with Part 8 of the Civil Procedure Rules⁴ as modified by the relevant practice direction⁵. An application by a third party to make representations and an application to vary or discharge a SCPO⁶ must be made to the High Court in accordance with the normal procedure⁷ as modified by the relevant practice direction⁸, but an application to vary or discharge a SCPO made by the Crown Court⁹ must be started in accordance with Part 8¹⁰.

Applications under Part 77 must be made to the Queen's Bench Division of the High Court in one of the courts set out in the relevant practice direction¹¹.

¹ Ie under the Serious Crime Act 2007 s 8: see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 350 et seq 'SCPO' means a serious crime prevention order under s 1 or s 19: CPR 77.1(2).

² Ie under the Serious Crime Act 2007 ss 9, 17 and 18: see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 355.

³ See CPR 77.1.

⁴ As to the procedure under CPR Pt 8 see PARA 127 et seq.

⁵ CPR 77.2. See *Practice Direction--Applications for and Relating to Serious Crime Prevention Orders* PD 77 paras 1.1-1.5.

⁶ Ie under the Serious Crime Act 2007 s 9, 17 or 18: see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 355.

⁷ Ie CPR Pt 23: see PARA 303 et seq.

⁸ CPR 77.3. See *Practice Direction--Applications for and Relating to Serious Crime Prevention Orders* PD 77 paras 2.1, 3.1, 3.2.

⁹ Ie under the Serious Crime Act 2007 s 17 or 18: see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 355.

¹⁰ CPR 77.4.

¹¹ CPR 77.5. See *Practice Direction--Applications for and Relating to Serious Crime Prevention Orders* PD 77 para 4.1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(5) COMMERCIAL PROCEEDINGS AND OTHER SPECIALIST PROCEEDINGS/1536. The Commercial Court.

(5) COMMERCIAL PROCEEDINGS AND OTHER SPECIALIST PROCEEDINGS

1536. The Commercial Court.

The Commercial Court was established in 1895 and constituted as part of the Queen's Bench Division¹ 'to provide a court in which there was a greater familiarity with the subject matter of commercial and mercantile disputes and to provide procedures which would enable those disputes to be determined justly, expeditiously and efficiently and without unnecessary formality'². The Commercial Court will only take 'commercial claims' as defined by rules of court³, which include any case arising out of trade and commerce in general, including any case relating to:

- 1135 (1) a business document or contract;
- 1136 (2) the export or import of goods;
- 1137 (3) the carriage of goods by land, sea, air or pipeline;
- 1138 (4) the exploitation of oil and gas reserves or other natural resources;
- 1139 (5) insurance and re-insurance;
- 1140 (6) banking and financial services;
- 1141 (7) the operation of markets and exchanges;
- 1142 (8) the purchase and sale of commodities;
- 1143 (9) the construction of ships;
- 1144 (10) business agency; and
- 1145 (11) arbitration⁴.

The judges of the Commercial Court are such of the puisne judges of the High Court as the Lord Chief Justice may, after consulting the Lord Chancellor, from time to time nominate to be commercial judges⁵. One of these judges is in charge of the commercial list, in which commercial claims in the Queen's Bench Division may be entered⁶.

All proceedings in the commercial list, including any appeal from a judgment, order or decision of a master or district judge before the proceedings were transferred to the Commercial Court, will be heard or determined by a Commercial Court judge, except that (a) another judge of the Queen's Bench Division or Chancery Division may hear urgent applications if no Commercial Court judge is available; and (b) unless the court otherwise orders, any application relating to the enforcement of a Commercial Court judgment or order for the payment of money will be dealt with by a master of the Queen's Bench Division or a district judge⁷.

Special provision for commercial proceedings is made in the Civil Procedure Rules by Part 58 and the practice direction relating to the Commercial Court which is supplementary thereto⁸.

The Commercial Court encourages the use of alternative dispute resolution ('ADR') in appropriate cases, including mediation, conciliation and (non-binding and without prejudice) early neutral evaluation by a Commercial Court judge⁹.

¹ Supreme Court Act 1981 s 6(1)(b). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. The Commercial Court was created as such by the Administration of

Justice Act 1970 s 3(1) (repealed). Before that the term 'Commercial Court' was loosely used to refer to the court consisting of specified Queen's Bench judges who were to try the list of commercial causes which came to be known as the 'commercial list'. The originator of this successful expedient was Mathew J, who envisaged the establishment of a special court with a simplified procedure which might better meet the requirements of the commercial community, and thus avoid unnecessary delay and inconvenience and the greater expense of the ordinary procedure. This court was established by a Resolution of the Judges issued on 24 May 1894: see *Barry v Peruvian Corpn Ltd* [1896] 1 QB 208 at 209, CA, per Lord Esher MR, and an article in (1902) 46 Sol Jo 644. Thereafter a series of notices relating to commercial causes was issued: see *Notice* dated February 1895 [1895] WN Appendix, p 2; *Notice* dated 28 July 1911; *Practice Note* [1927] WN 258; and *Notice* dated November 1929 (all reprinted in the Annual Practice 1965, pp 2402-2405); *Practice Direction* [1977] 1 All ER 912; *Practice Direction* [1981] 3 All ER 864. A Commercial Court Users Liaison Committee was formed to provide for a flow of information and suggestions between the court and those who appear there, either as litigants or as their professional advisers: see *Practice Note* [1968] 1 All ER 399, sub nom *Practice Statement* [1967] 1 WLR 1545. This committee has been replaced by the Commercial Court Committee, to which representations may be addressed through its Secretary at the Royal Courts of Justice: see *The Admiralty and Commercial Courts Guide* (2006 Edn) para A3 and, historically, *The Marie Leonhardt* [1981] 3 All ER 664 at 666, [1981] 1 WLR 1262 at 1264 per Robert Goff J; *Practice Direction* [1981] 3 All ER 864. An index to recent unreported judgments of the Commercial Court is available on disk, and judgments referred to therein can be consulted at the Registry: see *Practice Statement (Commercial and Admiralty Courts: Judgments Archive)* (1997) Times, 30 June. As to the more detailed history and practice of the court see Theobald Matthew's *Practice of the Commercial Court* and Scrutton's 'The Work of the Commercial Courts' (1923) 1 Cambridge Law Journal 6.

2 See *The Commercial Court Guide* (5th Edn, 1999) Introduction. The guide was brought into force by *Practice Direction--Commercial Court* PD 58 paras 9.1-9.5, which superseded all previous practice directions and practice statements in the Commercial Court: PARA 12. It has now been superseded by *The Admiralty and Commercial Courts Guide* (2006 Edn), which is published with the approval of the Lord Chief Justice and the Head of Civil Justice in consultation with the judges of the Admiralty and Commercial Courts and with the advice and support of the Admiralty Court and Commercial Court Committees (see para A1.2). For the complete text of *The Admiralty and Commercial Courts Guide* see *The Civil Court Practice*. As to the Head of Civil Justice see PARA 12 note 5.

3 See the Supreme Court Act 1981 s 62(3).

4 CPR 58.1(2).

5 See the Supreme Court Act 1981 s 6(2) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 114, 119(1), (2)). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under this provision: Supreme Court Act 1981 s 6(3) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 119(3)).

6 CPR 58.2(2). However, all the judges of the High Court, except where the Supreme Court Act 1981 expressly provides otherwise, have in all respects equal power, authority and jurisdiction: s 4(3). The commercial list is a specialist list for the purposes of the Civil Procedure Rules (see eg CPR 16.3(5)(d); CPR 30.5; and PARAS 586, 67 respectively): CPR 58.2(1).

7 *Practice Direction--Commercial Court* PD 58 para 1.2.

8 See CPR Pt 58; *Practice Direction--Commercial Court* PD 58. The CPR and their practice directions apply to claims in the commercial list unless CPR Pt 58 or a practice direction provides otherwise: CPR 58.3. In addition, *The Admiralty and Commercial Courts Guide* (2006 Edn), a guide to procedure in the Commercial Court, is to be read in conjunction with the CPR and practice directions. However, it 'is not intended to provide a blueprint for litigation to which practitioners and the court must unthinkingly conform. The interests of efficiency and justice are paramount and the Guide must be treated as a flexible instrument so as to enable the Court to continue to provide a service to the international business community of the highest quality': *The Admiralty and Commercial Courts Guide* (2006 Edn) Introduction.

9 See *The Admiralty and Commercial Courts Guide* (2006 Edn) paras G1, G2. The Commercial Court's encouragement of ADR began with *Practice Note* [1994] 1 All ER 34, sub nom *Practice Statement* [1994] 1 WLR 14, followed by *Practice Note* [1996] 3 All ER 383, sub nom *Practice Statement (No 2)* [1996] 1 WLR 1024 and *Practice Direction* (1997) Times, 2 October. As to the meaning of 'alternative dispute resolution' (ADR) see PARA 35 note 3; and as to alternative dispute resolution see generally **ARBITRATION** vol 2 (2008) PARA 1201 et seq. As to Commercial Court judges sitting as arbitrators see PARA 1544.

UPDATE

1536 The Commercial Court

TEXT AND NOTES--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(5) COMMERCIAL PROCEEDINGS AND OTHER SPECIALIST PROCEEDINGS/1537. Commencing proceedings in the Commercial Court.

1537. Commencing proceedings in the Commercial Court.

A commercial claim¹ may be started in the commercial list². Proceedings in the Commercial Court are commenced by a claim form under Part 7 or Part 8 of the Civil Procedure Rules, except for certain applications relating to arbitrations³. The Commercial Court does not give a fixed date for a hearing when it issues a claim and there is no production centre for the issue of claim forms for the Commercial Court⁴. An adapted version of the practice form for Part 7 claims has been approved for use in the Commercial Court⁵. Similarly, an adapted version of the practice form for Part 8 claims has been approved for Part 8 claims in the Commercial Court⁶.

The appropriate claim form must be marked in the top right hand corner with the words 'Queen's Bench Division, Commercial Court', and on the issue of the claim form out of the Registry the case will be entered in the commercial list⁷. The statement of value of the case (otherwise required by the Civil Procedure Rules) is not necessary where a claim form has been marked for the Commercial Court in this way⁸.

There is no requirement for a claim form to contain or be accompanied by particulars of claim in the Commercial Court, and the particulars of claim will often be served after the claim form⁹. A defendant must file an acknowledgment of service in every case¹⁰, and normally, the period for filing an acknowledgment of service is 14 days after service of the claim form¹¹.

The procedure for disputing the jurisdiction of the court¹² applies to claims in the commercial list with modifications¹³. An application¹⁴ must be made within 28 days after filing an acknowledgment of service¹⁵. If the defendant files an acknowledgment of service indicating an intention to dispute the court's jurisdiction, the claimant need not serve particulars of claim before the hearing of the application¹⁶.

Particular provision is made for transfers into and out of the commercial list. An application for the transfer of proceedings to or from the commercial list must be made to a judge dealing with claims in that list, except that a Commercial Court judge may order a claim to be transferred to any other specialist list¹⁷. If an application is made to a court other than the Commercial Court to transfer proceedings to the commercial list, the other court may either adjourn the application to be heard by a Commercial Court judge or dismiss the application¹⁸. An application by a defendant, including an additional defendant¹⁹, for an order transferring proceedings from the commercial list should be made promptly and normally not later than the first case management conference²⁰. A party applying to the Commercial Court to transfer a claim to the commercial list must give notice of the application to the court in which the claim is proceeding, and the Commercial Court will not make an order for transfer until it is satisfied that such notice has been given²¹.

1 As to the meaning of 'commercial claim' see PARA 1536.

2 CPR 58.4(1).

3 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para B2.1. The applications relating to arbitrations referred to in the text governed by CPR Pt 62. CPR Pt 8 (see PARA 127 et seq) applies to claims in the commercial list, with the modification that a defendant to a Part 8 claim who wishes to rely on written evidence must file and serve it within 28 days after filing an acknowledgment of service: CPR 58.12.

- 4 CPR 7.9, 7.10 and *Practice Direction--Production Centre* PD 7C (see PARAS 125-126) accordingly have no application in the Commercial Court: see *The Admiralty and Commercial Courts Guide* (2006 Edn) para B2.3.
- 5 I.e. practice form N1(CC): *Practice Direction--Commercial Court* PD 58 para 2.4; *The Admiralty and Commercial Courts Guide* (2006 Edn) para B3.1. *Practice Direction--How to Start Proceedings: The Claim Form* PD 7A para 3.4 provides for the approval of a different practice form for specialist proceedings.
- 6 I.e. practice form N208(CC): *Practice Direction--Commercial Court* PD 58 para 2.4. As to the meaning of 'Part 8 claim form' see PARA 130 note 11.
- 7 *Practice Direction--Commercial Court* PD 58 para 2.4; *The Admiralty and Commercial Courts Guide* (2006 Edn) para B3.2.
- 8 CPR 58.5(2); *The Admiralty and Commercial Courts Guide* (2006 Edn) para B3.3. As to statements of value see CPR 16.3, CPR 16.5(6); and PARAS 586, 599. If the claimant is claiming interest, he must include a statement to that effect and give the details set out in CPR 16.4(2) (see PARA 587) in both the claim form and the particulars of claim: CPR 58.5(3).
- 9 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para B3.4. This has the effect of disapplying *Practice Direction--Statements of Case* PD16 para 3.1 which requires particulars of claim to be set out in or with the claim form where practicable. As to particulars of claim see PARA 587. If, in a Part 7 claim, particulars of claim are not contained in or served with the claim form, the claim form must state that, if an acknowledgment of service is filed (see PARA 184) which indicates an intention to defend the claim, particulars of claim will follow: CPR 58.1(5)(a). When the claim form is served, it must be accompanied by the documents specified in CPR 7.8(1) (see PARA 124): CPR 58.1(5)(b). The claimant must serve particulars of claim within 28 days of the filing of an acknowledgment of service which indicates an intention to defend (CPR 58.1(5)(c)) and CPR 7.4(2) (see PARA 123) does not apply (CPR 58.1(5)(d)).
- 10 CPR 58.6(1).
- 11 CPR 58.6(2). However, where the claim form is served out of the jurisdiction, or on the agent of a defendant who is overseas, the time periods provided by CPR 6.12(3), 6.35 and 6.37(5) (see PARAS 147, 171, 185, 204) apply after service of the claim form: CPR 58.6(3).
- 12 I.e. CPR Pt 11: see PARA 206.
- 13 CPR 58.7(1).
- 14 I.e. under CPR 11(1).
- 15 CPR 58.7(2).
- 16 CPR 58.7(3).
- 17 See CPR 58.4(2), applying CPR 30.5(3).
- 18 *Practice Direction--Commercial Court* PD 58 para 4.1. If the Commercial Court orders proceedings to be transferred to the commercial list, it will order them to be transferred to the Royal Courts of Justice and it may give case management directions: para 4.2.
- 19 As to additional defendants see PARA 629.
- 20 See *Practice Direction--Commercial Court* PD 58 para 4.3.
- 21 See *Practice Direction--Commercial Court* PD 58 para 4.4.

UPDATE

1537 Commencing proceedings in the Commercial Court

NOTE 3--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para B2.1.

NOTE 4--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para B2.3.

NOTES 5, 7-9--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para B4.1-B4.4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(5) COMMERCIAL PROCEEDINGS AND OTHER SPECIALIST PROCEEDINGS/1538. Pleadings in commercial proceedings.

1538. Pleadings in commercial proceedings.

Pleadings must be drafted in a form that complies with Appendix 4 of *The Admiralty and Commercial Courts Guide* (for example being as brief and concise as possible and avoiding contentious paraphrasing) unless the court orders otherwise¹. The general provisions as to pleadings² apply subject to some exceptions and additions³. These include allowing the attaching or serving of only relevant pages or sections of a written agreement relied upon where appropriate⁴ and the serving of summaries of pleadings where the pleading itself exceeds 25 pages in length⁵.

Where insurers have the conduct of a case for multiple parties, the statement of truth in any statement of case may be signed by a senior individual with responsibility for the case at a lead insurer, rather than by the parties themselves, but must specify the capacity in which the individual signing does so⁶.

The procedure as to admission of part of a claim for a specified amount of money⁷ does not apply to claims in the commercial list⁸. If the defendant admits part of a claim for a specified amount of money, the claimant may apply⁹ for judgment on the admission¹⁰.

The rules as to defence and reply¹¹ apply to claims in the commercial list with the modification¹² that the claimant must file any reply to a defence and serve it on all other parties within 21 days after service of the defence¹³. The requirements as to service in relation to the period for filing a defence where the claim form is served out of the jurisdiction¹⁴ apply to claims in the commercial list, except that if the particulars of claim are served after the defendant has filed an acknowledgment of service¹⁵ the period for filing a defence is 28 days from service of the particulars of claim¹⁶.

1 See *The Commercial Court Guide* (5th Edn, 1999) para C1.1.

2 I.e CPR 16.4; CPR 16.5 (except CPR 16.5(6), (8)); and the relevant provisions of *Practice Direction--Statements of Case* PD16: see PARAS 587, 600.

3 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para C1.2(a).

4 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para C1.3(a). As to the meaning of 'service' see PARA 138 note 2.

5 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para C1.4. Such summaries must not normally exceed four pages in length: para C.1.4.

6 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para C1.9. As to statements of truth see PARA 613.

7 I.e CPR 14.5: see PARA 192.

8 CPR 58.9(1).

9 I.e under CPR 14.3: see PARA 190.

10 CPR 58.9(2). CPR 14.14(1) applies with the modification that CPR 14.14(1)(a) is to be read as if it referred to the claim form instead of the particulars of claim: CPR 58.9(3). As to the claim form see PARAS 117 et seq, 584 et seq. As to particulars of claim see PARA 123.

- 11 le CPR Pt 15: see PARAS 199 et seq, 604.
- 12 le to CPR 15.8: see PARA 604.
- 13 CPR 58.10(1).
- 14 le CPR 6.35: see PARAS 185, 204.
- 15 As to acknowledgment of service see PARAS 184-186.
- 16 CPR 58.10(2).

UPDATE

1538 Pleadings in commercial proceedings

NOTE 3--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para C1.2(a).

NOTE 4--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para C1.3(a).

NOTE 5--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para C1.1(b).

NOTE 6--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para C1.6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(5) COMMERCIAL PROCEEDINGS AND OTHER SPECIALIST PROCEEDINGS/1539. Case management in the Commercial Court.

1539. Case management in the Commercial Court.

Cases in the commercial list proceed as if allocated to the multi-track¹ and the usual allocation rules do not apply².

Specific Commercial Court case management procedure takes the place of Part 29 of the Civil Procedure Rules and the complementary practice direction thereto which deal with case management in the multi-track³, with the exception that the provisions dealing with the requirement for a legal representative to attend case management conferences and pre-trial reviews and with variation of the case management timetable⁴ do apply to proceedings in the Commercial Court⁵. As soon as practicable the court will hold a case management conference which must be fixed in accordance with the practice direction⁶. At the case management conference or at any hearing at which the parties are represented the court may give such directions for the management of the case as it considers appropriate⁷.

The Admiralty and Commercial Courts Guide identifies ten 'key features' of case management in a normal case (commenced by a Part 7 claim form⁸) in the Commercial Court:

- 1146 (1) statements of case⁹ will be exchanged within fixed or monitored time periods;
- 1147 (2) a case memorandum, a list of issues and a case management bundle will be produced at an early point in the case;
- 1148 (3) the case memorandum, list of issues and case management bundle will be amended and updated or revised on a running basis throughout the life of the case and will be used by the court at every stage of the case;
- 1149 (4) a mandatory case management conference will be held shortly after statements of case have been served, if not before (and preceded by the parties lodging case management information sheets identifying their views on the requirements of the case);
- 1150 (5) at the case management conference the court will (as necessary) discuss the issues in the case, and the requirements of the case with the advocates retained in the case; the court will set a pre-trial timetable and give any other directions as may be appropriate¹⁰;
- 1151 (6) before the progress monitoring date the parties will report to the court (using a progress monitoring information sheet) on compliance with the pre-trial timetable;
- 1152 (7) on or shortly after the progress monitoring date a judge of the court will (without a hearing) consider progress and give such further directions as he thinks appropriate;
- 1153 (8) if at the progress monitoring date all parties have indicated that they will be ready for trial, all parties will complete a pre-trial check list;
- 1154 (9) in many cases there will be a pre-trial review; in such cases the parties will be required to prepare (for consideration by the court) a trial timetable;
- 1155 (10) there will, throughout the case, be regular reviews of the estimated length of trial¹¹.

The above procedure presumes the service of particulars of claim¹². However, in some cases the court may commence case management before particulars of claim are served or may decide to try a case without particulars of claim or a defence being served¹³.

- 1 As to allocation to the multi-track see PARAS 269, 293 et seq.
- 2 CPR 58.13(1), particularly disapplying CPR Pt 26. As to allocation check-lists and track allocation normally see PARA 260 et seq.
- 3 See PARA 293 et seq.
- 4 Ie CPR 29.3(2) and CPR 29.5 (except CPR 29.5(1)(c)): see PARA 297.
- 5 See CPR 58.13(2); *Practice Direction--Commercial Court* PD 58 para 10; and *The Admiralty and Commercial Courts Guide* (2006 Edn) para D1.3.
- 6 CPR 58.13(3); *Practice Direction--Commercial Court* PD 58 para 10.
- 7 CPR 58.13(4).
- 8 As to the commencement of proceedings in the Commercial Court see PARA 1537; and as to Part 7 claim forms generally see PARA 117.
- 9 As to statements of case see PARA 584 et seq.
- 10 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para D2(5). A standard pre-trial timetable in the Commercial Court is given in Appendix 8.
- 11 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para D2.
- 12 As to particulars of claim see PARA 123.
- 13 See CPR 58.11, which provides that the court may at any time before or after the issue of the claim form order a claim in the commercial list to proceed without the filing or service of statements of case.

UPDATE

1539 Case management in the Commercial Court

NOTE 5--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para D1.3.

NOTE 10--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para D2(6).

NOTE 11--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para D2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(5) COMMERCIAL PROCEEDINGS AND OTHER SPECIALIST PROCEEDINGS/1540. Disclosure in commercial proceedings.

1540. Disclosure in commercial proceedings.

The court will seek to ensure that disclosure is no wider than appropriate; anything wider than standard disclosure¹ will need to be justified².

Part 31 of the Civil Procedure Rules³ and the practice direction supplementary thereto⁴ apply in the Commercial Court, subject to particular provisions of *The Admiralty and Commercial Courts Guide*⁵, which makes special provision for disclosure in commercial proceedings. In particular, disclosure statements must meet three additional requirements relating to searches for documents, in addition to complying with those in the relevant rules⁶. They must (1) expressly state that the disclosing party believes the extent of the search to have been reasonable in all the circumstances; (2) draw attention to any particular limitations on the extent of the search adopted for reasons of proportionality; and (3) give the reasons why they were adopted⁷.

Specific provision is made for the disclosure of a ship's papers in proceedings relating to a marine insurance policy⁸.

1 As to standard disclosure see CPR 31.6; *The Admiralty and Commercial Courts Guide* (2006 Edn) para E1.3; and PARA 542.

2 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para E1.1. As to the meaning of 'disclosure' see PARA 538.

3 Ie CPR Pt 31: see PARAS 112, 538 et seq.

4 Ie *Practice Direction--Disclosure and Inspection* PD 31: see PARA 538 et seq.

5 See *Admiralty and Commercial Courts Guide* Section E. An adapted version of practice form N265 (Form N265(CC)) has been approved for use in the Commercial Court and a copy of it appears at the end of *The Admiralty and Commercial Courts Guide* (2006 Edn). The court may at any stage order that any disclosure statement be verified by affidavit or witness statement: see para E3.9. As to the meaning of 'affidavit' see PARA 540 note 5; and as to the meaning of 'witness statement' see PARA 751 note 1.

6 The rules referred to in the text are CPR 31.7(3) (see PARA 543) and CPR 31.10(6) (see PARA 544): see *The Admiralty and Commercial Courts Guide* (2006 Edn) para E3.6.

7 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para E3.6.

8 See CPR 58.14; and **INSURANCE** vol 25 (2003 Reissue) PARA 512. If in such proceedings the underwriters apply for specific disclosure under CPR 31.12 (see PARA 547), the court may (1) order a party to produce all the ship's papers; and (2) require that party to use his best endeavours to obtain and disclose documents which are not or have not been in his control: CPR 58.14(1). Such an order may be made at any stage of the proceedings and on such terms, if any, as to staying the proceedings or otherwise, as the court thinks fit: CPR 58.14(2).

UPDATE

1540 Disclosure in commercial proceedings

NOTE 1--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para E2.2.

NOTE 2--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para E1.1.

NOTE 5--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) Section E.

NOTES 6, 7--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para E3.4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(5) COMMERCIAL PROCEEDINGS AND OTHER SPECIALIST PROCEEDINGS/1541. Applications in commercial proceedings.

1541. Applications in commercial proceedings.

There are five types of application in the Commercial Court, each treated differently. They are:

- 1156 (1) applications without notice;
- 1157 (2) expedited applications;
- 1158 (3) paper applications;
- 1159 (4) ordinary applications;
- 1160 (5) heavy applications¹.

Part 23 of the Civil Procedure Rules makes provision for applications generally and takes effect in the Commercial Court subject to the modifications made by Part 58 and the relevant practice direction². The practice direction supplementing Part 23 also applies generally but subject to a number of modifications³.

An adapted version of application notice has been approved for use in the Commercial Court. Special provision is made for time estimates and time limits for applications⁴.

Ordinary applications in the Commercial Court are applications expected to involve an oral hearing lasting half a day or less⁵. They will often be very short and will normally be heard on Fridays⁶. Very short applications, such as to extend time, can usually be heard without evidence and on short notice⁷. For other ordinary applications, evidence in support must normally be filed and served with the application, with evidence in answer within 14 days and any in reply within seven days⁸.

In ordinary applications, an 'ordinary application bundle'⁹ must be lodged with the Listing Office by 1 pm one clear day before the date fixed for the hearing (the application may be stood out of the list without further warning) and provided by the applicant to the other parties. The case management bundle will be passed by the Listing Office to the judge¹⁰. Except in very short and simple cases, skeleton arguments must be provided by all parties and lodged with the Listing Office and served on the advocates for all other parties to the application by 1 pm the day before the hearing¹¹.

By contrast, heavy applications are those in which an oral hearing is expected to last more than half a day and normally involve more evidence and more complex or extensive issues¹². Again, evidence in support must normally be filed and served with the application; however, evidence in answer must follow within 28 days and any in reply as soon as possible but in any event within 14 days thereafter¹³.

In heavy applications, an application bundle¹⁴ must be lodged with the Listing Office by 4 pm two clear days before the hearing, together with a reading list and an estimate for the reading time likely to be required by the court as agreed between the counsel or other advocates to appear on the application¹⁵. Skeleton arguments must be lodged with the Listing Office and served on the advocates for all other parties to the application, the applicant's by 4 pm two clear days before the hearing and the respondent's by 4 pm one clear day before the hearing¹⁶. The applicant's skeleton argument should normally contain a chronology and a dramatis personae if appropriate¹⁷.

The Admiralty and Commercial Courts Guide makes further detailed provision for lodging of reading lists, bundles, skeletons, evidence and time estimates in various different circumstances¹⁸. Provision is also made for dealing with applications by consent¹⁹. Different provisions apply to urgent applications such as applications for freezing injunctions and search orders²⁰.

The Admiralty and Commercial Courts Guide makes express provision for the use of alternative dispute resolution ('ADR')²¹ including the option of a without prejudice early neutral evaluation by a Commercial Court judge²².

- 1 See *The Admiralty and Commercial Courts Guide* (2006 Edn) paras F2-F6.
- 2 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para F1.1(a). As to CPR Pt 23 see PARA 303 et seq.
- 3 See *Practice Direction--Applications* PD 23A; and PARA 6 et seq. The modifications are that (1) PD23 paras 1, 2.3-2.6 (see PARA 306) do not apply; (2) paras 2.8, 2.10 (see PARA 305) apply only if the proposed (additional) application will not increase the time estimate already given for the hearing for which a date has been fixed; and (3) para 3 (see PARA 307) is subject in all cases to the judge's agreeing that the application may proceed without an application notice being served: see *The Admiralty and Commercial Courts Guide* (2006 Edn) para F1.1(a)(i)-(iii).
- 4 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para F10. The form of application notice referred to in the text is Form N244(CC): see *The Admiralty and Commercial Courts Guide* (2006 Edn) para F1.1(b).
- 5 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para F5.1.
- 6 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para F5.2.
- 7 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para F5.3.
- 8 See *Practice Direction--Commercial Court* PD 58 para 13.1; and *The Admiralty and Commercial Courts Guide* (2006 Edn) para F5.4.
- 9 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para F11.
- 10 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para F5.5.
- 11 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para F5.6. For guidelines on the preparation of skeleton arguments see Appendix 9 Pt 1.
- 12 *The Admiralty and Commercial Courts Guide* (2006 Edn) paras F6.1, F6.2.
- 13 See *Practice Direction--Commercial Court* PD 58 para 13.2; and *The Admiralty and Commercial Courts Guide* (2006 Edn) para F6.3.
- 14 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para F11.
- 15 *The Admiralty and Commercial Courts Guide* (2006 Edn) para F6.4(a).
- 16 *The Admiralty and Commercial Courts Guide* (2006 Edn) paras F6.5, F6.6.
- 17 *The Admiralty and Commercial Courts Guide* (2006 Edn) para F6.5.
- 18 See *The Admiralty and Commercial Courts Guide* (2006 Edn) paras F5, F6, F7, F10, F11, F12, F13.
- 19 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para F9.
- 20 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para F15, Appendix 5. The relevant provisions for costs in applications are found at paras F14, J13. As to costs generally see also PARA 1729 et seq.
- 21 As to the meaning of 'alternative dispute resolution' (ADR) see PARA 35 note 3; and as to alternative dispute resolution see generally **ARBITRATION** vol 2 (2008) PARA 1201 et seq.

22 See *The Admiralty and Commercial Courts Guide* (2006 Edn) paras G1, G2. The full text of the provisions referred to in the text and notes 1-21 and in the text to this note may be found in *The Civil Court Practice*. As to Commercial Court judges sitting as arbitrators see PARA 1544.

UPDATE

1541 Applications in commercial proceedings

NOTES 1-6--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009).

NOTE 7--*The Admiralty and Commercial Courts Guide* (7th Edn, 2006) para F5.3 not replicated in *The Admiralty and Commercial Courts Guide* (8th Edn, 2009).

NOTE 8--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para F5.3.

NOTE 9--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para F11.

NOTE 10--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para F5.4.

NOTE 11--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para F5.5.

NOTES 12-14--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009).

NOTE 15--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) para F6.4.

NOTES 16-22--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(5) COMMERCIAL PROCEEDINGS AND OTHER SPECIALIST PROCEEDINGS/1542. Trial in the Commercial Court.

1542. Trial in the Commercial Court.

Practice in the Commercial Court for trial broadly reflects the spirit and purpose of the provisions for applications¹. However, *The Admiralty and Commercial Courts Guide* sets out in detail particular provisions relating to the following:

- 1161 (1) witnesses of fact and witness statements²;
- 1162 (2) expert witnesses³;
- 1163 (3) evidence by video link⁴;
- 1164 (4) taking evidence from abroad⁵;
- 1165 (5) facility for expedited trial⁶;
- 1166 (6) information technology at trial⁷;
- 1167 (7) trial sitting days (not normally including Fridays)⁸;
- 1168 (8) oral opening statements at trial⁹;
- 1169 (9) written closing submissions¹⁰;
- 1170 (10) judgment¹¹;
- 1171 (11) costs¹²;
- 1172 (12) multi-party disputes, which may be allocated to a two-judge team¹³;
- 1173 (13) litigants in person¹⁴.

The Civil Procedure Rules have brought procedure in other civil courts more into line with the object and purpose of practice in the Commercial Court¹⁵.

1 See PARA 1541.

2 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para H1. As to the meaning of 'witness statement' see PARA 751 note 1.

3 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para H2. As to the meaning of 'expert' see PARA 791 note 10.

4 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para H3.

5 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para H4.

6 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para J1.

7 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para J4.

8 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para J7.

9 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para J8.

10 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para J11.

11 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para J12.

12 See *The Admiralty and Commercial Courts Guide* (2006 Edn) para J13.

13 See *The Admiralty and Commercial Courts Guide* (2006 Edn) paras L1, L2.

14 See *The Admiralty and Commercial Courts Guide* (2006 Edn) paras M1, M2. The full text of all the provisions referred to in the text and notes 2-14 and in the text to this note may be found in *The Civil Court Practice*.

15 As to the new civil procedure see PARA 24 et seq.

UPDATE

1542 Trial in the Commercial Court

TEXT AND NOTES--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(5) COMMERCIAL PROCEEDINGS AND OTHER SPECIALIST PROCEEDINGS/1543. Judgments and orders in the Commercial Court.

1543. Judgments and orders in the Commercial Court.

If, in a Part 7 claim¹ in the commercial list², a defendant³ fails to file an acknowledgment of service⁴, the claimant⁵ need not serve particulars of claim⁶ before he may obtain or apply for⁷ default judgment⁸.

Except for orders made by the court on its own initiative and unless the court orders otherwise, every judgment or order will be drawn up by the parties⁹. An application for a consent order must include a draft of the proposed order signed on behalf of all the parties to whom it relates¹⁰ and the normal provisions as to consent judgments and orders¹¹ do not apply¹².

1 As to Part 7 claims see PARA 116 et seq.

2 As to the commercial list see PARA 1536.

3 As to the meaning of 'defendant' see PARA 18.

4 As to acknowledgment of service see PARAS 184-186.

5 As to the meaning of 'claimant' see PARA 18.

6 As to particulars of claim see PARA 123.

7 Ie in accordance with CPR Pt 12: see PARA 506 et seq.

8 CPR 58.8(1). CPR 12.6(1) applies with the modification that CPR 12.6(1)(a) is to be read as if it referred to the claim form instead of the particulars of claim: CPR 58.8(2).

9 CPR 58.15(1). CPR 40.3 (drawing up and filing of judgments and orders: see PARA 1139) is modified accordingly: CPR 58.15(1).

10 CPR 58.15(2).

11 Ie CPR 40.6.

12 CPR 58.15(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(5) COMMERCIAL PROCEEDINGS AND OTHER SPECIALIST PROCEEDINGS/1544. Powers of Commercial Court or judges in arbitration proceedings.

1544. Powers of Commercial Court or judges in arbitration proceedings.

The Commercial Court has two distinct functions in arbitration proceedings: its judges may be appointed as arbitrators and it has a supervisory role over arbitrations in commercial cases.

If in all the circumstances he thinks fit, a judge of the Commercial Court or an Official Referee may accept appointment as sole arbitrator, or as umpire, by or by virtue of an arbitration agreement¹ where the dispute appears to him to be of a commercial character². An appeal from the decision of a judge appointed as an arbitrator must be made to the Court of Appeal, not to the Commercial Court as it would be in the case of a non-judge arbitrator³.

Substantive and procedural provisions relating to arbitration are principally found in the Arbitration Act 1996 and in Part 62 of the Civil Procedure Rules and the relevant practice direction supplementary thereto⁴.

1 As to the meaning of 'arbitration agreement' see the Arbitration Act 1996 ss 5(1), 6(1); and **ARBITRATION** vol 2 (2008) PARA 1213.

2 See the Arbitration Act 1996 s 93(1); and **ARBITRATION** vol 2 (2008) PARA 1226. A judge must not accept such an appointment unless he has been informed by the Lord Chief Justice that he can be made available, having regard to the state of business in the High Court and Crown Court: s 93(2).

3 See the Arbitration Act 1996 s 93(6), Sch 2 para 2(1).

4 See CPR Pt 62; *Practice Direction--Arbitration* PD 62; and **ARBITRATION** vol 2 (2008) PARA 1201 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(5) COMMERCIAL PROCEEDINGS AND OTHER SPECIALIST PROCEEDINGS/1545. Mercantile courts.

1545. Mercantile courts.

Mercantile courts have been established at Birmingham, Bristol, Cardiff, Chester, Leeds, Liverpool, Manchester, Mold and Newcastle upon Tyne and at the Commercial Court of the Queen's Bench Division at the Royal Courts of Justice (called 'The London Mercantile Court')¹. Provision is made for mercantile courts to hear mercantile claims, either from the outset or following a transfer from another court². 'Mercantile claim' means a claim proceeding in a mercantile court, and 'mercantile court' means a specialist list³ established within the courts listed in the practice direction supplementing Part 59 of the Civil Procedure Rules⁴. A claim may only be started in a mercantile court if it (1) relates to a commercial or business matter in a broad sense; and (2) is not required to proceed in the Chancery Division or in another specialist list⁵.

Procedure in mercantile courts is described in *The Mercantile Court Guides*, which are complementary to *The Admiralty and Commercial Courts Guide*⁶. The *Mercantile Court Guides* are concerned mainly to draw attention to areas where there are differences between the respective rules and practice directions in the Commercial Court and the mercantile courts and to highlight other areas where guidance is appropriate as to the practice and procedure in the mercantile courts⁷.

The claim form⁸ must be marked in the top right hand corner 'Queen's Bench Division, _____ District Registry, Mercantile Court' or 'Queen's Bench Division, The London Mercantile Court' as appropriate⁹.

The normal procedure for transfer between Divisions and to and from a specialist list¹⁰ applies in respect of transfers into and out of the mercantile court, with the modifications that (a) a mercantile judge may transfer a mercantile claim to another mercantile court; and (b) a commercial court judge may transfer a claim from the Commercial Court to a mercantile court¹¹.

The court may at any time before or after issue of the claim form order a mercantile claim to proceed without the filing or service of statements of case¹².

All mercantile claims are treated as being allocated to the multi-track¹³. Only specified parts of Part 29 of the Civil Procedure Rules¹⁴ apply¹⁵. As soon as practicable the court will hold a case management conference which must be fixed in accordance with the relevant practice direction¹⁶. At the case management conference or at any hearing at which the parties are represented the court may give such directions for the management of the case as it considers appropriate¹⁷.

Particular provision is made for claims in the mercantile court in respect of the claim form and particulars of claim¹⁸; acknowledgment of service¹⁹; disputing the court's jurisdiction²⁰; default judgment²¹; admissions²²; defence and reply²³; and judgments and orders²⁴.

1 See *Practice Direction--Mercantile Courts* PD 59 para 1.2. Outside London, the mercantile courts are established in district registries of the High Court: para 1.2.

2 See CPR Pt 59 and *Practice Direction--Mercantile Courts* PD 59, which make detailed provision as to the procedure applicable in mercantile claim cases. The Civil Procedure Rules and their practice directions apply to mercantile claims unless Pt 59 or a practice direction provides otherwise: CPR 59.2.

3 As to the meaning of 'specialist list' see PARA 67 note 8.

4 CPR 59.1(3)(a), (b); *Practice Direction--Mercantile Courts* PD 59.

5 CPR 59.1(2). A claim should only be started in a mercantile court if it will benefit from the expertise of a mercantile judge: *Practice Direction--Mercantile Courts* PD 59 para 2.1. 'Mercantile judge' means a judge authorised to sit in a mercantile court: CPR 59.1(3)(c).

6 Separate guides are available for each of the individual mercantile courts. They can be found on the Courts Service website at www.hmcourts-service.gov.uk. As to *The Admiralty and Commercial Courts Guide* see PARA 1536 note 2.

7 The *Mercantile Court Guides* are therefore mainly a commentary, adopting the same section and paragraph numbers as in *The Admiralty and Commercial Courts Guide*.

8 As to the claim form see PARAS 117 et seq, 584 et seq.

9 *Practice Direction--Mercantile Courts* PD 59 para 2.2.

10 Ie CPR 30.5(3): see PARA 1537.

11 See CPR 59.3; and *Practice Direction--Mercantile Courts* PD 59 para 4. If a claim which has not been issued in a mercantile court is suitable to continue as a mercantile claim (1) any party wishing the claim to be transferred to a mercantile court may make an application for transfer to the court to which transfer is sought; (2) if all parties consent to the transfer, the application may be made by letter to the mercantile listing officer of the court to which transfer is sought, stating why the case is suitable to be transferred to that court and enclosing the written consents of the parties, the claim form and statements of case: para 4.1. If an application for transfer is made to a court which does not have power to make the order, that court may (a) adjourn the application to be heard by a mercantile judge; or (b) dismiss the application: para 4.2. A mercantile judge may make an order under CPR 59.3 of his own initiative: *Practice Direction--Mercantile Courts* PD 59 para 4.3.

12 CPR 59.10.

13 CPR 59.11(1). CPR Pt 26 (preliminary stages of case management and allocation to track: see PARA 260 et seq) does not apply: CPR 59.11(1).

14 Ie are CPR 29.3(2) (appropriate legal representative to attend case management conferences and pre-trial reviews), and CPR 29.5 (variation of case management timetable), with the exception of CPR 29.5(1)(c).

15 CPR 59.11(2).

16 CPR 59.11(3). See *Practice Direction--Mercantile Courts* PD 59 paras 7.1-7.11.

17 CPR 59.11(4). See also *Practice Direction--Mercantile Courts* PD 59 paras 7.1-7.11, which provide as follows. The only parts of *Practice Direction--The Multi-Track* PD 29 which apply are para 5 (case management conferences), excluding para 5.9 and modified so far as is made necessary by other specific provisions of PD 59, and PD 29 para 7 (failure to comply with case management directions): *Practice Direction--Mercantile Courts* PD 59 para 7.1. If proceedings are started in a mercantile court, the claimant must apply for a case management conference, in the case of a CPR Pt 7 claim, within 14 days of the date when all defendants who intend to file and serve a defence have done so and, in the case of a Pt 8 claim, within 14 days of the date when all defendants who intend to serve evidence have done so: *Practice Direction--Mercantile Courts* PD 59 para 7.2. If proceedings are transferred to a mercantile court, the claimant must apply for a case management conference within 14 days of receiving an acknowledgment of the transfer from the receiving court, unless the judge held, or gave directions for, a case management conference when he made the order transferring the proceedings: para 7.3. Any party may, at a time earlier than that provided in para 7.2 or 7.3, apply in writing to the court to fix a case management conference: para 7.4. If the claimant does not make an application in accordance with para 7.2 or 7.3, any other party may apply for a case management conference: para 7.5. The court may fix a case management conference at any time on its own initiative; if it does so, the court will give at least seven days' notice to the parties, unless there are compelling reasons for a shorter period of notice: para 7.6. Not less than seven days before a case management conference (1) each party must file and serve (a) a case management information sheet substantially in the form set out in Appendix A; and (b) an application notice for any order which that party intends to seek at the case management conference, other than directions referred to in the case management information sheet; and (2) the claimant (or other party applying for the conference) must in addition file and serve (a) a case management file containing the claim form, the statements of case (excluding schedules of more than 15 pages), any orders already made, the case management information sheets, and a short list of the principal issues to be prepared by the claimant; and (b) a draft order substantially in the form set out at Appendix B, setting out the directions which that party thinks appropriate: para 7.7. In appropriate cases (i) the parties may, not less than seven days before the date fixed for the case management

conference, submit agreed directions for the approval of the judge; (ii) the judge will then either make the directions proposed, or make them with alterations, or require the case management conference to proceed; but (iii) the parties must assume that the conference will proceed until informed to the contrary: para 7.8. If the parties submit agreed directions and the judge makes them with alterations, any party objecting to the alterations may, within seven days of receiving the order containing the directions, apply to the court for the directions to be varied: para 7.9. The directions given at the case management conference (A) will normally cover all steps in the case through to trial, including the fixing of a trial date or window, or directions for the taking of steps to fix the trial date or window; and (B) may include the fixing of a progress monitoring date or dates, and make provision for the court to be informed as to the progress of the case at the date or dates fixed: para 7.10. If the court fixes a progress monitoring date, it may after that date fix a further case management conference or a pre-trial review on its own initiative if no or insufficient information is provided by the parties or it is appropriate in view of the information provided: para 7.11.

18 See CPR 59.4.

19 See CPR 59.5.

20 See CPR 59.6.

21 See CPR 59.7.

22 See CPR 59.8.

23 See CPR 59.9.

24 See CPR 59.12.

UPDATE

1545 Mercantile courts

TEXT AND NOTES 6, 7--See also Using the Mercantile Court: an easy guide.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(5) COMMERCIAL PROCEEDINGS AND OTHER SPECIALIST PROCEEDINGS/1546. Proceedings in the Technology and Construction Court.

1546. Proceedings in the Technology and Construction Court.

Technology and Construction Court ('TCC') claims¹ will be dealt with in a Technology and Construction Court² and by a TCC judge³, unless (1) Part 60 of the Civil Procedure Rules or the relevant practice direction⁴ permits otherwise; or (2) a TCC judge directs otherwise⁵.

The TCC is a specialist list for the purposes of the rules relating to the transfer of proceedings⁶ but modified procedures apply⁷.

A TCC claim must be issued in (a) the High Court in London; (b) a district registry of the High Court; or (c) a specified⁸ county court⁹. When a TCC claim is issued or an order is made transferring a claim to the TCC specialist list, the court will assign the claim to a named TCC judge (the 'assigned TCC judge') who will have the primary responsibility for the case management of that claim¹⁰. An application should normally be made to the assigned TCC judge. If the assigned TCC judge is not available, or the court gives permission, the application may be made to another TCC judge¹¹. If an application is urgent and there is no TCC judge available to deal with it, the application may be made to any judge who, if the claim were not a TCC claim, would be authorised to deal with the application¹².

Every claim allocated to the TCC will be allocated to the multi-track¹³ and the rules relating to track allocation¹⁴ will not apply¹⁵. Provision is made for case management¹⁶, in particular for the holding of a case management conference¹⁷ and a pre-trial review¹⁸. The Civil Procedure Rules and the practice directions supplementing them apply to TCC claims unless Part 60 or a practice direction provides otherwise¹⁹.

1 A TCC claim is a claim which involves issues or questions which are technically complex or for which a trial by a judge of the Technology and Construction Court (TCC) is for any other reason desirable, and which has been issued in or transferred into the specialist list for such claims: CPR 60.1(2)(a), (3). TCC claims include all official referees' business referred to in the Supreme Court Act 1981 s 68(1)(a): CPR 60.1(4) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2) to refer to the Senior Courts Act 1981 instead of the Supreme Court Act 1981; at the date at which this title states the law, no such day had been appointed).

The following are examples of the types of claim which it may be appropriate to bring as TCC claims: (1) building or other construction disputes, including claims for the enforcement of the decisions of adjudicators under the Housing Grants, Construction and Regeneration Act 1996; (2) engineering disputes; (3) claims by and against engineers, architects, surveyors, accountants and other specialised advisers relating to the services they provide; (4) claims by and against local authorities relating to their statutory duties concerning the development of land or the construction of buildings; (5) claims relating to the design, supply and installation of computers, computer software and related network systems; (6) claims relating to the quality of goods sold or hired, and work done, materials supplied or services rendered; (7) claims between landlord and tenant for breach of a repairing covenant; (8) claims between neighbours, owners and occupiers of land in trespass, nuisance etc; (9) claims relating to the environment (for example, pollution cases); (10) claims arising out of fires; (11) claims involving taking of accounts where these are complicated; and (12) challenges to decisions of arbitrators in construction and engineering disputes including applications for permission to appeal and appeals: *Practice Direction--Technology and Construction Court Claims* PD 60 para 2.1. A claim given as an example in para 2.1 will not be suitable for this specialist list unless it demonstrates the characteristics in CPR 60.1(3). Similarly, the examples are not exhaustive and other types of claim may be appropriate to this specialist list: *Practice Direction--Technology and Construction Court Claims* PD 60 para 2.2. See *Collins v Drumgold* [2008] EWHC 584 (TCC), [2008] All ER (D) 27 (Apr) (appropriate type of case for transfer to Technology and Construction Court under CPR 30.3(2) and *Practice Direction--Technology and Construction Court Claims* PD 60 para 2.1).

2 'Technology and Construction Court' means any court in which TCC claims are dealt with in accordance with CPR Pt 60 or *Practice Direction--Technology and Construction Court Claims* PD 60: CPR 60.1(2)(b). As to the TCC see PARA 43 note 1.

3 'TCC judge' means any judge authorised to hear TCC claims: CPR 60.1(2)(c).

4 ie *Practice Direction--Technology and Construction Court Claims* PD 60.

5 CPR 60.1(5).

6 CPR 60.2(1).

7 See *Practice Direction--Technology and Construction Court Claims* PD 60 para 5. Where no TCC judge is available to deal with a claim which has been issued in a High Court district registry or one of the county courts listed in para 3.4 (see note 8), the claim may be transferred (1) if it has been issued in a district registry, to another district registry or to the High Court in London; or (2) if it has been issued in a county court, to another county court where a TCC judge would be available: para 5.1. Paragraph 5.1 is without prejudice to the court's general powers to transfer proceedings under CPR Pt 30 (see generally PARA 66 et seq): *Practice Direction--Technology and Construction Court Claims* PD 60 para 5.2. A party applying to a TCC judge to transfer a claim to the TCC specialist list must give notice of the application to the court in which the claim is proceeding, and a TCC judge will not make an order for transfer until he is satisfied that such notice has been given: para 5.3. See in particular, CPR 30.5(3); and PARA 67.

8 ie specified in *Practice Direction--Technology and Construction Court Claims* PD 60. The specified county courts are Birmingham, Bristol, Cardiff, Central London, Chester, Exeter, Leeds, Liverpool, Manchester, Mold, Newcastle upon Tyne and Nottingham: para 3.4.

9 CPR 60.4; *Practice Direction--Technology and Construction Court Claims* PD 60 para 3.1. The claim form must be marked in the top right hand corner 'Technology and Construction Court' below the words 'The High Court, Queen's Bench Division' or 'The ____ County Court': para 3.2. TCC claims brought in the High Court outside London may be issued in any district registry, but it is preferable that wherever possible they should be issued in one of the following district registries, in which a TCC judge will usually be available: ie Birmingham, Bristol, Cardiff, Chester, Exeter, Leeds, Liverpool, Manchester, Mold, Newcastle upon Tyne and Nottingham: para 3.3.

10 *Practice Direction--Technology and Construction Court Claims* PD 60 para 6.1. All documents relating to the claim must be marked in similar manner to the claim form with the words 'Technology and Construction Court' and the name of the assigned TCC judge: para 6.2.

11 *Practice Direction--Technology and Construction Court Claims* PD 60 para 7.1.

12 *Practice Direction--Technology and Construction Court Claims* PD 60 para 7.2.

13 As to the multi-track see PARAS 269, 293 et seq.

14 ie CPR Pt 26: see PARA 261 et seq.

15 CPR 60.6(1).

16 See CPR 60.6(2), which provides that CPR Pt 29 and *Practice Direction--The Multi-Track* PD 29 apply to the case management of TCC claims, except where they are varied by or inconsistent with *Practice Direction--Technology and Construction Court Claims* PD 60.

17 The court will fix a case management conference within 14 days of the earliest of these events (1) the filing of an acknowledgment of service; (2) the filing of a defence; or (3) the date of an order transferring the claim to a TCC: *Practice Direction--Technology and Construction Court Claims* PD 60 para 8.1. When the court notifies the parties of the date and time of the case management conference, it will at the same time send each party a case management information sheet (in the form set out in Appendix A) and a case management conference directions form (in the form set out in Appendix B): para 8.2. Not less than two days before the case management conference, each party must file and serve on all other parties (a) completed copies of the case management information sheet and case management directions form; and (b) an application notice for any order which that party intends to seek at the case management conference, other than directions referred to in the case management directions form: para 8.3. The parties are encouraged to agree directions to propose to the court by reference to the case management directions form: para 8.4. If any party fails to file or serve the case management information sheet and the case management directions form by the date specified, the court may (i) impose such sanction as it sees fit; and (ii) either proceed with or adjourn the case management conference: para 8.5. The directions given at the case management conference will normally include the fixing

of dates for (A) any further case management conferences; (B) a pre-trial review; (C) the trial of any preliminary issues that it orders to be tried; and (D) the trial: para 8.6.

18 When the court fixes the date for a pre-trial review it will send each party a pre-trial review questionnaire (which is in the form set out in *Practice Direction--Technology and Construction Court Claims* PD 60 Appendix C): para 9.1. Each party must file and serve on all other parties completed copies of the questionnaire not less than two days before the date fixed for the pre-trial review: para 9.2. The parties are encouraged to agree directions to propose to the court: para 9.3. If any party fails to return or exchange the questionnaire by the date specified the court may (1) impose such sanction as it sees fit; and (2) either proceed with or adjourn the pre-trial review: para 9.4. At the pre-trial review, the court will give such directions for the conduct of the trial as it sees fit: para 9.5.

19 CPR 60.3. CPR Pt 15 (defence and reply: see PARA 199 et seq) applies to TCC claims with the modification to CPR 15.8 that the claimant must file any reply to a defence and serve it on all other parties, within 21 days after service of the defence: CPR 60.5. Except for orders made by the court of its own initiative and unless the court otherwise orders, every judgment or order made in claims proceeding in the TCC will be drawn up by the parties, and CPR 40.3 is modified accordingly: CPR 60.7(1). An application for a consent order must include a draft of the proposed order signed on behalf of all the parties to whom it relates, and CPR 40.6 (consent judgments and orders) does not apply: CPR 60.7(2), (3).

UPDATE

1546 Proceedings in the Technology and Construction Court

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 16--As to guidance for claimants seeking to enforce a decision of an adjudicator on obtaining judgment in default where the defendant fails to lodge an acknowledgment of service: see *Coventry Scaffolding Company (London) Ltd v LancsVille Construction Ltd* [2009] EWHC 2995 (TCC), [2009] All ER (D) 93 (Dec).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(5) COMMERCIAL PROCEEDINGS AND OTHER SPECIALIST PROCEEDINGS/1547. Other specialist proceedings.

1547. Other specialist proceedings.

Part 49 of the Civil Procedure Rules makes provision for specialist proceedings¹. Formerly a number of types of proceeding were included but provision has been made by specific Parts of the Civil Procedure Rules for all of these except applications under the Companies Acts 1985 and 1989².

1 See CPR 49(1).

2 See CPR 49(2). As to such proceedings see **COMPANIES** vol 14 (2009) PARA 305.

UPDATE

1547 Other specialist proceedings

TEXT AND NOTES--CPR 49 substituted: SI 2009/2092.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(i) Introduction/1548. Management and investment of funds in court; in general.

(6) PRACTICE IN THE COURT FUNDS OFFICE

(i) Introduction

1548. Management and investment of funds in court; in general.

The Lord Chancellor, with the concurrence of the Treasury, may make provision as to the payment of interest on funds in court¹ and may make rules as to the administration and management of funds in court including the deposit, payment, delivery and transfer in, into and out of any court of funds in court and regulating the evidence of such deposit, payment, delivery or transfer². Any such rules may make different provision for different cases³.

Subject to rules so made, all sums of money, securities and effects paid and deposited in, or under the custody of, the High Court, a county court or such other courts and tribunals as the Lord Chancellor may prescribe by such rules, is to be vested in the Accountant General⁴. One or more accounts must be opened and kept in the name of the Accountant General at such bank or banks as may be designated by the Lord Chancellor with the concurrence of the Treasury⁵.

A sum of money paid and deposited in court may be invested and reinvested by the Accountant General in any manner authorised by rules made as mentioned above⁶. The Accountant General may, in such cases as the Lord Chancellor may prescribe by such rules, apply to the court for an order for directions as to the manner in which a particular fund in court is to be dealt with⁷.

1 For these purposes, 'funds' or 'funds in court' means (1) any money, securities or other investments, including foreign currency and assets, standing or to be placed to the account of the Accountant General by virtue of the Administration of Justice Act 1982 s 38(1) (see the text and note 4) or of any other person by virtue of rules made under s 38(7) (see the text and note 2); and (2) any effects deposited with the Accountant General by virtue of s 38(1), but does not include any statutory deposit referred to in s 40 (which provides for money or securities deposited with the Accountant General under any enactment or subordinate legislation to be treated as if they were funds in court except in so far as that enactment or subordinate legislation, or rules made under s 38(7), provide to the contrary): see s 47. 'Accountant General' means the Accountant General of the Supreme Court: Administration of Justice Act 1982 s 47. As to the Accountant General see PARA 1549. The definition of 'Accountant General' is prospectively amended by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 4 para 27(1), (3), as from a day to be appointed; from such day, 'Accountant General' means, in relation to England and Wales, the Accountant General of the Senior Courts and, in relation to Northern Ireland, the Accountant General of the Court of Judicature. At the date at which this title states the law, no such day had been appointed.

2 Administration of Justice Act 1982 s 38(7). This power to make rules is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 46(1). Rules so made may (1) provide for the discharge of the functions of the Accountant General under the rules by a person or persons appointed by him; (2) provide for the transfer of money in court to and from the National Debt Commissioners; (3) provide for money paid and deposited in a county court to be vested in, and accounted for by, a person other than the Accountant General; (4) prescribe cases in which interest is to be paid on funds in court; (5) prescribe cases in which funds in court are to be invested; (6) make provision for the transfer of funds in court from one court to another; and (7) prescribe cases in which moneys payable under a judgment or order are to be paid into court: ss 38(8), 47. In exercise of the power so conferred, the Lord Chancellor has made the Court Funds Rules 1987, SI 1987/821 (amended by SI 1988/817; SI 1990/518; SI 1991/1227; SI 1997/177; SI 1999/1021; SI 2000/2918; SI 2001/703; SI 2003/375; SI 2003/720; SI 2007/729; and SI 2007/2617): see PARA 1550 et seq. The Court Funds Rules 1987, SI 1987/821, came into force on 1 June 1987: art 1(1).

As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512.

- 3 Administration of Justice Act 1987 s 38(9).
- 4 Administration of Justice Act 1982 s 38(1).
- 5 Administration of Justice Act 1982 s 38(2).
- 6 Administration of Justice Act 1982 s 38(4) (amended by the Public Trustee and Administration of Funds Act 1986 s 4).
- 7 Administration of Justice Act 1987 s 38(6).

UPDATE

1548 Management and investment of funds in court; in general

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(i) Introduction/1549. The Accountant General and the Court Funds Office.

1549. The Accountant General and the Court Funds Office.

The Court Funds Office¹ is the office of the Accountant General². The position of Accountant General³ is held by the Permanent Secretary to the Lord Chancellor, and is an office of the Supreme Court⁴. Subject to such conditions as the Accountant General may direct, his functions under the Court Funds Rules 1987⁵ may be discharged by any officer appointed by him⁶, and any direction issued by him to give effect to those rules is to be authenticated on his behalf by such officers as the Treasury from time to time prescribes or approves⁷.

The Accountant General must maintain one or more accounts in his name at such bank or banks as the Lord Chancellor may designate with Treasury concurrence⁸. Where in his opinion the cash balance in his bank account exceeds the amount which he requires to satisfy current demands, he must remit the excess to the National Debt Commissioners, and where in his opinion the balance is insufficient to meet those demands the commissioners must remit to that account such amount as he may in writing request⁹. Money and securities held by him vest in his successor in office without any assignment or transfer¹⁰.

If the Lord Chancellor, whether on a recommendation made to him by any person interested¹¹ or not, certifies that the Accountant General has been guilty of any default with respect to any money, securities and effects for which he is responsible¹² such sum as may be certified by the Lord Chancellor to be necessary for making good the default must be paid out of moneys provided by Parliament or, if and so far as it is not so paid, must be charged on and issued out of the Consolidated Fund¹³.

The Accountant General must prepare accounts in respect of his transactions relating to court funds and must send them to the Comptroller and Auditor General at such times as the Treasury may direct¹⁴.

1 The Court Funds Office was originally created in 1726 as the Accountant General's Office (12 Geo 1, c 32 (Suits of Court of Chancery) (repealed)), and was subsequently renamed the Chancery Pay Office (Court of Chancery (Funds) Act 1872 (repealed)), and then the Supreme Court Pay Office (Supreme Court of Judicature (Funds, &c) Act 1883 (repealed)). The name dates only from 1975 and is retained by the current rules: see the Court Funds Rules 1987, SI 1987/821, r 3. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

2 Court Funds Rules 1987, SI 1987/821, r 3.

3 The office of Accountant General of the Court of Chancery was created in 1726 with the Accountant General's Office (see note 1), but was abolished in 1872, when funds were vested in HM Paymaster General by the Court of Chancery (Funds) Act 1872 s 6 (repealed). For the purposes of the Court Funds Rules 1987, SI 1987/821, 'Accountant General' means the Accountant General of the Supreme Court or an officer appointed by him under r 4 (see the text and notes 6-7): r 2(2).

4 See the Administration of Justice Act 1982 s 47; and PARA 1548.

5 See under the Court Funds Rules 1987, SI 1987/821: see PARA 1550 et seq.

6 Court Funds Rules 1987, SI 1987/821, r 4(1).

7 Court Funds Rules 1987, SI 1987/821, r 4(2). 'Authenticated' means authenticated with the impression of a stamp issued by the Accountant General: r 2(2).

8 See the Administration of Justice Act 1982 s 38(2); and PARA 1548.

9 Court Funds Rules 1987, SI 1987/821, r 56(1). As to the National Debt Commissioners see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1332. The commissioners may invest, in such manner as may be prescribed by regulations made by the Treasury, money so transferred to them and the interest or dividends accruing on investments so made: Administration of Justice Act 1982 s 39(1). If in any accounting year the aggregate of the sums of money received by the commissioners by way of interest and dividends on investments so made by them after deduction of (1) any sum required by the Treasury to be set aside to provide for depreciation in the value of investments so made; and (2) such sum as the Lord Chancellor may with the concurrence of the Treasury direct to be paid to him in respect of the cost to him in that year of administering funds in court; and (3) an amount equal to the expenses incurred by the commissioners in that year in so making investments and disposing of investments so made, exceeds the aggregate of the sums due to be paid or credited in respect of that year by way of interest on funds in court, the excess must be paid into the Consolidated Fund: s 39(2) (s 39(2), (3) amended, and s 39(4A) added, by the Public Trustee and Administration of Funds Act 1986 s 5). If in any accounting year the aggregate of the sums of money received as mentioned in the Administration of Justice Act 1982 s 39(2) (as so amended), after deduction of the sum or sums falling to be deducted under heads (1)-(3), is less than the aggregate of the sums due as mentioned, the deficiency must be made good out of the Consolidated Fund: s 39(3) (as so amended). The commissioners must pay to the Lord Chancellor any sum deducted by them under head (2) and any sum so received by the Lord Chancellor must be paid into the Consolidated Fund: s 39(4). Any sum deducted by the commissioners under head (3) must be applied as an appropriation in aid of moneys provided by Parliament for the expenses of the National Debt Commissioners; and, so far as not so applied, must be paid into the Consolidated Fund: s 39(4A) (as so added). If at any time the commissioners are unable to pay to the Accountant General a sum due from them to him under rules made under s 38(7) (see PARA 1548), the Treasury must provide them with it out of the Consolidated Fund: s 39(5). As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512; and as to the Consolidated Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711.

10 Administration of Justice Act 1982 s 38(3).

11 As to the meaning of 'person interested' see, in the context of persons who may apply for judicial review, **JUDICIAL REVIEW** vol 61 (2010) PARA 656.

12 He responsible under the Administration of Justice Act 1982 Pt VI (ss 38-48): see PARA 1548; the text and notes 1-10; and PARA 1550 et seq.

13 Administration of Justice Act 1982 s 43. The like provision is made by s 43 with respect to defaults by the manager of a common investment fund. As to common investment funds see PARA 1563. Section 43 may be repealed or modified by Order in Council, subject to annulment in pursuance of a resolution of either House of Parliament: see s 44(1), (2). At the date at which this title states the law, no such order had been made.

14 See the Administration of Justice Act 1982 s 45(1)(a). The accounts must be in such form and be prepared in respect of such periods as the Treasury may direct: s 45(2). The Comptroller and Auditor General must examine, certify and report on such accounts sent to him and lay copies of them and his report on them before each House of Parliament: s 45(3).

UPDATE

1549 The Accountant General and the Court Funds Office

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(i) Introduction/1550. The Court Funds Rules 1987.

1550. The Court Funds Rules 1987.

The Court Funds Rules 1987¹ have been made by the Lord Chancellor with Treasury concurrence to provide for the payment of interest on funds in court and the administration and management of funds in court, including the deposit, payment, delivery and transfer in, into and out of any funds in court and regulating the evidence of such deposit, payment, delivery or transfer². No specific forms are prescribed by the Court Funds Rules 1987.

The Court Funds Rules 1987 apply to the Court of Appeal, the High Court of Justice, the Crown Court, the Court of Protection, any county court, the Employment Appeal Tribunal and the Lands Tribunal; and in those rules 'court', unless otherwise specified, includes those courts and tribunals³. 'Any county court' means a judge or district judge exercising the powers of a county court in chambers as well as in open court⁴.

Unless the context otherwise requires, expressions used in the Court Funds Rules 1987 have the same meaning as in the Civil Procedure Rules⁵.

1 le the Court Funds Rules 1987, SI 1987/821: see PARAS 1548-1549, 1551 et seq.

2 See the Administration of Justice Act 1982 s 38(7)-(9); and PARA 1548. As to the meaning of 'funds in court' see PARA 1548 note 1.

3 Court Funds Rules 1987, SI 1987/821, r 2(2) (amended by SI 2007/2617).

4 Court Funds Rules 1987, SI 1987/821, r 2(2) (definition amended by SI 1997/177).

5 Court Funds Rules 1987, SI 1987/821, r 2(1) (substituted by SI 1999/1021).

UPDATE

1550 The Court Funds Rules 1987

TEXT AND NOTE 3--Reference to the Lands Tribunal is now to the Upper Tribunal: SI 1987/821 r 2(2) (amended by SI 2009/1307).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(i) Introduction/1551. Certificates in respect of funds in court.

1551. Certificates in respect of funds in court.

The Accountant General¹ may, on receipt of a written request from a person appearing to him to be interested in a fund in court², issue to him a certificate as to lodgment in court³, non-payment into court under an order⁴, carry over⁵ of the fund to an account of unclaimed balances or any other dealing with the fund⁶. The certificate must, where appropriate, state the account to which the fund has been placed, the amount standing to its credit, and particulars of any charges or restraints on the fund of which the Accountant General is aware⁷.

On receipt of a written request the Accountant General may issue to a person appearing to him to be interested in a fund in court a copy of the account relating to the fund, which must be authenticated by the National Audit Office if that person so requires⁸.

The Accountant General must supply an annual statement of any fund in court for the benefit of a child to that person or to his representative⁹.

1 As to the Accountant General see PARA 1549.

2 As to the meaning of 'fund' see PARA 1548 note 1.

3 'Lodge in court' means pay or transfer into court or deposit in court: Court Funds Rules 1987, SI 1987/821, r 2(2). As to lodgment in court see PARA 1553 et seq. As to the meaning of 'court' for these purposes see PARA 1550.

4 'Order' means a judgment or an order under the seal of the High Court or Court of Appeal or a county court, an order, certificate or direction under the seal of the Court of Protection, an order under the seal of the Employment Appeal Tribunal or an order under the seal of the Lands Tribunal: Court Funds Rules 1987, SI 1987/821, r 2(2) (amended by SI 2007/2617). As to the meaning of 'seal' see PARA 81 note 2 (definition applied by virtue of the Court Funds Rules 1987, SI 1987/821, r 2(1) (substituted by SI 1999/1021)).

5 'Carry over' means to transfer a fund in court or any part of it from one account to another in the books of the Court Funds Office: see the Court Funds Rules 1987, SI 1987/821, r 2(2). As to the Court Funds Office see PARA 1549.

6 Court Funds Rules 1987, SI 1987/821, r 63(1). As to unclaimed balances see PARA 1581.

7 Court Funds Rules 1987, SI 1987/821, r 63(1).

8 Court Funds Rules 1987, SI 1987/821, r 63(2). As to the National Audit Office see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 720.

9 Court Funds Rules 1987, SI 1987/821, r 63(3) (amended by SI 2007/729).

UPDATE

1551 Certificates in respect of funds in court

NOTE 4--Reference to the Lands Tribunal is now to the Upper Tribunal: SI 1987/821 r 2(2) (amended by SI 2009/1307).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(i) Introduction/1552. Lodgment and payment schedules.

1552. Lodgment and payment schedules.

Where lodgment of funds in court¹ is directed by an order² or authorised by a master³, the Accountant General⁴ may not make such lodgment until he has received:

- 1174 (1) in proceedings in the Chancery Division, a lodgment schedule⁵; or
- 1175 (2) in proceedings in the Queen's Bench Division, the Family Division or any other court or tribunal, a copy of the order⁶.

In the latter case, however, the Accountant General retains a discretion to refuse the making of a lodgment until he has received a lodgment schedule⁷.

The provisions above do not apply to proceedings in the Court of Protection⁸. Where, in proceedings in the Court of Protection, a person ('Person A') seeks to lodge funds in court on behalf of a person who lacks capacity⁹ ('Person B'), the Accountant General must not make such lodgment until he has received one of the following documents: (a) a lodgment schedule; (b) where a deputy¹⁰ has not been appointed in relation to Person B, and the funds are required to be lodged by Person A by court order, a copy of that order; (c) where, prior to 1 October 2007, Person A had been appointed as Person B's receiver under Part VII of the Mental Health Act 1983 (as that part was in force immediately prior to that date), a copy of the order of the Court of Protection by which Person A was so appointed; or (d) a copy of the order of the Court of Protection appointing Person A as Person B's deputy¹¹.

Where proceedings in which money has been lodged in court are ordered to be transferred to another court¹², the court officer¹³ of the transferring court must advise the Accountant General in writing¹⁴.

A payment schedule¹⁵, signed and authenticated by a court officer, must be lodged with the Accountant General where an order directs the manner in which any fund in court is to be dealt with and is sufficient authority to the Accountant General to deal with a fund in accordance with the schedule¹⁶.

Except in proceedings in the Court of Protection, the Lands Tribunal or the Employment Appeal Tribunal, the preparation of a lodgment or payment schedule is normally the responsibility of the party having carriage of the order¹⁷ and the court officer of the court in question must sign and authenticate the schedule and forward it to the Accountant General¹⁸. Any amendment needed to correct a clerical or accidental error or omission must be signed by the court officer¹⁹.

Where a payment schedule directs that regular payments, not being interest²⁰ payable as it accrues due, are to be made by the Accountant General, the schedule must state the dates on which payments are to be made²¹.

1 As to the meaning of 'lodge in court' see PARA 1551 note 3; and as to the meaning of 'fund' see PARA 1548 note 1.

2 As to the meaning of 'order' see PARA 1551 note 4.

3 For these purposes, 'master' means a master of the Supreme Court and includes the Admiralty Registrar, a district judge, a registrar in bankruptcy and the registrar of the Employment Appeal Tribunal: Court Funds Rules

1987, SI 1987/821, r 2(2) (definition amended by SI 1997/177; and SI 2007/2617). As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

4 As to the Accountant General see PARA 1549.

5 'Lodgment schedule' means a schedule to an order directing funds to be lodged to the account of the Accountant General: Court Funds Rules 1987, SI 1987/821, r 2(2).

6 Court Funds Rules 1987, SI 1987/821, r 6(1) (amended by SI 2007/2617).

7 See the Court Funds Rules 1987, SI 1987/821, r 6(1).

8 Court Funds Rules 1987, SI 1987/821, r 6(1A) (added by SI 2007/2617). As to the Court of Protection see **MENTAL HEALTH**.

9 'Person who lacks capacity' means a person who (1) immediately before 1 October 2007, was a patient within the meaning of the Mental Health Act 1983 Pt VII (ss 93-113) (as that Act was in force immediately prior to that date); or (2) a court has found lacks capacity within the meaning of the Mental Capacity Act 2005 and whose lack of capacity relates (directly or indirectly) to funds in court held (or to be held) on his behalf: Court Funds Rules 1987, SI 1987/821, r 2(2) (definition added by SI 2007/2617).

10 'Deputy' means, in relation to a person who lacks capacity, a person (1) appointed by the Court under the Mental Capacity Act 2005 s 16(2)(b) to make decisions on that person's behalf; or (2) deemed to be so appointed by virtue of Sch 5 para 1 (existing receivers): Court Funds Rules 1987, SI 1987/821, r 2(2) (definition added by SI 2007/2617). Where two or more deputies are appointed in relation to a person who lacks capacity, in the Court Funds Rules 1987, SI 1987/821, (a) the word 'deputy' is to be construed as a reference to those deputies acting jointly if and to the extent that joint action is required by the terms of their appointment; and (b) any rule permitting the Accountant General to refuse to follow a direction given by or undertake any other act at the request of, a deputy includes a power, where more than one deputy has been appointed, to refuse to do so on the grounds that while the terms of appointment require the deputies to act jointly, the direction or request was not jointly made: r 2(2A) (added by SI 2007/2617).

11 Court Funds Rules 1987, SI 1987/821, r 6(1B) (added by SI 2007/2617).

12 As to the transfer of proceedings see PARA 66 et seq.

13 As to the meaning of 'court officer' see PARA 49 note 3 (definition applied by virtue of the Court Funds Rules 1987, SI 1987/821, r 2(1) (substituted by SI 1999/1021).

14 Court Funds Rules 1987, SI 1987/821, r 6(2) (amended by SI 1999/1021).

15 'Payment schedule' means a schedule to an order directing the payment of funds from the account of the Accountant General: Court Funds Rules 1987, SI 1987/821, r 2(2).

16 See the Court Funds Rules 1987, SI 1987/821, r 7(1), (2) (amended by SI 1999/1021). Where, however, money is lodged in court in proceedings under the Law of Property Act 1925 s 84 (power to discharge or modify restrictive covenants affecting land: see **EQUITY** vol 16(2) (Reissue) PARA 630 et seq) and directions are given by the Lands Tribunal instructing the Accountant General to deal with that fund, such directions are sufficient authority to the Accountant General to deal with the fund accordingly: Court Funds Rules 1987, SI 1987/821, r 7(3).

17 See the Court Funds Rules 1987, SI 1987/821, r 8(1). That party must submit the schedule to the appropriate court office for authentication: r 8(1). Without prejudice to r 8(1), however, the court officer of a court in which an order has been made for the lodgment of or dealing with funds in court may prepare the lodgment or payment schedule where he considers it appropriate to do so: r 8(2) (rr 8(2)-(4) amended by SI 1999/1021).

18 Court Funds Rules 1987, SI 1987/821, r 8(3) (as amended: see note 17).

19 Court Funds Rules 1987, SI 1987/821, r 8(4) (as amended: see note 17).

20 'Interest' means interest accruing on funds and includes dividends: Court Funds Rules 1987, SI 1987/821, r 2(2).

21 Court Funds Rules 1987, SI 1987/821, r 11 (amended by SI 2007/729).

UPDATE

1552 Lodgment and payment schedules

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

TEXT AND NOTES 16, 17--References to the Lands Tribunal are now to the Upper Tribunal:
SI 1987/821 rr 7(3), 8(1) (amended by SI 2009/1307).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(ii) Lodgment of Funds in Court/1553. Mode of lodgment.

(ii) Lodgment of Funds in Court

1553. Mode of lodgment.

Money to be lodged in court¹ must not be paid directly to the bank² except on the Accountant General's direction³. It is paid directly into the Court Funds Office⁴ and must be paid into the bank for the credit of the Accountant General's account as soon as practicable⁵. A litigant in person without a current account may pay money into a district registry or a county court in accordance with the following provision⁶. In such a case, payment must be made in cash at the appropriate court office during office hours on any day on which the office is open and the court officer must give a receipt for it⁷. Payments must be forwarded to the Accountant General within one working day of the date of receipt⁸.

In the Employment Appeal Tribunal and in certain specified Chancery Division and county court proceedings⁹, approval for the lodgment of funds in court must be given by the Accountant General on receipt of a lodgment schedule¹⁰.

Where, in proceedings in the Court of Protection, a person ('Person A') seeks to lodge funds in court on behalf of a person who lacks capacity¹¹ ('Person B'), the Accountant General must not make such lodgment until he has received one of the following documents: (1) a lodgment schedule; (2) where a deputy¹² has not been appointed in relation to Person B, and the funds are required to be lodged by Person A by court order, a copy of that order; (3) where, prior to 1 October 2007, Person A had been appointed as Person B's receiver under Part VII of the Mental Health Act 1983¹³ (as that part was in force immediately prior to that date), a copy of the order of the Court of Protection by which Person A was so appointed; or (4) a copy of the order of the Court of Protection appointing Person A as Person B's deputy¹⁴.

In other cases approval is given on receipt of a written request¹⁵.

The effective date of lodgment of money lodged depends upon the method of payment. In the case of cash or a banker's draft, it is the date of its receipt in the Court Funds Office; in the case of a cheque or instrument other than a banker's draft, it is the date of its receipt in the Court Funds Office or such later date as the Accountant General may determine and, in the case of money paid directly to the credit of the Accountant General's account, it is the date certified by the bank as that on which the money was placed in an account for the credit of the Accountant General¹⁶. The effective date of lodgment of money paid into a district registry or a county court is the date of its receipt in the court office¹⁷.

1 As to the meaning of 'lodge in court' see PARA 1551 note 3.

2 'Bank' means such bank or banks as may be designated by the Lord Chancellor with the concurrence of the Treasury: Court Funds Rules 1987, SI 1987/821, r 2(2) (definition amended by SI 2007/729).

3 Court Funds Rules 1987, SI 1987/821, r 13. Lodgments of money which are not required to be paid into the Court Funds Office under r 16 (see the text and notes 5-10) or to which r 19 applies (see the text and note 6) must be made directly to the bank to the credit of the Accountant General's account: r 16(5) (substituted by SI 1999/1021; and amended by SI 2003/375).

4 Ie except for money representing the proceeds of sale or redemption of National Savings Stock or money to be paid into court under the Court Funds Rules 1987, SI 1987/821, r 19: see r 16(1) (as substituted (see note 3); and amended by SI 2003/375). 'National Savings Stock' means stock registered on the National Savings

Stock Register: r 2(2). As to the National Savings Stock Register see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1347.

5 See the Court Funds Rules 1987, SI 1987/821, r 16(1), (4) (r 16(1) as substituted: see note 3). Cheques or other instruments must be made payable to the Accountant General of the Supreme Court: r 16(3) (amended by SI 1999/1021). As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

An officer of a district registry or county court who receives money under the process of the court must give a written receipt for every sum so received: see the Court Funds Rules 1987, SI 1987/821, r 22 (amended by SI 1999/1021). As to the meaning of 'court officer' see PARA 49 note 3 (definition applied by virtue of r 2(1) (substituted by SI 1999/1021)).

Any person who desires or is directed to pay money into a district registry or county court under any enactment, other than a payment to which the Court Funds Rules 1987, SI 1987/821, r 15 applies, and who has complied with the requirements of the relevant Civil Procedure Rules must pay the money into the appropriate court office, by a cheque or other instrument made payable to the Accountant General of the Supreme Court which must be forwarded to the Accountant General within one working day of the date of receipt: Court Funds Rules 1987, SI 1987/821 r 16(7) (amended by SI 1999/1021; and SI 2003/375). The effective date of lodgment of money paid in under this provision is the date of its receipt in the court office: Court Funds Rules 1987, SI 1987/821, r 16(8) (added by SI 1999/1021). Money paid to a court office under the Court Funds Rules 1987, SI 1987/821, r 16(7) and which is remitted to the Accountant General in accordance with r 16(7) must be accompanied by a notice stating the reason for the payment and its date: r 19(4) (added by SI 2007/729).

6 Court Funds Rules 1987, SI 1987/821, r 19(1) (r 19 substituted by SI 2003/375). As to the meaning of 'fund' see PARA 1548 note 1.

7 Court Funds Rules 1987, SI 1987/821, r 19(2) (as substituted: see note 6).

8 Court Funds Rules 1987, SI 1987/821, r 19(3) (as substituted: see note 6). Money paid to a court office under r 19(2) and which is remitted to the Accountant General in accordance with r 19(3) must be accompanied by a notice stating the reason for the payment and its date: r 19(4) (as added: see note 5).

9 le (1) in the Chancery Division of the High Court, where the lodgment is directed by a lodgment schedule or made under the Life Assurance Companies (Payment into Court) Act 1896 or the Trustee Act 1925, and the lodgment schedule is accompanied by a copy of a witness statement or affidavit filed in accordance with CPR 37.4 (see PARA 744); or (2) in a county court where money is paid into court under the Trustee Act 1925 in accordance with CPR 37.4, and the lodgment schedule has been authenticated by the court officer: see the Court Funds Rules 1987, SI 1987/821, r 14(1)(ii), (iii) (r 14(1) amended by SI 1999/1021; and SI 2007/729). As to the meaning of 'lodgment schedule' see PARA 1552 note 5; and as to the meaning of 'witness statement' and 'affidavit' see PARAS 751 note 1, 540 note 5 respectively (definitions applied by virtue of the Court Funds Rules 1987, SI 1987/821, r 2(1) (substituted by SI 1999/1021)).

10 See the Court Funds Rules 1987, SI 1987/821, r 14(1) (as amended: see note 9). Where the Accountant General receives from a company a notice of claim after the making of the witness statement or affidavit required under CPR 37.4, he must note the account accordingly: Court Funds Rules 1987, SI 1987/821, r 14(2) (as so amended).

11 As to the meaning of 'person who lacks capacity' see PARA 1552 note 9.

12 As to the meaning of 'deputy' see PARA 1552 note 10.

13 le the Mental Health Act 1983 Pt VII (ss 93-113): see **MENTAL HEALTH** vol 30(2) (Reissue) para 704 et seq.

14 Court Funds Rules 1987, SI 1987/821, r 14(1A) (added by SI 2007/2617).

15 See the Court Funds Rules 1987, SI 1987/821, r 15 (amended by SI 1999/1021; SI 2003/375; and SI 2007/729). The request must be accompanied (1) in the Queen's Bench Division or Family Division or in a county court, by a sealed copy order directing lodgment (but the Accountant General may give approval notwithstanding the omission of the sealed copy order, provided that he is satisfied that such an order has been made and the reason why a copy of the order does not accompany the request is stated in the request (Court Funds Rules 1987, SI 1987/821, r 15(2)); (2) in any Division of the High Court or in a county court where the lodgment is made under CPR 37.2 (see PARA 600), by a copy of the claim form and a copy of the defence: Court Funds Rules 1987, SI 1987/821, r 15(1)(i), (iii) (amended by SI 1999/1021; SI 2003/375; and SI 2007/729). In the Chancery Division, where lodgment is made in proceedings under the Trustee Act 1925 the written request must be signed by or on behalf of the personal representative; in Admiralty proceedings it must be made by the Admiralty Marshal; and in the Admiralty Registry it must be sealed by the registry: see the Court Funds Rules 1987, SI 1987/821, r 15(1)(i), (ii)(b), (iv). Otherwise it must be accompanied by the appropriate document

authorising lodgment where specific authority is required by the relevant enactment: see r 15(1)(ii)(c). As to the meaning of 'seal' see PARA 81 note 2 (definition applied by virtue of r 2(1) (substituted by SI 1999/1021)).

16 See the Court Funds Rules 1987, SI 1987/821, r 16(6) (substituted by SI 1999/1021; and amended by SI 2003/375).

17 See the Court Funds Rules 1987, SI 1987/821, r 19A (added by SI 1999/1021). See also r 16(8) (added by SI 1999/1021); and note 5.

UPDATE

1553 Mode of lodgment

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 16--See *ENE Kos 1 Ltd v Petroleo Brasileiro SA* [2009] EWCA Civ 1127, [2009] All ER (D) 02 (Nov).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(ii) Lodgment of Funds in Court/1554. Lodgment of foreign currency.

1554. Lodgment of foreign currency.

Foreign currency¹ may only be lodged in court² when the court so directs or permits³. Where foreign currency is lodged in court, it must be paid into court in the manner authorised by the Accountant General⁴.

1 'Foreign currency' means any currency other than sterling: Court Funds Rules 1987, SI 1987/821, r 2(2).

2 As to the meaning of 'lodge in court' see PARA 1551 note 3.

3 Court Funds Rules 1987, SI 1987/821, r 38(1) (amended by SI 1999/1021; and SI 2007/729).

4 Court Funds Rules 1987, SI 1987/821, r 38(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(ii) Lodgment of Funds in Court/1555. Lodgment of securities and deposit of effects.

1555. Lodgment of securities and deposit of effects.

The lodgment in the Supreme Court¹ of securities² transferable by delivery and the deposit of effects must be made either by delivery to the Court Funds Office or, if the Accountant General³ so directs, by delivery to the bank⁴. Where such lodgment is made by delivery to the bank, effects so delivered must be secured in locked boxes or otherwise to the satisfaction of the bank, and any person delivering such effects must, if the bank so requires, permit them to be inspected in his presence by an officer of the bank⁵. The bank must give a written receipt for the delivery of any securities or effects⁶.

Any person who deposits effects in court in accordance with the Court Funds Rules 1987⁷ must provide the Accountant General with an inventory of those effects signed and certified by him as a true and accurate record⁸.

Any person who desires or is directed to deposit securities in a county court under any statute, and has complied with the requirements of the relevant Civil Procedure Rules, must deposit the securities with the court officer⁹ who must give the depositor a receipt of the deposit and must forward the security certificate or certificates to the Accountant General¹⁰.

1 As to the meaning of 'lodge in court' see PARA 1551 note 3. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

2 'Securities' includes units purchased and investments effected by placing money to special accounts: Court Funds Rules 1987, SI 1987/821, r 2(2). 'Unit' means one of the shares into which a common investment fund is treated as being divided; and 'common investment fund' means a fund established by a scheme made under the Administration of Justice Act 1982 s 42 (see PARA 1563): Court Funds Rules 1987, SI 1987/821, r 2(2). 'Special account' means an investment account bearing interest as established under r 26 (see PARAS 1558-1559): r 2(2).

3 As to the Court Funds Office and the Accountant General see PARA 1549.

4 Court Funds Rules 1987, SI 1987/821, r 17(1). As to the meaning of 'bank' see PARA 1553 note 2.

5 Court Funds Rules 1987, SI 1987/821, r 17(2)(i).

6 Court Funds Rules 1987, SI 1987/821, r 17(2)(ii).

7 Ie the Court Funds Rules 1987, SI 1987/821: see PARA 1550.

8 Court Funds Rules 1987, SI 1987/821, r 17(3).

9 As to the meaning of 'court officer' see PARA 49 note 3 (definition applied by virtue of the Court Funds Rules 1987, SI 1987/821, r 2(1) (substituted by SI 1999/1021)).

10 Court Funds Rules 1987, SI 1987/821, r 17(4) (amended by SI 1999/1021).

UPDATE

1555 Lodgment of securities and deposit of effects

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(ii) Lodgment of Funds in Court/1556. Return of lodgment directions.

1556. Return of lodgment directions.

Where money lodged directly with the bank¹ has been received and credited to the Accountant General's² account or securities³ transferable by delivery or effects have been delivered to the bank, or where other securities have been transferred into the Accountant General's name in the books of the bank or in the books of a company, the bank or company, as the case may be, must certify on the lodgment direction⁴ that funds have been lodged and must send it to the Court Funds Office⁵.

1 As to the meaning of 'bank' see PARA 1553 note 2.

2 As to the Accountant General see PARA 1549.

3 As to the meaning of 'securities' see PARA 1555 note 2.

4 I.e. the lodgment direction issued under the Court Funds Rules 1987, SI 1987/821, r 14: see PARA 1553.

5 Court Funds Rules 1987, SI 1987/821, r 18. As to the Court Funds Office see PARA 1549.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(ii) Lodgment of Funds in Court/1557. Appropriation of money lodged to satisfy Part 36 offer.

1557. Appropriation of money lodged to satisfy Part 36 offer.

Where a defendant¹ has paid money into court under a court order or in support of a defence of tender before claim², and a Part 36 offer³ is subsequently accepted without needing the permission of the court, any request for payment lodged with the Accountant General⁴ by the claimant must include the written consent of the defendant that all, or part, of the money paid into court may be used to satisfy the offer (in whole or in part)⁵. Where, before the date on which a request for payment is received, interest⁶ has accrued on the money in question, some or all of the accrued interest may be included in the amount used to satisfy the offer, and this applies to the interest in the same way as it applies to the money paid into court⁷.

1 As to the meaning of 'defendant' see PARA 18 (definition applied by virtue of the Court Funds Rules 1987, SI 1987/821, r 2(1) (substituted by SI 1999/1021)).

2 As to the defence of tender before claim see PARA 600.

3 As to the meaning of 'Part 36 offer' see PARA 730 (definition as applied: see note 1).

4 As to the Accountant General see PARA 1549.

5 Court Funds Rules 1987, SI 1987/821, r 25(1) (r 25 substituted by SI 2007/729).

6 As to the meaning of 'interest' see PARA 1552 note 20.

7 Court Funds Rules 1987, SI 1987/821, r 25(2) (as substituted: see note 5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iii) Dealings with Funds in Court/1558. Placing of money in an interest bearing account.

(iii) Dealings with Funds in Court

1558. Placing of money in an interest bearing account.

A sum of money paid and deposited in court¹ may be invested and reinvested by the Accountant General² in any manner authorised by the Court Funds Rules 1987³.

There are two interest bearing accounts into which money can be placed: a deposit account (known as a basic account) and an investment account (known as a special account) to which interest⁴ derived from the transfer to, and investment by, the National Debt Commissioners⁵ of the money placed to all the accounts of those kinds accrues⁶. Money under the control of or subject to an order⁷ of the Court of Protection may be invested or reinvested by the Accountant General in such investments as the court may direct, or if a deputy⁸ has been appointed to make decisions in relation to that money on behalf of a person who lacks capacity⁹, as the deputy may in writing direct or, if the deputy has appointed an investment manager¹⁰, as the investment manager may in writing direct¹¹. Subject to that, money under the control of, or subject to an order of, the court may be invested or reinvested by the Accountant General in accordance with the Court Funds Rules 1987 in the following ways:

- 1176 (1) it may be placed to a basic account, or in the case of a person under a disability¹², to a special account;
- 1177 (2) it may be transferred to such of the funds established by common investment schemes¹³ as may be specified;
- 1178 (3) it may be invested in any manner in which trustees are permitted by statute to make investments¹⁴;
- 1179 (4) it may be invested in investment trust ordinary shares¹⁵.

Money subject to an order of the court may be invested or reinvested in accordance with instructions received from the Public Trustee Office¹⁶.

Subject to the relevant rules¹⁷, money, including interest, must be invested as soon as it is available¹⁸. No sum of money or interest must, however, be invested in any case where in the view of the Accountant General the cost of investment, by way of commission or otherwise, would be disproportionate to the amount of money involved¹⁹. Any money which is not invested must be placed, in the case of a person under a disability, to a special account and in all other cases to a basic account and must be drawn from the account and invested when it, together with the interest credited to it, and further sums of money or interest credited to the account which are required to be invested in the same manner, amount to a sum in respect of which the cost of investment is not disproportionate²⁰.

A payment schedule²¹ signed and authenticated by a court officer²² is normally sufficient authority to the Accountant General to deal with a fund in accordance with that schedule²³.

1 As to the courts to which these provisions apply see PARA 1550.

2 As to the Accountant General see PARA 1549.

3 See the Administration of Justice Act 1982 s 38(4); and PARA 1548.

4 As to the meaning of 'interest' see PARA 1552 note 20. The rate at which interest on money placed to a basic account or a special account is to accrue is prescribed from time to time by a direction made by the Lord Chancellor with the concurrence of the Treasury: see the Court Funds Rules 1987, SI 1987/821, r 27(1). Interest on money placed to a basic account or a special account accrues from day to day from the day on which the money is placed to the account until the day preceding its withdrawal from the account: r 27(2). Unless the Accountant General directs otherwise, accrued interest must be credited (1) on the capital sum when it is withdrawn from the account; or (2) on transfer of the capital sum from a basic account to a special account; and (3) on the last Friday in March and the last Friday in September each year in respect of money placed to a basic account and on the last Friday in May and the last Friday in November each year in respect of money placed to a special account: r 27(3) (amended by SI 1988/817; SI 1999/1021). Accrued interest must be credited without deduction of income tax: Court Funds Rules 1987, SI 1987/821, r 27(4).

5 As to the National Debt Commissioners see PARA 1549; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1332. As soon as practicable after half-yearly interest accruing on money placed to an interest bearing account has been credited to the appropriate account in accordance with the Court Funds Rules 1987, SI 1987/821, the Accountant General must certify to the National Debt Commissioners the amount of the interest and the commissioners must credit that amount to the account kept by them of money received from the Accountant General: r 56(2).

6 Court Funds Rules 1987, SI 1987/821, r 26. 'Basic account' means a deposit account bearing interest as established under r 26: r 2(2).

7 As to the meaning of 'order' see PARA 1551 note 4.

8 As to the meaning of 'deputy' see PARA 1552 note 10.

9 As to the meaning of 'person who lacks capacity' see PARA 1552 note 9.

10 'Investment manager' means a person appointed by a deputy to make decisions as to the investment of money held in court on behalf of a person who lacks capacity: Court Funds Rules 1987, SI 1987/821, r 34(4) (added by SI 2007/2617). If a deputy decides to appoint an investment manager for these purposes, he must send in writing to the Accountant General (1) contact details of the investment manager; and (2) authority for the investment manager to give directions for the investment of the funds held in court: Court Funds Rules 1987, SI 1987/821 r 34(6) (added by SI 2007/2617).

11 Court Funds Rules 1987, SI 1987/821, r 34(5) (added by SI 2007/2617). The Accountant General may refuse to comply with a direction made under the Court Funds Rules 1987, SI 1987/821, r 34(5), if (1) in relation to a direction given by a deputy, it appears to him that the direction is not within the powers conferred on the deputy by the terms of his appointment; (2) in relation to an investment manager, it appears to him that (a) it was not within the powers of the deputy to appoint an investment manager; (b) the deputy has not complied with r 34(5); or (c) it was not within the powers of the investment manager to give that direction; or (3) the court has made a contrary direction, or for another good reason: r 34(7) (added by SI 2007/2617).

12 For these purposes, 'person under a disability' means a person who is a child or lacks capacity: Court Funds Rules 1987, SI 1987/821, r 2(2) (definition amended by SI 1999/1021; SI 2007/729; and SI 2007/2617). As to the meaning of 'child' see PARA 222 note 3 (definition applied by virtue of the Court Funds Rules 1987, SI 1987/821, r 2(1) (as substituted: see PARA 1550 note 5)).

13 As to common investment schemes see PARA 1563.

14 I.e. as specified in the Trustee Investments Act 1961 Sch 1 Pt I, Pt II paras 1-10, 12, Pt III paras 2, 2A, 3, as supplemented by the provisions of Pt IV (all now repealed): see **TRUSTS** vol 48 (2007 Reissue) PARA 1005 et seq. As to the repeal of these provisions and their replacement by the Trustee Act 2000 Pt II (ss 3-7) see **TRUSTS** vol 48 (2007 Reissue) PARA 1012 et seq.

15 See the Court Funds Rules 1987, SI 1987/821, r 34(1) (amended by SI 1991/1227; SI 2003/720; and SI 2007/2617).

16 Court Funds Rules 1987, SI 1987/821, r 34(2) (amended by SI 1991/1227; and SI 2007/2617). This does not apply to money under the control of or subject to an order of the Court of Protection: Court Funds Rules 1987, SI 1987/821, r 34(3) (substituted by SI 2007/2617).

17 I.e. subject to the Court Funds Rules 1987, SI 1987/821, Pt IV (rr 26-33), Pt V (rr 34-37): see the text and notes 4-16, 18-20; and PARA 1559 et seq.

18 Court Funds Rules 1987, SI 1987/821, r 35. Subject to the provisions of Pt IV, and to any direction of the court, all money (including interest) must be placed to a basic account or, in the case of a person under a

disability, to a special account, on the day on which the schedule or other authority is received in the Court Funds Office or on the effective date of lodgment of the money, whichever is the later: r 28(1) (amended by SI 2007/729; and SI 2007/2617). Interest does not accrue from a date earlier than that on which the money is placed to an interest bearing account in accordance with this rule: Court Funds Rules 1987, SI 1987/821, r 28(3). This rule does not apply to transitional funds (see PARA 1561): r 28(4) (added by SI 1999/1021; and substituted by SI 2007/729). As to transitional funds see PARA 1561.

19 Court Funds Rules 1987, SI 1987/821, r 36(1).

20 Court Funds Rules 1987, SI 1987/821, r 36(2).

21 As to the meaning of 'payment schedule' see PARA 1552 note 15.

22 As to the meaning of 'court officer' see PARA 49 note 3 (definition applied by virtue of the Court Funds Rules 1987, SI 1987/821, r 2(1) (substituted by SI 1999/1021)).

23 See the Court Funds Rules 1987, SI 1987/821, r 7; and PARA 1552.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iii) Dealings with Funds in Court/1559. Special accounts.

1559. Special accounts.

Where funds in court are likely to be required within five years, a long-term investment in a common investment fund¹ is unsuitable, and investment may accordingly be made in a special account², which attracts a higher rate of interest than money merely placed on deposit.

Money, including interest³, may only be placed to a special account where the person entitled to it is under a disability⁴ and it amounts to a sum which is not less than £10⁵. Where judgment is given in favour of a person under a disability, or settlement of his claim is approved by the court⁶, the money to which he is entitled must, subject to any directions of the court, be placed to a special account in his name as at the date of the judgment or on the effective date of lodgment of the money, whichever is the later, without further authority⁷.

1 As to the meaning of 'common investment fund' see PARA 1555 note 2. As to the common investment scheme see PARA 1563.

2 See the Court Funds Rules 1987, SI 1987/821, r 26; and PARA 1558.

3 As to the meaning of 'interest' see PARA 1552 note 20. As to when interest accrues see PARA 1558 notes 4, 18.

4 As to the meaning of 'person under a disability' see PARA 1558 note 12.

5 Court Funds Rules 1987, SI 1987/821, r 30.

6 As to the meaning of 'court' for these purposes see PARA 1550.

7 Court Funds Rules 1987, SI 1987/821, r 28(2) (amended by SI 2007/729).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iii) Dealings with Funds in Court/1560. Money which may not be placed in a basic account.

1560. Money which may not be placed in a basic account.

Money, including interest¹, must not be placed in a basic account² where the money has been directed by an order³ or other authority to be dealt with other than by being placed in a basic account or has been carried over⁴ to an account of unclaimed balances⁵. Nor may money be placed in a basic account if it amounts to a sum which is less than £10⁶, if it stood to the credit of a fund in court before 1 October 1965 without a request that it be placed on deposit⁷ or if it was paid into court in satisfaction of a claim before 1 April 1983 without a direction that it be placed on deposit⁸.

1 As to the meaning of 'interest' see PARA 1552 note 20. As to when interest accrues see PARA 1558 notes 4, 18.

2 As to the meaning of 'basic account' see PARA 1558 note 6; and as to basic accounts and special accounts see PARA 1558.

3 As to the meaning of 'order' see PARA 1551 note 4.

4 See under the Court Funds Rules 1987, SI 1987/821, r 57: see PARA 1581. As to the meaning of 'carry over' see PARA 1551 note 5.

5 Court Funds Rules 1987, SI 1987/821, r 29(i), (ii).

6 Court Funds Rules 1987, SI 1987/821, r 29(v). There is a similar restriction on placing such a sum to a special account: see r 30; and PARA 1559.

7 Court Funds Rules 1987, SI 1987/821, r 29(iii).

8 Court Funds Rules 1987, SI 1987/821, r 29(iv).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iii) Dealings with Funds in Court/1561. Treatment of transitional funds.

1561. Treatment of transitional funds.

Transitional funds¹ must be placed to a basic account² 21 days after the effective date of lodgment³ or the effective date of appropriation⁴ and interest⁵ accrues on those funds from the date of placement to that account⁶. This does not apply, however, where a request for payment from the claimant⁷ is received in the Court Funds Office within the 21 days specified⁸.

Where the claimant is a person under a disability⁹, the requirement to place funds to a basic account applies unless the court¹⁰ otherwise directs¹¹. Where the court directs that the requirement does not apply, interest accrues on the funds in court from the date they are placed to a basic account¹². Transitional funds placed to a basic account must, unless the court otherwise directs, remain so placed until the claim is determined or the court approves a settlement, whether or not the claimant has indicated that he wishes to accept the payment or appropriation¹³.

1 'Transitional funds' means money which, less than 21 days prior to 6 April 2007, in satisfaction of a claim, had been paid into court in accordance with CPR Pt 36 or had been appropriated in accordance with CPR Pt 37 as those Parts were in force immediately prior to 6 April 2007: Court Funds Rules 1987, SI 1987/821, r 2(2) (definition added by SI 2007/729).

2 As to the meaning of 'basic account' see PARA 1558 note 6; and as to basic accounts and special accounts see PARA 1558.

3 As to the effective date of lodgment see PARA 1555.

4 'Effective date of appropriation' means, in relation to funds appropriated prior to 6 April 2007, the date on which a notice of appropriation was received by the Accountant General: Court Funds Rules 1987, SI 1987/821, r 2(2) (definition added by SI 2007/729). As to the Accountant General see PARA 1549. 'Appropriation' means where the whole or any part of money paid into court under a court order or in support of a defence of tender before claim (1) prior to 6 April 2007, was treated as a CPR Part 36 payment in accordance with CPR Part 37 as it was in force immediately prior to that date; and (2) on or after 6 April 2007, is used to satisfy a Part 36 offer in accordance with CPR 37.3, and the verb 'appropriate' is to be construed accordingly: Court Funds Rules 1987, SI 1987/821, r 2(2) (definition added by SI 2007/729). As to the meaning of 'Part 36 offer' see PARA 730 (definition applied by virtue of the Court Funds Rules 1987, SI 1987/821, r 2(1) (substituted by SI 1999/1021)).

5 As to the meaning of 'interest' see PARA 1552 note 20.

6 Court Funds Rules 1987, SI 1987/821, r 31(1) (r 31 substituted by SI 2007/729).

7 As to the meaning of 'claimant' see PARA 18 (definition as applied: see note 4).

8 Court Funds Rules 1987, SI 1987/821, r 31(2) (as substituted: see note 6).

9 As to the meaning of 'person under a disability' see PARA 1558 note 12.

10 As to the meaning of 'court' for these purposes see PARA 1550.

11 Court Funds Rules 1987, SI 1987/821, r 31(3)(i) (as substituted: see note 6).

12 Court Funds Rules 1987, SI 1987/821, r 31(3)(ii) (as substituted: see note 6).

13 Court Funds Rules 1987, SI 1987/821, r 31(3)(iii) (as substituted: see note 6).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iii) Dealings with Funds in Court/1562. Interest on payment out of money in court.

1562. Interest on payment out of money in court.

No interest¹ accrues on money held in court in relation to a claim after the date on which the claimant² serves notice on the Accountant General³ of acceptance of a Part 36 offer⁴.

Where the permission of the court is not required to take money out of court and money lodged or appropriated by the defendant⁵ in satisfaction of a claim has been accepted by and paid to the claimant, the Accountant General must pay any accrued interest remaining in court in respect of that claim to the defendant⁶.

Where the permission of the court is required to take money out of court, including where the court determines a claim or approves a settlement on behalf of a person under a disability⁷, any interest which has accrued on the money in court must be dealt with as the court orders⁸.

The rate at which interest is paid is prescribed from time to time by the Lord Chancellor with the concurrence of the Treasury⁹.

Where money has been paid into court in a claim proceeding in the Royal Courts of Justice¹⁰ and the claim is transferred to a district registry or county court¹¹, the court officer¹² of the court to which the claim is transferred must notify the Accountant General¹³.

1 As to the meaning of 'interest' see PARA 1552 note 20.

2 As to the meaning of 'claimant' see PARA 18 (definition applied by virtue of the Court Funds Rules 1987, SI 1987/821, r 2(1) (substituted by SI 1999/1021)).

3 As to the Accountant General see PARA 1549.

4 Court Funds Rules 1987, SI 1987/821, r 32(1) (r 32 substituted by SI 2007/729). As to the meaning of 'Part 36 offer' see PARA 730 (definition applied by virtue of the Court Funds Rules 1987, SI 1987/821, r 2(1) (substituted by SI 1999/1021)).

5 As to the meaning of 'defendant' see PARA 18.

6 Court Funds Rules 1987, SI 1987/821, r 32(2) (as substituted: see note 4).

7 As to the meaning of 'person under a disability' see PARA 1558 note 12.

8 Court Funds Rules 1987, SI 1987/821, r 32(3) (as substituted: see note 4).

9 See the Court Funds Rules 1987, SI 1987/821, r 27(1).

10 'Royal Courts of Justice' means the Supreme Court at the Royal Courts of Justice and does not include any district registry: r 2(2) (definition added by SI 1999/1021). As to district registries see PARA 54. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

11 As to the transfer of proceedings see PARA 66 et seq.

12 As to the meaning of 'court officer' see PARA 49 note 3 (definition as applied: see note 2).

13 Court Funds Rules 1987, SI 1987/821, r 24 (substituted by SI 1999/1021; and amended by SI 2003/375).

UPDATE

1562 Interest on payment out of money in court

NOTE 10--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iii) Dealings with Funds in Court/1563. Common investment scheme.

1563. Common investment scheme.

The Lord Chancellor may continue to make common investment schemes establishing common investment funds for the purpose of investing funds in court¹ and money held by any person who may² hold shares in common investment funds³. Such a scheme must provide for the fund thereby established to be under the management and control of an investment manager appointed by the Lord Chancellor⁴.

A common investment scheme must make provision:

- 1180 (1) for the investment by its investment manager in accordance with the following provisions of funds in court transferred to the fund under the Court Funds Rules 1987⁵ and of any sums of money transferred to the fund by persons who may⁶ hold shares in the fund⁷;
- 1181 (2) for treating the fund established by it as being divided into shares⁸; and
- 1182 (3) for treating a sum invested in the fund as being represented by a number of shares determined by reference to that sum and the value of the fund at the time the investment was made⁹.

Shares in a common investment fund must be allotted to and held by the Accountant General¹⁰ and may be allotted to and held by the Accountant General of the Supreme Court of Judicature of Northern Ireland and any other person authorised by the Lord Chancellor¹¹. Where a person is so authorised to hold shares in a common investment fund he may invest trust money in shares in the fund without obtaining and considering advice on whether to make such an investment and he may invest trust money in a common investment fund of which he is the investment manager¹². Moneys comprised in the fund established by a common investment scheme may, subject to the provisions of the scheme, be invested by the investment manager of the fund in any way in which he thinks fit, whether or not authorised by the general law in relation to trust funds¹³ and such investment manager is not required or entitled to take account of any trusts or equities affecting any share in the fund whether or not he is also a trustee of any such trust¹⁴.

The investment manager of a fund established by a common investment scheme must be remunerated at such rates and in such manner as the Lord Chancellor determines with the concurrence of the Treasury¹⁵. His salary or remuneration and that of his officers and such other expenses of executing his office or otherwise carrying the provisions of Part VI of the Administration of Justice Act 1982¹⁶ into effect as may be sanctioned by the Treasury must be paid out of moneys provided by Parliament¹⁷.

Such fees, whether by way of percentage or otherwise, in respect of the running of a common investment scheme as the Lord Chancellor fixes with the concurrence of the Treasury are to be charged and such fees must be collected and accounted for by such persons, and in such manner, and must be paid to such account, as the Treasury directs¹⁸. Any expenses which could be retained or paid out of trust property if the investment manager of the fund were a trustee are to be retained or paid out of a fund established by a common investment scheme and such expenses must be retained or paid in the same way as and in addition to fees charged in respect of the running of the scheme¹⁹. Fees and expenses recovered under these provisions must be paid into the Consolidated Fund²⁰.

The investment manager of the fund must prepare accounts and send them direct to the Comptroller General at such times as the Treasury may direct²¹. Provision is made for making good any default by such a manager²².

Money and securities held by an investment manager of a fund established by a common investment scheme vest in his successor in office without any assignment or transfer²³.

Under the Common Investment Scheme 2004, there is only one fund, namely the capital fund²⁴.

Where funds are required to be invested in common investment fund units or such units are required to be realised, the purchases and sales must be effected on the first available valuation day²⁵. Funds may not be directed to be invested in common investment fund units unless the authority giving the direction is satisfied that the funds are likely to remain so invested for at least five years; but this restriction does not apply in any case where there is an express request for investment in common investment fund units by or on behalf of one or more of the persons interested in the fund, or, if no such person is ascertained or traceable, by the person who pays the funds into court²⁶.

1 As to the meaning of 'funds in court' see PARA 1548 note 1.

2 Ie in accordance with the Administration of Justice Act 1982 s 42(5)(b): see the text and note 11.

3 Administration of Justice Act 1982 s 42(1). The power so conferred to make a common investment scheme includes the power to vary or revoke such a scheme: s 42(16). In exercise of the power so conferred, the Lord Chancellor has made (1) the Common Investment Scheme 2004, SI 2004/266, which came into force on 27 February 2004 (see para 1); and (2) the Common Investment (Amendment) Scheme 2007, SI 2007/1095, which came into force on 20 April 2007 (see para 1).

4 Administration of Justice Act 1982 s 42(2); and see the Common Investment Scheme 2004, SI 2004/266, paras 4, 5, Sch 1.

5 Ie funds in court transferred under rules made by virtue of the Administration of Justice Act 1982 s 38(7): see PARA 1548. As to the Court Funds Rules 1987, SI 1987/821, see PARAS 1550 et seq, 1564 et seq.

6 See note 2.

7 Administration of Justice Act 1982 s 42(3).

8 Administration of Justice Act 1982 s 42(4)(a).

9 Administration of Justice Act 1982 s 42(4)(b).

10 Administration of Justice Act 1982 s 42(5)(a). As to the Accountant General see PARA 1548.

11 Administration of Justice Act 1982 s 42(5)(b) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 4 para 27(1), (2)(d), to substitute a reference to the Court of Judicature of Northern Ireland for the reference to the Supreme Court of Judicature of Northern Ireland; at the date at which this title states the law, no such day had been appointed).

12 Administration of Justice Act 1982 s 42(6) (amended by the Trustee Act 2000 s 40(1), Sch 2 para 44).

13 Administration of Justice Act 1982 s 42(7).

14 Administration of Justice Act 1982 s 42(9).

15 Administration of Justice Act 1982 s 42(10). Section 42(10), (12), (14), (15) may be repealed or modified by Order in Council subject to annulment in pursuance of a resolution of either House of Parliament: see s 44.

16 Ie the provisions of Administration of Justice Act 1982 Pt VI (ss 38-47): see PARAS 1548-1549, 1579.

17 Administration of Justice Act 1982 s 42(11).

18 See the Administration of Justice Act 1982 s 42(12). See also note 15.

19 Administration of Justice Act 1982 s 42(13).

- 20 Administration of Justice Act 1982 s 42(14). See also note 15.
- 21 See the Administration of Justice Act 1982 s 45(1)(c). Section 45(2), (3) applies in relation to such accounts: see PARA 1549 note 14.
- 22 See the Administration of Justice Act 1982 s 43; and PARA 1549 note 13.
- 23 Administration of Justice Act 1982 s 42(15). See also note 15.
- 24 See the Common Investment Scheme 2004, SI 2004/266, para 3.
- 25 Court Funds Rules 1987, SI 1987/821, r 37(1).
- 26 Court Funds Rules 1987, SI 1987/821, r 37(2) (amended by SI 1991/1227).

UPDATE

1563 Common investment scheme

NOTE 11--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iii) Dealings with Funds in Court/1564. Dealings with foreign currencies.

1564. Dealings with foreign currencies.

Where foreign currency¹ is lodged in court², the court may direct that it be placed in an interest bearing account³ in the same or any other currency⁴. Any interest⁵ accrues from the date of the order⁶ or the date of placing it in the account, whichever is the later, and the Accountant General⁷ must deal with the interest as the court may direct⁸.

Any charges incurred by placing foreign currency to an account must be deducted from the currency so placed or from the accrued interest, as may be appropriate⁹.

Where income from a security in court is received in a foreign currency, the court may give such direction as it thinks fit, and in the absence of such direction the foreign currency must be converted into sterling and invested in accordance with provisions¹⁰ of the relevant rules¹¹.

1 Ie currency other than sterling: see the Court Funds Rules 1987, SI 1987/821, r 2(2).

2 As to the meaning of 'lodge in court' see PARA 1551 note 3; and as to the meaning of 'court' for these purposes see PARA 1550.

3 'Interest bearing account' means an account of funds established under the Court Funds Rules 1987, SI 1987/821, r 26 (ie either a basic or a special account: see PARA 1558): r 2(2).

4 Court Funds Rules 1987, SI 1987/821, r 39(1). As to when foreign currency may be lodged in court see r 38; and PARA 1554.

5 As to the meaning of 'interest' see PARA 1552 note 20.

6 As to the meaning of 'order' see PARA 1551 note 4.

7 As to the Accountant General see PARA 1548.

8 Court Funds Rules 1987, SI 1987/821, r 39(1).

9 Court Funds Rules 1987, SI 1987/821, r 39(2).

10 Ie in accordance with the provisions of the Court Funds Rules 1987, SI 1987/821, Pt IV (rr 26-33): see PARA 1558 et seq.

11 See the Court Funds Rules 1987, SI 1987/821, r 39(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iii) Dealings with Funds in Court/1565. Withdrawal from interest bearing accounts.

1565. Withdrawal from interest bearing accounts.

Money must only be withdrawn from an interest bearing account¹ where the money, including any interest² which has accrued at the time of withdrawal, is required to be withdrawn for the purpose of giving effect to a direction of the court³ or the Court Funds Rules 1987⁴. Such interest must not, however, be used if directed by the court to be otherwise dealt with⁵.

1 As to the meaning of 'interest bearing account' see PARA 1564 note 3.

2 As to the meaning of 'interest' see PARA 1552 note 20.

3 As to the meaning of 'court' for these purposes see PARA 1550.

4 Court Funds Rules 1987, SI 1987/821, r 33.

5 Court Funds Rules 1987, SI 1987/821, r 33 proviso.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iii) Dealings with Funds in Court/1566. Conversion, allotment and write-off of securities.

1566. Conversion, allotment and write-off of securities.

Where a question has arisen as to an allotment or conversion of securities¹ which have been paid into court by trustees under the Trustee Act 1925², or in any other case in which he considers it appropriate because no application will otherwise be made, the Accountant General³ may apply to the court⁴ for directions as to how the securities should be dealt with⁵.

Where a security in court has been converted into another security, the Accountant General must write off the original security from the account to which it is standing and place to that account the whole, or where appropriate a proportionate part, of the substituted security⁶. He must deal with the substituted security, and any interest⁷ on it, in the same manner as the original security and interest in so far as this is practicable⁸. Likewise, where a security in court is paid off and the money received is invested or placed to an interest bearing account⁹, the security purchased or money in the account and any interest on it must, unless the court otherwise directs, be dealt with by the Accountant General in the same manner as the original security and interest¹⁰.

Where an allotment is made in respect of a security in court the Accountant General may credit the whole, or where appropriate a proportionate part, of the allotment to the account of the original security if the allotment is fully paid¹¹. If the allotment is not fully paid, he may sell the allotment and credit the whole or a proportionate part of the proceeds of sale to that account or otherwise as the court may direct¹². He may sell any non-apportionable shares and apportion such proceeds as nearly as practicable to the appropriate account¹³.

Where bearer or similar bonds or securities deposited at the bank¹⁴ to the credit of the Accountant General are being paid off, the bank must take the necessary steps to receive the principal money and interest due and must inform the Accountant General in writing of the amounts of the securities paid off and of the principal money and interest received¹⁵. Where the interest on securities in court is payable on the presentation of coupons in a series and the last coupon of any such series has been presented and paid, the bank must take the necessary steps to obtain a new series of coupons¹⁶.

Where a company has been wound up and the Accountant General has received written notice from the liquidator or from the Department for Business, Enterprise and Regulatory Reform that no assets are or will be distributable in respect of the securities of the company and written notice from the Registrar of the Companies Registration Office that the company has been dissolved, he must withdraw from the bank the certificate representing any security in that company and must write off any such security from the account to which it stands¹⁷.

1 As to the meaning of 'securities' see PARA 1555 note 2.

2 I.e. under the Trustee Act 1925 s 63: see **TRUSTS** vol 48 (2007 Reissue) PARA 917.

3 As to the Accountant General see PARA 1548.

4 As to the meaning of 'court' for these purposes see PARA 1550.

5 Court Funds Rules 1987, SI 1987/821, r 52.

6 Court Funds Rules 1987, SI 1987/821, r 53(1).

- 7 As to the meaning of 'interest' see PARA 1552 note 20.
- 8 Court Funds Rules 1987, SI 1987/821, r 53(2).
- 9 As to the meaning of 'interest bearing account' see PARA 1564 note 3.
- 10 Court Funds Rules 1987, SI 1987/821, r 53(2).
- 11 Court Funds Rules 1987, SI 1987/821, r 53(3)(i).
- 12 Court Funds Rules 1987, SI 1987/821, r 53(3)(ii).
- 13 Court Funds Rules 1987, SI 1987/821, r 53(3)(iii).
- 14 As to the meaning of 'bank' see PARA 1553 note 2.
- 15 Court Funds Rules 1987, SI 1987/821, r 54(1).
- 16 Court Funds Rules 1987, SI 1987/821, r 54(2).
- 17 Court Funds Rules 1987, SI 1987/821, r 55 (amended by SI 2007/3224).

UPDATE

1566 Conversion, allotment and write-off of securities

NOTE 17--SI 1987/821 r 55 further amended: SI 2009/2748.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iii) Dealings with Funds in Court/1567. Charging orders and stop orders on funds in court.

1567. Charging orders and stop orders on funds in court.

The procedure relating to charging orders and stop orders on funds in court has already been dealt with¹.

1 See PARAS 1477, 1489.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iv) Payment, Transfer and Delivery of Funds/1568. Authority for payment, transfer or delivery of funds.

(iv) Payment, Transfer and Delivery of Funds

1568. Authority for payment, transfer or delivery of funds.

The general rule is that the payment out of money lodged in court¹ may be made by the Accountant General² by means of the Bankers' Automated Clearing System³ to a bank in the United Kingdom or by international money transfer to a bank outside the United Kingdom, for the credit of the account of the payee at that bank⁴. The payment schedule⁵ must contain the necessary details of the payee's bank and account in order for the payment to be made⁶.

However, special requirements apply in the case of payment out to personal representatives of a deceased payee⁷ or to persons who change their name or style⁸, payment of funeral expenses out of funds in court⁹, payment of inheritance tax out of funds in court¹⁰, payments pursuant to Court of Protection directions¹¹, payment out of money lodged in satisfaction of a claim¹², and payment of interest on and transfer or delivery of securities¹³.

The Accountant General may, if he thinks fit, refuse to make a payment (1) until he is satisfied as to the identity and entitlement of any person claiming to be the payee¹⁴; (2) by means of the Bankers' Automated Clearing System or international money transfer in any individual case if the payment schedule is not completed with sufficient information or for another good reason¹⁵.

1 As to the meaning of 'lodge in court' see PARA 1551 note 3.

2 As to the Accountant General see PARA 1549.

3 'Bankers' Automated Clearing System' (BACS) means the method of payment whereby funds are transferred from one bank in the United Kingdom to another by means of an automated system: Court Funds Rules 1987, SI 1987/821, r 2(2) (definition added by SI 1997/177; and amended by SI 2007/2617).

4 See the Court Funds Rules 1987, SI 1987/821, r 40(2) (substituted by SI 2007/2617). The person entitled to the payment out of money lodged in court is referred to as the 'payee': Court Funds Rules 1987, SI 1987/821, r 40(1) (substituted by SI 1997/177). Where the Accountant General does not make a payment by means of the Bankers' Automated Clearing System under the Court Funds Rules 1987, SI 1987/821, r 40(2), he must make the payment by a cheque crossed 'account payee' in accordance with r 40(8): r 40(6) (as so substituted). In cases where the payee does not have an account which is suitable for the receipt of funds (in respect of an account held at a bank in the United Kingdom) by the Bankers' Automated Clearing System or (in respect of an account held at a bank outside the United Kingdom) by international money transfer, or there is a written request from the payee for the payment to be made by cheque, the Accountant General must make the payment by a cheque crossed 'account payee': r 40(7)(i), (ii) (r 40(7) as so substituted; r 40(7)(i) further substituted by SI 2007/2617). Where the Accountant General makes a payment under the Court Funds Rules 1987, SI 1987/821, r 40(6) or (7) it must be sent by as follows: (1) where the address of the payee is stated in the payment schedule or supplementary authority and that schedule or authority is dated not more than one year prior to the date on which the Accountant General is able to make payment, he must make payment to the payee at the address so stated; (2) where the payment schedule or supplementary authority is dated more than one year prior to the date on which the Accountant General is able to make payment, he must make payment on receipt of a written request from the payee and, in a case where there has been a written request under r 40(7)(ii), that request is sufficient for these purposes: r 40(8) (substituted by SI 1997/177).

On receipt of a written request from a donee under a power of attorney given by the payee, the Accountant General may make payment by means of the Bankers' Automated Clearing System (if the account is held at a bank in the United Kingdom) or international money transfer (if the account is held at a bank outside the United Kingdom), for the credit of the account of the payee at that bank: Court Funds Rules 1987, SI 1987/821, r 40(5) (substituted by SI 2007/2617). The request for payment must be accompanied by (a) an office copy of that power of attorney showing that it has been registered as required by the relevant Act in the case of (i) a lasting

power of attorney made under the Mental Capacity Act 2005 s 9; or (ii) an enduring power of attorney (as defined in the Mental Capacity Act 2005 Sch 4 para 2) made before 1 October 2007 which was registered before that date under the Enduring Powers of Attorney Act 1985 (as that Act was in force immediately prior to that date) or on or after that date under the Mental Capacity Act 2005; and (b) in all other cases, a copy of the power of attorney by which the donee was appointed, certified in accordance with the provisions of the Powers of Attorney Act 1971 s 3: Court Funds Rules 1987, SI 1987/821, r 40(5A) (added by SI 2007/2617). The Accountant General may refuse to make the payment if the requirements for exhibiting the power of attorney have not been met or he considers that the request for payment is not within the powers conferred on the donee by the power of attorney: Court Funds Rules 1987, SI 1987/821, r 40(5B) (added by SI 2007/2617).

5 As to the meaning of 'payment schedule' see PARA 1552 note 15.

6 Court Funds Rules 1987, SI 1987/821, r 40(3) (substituted by SI 1999/177).

7 See the Court Funds Rules 1987, SI 1987/821, r 43; and PARA 1570.

8 See the Court Funds Rules 1987, SI 1987/821, r 41; and PARA 1573.

9 See the Court Funds Rules 1987, SI 1987/821, r 43A; and PARA 1571.

10 See the Court Funds Rules 1987, SI 1987/821, r 43B; and PARA 1572.

11 See the Court Funds Rules 1987, SI 1987/821, r 42; and PARA 1574.

12 See the Court Funds Rules 1987, SI 1987/821, r 44; and PARA 1575.

13 See the Court Funds Rules 1987, SI 1987/821, rr 46-48; and PARA 1576.

14 Court Funds Rules 1987, SI 1987/821, r 40(9)(i) (r 40(9) substituted by SI 1999/177). He may require the personal attendance of the payee at the Court Funds Office or a court office as a condition of payment: Court Funds Rules 1987, SI 1987/821, r 40(9)(i) (as so substituted).

15 Court Funds Rules 1987, SI 1987/821, r 40(9)(ii) (as substituted (see note 14); and amended by SI 2007/2617).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iv) Payment, Transfer and Delivery of Funds/1569. Time for making payments.

1569. Time for making payments.

In cases where the payment schedule¹ or supplementary authority is dated not more than one year prior to the date on which the Accountant General² is able to make payment, he must make payment as soon as is practicable³. In other cases he must make payment on receipt of a written request from the payee⁴.

1 As to the meaning of 'payment schedule' see PARA 1552 note 15.

2 As to the Accountant General see PARA 1549.

3 Court Funds Rules 1987, SI 1987/821, r 40(4)(i) (substituted by SI 1997/177).

4 See the Court Funds Rules 1987, SI 1987/821, r 40(4)(ii) (as substituted: see note 4). As to the meaning of 'payee' see PARA 1568 note 4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iv) Payment, Transfer and Delivery of Funds/1570. Payment to personal representatives of deceased payee.

1570. Payment to personal representatives of deceased payee.

Where a person entitled to a fund in court¹ either in his own right or as sole, or sole surviving, executor dies, the Accountant General² may, where the fund exceeds £5,000, pay it to the personal representative of the deceased on production of a grant of probate or office copy of the grant, or, where the deceased was entitled to the fund in his own right, letters of administration in respect of the deceased's estate³.

Where a person entitled to a fund in court in his own right dies intestate and no grant of administration has been issued, the Accountant General may, where the assets of the deceased (including the fund in court and after deduction of debts and funeral expenses) do not exceed £5,000, pay the fund to the person who appears to him to have the prior right to a grant of administration of the estate, on lodgment in the Court Funds Office⁴ of a written declaration of kinship⁵.

Where two or more persons were entitled to payment of a fund in court as personal representatives and any of them dies before the fund is dealt with, the Accountant General may pay the fund to the surviving personal representatives on proof of the death of the deceased personal representative; and where the fund does not exceed £5,000 the Accountant General may, unless a court⁶ otherwise directs, pay the fund to any one of them⁷.

1 As to the meaning of 'fund in court' see PARA 1548 note 1.

2 As to the Accountant General see PARA 1549.

3 Court Funds Rules 1987, SI 1987/821, r 43(1).

4 As to the Court Funds Office see PARA 1549.

5 Court Funds Rules 1987, SI 1987/821, r 43(2).

6 As to the meaning of 'court' for these purposes see PARA 1550.

7 Court Funds Rules 1987, SI 1987/821, r 43(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iv) Payment, Transfer and Delivery of Funds/1571. Payment of funeral expenses out of funds in court.

1571. Payment of funeral expenses out of funds in court.

On the written request of the person who is the executor of the deceased's¹ will or, if the deceased died intestate, arranged the deceased's funeral, the Accountant General² may, on receipt of an invoice issued by funeral directors, pay direct to those directors such amounts as have been reasonably incurred for the purposes of arranging and conducting the deceased's funeral³. The Accountant General may, if he thinks fit, refuse to make such payment in any individual case (1) if he has not received the invoice referred to; (2) if the person requesting such payment fails to provide him with sufficient evidence as to his entitlement to make the request; (3) if the fund in court to which the deceased was entitled is insufficient to meet the cost of arranging and conducting the funeral; or (4) for another good reason⁴.

1 For these purposes, the 'deceased' means a person (1) who immediately prior to his death was entitled to a fund in court in his own right; (2) in respect of whom a deputy had been appointed or, where the person died before 1 October 2007, a receiver had been appointed under the Mental Health Act 1983 Pt VII (ss 93-113) (as that Act was in force immediately prior to that date); and (3) in respect of whose estate no grant of probate or administration has been issued: Court Funds Rules 1987, SI 1987/821, r 43A(1) (r 43A added by SI 2007/2617). As to the meaning of 'fund in court' see PARA 1548 note 1. As to the meaning of 'deputy' see PARA 1552 note 10. As to executors see **EXECUTORS AND ADMINISTRATORS**.

2 As to the Accountant General see PARA 1549.

3 Court Funds Rules 1987, SI 1987/821, r 43A(2) (as added: see note 1).

4 Court Funds Rules 1987, SI 1987/821, r 43A(3) (as added: see note 1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iv) Payment, Transfer and Delivery of Funds/1572. Payment of inheritance tax out of funds in court.

1572. Payment of inheritance tax out of funds in court.

On the written request of the person who is the executor of the deceased's¹ will or, if the deceased died intestate, appears to the Accountant General² to have the prior right to a grant of administration of the estate³, the Accountant General may pay direct to Her Majesty's Revenue and Customs such funds as may be required to satisfy all, or any part, of the inheritance tax due on the deceased's estate⁴. A request must be accompanied by (1) such information as Her Majesty's Revenue and Customs may require to be sent to financial institutions for the purposes of enabling those institutions to make direct payment of inheritance tax; (2) in the case of a request from the executor of the deceased's will, a certified copy of the will by which he was appointed; and (3) in the case of a request from the person who appears to have the prior right to a grant of administration, a written declaration of kinship⁵. The Accountant General may refuse to make payment if these requirements are not met, or for another good reason⁶.

1 As to the meaning of 'the deceased' see PARA 1571 note 1. As to executors see **EXECUTORS AND ADMINISTRATORS**.

2 As to the Accountant General see PARA 1549.

3 As to grants of administration see **EXECUTORS AND ADMINISTRATORS**.

4 Court Funds Rules 1987, SI 1987/821, r 43B(1) (r 43B added by SI 2007/2617). As to inheritance tax see **INHERITANCE TAXATION**.

5 Court Funds Rules 1987, SI 1987/821, r 43B(2) (as added: see note 4).

6 Court Funds Rules 1987, SI 1987/821, r 43B(2) (as added: see note 4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iv) Payment, Transfer and Delivery of Funds/1573. Payment after a change of name or style.

1573. Payment after a change of name or style.

Where a person entitled to payment of a fund in court¹ changes his name or style before the fund is paid, transferred or delivered to him, the Accountant General² must require evidence of the change before dealing with the fund, except where payment is to be made to the person as deputy³.

1 As to the meaning of 'fund in court' see PARA 1548 note 1.

2 As to the Accountant General see PARA 1549.

3 Court Funds Rules 1987, SI 1987/821, r 41 (amended by SI 2007/2617). As to the meaning of 'deputy' see PARA 1552 note 10.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iv) Payment, Transfer and Delivery of Funds/1574. Payment pursuant to direction of the Court of Protection.

1574. Payment pursuant to direction of the Court of Protection.

Where a person who lacks capacity¹ is entitled to a fund in court² (other than pursuant to an order³ made under Part VII of the Mental Health Act 1983⁴ as that Act was in force immediately prior to 1 October 2007, or under Part 1 of the Mental Capacity Act 2005⁵) the Accountant General⁶ must, on receipt of a direction from the Court of Protection, either pay the money to the person's deputy⁷ or carry it over⁸ to such account as that court may direct⁹.

1 As to the meaning of 'person who lacks capacity' see PARA 1552 note 9.

2 As to the meaning of 'fund in court' see PARA 1548 note 1.

3 As to the meaning of 'order' see PARA 1551 note 4.

4 I.e. the Mental Health Act 1983 Pt VII (ss 93-113): see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 704 et seq.

5 I.e. the Mental Capacity Act 2005 Pt 1 (ss 1-14): see **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 406, 641 et seq.

6 As to the Accountant General see PARA 1549.

7 As to the meaning of 'deputy' see PARA 1552 note 10.

8 As to the meaning of 'carry over' see PARA 1551 note 5.

9 Court Funds Rules 1987, SI 1987/821, r 42 (substituted by SI 2007/2617).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iv) Payment, Transfer and Delivery of Funds/1575. Payment out without order of money lodged in satisfaction of claim.

1575. Payment out without order of money lodged in satisfaction of claim.

The general rule is that, upon receipt of a written request, the Accountant General¹ must pay money lodged in court² in satisfaction of a claim or appropriated in accordance with the relevant provision of the Court Funds Rules 1987³ by the claimant⁴ (1) by cheque crossed 'account payee' to the claimant; (2) to a bank in the United Kingdom by means of the Bankers' Automated Clearing System⁵ for the credit of the claimant's account; or (3) to a bank outside the United Kingdom by means of international money transfer for the credit of the account of the claimant at that bank⁶. Where, however, the claimant is represented by a solicitor who is acting for him in the proceedings in which the money was lodged or appropriated by virtue of a certificate which has been issued pursuant to a decision to fund legal services for that claimant as part of the Community Legal Service⁷, the Accountant General must pay the money to that solicitor or, in certain circumstances, to the Legal Services Commission⁸. The written request for payment must provide the necessary details of the claimant's bank account⁹ but, if the claimant does not have a bank account suitable for the receipt of funds by the Bankers' Automated Clearing System or by international money transfer, or if there is a written request from the claimant for the payment to be made by cheque, the Accountant General must make the payment by a cheque crossed 'account payee', to the claimant by post¹⁰.

If he thinks fit, the Accountant General may refuse to make a payment by means of the Bankers' Automated Clearing System or international money transfer in any individual case if the claimant does not provide him with sufficient information or for another good reason¹¹.

The Accountant General must not make any payment under these provisions¹² where¹³:

- 1183 (a) funds have been lodged or appropriated by one or more, but not all, of a number of defendants¹⁴ sued jointly or in the alternative, unless (i) the claimant discontinues the claim against all the other defendants; (ii) those defendants consent in writing to the payment; and (iii) a copy of the notice of discontinuance and the written consent of each consenting defendant is lodged with the Accountant General¹⁵; or
- 1184 (b) a defence of tender before claim¹⁶ has been pleaded, unless (i) a Part 36 offer¹⁷ is accepted without needing the permission of the court; and (ii) the written consent of the defendant that all, or part, of the money paid into court in support of that defence may be used to satisfy the offer (in whole or in part) is lodged with the Accountant General¹⁸; or
- 1185 (c) the claim is made by, or on behalf of, a person under a disability¹⁹; or
- 1186 (d) money has been lodged in proceeding under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934, or under the first mentioned Act alone where more than one person is entitled to the money²⁰; or
- 1187 (e) in respect of transitional funds²¹, (i) the payment into court or appropriation was made less than 21 days prior to the start of the trial; or (ii) the claimant has not accepted the payment or appropriation within 21 days of the payment into court or appropriation²²; or
- 1188 (f) a defendant has paid money into court under a court order or in support of a defence of tender before claim and a Part 36 offer is subsequently accepted without needing the permission of the court²³, unless the request for payment lodged with the Accountant General by the claimant includes the written consent of

the defendant that all, or part, of the money paid into court may be used to satisfy the offer (in whole or in part)²⁴.

- 1 As to the Accountant General see PARA 1549.
- 2 As to the meaning of 'lodge in court' see PARA 1551 note 3.
- 3 It is appropriated in accordance with the Court Funds Rules 1987, SI 1987/821, r 25: see PARA 1557.
- 4 For these purposes, a person in respect of whose cause of action a sum has been paid into court in satisfaction, whether by way of claim or counterclaim, is referred to as a 'claimant' and a person against whom such a cause of action lies is referred to as a 'defendant': Court Funds Rules 1987, SI 1987/821, r 44(1) (amended by SI 1999/1021; and SI 2007/729). See, however, PARA 18. As to the meaning of 'counterclaim' see PARA 618 note 3 (definition applied by virtue of the Court Funds Rules 1987, SI 1987/821, r 2(1) (substituted by SI 1999/1021)).
- 5 As to the meaning of 'Bankers' Automated Clearing System' see PARA 1568 note 3.
- 6 Court Funds Rules 1987, SI 1987/821 r 44(2) (substituted by SI 1997/177; amended by SI 1999/1021; SI 2007/729; and SI 2007/2616).
- 7 It is a certificate issued under the code approved by the Access to Justice Act 1999 s 9 certifying a decision to fund services under ss 4-10: see **LEGAL AID** vol 65 (2008) PARA 40.
- 8 See the Court Funds Rules 1987, SI 1987/821, r 44(2) proviso (as substituted (see note 5); and amended by SI 1999/1021; and SI 2000/2918).
- 9 Court Funds Rules 1987, SI 1987/821, r 44(2A) (r 44(2A)-(2C) added by SI 1997/177; r 44(2A) amended by SI 1999/1021; and SI 2007/2617).
- 10 Court Funds Rules 1987, SI 1987/821, r 44(2B) (as added (see note 9); and amended by SI 1999/1021; and SI 2007/2617).
- 11 Court Funds Rules 1987, SI 1987/821, r 44(2C) (as added (see note 9); and amended by SI 1999/1021; and SI 2007/2617).
- 12 It is under Court Funds Rules 1987, SI 1987/821, r 44(2): see the text and notes 1-8.
- 13 Court Funds Rules 1987, SI 1987/821, r 44(4) (amended by SI 1997/177).
- 14 As to the meaning of 'defendant' for these purposes see note 4.
- 15 Court Funds Rules 1987, SI 1987/821, r 44(4)(i) (substituted by SI 2007/729).
- 16 As to the meaning of 'defence of tender before claim' see PARA 600 note 1.
- 17 As to the meaning of 'Part 36 offer' see PARA 730 (definition applied by virtue of the Court Funds Rules 1987, SI 1987/821, r 2(1) (substituted by SI 1999/1021)).
- 18 Court Funds Rules 1987, SI 1987/821, r 44(4)(ii) (substituted by SI 2007/729).
- 19 Court Funds Rules 1987, SI 1987/821, r 44(4)(iii) (amended by SI 2007/2617). As to the meaning of 'person under a disability' see PARA 1558 note 12.
- 20 Court Funds Rules 1987, SI 1987/821, r 44(4)(iv).
- 21 As to the meaning of 'transitional funds' see PARA 1561 note 1.
- 22 Court Funds Rules 1987, SI 1987/821, r 44(4)(v) (substituted by SI 2007/729). This does not apply where (1) at the time the request for payment is made the claimant certifies to the Accountant General that the parties have agreed liability for costs; or (2) less than 21 days prior to 6 April 2007, the defendant increased a Part 36 payment or appropriation by lodging further funds or by appropriating all or a further part of a sum lodged in court and the increased payment or appropriation is accepted within 21 days of the effective date of lodgment or appropriation of the further funds: Court Funds Rules 1987, SI 1987/821, r 44(5) (added by SI 2007/729).
- 23 It is the Court Funds Rules 1987, SI 1987/821, r 25(1)(i), (ii) applies: see PARA 1557.

24 Court Funds Rules 1987, SI 1987/821, r 44(4)(vi) (added by SI 2007/729).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iv) Payment, Transfer and Delivery of Funds/1576. Securities.

1576. Securities.

Where securities¹ are lodged in court² or money lodged is invested, the interest³ that accrues is paid by the Accountant General⁴ to the person in whose name the lodgment is made⁵.

Where the Accountant General is required⁶ to transfer or deliver any securities or effects, he must issue directions accordingly which constitute sufficient authority for the relevant transfer or delivery and, in the case of a transfer of securities for sale, for the bank⁷ to receive the proceeds of sale⁸. No directions of the Accountant General are, however, required for the transfer of National Savings stock⁹, on sale or otherwise¹⁰.

Subject to certain exceptions¹¹ and to any directions of the court, where money in court is invested in the purchase of securities, the payment for the purchase includes all applicable charges and, where securities in court are sold, all applicable charges are deducted from the proceeds of sale¹². If, however, the schedule directing a purchase or sale also directs that charges are not to be deducted from the fund in court, the transaction must not be completed until such charges have been paid either to the stockbroker or to the Accountant General, as the case may be¹³.

1 As to the meaning of 'securities' see PARA 1555 note 2.

2 I.e. under the Court Funds Rules 1987, SI 1987/821, r 15: see PARA 1553. As to the meaning of 'lodge in court' see PARA 1551 note 3.

3 As to the meaning of 'interest' see PARA 1552 note 20.

4 As to the Accountant General see PARA 1549.

5 Court Funds Rules 1987, SI 1987/821, r 46. This is subject to any contrary provision contained in the relevant enactment: r 46.

6 I.e. required pursuant to directions of the court or under the Court Funds Rules 1987, SI 1987/821: r 47(1). As to the meaning of 'court' for these purposes see PARA 1550.

7 As to the meaning of 'bank' see PARA 1553 note 2.

8 Court Funds Rules 1987, SI 1987/821, r 47(1).

9 As to the meaning of 'National Savings Stock' see PARA 1553 note 4.

10 Court Funds Rules 1987, SI 1987/821, r 47(2).

11 I.e. except where Court Funds Rules 1987, SI 1987/821, r 34 applies (see PARA 1558): r 48.

12 Court Funds Rules 1987, SI 1987/821, r 48(i), (ii).

13 Court Funds Rules 1987, SI 1987/821, r 48.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iv) Payment, Transfer and Delivery of Funds/1577. Application of funds dealt with before receipt of payment schedule.

1577. Application of funds dealt with before receipt of payment schedule.

Unless the court¹ otherwise directs, where an order² has been made dealing with a fund³ and, after the date of the order but before the Court Funds Office⁴ receives the payment schedule⁵, interest⁶ has accrued or money and interest have been dealt with in accordance with a previous court direction or under the Court Funds Rules 1987, the part of the fund attributable to accrued interest or to money and interest must be treated as follows:

- 1189 (1) interest accrued on securities directed to be transferred, delivered or carried over⁷ must be dealt with as the securities are directed to be dealt with under the payment schedule;
- 1190 (2) interest accrued on securities directed to be sold, except where the sale is to raise a specified sum of money, must be dealt with as the proceeds of sale are directed to be dealt with under the payment schedule;
- 1191 (3) where interest which has accrued on securities directed to be transferred, delivered or carried over has been invested in the purchase of further securities, those further securities and any interest on them must be dealt with as the original securities are directed to be dealt with;
- 1192 (4) where interest which has accrued on securities directed to be sold has been invested in the purchase of further securities, those further securities must be sold and the proceeds of sale added to the proceeds of the original securities;
- 1193 (5) money or accrued interest which has been placed to a basic or special account⁸ must be withdrawn and, together with any interest credited on withdrawal, applied as directed by the payment schedule, although where such money is directed to be invested, any interest credited on withdrawal must be applied as interest accruing on the investment is directed to be applied⁹.

1 As to the meaning of 'court' for these purposes see PARA 1550.
 2 As to the meaning of 'order' see PARA 1551 note 4.
 3 As to the meaning of 'fund' see PARA 1548 note 1.
 4 As to the Court Funds Office see PARA 1549.
 5 As to the meaning of 'payment schedule' see PARA 1552 note 15.
 6 As to the meaning of 'interest' see PARA 1552 note 20.
 7 As to the meaning of 'carry over' see PARA 1551 note 5.
 8 As to basic accounts and special accounts see PARA 1558.
 9 Court Funds Rules 1987, SI 1987/821, r 49.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iv) Payment, Transfer and Delivery of Funds/1578. Specially created account.

1578. Specially created account.

In apportioning to any account the interest¹ received in respect of securities² the Accountant General³ must exclude all fractions of one penny and must carry over⁴ the aggregate of such fractions to a specially created account⁵. The Accountant General must from time to time transfer to the cash account of Her Majesty's Paymaster General⁶ all sums standing to the specially created account⁷.

1 As to the meaning of 'interest' see PARA 1552 note 20.

2 As to the meaning of 'securities' see PARA 1555 note 2.

3 As to the Accountant General see PARA 1549.

4 As to the meaning of 'carry over' see PARA 1551 note 5.

5 Court Funds Rules 1987, SI 1987/821, r 51(1).

6 Ie for the credit of the Administration of Justice--England and Wales (Lord Chancellor's Department) Vote: Court Funds Rules 1987, SI 1987/821, r 51(2). As to the Paymaster General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 714.

7 Court Funds Rules 1987, SI 1987/821, r 51(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(iv) Payment, Transfer and Delivery of Funds/1579. Transfer of funds in court to Official Custodian for Charities or appropriate body.

1579. Transfer of funds in court to Official Custodian for Charities or appropriate body.

On an application being made to him in that behalf, the Accountant General¹ may transfer funds vested in him and held in trust for any charity or ecclesiastical corporation to the Official Custodian for Charities or the appropriate authority².

1 As to the Accountant General see PARA 1549.

2 See the Administration of Justice Act 1982 s 41 (amended by the Charities Act 2006 s 75(1), Sch 8 para 67; and the Church of England (Miscellaneous Provisions) Measure 2006 s 14, Sch 5 para 25); and **CHARITIES** vol 8 (2010) PARA 299.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(v) Unclaimed Funds and Effects/1580. Unclaimed funds; in general.

(v) Unclaimed Funds and Effects

1580. Unclaimed funds; in general.

A fund¹ is treated as unclaimed if it stands to the credit of an account that has not been dealt with for a period of ten years² and the Accountant General³ is, at any time, satisfied that although all reasonable steps have been taken to trace the person entitled to it and to pay it to him, that person cannot be traced⁴. Where, however, the fund was lodged for the benefit of a child, the ten-year period does not run until the child's eighteenth birthday or, if his date of birth is not known, until 18 years have elapsed since the account was opened⁵.

1 As to the meaning of 'fund' see PARA 1548 note 1.

2 I.e. otherwise than by the continuous investment or placing on deposit of accrued interest, the compulsory conversion, redemption or acquisition of securities or the placing on deposit of any money arising therefrom: Court Funds Rules 1987, SI 1987/821, r 57(2)(i). As to the meaning of 'interest' see PARA 1552 note 20; and as to the meaning of 'securities' see PARA 1555 note 2.

3 As to the Accountant General see PARA 1549.

4 Court Funds Rules 1987, SI 1987/821, r 57(2) (amended by SI 2000/2918; and SI 2007/729).

5 Court Funds Rules 1987, SI 1987/821, r 57(3) (amended by SI 2000/2918; and SI 2007/729).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(v) Unclaimed Funds and Effects/1581. Carrying over unclaimed funds.

1581. Carrying over unclaimed funds.

Subject to special provisions where the person entitled to the fund is a child¹, the Accountant General² may carry over³ an unclaimed fund in court⁴ to an account of unclaimed balances⁵.

On receipt of a payment schedule⁶ directing a dealing with a fund carried over in accordance with these provisions, the Accountant General must carry back the unclaimed balance to the appropriate account⁷. Where a fund is carried back, simple interest⁸ must be credited to the fund in respect of the whole period during which the fund stood to an account of unclaimed balances at the rate of interest prescribed, at the date when the fund is carried back, for money placed in a basic account⁹.

The Accountant General must maintain a list of the accounts in respect of which funds have been carried over to an account of unclaimed balances, which may be inspected at the Court Funds Office¹⁰ during normal office hours¹¹. Similarly, the court officer¹² of each county court must maintain a list of unclaimed funds in the custody of that court, which may be inspected at the court office; and he must send to the Accountant General a copy of the list from time to time¹³.

1 See the Court Funds Rules 1987, SI 1987/821, r 57(3); and PARA 1580.

2 As to the Accountant General see PARA 1549.

3 As to the meaning of 'carry over' see PARA 1551 note 5.

4 As to the meaning of 'fund in court' see PARA 1548 note 1. As to when such a fund is treated as unclaimed see PARA 1580.

5 Court Funds Rules 1987, SI 1987/821, r 57(1) (amended by SI 2007/2617).

6 As to the meaning of 'payment schedule' see PARA 1552 note 15.

7 Court Funds Rules 1987, SI 1987/821, r 57(6).

8 As to the meaning of 'interest' see PARA 1552 note 20.

9 Court Funds Rules 1987, SI 1987/821, r 57(7). As to basic accounts see PARA 1558.

10 As to the Court Funds Office see PARA 1549.

11 Court Funds Rules 1987, SI 1987/821, r 58(1).

12 As to the meaning of 'court officer' see PARA 49 note 3 (definition applied by virtue of the Court Funds Rules 1987, SI 1987/821, r 2(1) (substituted by SI 1999/1021)).

13 Court Funds Rules 1987, SI 1987/821, r 58(2) (amended by SI 1999/1021).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(v) Unclaimed Funds and Effects/1582. Disposal of unclaimed effects.

1582. Disposal of unclaimed effects.

Where effects have been deposited in court¹ on or after 3 July 1978 and have been carried over² to an account of unclaimed balances³, the Accountant General⁴ may send to the court a copy of any inventory provided to him⁵ in respect of such effects when 25 years have elapsed since the authority for the lodgment was received⁶.

Upon receipt of such an inventory, the court may cause inquiries to be made whether any party to the proceedings in which the effects were deposited wishes to make any application in respect of them, or whether any other person who may have an interest in the effects can be found⁷. The court may also, of its own motion and without reference to any party or person (other than a party or person who may have an interest and whose whereabouts or the whereabouts of whose personal representatives are known), order the final disposal of the effects by sale, realisation or otherwise⁸. It must not, however, order the destruction of any effects unless it is satisfied that they have no realisable value⁹.

The amount of the net proceeds of any sale or realisation under these provisions must be credited by the court officer¹⁰ and placed to the credit of the unclaimed balance account in which the effects were held prior to the sale or realisation¹¹.

1 As to the meaning of 'court' for these purposes see PARA 1550.

2 As to the meaning of 'carry over' see PARA 1551 note 5.

3 I.e. under the Court Funds Rules 1987, SI 1987/821, r 57: see PARA 1581.

4 As to the Accountant General see PARA 1549.

5 I.e. in accordance with the Court Funds Rules 1987, SI 1987/821, r 17(3): see PARA 1555.

6 Court Funds Rules 1987, SI 1987/821, r 59(1).

7 Court Funds Rules 1987, SI 1987/821, r 59(2)(i).

8 Court Funds Rules 1987, SI 1987/821, r 59(2)(ii). For the purpose of any reference to a party or other person who may have an interest in the effects in question it is not necessary to revive any proceedings which may have abated or to issue any summons unless the court so directs and an order for such final disposal may be made after oral or written communication with such party or person: r 59(3).

9 Court Funds Rules 1987, SI 1987/821, r 59(2)(ii) proviso.

10 As to the meaning of 'court officer' see PARA 49 note 3 (definition applied by virtue of the Court Funds Rules 1987, SI 1987/821, r 2(1) (substituted by SI 1999/1021)).

11 Court Funds Rules 1987, SI 1987/821, r 59(4) (amended by SI 1999/1021).

UPDATE

1582 Disposal of unclaimed effects

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(v) Unclaimed Funds and Effects/1583. Disposal of unclaimed securities in court.

1583. Disposal of unclaimed securities in court.

Where any securities¹ (including common investment fund units²) are carried over³, or are standing to an account of unclaimed balances on 1 June 1987, the Accountant General⁴ must sell the securities and pay the proceeds into the account of unclaimed balances⁵. He must write off any such securities which have no value⁶.

Where any sum carried over⁷ stands to an interest bearing account⁸ the Accountant General must withdraw the sum and place it to the account of unclaimed balances⁹.

1 As to the meaning of 'securities' see PARA 1555 note 2.

2 As to the meaning of 'common investment fund' see PARA 1555 note 2. As to the meaning of 'unit' see PARA 1555 note 2.

3 Ie under the Court Funds Rules 1987, SI 1987/821, r 57: see PARA 1581. As to the meaning of 'carry over' see PARA 1551 note 5.

4 As to the Accountant General see PARA 1549.

5 Court Funds Rules 1987, SI 1987/821, r 60(1).

6 See the Court Funds Rules 1987, SI 1987/821, r 60(2).

7 See note 3.

8 As to the meaning of 'interest bearing account' see PARA 1564 note 3.

9 Court Funds Rules 1987, SI 1987/821, r 60(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(6) PRACTICE IN THE COURT FUNDS OFFICE/(v) Unclaimed Funds and Effects/1584. Repayment of closed county court funds.

1584. Repayment of closed county court funds.

Where a fund¹ in a county court has been closed, a person may apply to the court at which the funds account was kept for repayment of all or part of the fund to him in whole or in part². If the court is satisfied that the claimant is entitled to the whole or part of the fund, it may order the payment to him of money standing to the credit of the account as at the date of its closure or of a sum of money representing the value of the fund at the date of its closure³.

Where the court makes an order for payment under these provisions, the court officer⁴ must send a sealed copy of the court's order to the Accountant General⁵. On receipt of the order the Accountant General must take such steps as may be necessary to give effect to it and must forward a remittance for the amount of the fund to the claimant⁶.

The provisions of Part X of the Court Funds Rules 1987⁷ apply, with such modifications as may be necessary, to unclaimed moneys in a county court which have not been dealt with for a period of one year immediately before the preceding 1 March⁸.

1 As to the meaning of 'fund' see PARA 1548 note 1.

2 Court Funds Rules 1987, SI 1987/821, r 61(1).

3 Court Funds Rules 1987, SI 1987/821, r 61(2).

4 As to the meaning of 'court officer' see PARA 49 note 3 (definition applied by virtue of the Court Funds Rules 1987, SI 1987/821, r 2(1) (substituted by SI 1999/1021)).

5 Court Funds Rules 1987, SI 1987/821, r 61(3) (amended by SI 1999/1021). As to the Accountant General see PARA 1549.

6 Court Funds Rules 1987, SI 1987/821, r 61(4).

7 I.e the Court Funds Rules 1987, SI 1987/821, Pt X (rr 57-62): see the text and notes 1-6; and PARAS 1580-1583.

8 Court Funds Rules 1987, SI 1987/821, r 62 (amended by SI 1988/817).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(i) Introduction/1585. Meaning of 'interpleader'.

(7) INTERPLEADER

(i) Introduction

1585. Meaning of 'interpleader'.

Where a person, for example an enforcement officer who has levied under a writ of execution, is in possession of property or its proceeds of sale and he is, or expects to be, sued in respect thereof by two or more persons making adverse claims thereto, he may apply to the court for an order requiring the claimants to litigate their differences and to abide by the court's final order in respect thereof¹. He is thereafter safeguarded by being able to act in respect of the property or its proceeds of sale consistently with, or as may be directed by, the court's final order. In these circumstances he is said to apply to the court for relief by way of interpleader².

1 See CPR Sch 1 RSC Ord 17 r 1. For a consideration of the nature of interpleader see *De La Rue v Hernu, Peron and Stockwell Ltd*[1936] 2 KB 164, [1936] 2 All ER 411, CA. For the distinction between interpleader by an enforcement officer and by a stakeholder see PARAS 1588-1589.

2 See CPR Sch 1 RSC Ord 17 r 1(1). The former interpleader summons (now the interpleader claim or application) is a proceeding the object of which is to extricate the defendant from the embarrassment of being sued, or being likely to be sued, by more than one party in respect of the same subject matter: *Eastern Holdings Establishment of Vaduz v Singer and Friedlander Ltd*[1967] 2 All ER 1192, [1967] 1 WLR 1017.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(i) Introduction/1586. Jurisdiction to grant relief.

1586. Jurisdiction to grant relief.

In former times, interpleader relief was given to a limited extent by the courts of common law but more widely in equity¹. Before 1873 interpleader proceedings were brought either in the Courts of Chancery by a bill of interpleader, or in the common law courts under the Interpleader Act 1831². The sheriff had rights to summon a jury to decide to whom goods belonged³. The High Court jurisdiction to grant relief by way of interpleader is now governed by the procedure contained in the preserved and amended Rules of the Supreme Court⁴ contained in Schedule 1 to, and the preserved and amended County Court Rules⁵ contained in Schedule 2 to, the Civil Procedure Rules⁶, and the statutory provisions have been repealed⁷. Interpleader relief is available in all divisions of the High Court⁸ and in the county court⁹.

1 See **EQUITY** vol 16(2) (Reissue) PARAS 489-490.

2 As to the effect of 1 & 2 Will 4 c 58 (Interpleader etc) (1831) (repealed) see *De La Rue v Hernu, Peron and Stockwell Ltd* [1936] 2 KB 164, [1936] 2 All ER 411, CA.

3 Juries Act 1825 s 52 (repealed): see *Mather on Sheriff and Execution Law* (3rd Edn) p 498 et seq.

4 Ie CPR Sch 1 RSC Ord 17: see PARA 1587 et seq.

5 Ie CPR Sch 2 CCR Ord 33: see PARA 1628 et seq.

6 As to the scheduled rules see CPR Pt 50; and PARA 30 note 19. As to the introduction of this procedural code see *Reading v London School Board* (1886) 16 QBD 686; *Ex p Mersey Docks and Harbour Board* [1899] 1 QB 546, CA; *Fredericks and Pelhams Timber Buildings v Wilkins (Read, Claimant)* [1971] 3 All ER 545, [1971] 1 WLR 1197, CA.

7 For the repeal of 1 & 2 Will 4 c 58 (Interpleader etc) (1831) see the Civil Procedure Acts Repeal Act 1879 s 2, Schedule Pt I (repealed); the Statute Law Revision and Civil Procedure Act 1883 s 3, Schedule (repealed). For the repeal of the Common Law Procedure Act 1860 ss 12-18 see the Statute Law Revision and Civil Procedure Act 1883 s 3, Schedule (repealed); the Rules of the Supreme Court (No 1) 1929, SR & O 1929/424, r 12 (spent). The statutory relief available under the Law of Property Act 1925 s 136(1), permitting interpleader by a debtor where an assignment of the debt is alleged and disputed (see PARA 1588) would be within the scope of CPR Sch 1 RSC Ord 17, without this special statutory provision.

8 Interpleader relief may be granted in insolvency proceedings: see *Re Morris, ex p Streeter* (1881) 19 ChD 216, CA. As to the form and contents of the application see the Insolvency Rules 1986, SI 1986/1925, r 7.3; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 765-766. Certain local courts formerly had jurisdiction in interpleader proceedings, but are now either abolished or merged into the High Court: see the Courts Act 1971 ss 41, 43 (repealed), 56(4), Sch 11 Pt II.

9 See the County Courts Act 1984 s 101; and CPR Sch 2 CCR Ord 33 rr 1, 6. As to interpleader in county court proceedings see PARA 1628 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1587. In general.

(ii) Interpleader in the High Court

A. RELIEF IN THE HIGH COURT

1587. In general.

Relief in the High Court is available in two classes of case, known traditionally as stakeholder's and sheriff's interpleader.

An interpleader issue arising in an existing claim is technically a 'proceeding' in that claim, and not itself a claim¹. It is, however, sufficiently distinct from the original claim to be regarded for some purposes, for example a solicitor's retainer, as a separate litigation². If the application for relief by way of interpleader is not made in an existing claim the applicant must issue a claim form³ and the court may order an issue to be tried⁴, in which case that issue will fall within the meaning of 'action' for the purposes of the Supreme Court Act 1981⁵.

1 See *Hamlyn v Betteley*(1880) 6 QBD 63, CA; *Collis v Lewis*(1887) 20 QBD 202, DC; *McNair & Co v Audenshaw Paint and Colour Co Ltd*[1891] 2 QB 502, CA; *De La Rue v Hernu, Peron and Stockwell Ltd*[1936] 2 KB 164, [1936] 2 All ER 411, CA. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

2 *James v Ricknell*(1887) 20 QBD 164.

3 See CPR Sch 1 RSC Ord 17 r 3(1).

4 See CPR Sch 1 RSC Ord 17 r 5(1)(b).

5 See the Supreme Court Act 1981 s 151(1); *Re Fawsitt, Galland v Burton*(1885) 30 ChD 231, CA. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. Under the current civil procedure an action is referred to as a 'claim': see PARA 18.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1588. Stakeholder's interpleader.

1588. Stakeholder's interpleader.

In a stakeholder's interpleader, relief is available where the applicant is under a liability in respect of a debt, or in respect of any money, goods or chattels, and he is, or expects to be, sued for or in respect of that debt or money, or those goods or chattels, by two or more persons making adverse claims thereto¹. Those applicants are traditionally referred to as stakeholders, and the ensuing proceedings as stakeholder's interpleader². By statute, stakeholder's interpleader is available also to a debtor, trustee, or other person liable in respect of a debt or chose (or thing) in action which has been the subject of a legal assignment when he has had notice either that the assignment is disputed by the assignor or any person claiming under him, or of other opposing or conflicting claims to the debt or chose (or thing) in action³. In such a case the applicant may either call upon the claimants to interplead, or pay the debt or chose (or thing) in action into court⁴.

As the assignment must have been a legal assignment in order to give rise to the right to interplead, the applicant must have had written notice of the assignment before he applies to interplead⁵. Application for this relief is made under the rules relating to stakeholder's interpleader. Stakeholder's interpleader relief is available to the Crown⁶.

1 CPR Sch 1 RSC Ord 17 r 1(1)(a); see further PARAS 1591-1593. An enforcement officer who, after executing a judgment against a debtor obtained by the assignor of the debt, receives notice of the assignee's claim, is not entitled to relief under this head: cf *Plant v Collins* [1913] 1 KB 242, CA.

2 See *Matthew v Northern Assurance Co* (1878) 9 ChD 80.

3 See the Law of Property Act 1925 s 136(1) proviso. However, such relief is also available under the general provisions of CPR Sch 1 RSC Ord 17. The debtor, trustee or other person must have been given express written notice of the assignment: Law of Property Act 1925 s 136(1).

4 Law of Property Act 1925 s 136(1) proviso.

5 *Re New Hamburg and Brazilian Rly Co* [1875] WN 239.

6 See the Crown Proceedings Act 1947 s 16 (amended by SI 2005/2712); and **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARAS 109, 113.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1589. Sheriff's interpleader.

1589. Sheriff's interpleader.

In a sheriff's interpleader, relief is available to a sheriff¹ where a claim is made by any person, other than the person against whom the process is issued, to any money, goods, or chattels taken, or intended to be taken, by a sheriff in execution under any process or to the proceeds or value of any such goods or chattels².

1 References in CPR Sch 1 RSC Ord 17 to a sheriff are to be construed as including references to an individual authorised to act as an enforcement officer under the Courts Act 2003 and any other officer charged with the execution of process by or under the authority of the High Court: CPR Sch 1 RSC Ord 17 r 1(2). As to persons other than a sheriff being protected see *Levasseur v Mason and Barry Ltd* [1891] 2 QB 73, CA (receiver of judgment debtor's property appointed by the court). The rule would also allow an application for relief by a sequestrator appointed by the court.

2 CPR Sch 1 RSC Ord 17 r 1(1)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1590. Discretionary nature of relief.

1590. Discretionary nature of relief.

Interpleader relief is discretionary and cannot be claimed as of right¹. Provided, however, that the applicant fulfils the necessary conditions², and both claimants have substantive claims, the court's jurisdiction is limited only by terms of the relevant rule of court³, and the court leans strongly in favour of granting the application if possible. Where the enforcement officer is the applicant the court may make a specific order barring future claims being brought against him in respect of the seizure for which he applied for relief⁴. Relief will be granted if the conditions relating to jurisdiction and procedure are fulfilled wherever the court is satisfied that it is proper to do so⁵.

Relief may be granted even though the claimant may claim under an equitable title⁶ or even though the applicant may be estopped, as for instance by bailment or agency, from denying a claimant's title, and even where the relief which can be given is not complete⁷. Where there is a question of estoppel the order directing the issue between the claimants should be so framed as not to shut out either claimant from asserting any claim which he may have against the applicant on the estoppel, but should leave it open to him to assert that claim if defeated by the other claimant on the issue⁸.

Relief may also be granted even though the applicant admits liability as to part of the claim only⁹, and though the claims made against him are not co-extensive¹⁰; but relief will be refused where the applicant is or may be liable to both claimants¹¹.

1 *Cave v Capel* [1954] 1 QB 367, [1954] 1 All ER 428, CA; *Gerhard v Montagu & Co (Low & Co, Claimants)* (1889) 61 LT 564; see *Re Baker, Nichols v Baker* (1890) 44 ChD 262, CA; *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214, HL; *R v His Honour Judge Turner and Hodgson* [1897] 1 QB 445, DC; cf *Belcher v Smith* (1832) 9 Bing 82.

2 See PARA 1602.

3 See CPR Sch 1 RSC Ord 17 r 1; cf *Sun Insurance Office v Galinsky* [1914] 2 KB 545, CA.

4 See CPR Sch 1 RSC Ord 17 r 8(1) (power to make such orders as to any matter as the court thinks just); *Hooke v Ind, Coope & Co* (1877) 36 LT 467. In *Neumann v Bakeaway Ltd (Ghotli, Claimant)* [1983] 2 All ER 935, [1983] 1 WLR 1016n, CA, relief was granted where the sheriff had seized and sold goods admitted to be the claimant's property.

5 *Gerhard v Montagu & Co (Low & Co, Claimants)* (1889) 61 LT 564; *Ex p Mersey Docks and Harbour Board* [1899] 1 QB 546, CA.

6 *Duncan v Cashin* (1875) LR 10 CP 554; *Engelbach v Nixon* (1875) LR 10 CP 645; *Jenkinson v Brandley Mining Co* (1887) 19 QBD 568; *Jennings v Mather* [1901] 1 KB 108; affd [1902] 1 KB 1, CA; *Usher v Martin* (1889) 24 QBD 272. Earlier decisions to the contrary before the Supreme Court of Judicature Act 1873 (repealed) are no longer of authority.

7 *Robinson v Jenkins* (1890) 24 QBD 275, CA; *Rogers, Sons & Co v Lambert & Co* [1891] 1 QB 318, CA; *Attenborough v London and St Katharine's Dock Co* (1878) 3 CPD 450, CA; *Ex p Mersey Docks and Harbour Board* [1899] 1 QB 546, CA; see also **AGENCY** vol 1 (2008) PARA 120; **BAILMENT** vol 3(1) (2005 Reissue) PARA 83.

8 *Ex p Mersey Docks and Harbour Board* [1899] 1 QB 546, CA.

9 *Reading v London School Board* (1886) 16 QBD 686.

10 *Attenborough v London and St Katharine's Dock Co* (1878) 3 CPD 450 at 459, CA, per Brett LJ, cited with approval in *Ex p Mersey Docks and Harbour Board* [1899] 1 QB 546 at 552-553, CA, per A L Smith LJ. Earlier decisions to the contrary are no longer of authority.

11 *Greatorex v Shackle* [1895] 2 QB 249; *Victor Söhne v British and African Steam Navigation Co Ltd* [1888] WN 84, DC; *Sablicich v Russell* (1866) LR 2 Eq 441; *Crawford v Fisher* (1842) 1 Hare 436; cf also *Farr v Ward* (1837) 2 M & W 844; *Cochrane v O'Brien* (1845) 2 Jo & Lat 380.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1591. Subject matter of stakeholder's interpleader.

1591. Subject matter of stakeholder's interpleader.

The subject matter of a stakeholder's interpleader is a debt, money, goods or chattels, or a debt or chose (or thing) in action which has been the subject of a legal assignment¹.

A debt for which the claimant has already obtained judgment against the applicant cannot be made the subject matter of an application for relief².

An insurance company's statutory obligation to lay out money payable under a fire insurance policy upon a house in rebuilding it if so requested by a person interested, unless the party claiming the money gives security as to its application³, is not a liability for a debt or money and, if a lessor claims the fulfilment of the obligation and the lessee claims payment of the insurance money to him, there are not adverse claims to a debt or money so as to entitle the company to interplead⁴.

It has been held that 'money'⁵ does not include a contested claim to the reward advertised for the apprehension of a criminal⁶.

The word 'chattels' in this connection is one of the widest words known to the law in its relation to personal property⁷, and includes deeds and other papers⁸, and choses (or things) in action, for instance the shares in a joint stock company⁹. Where either of the claims is substantially one for unliquidated damages the case is outside the scope of interpleader, but, where the main subject of dispute is specified goods or money, the existence of a claim for damages will not in itself bar the applicant from obtaining the relief sought¹⁰.

An applicant may not ordinarily interplead in respect of a debt which has been made the subject of a third party debt order absolute¹¹, even though a claim is made to the debt by an adverse claimant. He is bound to comply with the order and is protected by it¹².

1 CPR Sch 1 RSC Ord 17 r 1(1)(a); Law of Property Act 1925 s 136(1); and see PARA 1588.

2 See the cases cited in PARA 1609 note 14.

3 See the Fires Prevention (Metropolis) Act 1774 s 83; and **INSURANCE**.

4 *Sun Insurance Office v Galinsky* [1914] 2 KB 545, CA. In this case it appears that the lessee had not in fact put forward any genuine claim: see at 552 per Vaughan Williams LJ, and at 558 per Kennedy LJ.

5 I.e. 'money' in CPR Sch 1 RSC Ord 17 r 1(1)(a).

6 *Callis v Lee* (1835) 1 Hodg 204; *Grant v Fry* (1835) 4 Dowl 135; *Gay v Pittman* (1838) 5 Scott 795. These were decisions under 1 & 2 Will 4 c 58 (Interpleader etc) (1831) (repealed): see PARA 1586.

7 *Robinson v Jenkins* (1890) 24 QBD 275, CA.

8 *Smith v Wheeler* (1835) 1 Gale 163; *Walker v Ker* (1843) 12 LJ Ex 204; *Roberts v Bell* (1857) 7 E & B 323.

9 *Robinson v Jenkins* (1890) 24 QBD 275, CA.

10 *Walter v Nicholson* (1838) 6 Dowl 517; *Wright v Freeman* (1879) 48 LJQB 276; affd 40 LT 358, CA; *Ingham v Walker* (1887) 31 Sol Jo 271 per Pollock B (explaining *Attenborough v London and St Katharine's Dock Co* (1878) 3 CPD 450, CA); affd (1887) 3 TLR 448, CA.

11 As to effect of third party debt orders see CPR Pt 72; and PARA 1411 et seq.

12 *Randall v Lithgow* (1884) 12 QBD 525, DC. See, however, *Richter v Laxton* (1878) 48 LJQB 184, where an issue was ordered in special circumstances, and *Nelson v Barter* (1864) 10 Jur NS 832; affd (1864) 33 LJCh 705. As to the determination of questions before the making of the order where the third party disputes liability or where there are adverse claims see PARA 1424.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1592. Possession of subject matter.

1592. Possession of subject matter.

Where the claim is for a specific article or fund, any applicant for relief, other than a sheriff¹, must be in possession of the subject matter in dispute between the claimants, for he has to satisfy the court that he is willing to pay or transfer it into court or to dispose of it as the court may direct². Where he has parted with possession he may be denied relief even though he undertakes to pay over the value to the party found entitled³. So also he may disentitle himself to relief if, after receiving notice of adverse claims to goods, he sells them and disposes of a portion of the proceeds in accordance with the direction of one of the parties⁴.

1 As to the meaning of 'sheriff' see PARA 1589 note 1.

2 *Meux v Bell* (1833) 6 Sim 175; CPR Sch 1 RSC Ord 17 r 3(4)(c). See PARA 1605.

3 *Burnett v Anderson* (1816) 1 Mer 405.

4 *Poland v Coall* (1873) IR 7 CL 108.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1593. Reality of the claims.

1593. Reality of the claims.

To entitle a stakeholder to relief it is essential that he is, or genuinely expects to be, sued by two or more persons¹. It is therefore normally too late to apply for relief after judgment². It is not necessary that he be actually sued³, but there must be some real foundation for the expectation. A mere anticipation, without any intimation having been received, is not enough⁴. Where, therefore, the applicant knows that the rival claims are about to be settled by litigation between the claimants he cannot obtain relief by interpleader⁵. So also where the allegation that proceedings are threatened is known to be groundless, interpleader proceedings, if begun, may be dismissed with costs⁶.

The claims should be at least two in number and should be adverse⁷. The conflict between the claimants must be real in the sense that each claim, if proved, would give a good cause of action against the applicant, so that where the applicant is not under any obligation to one of the claimants⁸, or where he can, without incurring any liability, pay the subject matter of the claim to one of the claimants⁹, he is not entitled to relief. A mere pretext of a conflicting claim is not sufficient, and the court must be satisfied that there is a question to be tried¹⁰. The claims must be adverse in the sense of being claims to the whole or part of the same money or goods or thing. They may arise out of the same transaction and still be so different as to prevent relief being granted¹¹.

It is of the essence of interpleader that the applicant is liable to one or other only of the claimants in respect of the same subject matter¹². Where, therefore, the applicant is or may be liable to both, as when two auctioneers claim agents' commission on the sale of the same house, interpleader is not available¹³.

1 CPR Sch 1 RSC Ord 17 r 1(1)(a).

2 See PARA 1609.

3 CPR Sch 1 RSC Ord 17 r 1(1)(a); *Morgan v Marsack* (1816) 2 Mer 107.

4 *Harrison v Payne* (1836) 2 Hodg 107; *Sharpe v Redman* (1837) Will Woll & Dav 375; *Watson v Park Royal (Caterers) Ltd* [1961] 2 All ER 346, [1961] 1 WLR 727.

5 *Diplock v Hammond* (1854) 2 Sm & G 141; on appeal 5 De G M & G 320.

6 *Re Hook, Cook v Earl of Rosslyn* (1861) 3 Giff 175.

7 CPR Sch 1 RSC Ord 17 r 1(1)(a).

8 *East India Co v Edwards* (1811) 18 Ves 376; *Wright v Ward* (1827) 4 Russ 215; *Glynn v Locke* (1842) 3 Dr & War 11.

9 *Myers v United Guarantee and Life Assurance Co, United Guarantee and Life Assurance Co v Cleland* (1855) 7 De GM & G 112; see *Re Hook, Cook v Earl of Rosslyn* (1861) 3 Giff 175; *Desborough v Harris* (1855) 5 De GM & G 439 (mortgagor and mortgagee).

10 *Cochrane v O'Brien* (1845) 2 Jo & Lat 380; and see *Sun Insurance Office v Galinsky* [1914] 2 KB 545, CA (cited in PARA 1591 note 4), where in the circumstances it was doubtful whether there was any genuine adverse claim.

11 *Greatorex & Co v Shackle* [1895] 2 QB 249.

12 *Crawford v Fisher* (1842) 1 Hare 436.

13 *Greatorex & Co v Shackle* [1895] 2 QB 249; *Victor Söhne v British and African Steam Navigation Co Ltd* [1888] WN 84, DC; *Sablich v Russell* (1866) LR 2 Eq 441; *Farr v Ward* (1837) 2 M & W 844, DC; *Cochrane v O'Brien* (1845) 2 Jo & Lat 380. This principle, however, is subject to the court's power to grant relief even though the claims are not co-extensive, and even though the applicant denies liability in part to either claimant: see PARA 1590.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1594. Wagering contracts.

1594. Wagering contracts.

A stakeholder of money deposited by parties to a wagering contract will not normally be granted relief by way of interpleader, at least where a defence under the Gaming Acts¹ is open to him, or where, by ordering an issue, the court would in effect be driven into the position where it would have to decide the event of a wager². This principle does not seem, however, to have been acted on consistently³. It may well be that the true rule is that, where both of the claimants are the parties to the wagering contract, and the real object of the interpleader is to obtain the court's decision as to which is entitled to the stakes deposited, the court must refuse relief, but not where the claimants are not both parties to the wager, and the illegality of the transaction is set up against a party who is not party to it⁴. Thus, the Court of Appeal has at least acquiesced in relief given in a court of first instance where the only question at issue was between a bankrupt and his own trustee in bankruptcy, and where the bankrupt was endeavouring to set up against the trustee the illegality of the title by which he had himself become entitled to the money in question⁵.

1 See **LICENSING AND GAMBLING**.

2 *Shoolbred v Roberts* [1900] 2 QB 497, CA; *Applegarth v Colley* (1842) 2 Dowl NS 223.

3 *Dowson v Macfarlane* (1899) 81 LT 67 appears to be an authority to some extent at least to the contrary of the proposition in the text. It is submitted, however, that it is at least doubtful whether this case would now be followed; cf also *Hill v William Hill (Park Lane) Ltd* [1949] AC 530, [1949] 2 All ER 452, HL.

4 See *Shoolbred v Roberts* [1900] 2 QB 497, CA.

5 *Shoolbred v Roberts* [1900] 2 QB 497, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1595. Examples of relief in stakeholder's interpleader.

1595. Examples of relief in stakeholder's interpleader.

Relief has been given to the obligor of a bond when sued by executors of a will, when a claim was also made by trustees for a legatee under the will¹; to executors of a debtor when the whole debt due was claimed by one party, another claiming a part of it, and a third claiming in respect of a lien for costs²; to a tenant for life where conflicting claims were made as to a charge on his interest³; to acceptors of a bill of exchange sued by the holder after notice from a third person not to pay on the ground of fraud⁴, and where actions have been brought against an acceptor by two persons claiming to be lawful owners of a bill⁵, or where the proceeds of sale of a ship in the form of a bill of exchange in the hands of a third person were claimed adversely by two claimants⁶; to a carrier of goods faced with conflicting demands for delivery⁷; to warehousemen or wharfingers sued by the holder of a warrant for delivery of goods, after notice by the consignor not to deliver on the ground of fraud or other grounds⁸; to a debtor, sued by the assignee of a debt after notice of an adverse claim from the assignor's⁹ trustee in bankruptcy; to brokers where goods or the proceeds of their sale were claimed adversely¹⁰; to a purchaser of goods, sued by assignees of the seller, a factor for sale, who became bankrupt subsequently to the sale, where a claim was made by the consignor of the goods to the factor¹¹; to a bank after receipt of notice by a person alleging himself to be the husband of a depositor, not to repay the money to her, and of notice by the depositor that she disputed the marriage and had instituted criminal proceedings¹², and where the deposit was made by a married woman representing herself to be a widow, and claims were made by her husband and a transferee¹³; to an insurance company where the policy money was claimed by two or more claimants¹⁴; to stockbrokers, who were transferees for sale of shares claimed by a person other than the transferor¹⁵; and to a chief constable of police, in possession of a stolen car, to which a purchaser in good faith had done substantial works of repair at a cost which that purchaser claimed should be paid by the true owner as a condition of the car's return¹⁶.

1 *Wright v Ward* (1827) 4 Russ 215.

2 *Jones v Thomas* (1854) 2 Sm & G 186.

3 *Vyvyan v Vyvyan* (1861) 30 Beav 65.

4 *Gerhard v Montagu & Co (Low & Co, Claimants)* (1889) 61 LT 564.

5 *Regan v Serle* (1840) 9 Dowl 193.

6 *Gibbs v Gibbs* (1858) 6 WR 415.

7 *Wilson v Anderton* (1830) 1 B & Ad 450; and cf **CARRIAGE AND CARRIERS** vol 7 (2008) PARAS 14, 771.

8 *Attenborough v London and St Katharine's Dock Co* (1878) 3 CPD 450, CA. See also *Mason v Hamilton* (1831) 5 Sim 19; *Crawshay v Thornton* (1837) 2 My & Cr 1; *Ex p Mersey Docks and Harbour Board* [1899] 1 QB 546; *De Rothschild Frères v Morrison, Kekewich & Co, Banque de Paris et des Pays Bas v Morrison, Kekewich & Co, Banque de France v Morrison, Kekewich & Co* (1890) 24 QBD 750, CA.

9 *Re Hilton, ex p March* (1892) 67 LT 594.

10 *Suart v Welch* (1839) 4 My & Cr 305; see *Braik v Douglas* (1828) 4 My & Cr 320n.

11 *Johnson v Shaw* (1842) 4 Man & G 916.

12 *Crellin v Leyland* (1842) 6 Jur 733.

13 *Costello v Martin* (1867) 15 WR 548.

14 *Fenn v Edmonds* (1846) 5 Hare 314; *Prudential Assurance Co v Thomas* (1867) 3 Ch App 74; *Re Haycock's Policy* (1876) 1 ChD 611; cf *Desborough v Harris* (1855) 5 De G M & G 439. As to conflicting claims under the Fires Prevention (Metropolis) Act 1774 see *Sun Insurance Office v Galinsky* [1914] 2 KB 545, CA (cited in PARA 1591 note 4). It has been held that a bill of interpleader in equity by the captain of a ship would not lie where suits had been instituted in the Court of Admiralty on the ground, inter alia, that the proceedings were not against the captain, but against the ship: *Sablicich v Russell* (1866) LR 2 Eq 441; but see, to the contrary, *Lowe v Richardson* (1818) 3 Madd 277. As to interpleader by insurers see further **INSURANCE**.

15 *Robinson v Jenkins* (1890) 24 QBD 275, CA.

16 *Greenwood v Bennett* [1973] QB 195, [1972] 3 All ER 586, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1596. Subject matter of sheriff's interpleader.

1596. Subject matter of sheriff's interpleader.

Relief by way of sheriff's interpleader is available to sheriffs or other officers¹ charged with the execution of process by or under the authority of the High Court². The claim for relief may be made in two sets of circumstances: (1) when the sheriff is met with a claim which is disputed by the execution creditor to money, goods or chattels taken or intended to be taken in execution under any process of the court, or to the proceeds or value of any such goods or chattels³; and (2) when the claim is admitted and the sheriff has withdrawn, and the sheriff requires an order restraining the bringing of proceedings against him in respect of his action in seizing under the writ of execution⁴.

As an intended seizure is enough, actual seizure is unnecessary⁵, and may be undesirable where there is nothing to identify the goods directed to be seized with ownership or possession by the judgment debtor⁶, but the fact that the goods are not in the possession of the judgment debtor but are in the possession of his trustee or even of the claimant himself need not deprive the sheriff of his right to relief⁷.

'Proceeds or value of any such goods'⁸ includes money paid to the sheriff under protest by the claimant himself⁹, and this indicates a convenient procedure to release the goods seized from the sheriff's custody and to allow the claimant to deal in the goods¹⁰.

¹ As to the meaning of 'sheriff' see PARA 1589 note 1.

² See CPR Sch 1 RSC Ord 17 r 1(1)(b), (2).

³ See CPR Sch 1 RSC Ord 17 r 2(1), (3)(a). The sheriff must allow seven days for the execution creditor to consider the claim: CPR Sch 1 RSC Ord 17 r 2(2); and see PARA 1598.

⁴ See CPR Sch 1 RSC Ord 17 r 2(4); and PARA 1598.

⁵ *Day v Carr* (1852) 7 Exch 883; *Lea v Rossi* (1855) 11 Exch 13; see CPR Sch 1 RSC Ord 17 r 1(1)(b).

⁶ See PARA 1601.

⁷ *Allen v Gibbon* (1833) 2 Dowl 292; *Aylwin v Evans* (1882) 52 LJCh 105.

⁸ See in CPR Sch 1 RSC Ord 17 rr 1(1)(b), 2(1).

⁹ *Smith v Critchfield* (1885) 14 QBD 873, CA.

¹⁰ See Queen's Bench Masters' Practice Form PF32.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1597. Nature of claims in sheriff's interpleader.

1597. Nature of claims in sheriff's interpleader.

As in stakeholder's interpleader, the claim made by the third party must be a real one and the applicant sheriff must be or expect to be sued¹. The claim must be one to the goods as such or their proceeds or value as representing the goods².

Interpleader proceedings do not lie on a claim by a third party to be the person rightfully entitled to payment of the debt in respect of which execution has been issued³, nor on a claim by a judgment debtor to set off another judgment debt due to him from a creditor⁴, nor to dispute a landlord's claim for rent made under the statutory provisions which prohibit the removal of goods from leasehold property until certain arrears of rent have been paid by an execution creditor⁵.

Provided the claim has been duly made⁶, a sheriff will normally be entitled to relief even though the claim is obviously bad. If he has already exercised his discretion in the matter he will not be granted relief⁷. If a sheriff is in any way indemnified he is also not entitled to relief and can refuse to accept an offer of indemnity made by the execution creditor⁸. Questions of priority of time between different execution creditors are not claims which entitle a sheriff to interplead⁹, but relief may be available where, in addition to the questions of priority, there is a claim against both execution creditors¹⁰. If, on execution being levied against a partner, a claim is made that the property seized is partnership property and the execution creditor disputes the partnership or denies that the goods seized are partnership property, the dispute is a proper subject for interpleader proceedings¹¹.

If a seizure is made and a claim is made that the goods are owned by the debtor jointly with others or as tenants in common, the sheriff can sell and the question of the distribution of the proceeds if in dispute can be the subject of interpleader proceedings¹².

The claim by a debenture holder can be a subject for interpleader proceedings if, for example, the validity of the receiver's appointment is disputed, but where the charge over the company's assets has been crystallised by the valid appointment of a receiver before the completion of an execution by seizure and sale the rights of the debenture holders will have priority over those of the execution creditor¹³.

1 Cf CPR Sch 1 RSC Ord 17 r 1(1)(a); and PARA 1593.

2 CPR Sch 1 RSC Ord 17 r 1(1)(b).

3 See *Plant v Collins* [1913] 1 KB 242, CA.

4 *Smith v Saunders* (1877) 37 LT 359.

5 See the Landlord and Tenant Act 1709 s 1 (repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 86, 146, Sch 14 para 2(a), Sch 23 Pt 4); and **DISTRESS** vol 13 (2007 Reissue) PARA 1032. That section does not apply to a county court execution, but on receiving a landlord's claim the bailiff levying the execution must in addition distrain for the rent claimed: see the County Courts Act 1984 s 102; and PARA 1353; and **COURTS**.

6 As to the making of claims see PARA 1598.

7 *Crump v Day* (1847) 4 CB 760.

8 *Ostler v Bower* (1836) 4 Dowl 605; and cf *Levy v Champneys* (1834) 2 Dowl 454, and *Harrison v Forster* (1836) 4 Dowl 558.

9 *Salmon v James* (1832) 1 Dowl 369; *Day v Waldock*, *Lawrence v Waldock* (1833) 1 Dowl 523; and see *Bowyer v Pritchard* (1822) 11 Price 103; *Blennerhassett v Scanlan* (1826) 2 Mol 539. In *Vyner v Buchanan-Michaelson* (13 February 1976, unreported), QBD, the interpleader issue as to ownership was extended to include a decision on priorities between different execution creditors already respondents to the issue.

10 *Slowman v Back* (1832) 3 B & Ad 103.

11 See the Partnership Act 1890 s 23; *Peake v Carter* [1916] 1 KB 652, CA; and **PARTNERSHIP** vol 79 (2008) PARA 95.

12 *Farrar v Beswick* (1836) 1 M & W 682; *Mayhew v Herrick* (1849) 7 CB 229.

13 *Re Standard Manufacturing Co* [1891] 1 Ch 627, CA; *Re Opera Ltd* [1891] 3 Ch 260, CA; and see *Taunton v Sheriff of Warwickshire* [1895] 2 Ch 319, CA; *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979, CA; *Robinson v Burnell's Vienna Bakery Co Ltd* [1904] 2 KB 624; *Heaton and Dugard Ltd v Cutting Bros Ltd* [1925] 1 KB 655, DC.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1598. Claim and admission in sheriff's interpleader.

1598. Claim and admission in sheriff's interpleader.

The sheriff's right to interplead is founded on the existence of one or more claims to the subject matter of the seizure or intended seizure, not being claims which the execution creditor admits. In order to entitle the sheriff to interplead, any person making a claim to or in respect of any money, goods or chattels taken or intended to be taken in execution under the process of the court, or to the proceeds or value of any such goods or chattels, must give notice of this claim¹ to the sheriff² charged with the execution of the process and must include in his notice a statement of his address, which will be his address for service³. On receipt of the claim the sheriff must forthwith give notice of it to the execution creditor⁴ who must, within seven days after receiving the notice, give notice to the sheriff informing him whether he admits or disputes the claim⁵. Where the sheriff receives a notice from an execution creditor disputing a claim, or the execution creditor fails, within seven days, to give the required notice, and the claim is not withdrawn, the sheriff may apply to the court⁶ for relief⁷. On the other hand, a sheriff who receives a notice from an execution creditor admitting a claim must withdraw from possession of the money, goods or chattels claimed and may apply to the court for an order restraining the bringing of a claim against him for or in respect of his having taken possession of that money or those goods or chattels⁸.

1 CPR Sch 1 RSC Ord 17 r 2(1). Whilst the rule does not specifically require the claim to be in writing (as did the former RSC (1883) Ord LVII r 16(1) (revoked)), this is implied; an oral claim is not sufficient but must be fully investigated by the sheriff; see *Observer Ltd v Gordon (Cranfield, Claimants)* [1983] 2 All ER 945, [1983] 1 WLR 1008.

The claim should give a description and full details of the goods and chattels claimed, as costs are frequently awarded on the basis of whether it was reasonable for the execution creditor to have been suspicious of the claim because it was vague or insufficient: see *Powell v Lock* (1835) 3 Ad & El 315. The claim need not necessarily be signed: see *JRP Plastics Ltd v Gordon Rossall Plastics Ltd (Hexa Pen Co Ltd, Claimants)* [1950] 1 All ER 241, DC.

2 As to the meaning of 'sheriff' see PARA 1589 note 1.

3 CPR Sch 1 RSC Ord 17 r 2(1).

4 CPR Sch 1 RSC Ord 17 r 2(2). For a form of notice see Queen's Bench Masters' Practice Form PF23. Any clear written notice, however, enclosing a copy of the claim, will suffice. The giving of this notice is a condition precedent to the sheriff's right to claim interpleader relief: *Dalton v Furness* (1866) 35 Beav 461.

5 CPR Sch 1 RSC Ord 17 r 2(2). For a form of notice admitting or disputing the claim see Queen's Bench Masters' Practice Form PF24. Sheriff's officers usually combine in this notice a form for return by the execution creditor to indicate whether the claim is admitted or disputed.

6 As to the court to which application may be made see PARA 1609.

7 CPR Sch 1 RSC Ord 17 r 2(3).

8 CPR Sch 1 RSC Ord 17 r 2(4). As to whether the sheriff is entitled to an order protecting him from future actions see *Cave v Capel* [1954] 1 QB 367, [1954] 1 All ER 428, CA, per Somervell LJ, where the claimant was in a caravan which was then towed to a barn by the sheriff's officers. See also *Neumann v Bakeaway Ltd (Ghotli, Claimant)* [1983] 2 All ER 935, [1983] 1 WLR 1016n, CA, per Geoffrey Lane LJ: it is the quality of the sheriff's admitted wrong which is relevant.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1599. Claim in respect of goods protected from seizure.

1599. Claim in respect of goods protected from seizure.

Where a judgment debtor whose goods have been seized, or are intended to be seized, by a sheriff¹ under a writ of execution claims that such goods are not liable to execution², he must within five days of the seizure give notice in writing to the sheriff identifying all those goods in respect of which he makes such a claim and the grounds of such claim in respect of each item³. Upon receipt of a notice of claim under this provision, the sheriff must forthwith give notice of it to the execution creditor and to any person who has made a claim to, or in respect of, the goods⁴ and the execution creditor and any person who has made claim must, within seven days of receipt of such notice, inform the sheriff in writing whether he admits or disputes the judgment debtor's claim in respect of each item⁵.

The sheriff must withdraw from possession of any goods in respect of which the judgment debtor's claim is admitted or if the execution creditor or any person claiming the goods⁶ fails to notify him in accordance with the above requirement, and the sheriff must so inform the parties in writing⁷.

Where the sheriff receives notice from the execution creditor, or any such person to whom notice was given as mentioned above, that the claim or any part of it is disputed, he must forthwith seek the directions of the court and may include therein an application for an order⁸ restraining the bringing of any claim against him for, or in respect of, his having seized any of those goods or his having failed so to do⁹. The application must be made in accordance with Part 23 of the Civil Procedure Rules¹⁰.

On the hearing of the application, the court may determine the judgment debtor's claim summarily or may give such directions for the determination of any issue raised by such claim as may be just¹¹.

1 As to the meaning of 'sheriff' see PARA 1589 note 1.

2 As to goods not liable to execution see PARA 1315.

3 CPR Sch 1 RSC Ord 17 r 2A(1).

4 I.e. under CPR Sch 1 RSC Ord 17 r 2(1): see PARA 1598.

5 CPR Sch 1 RSC Ord 17 r 2A(2).

6 See note 4.

7 CPR Sch 1 RSC Ord 17 r 2A(3).

8 A master and a district judge of a district registry have power to make such an order and the reference to 'master' is to be construed, where the claim is proceeding in the Admiralty Court or the Family Division, as a reference to the Admiralty Registrar or to a district judge of that Division: CPR Sch 1 RSC Ord 17 rr 2A(6), 4.

9 CPR Sch 1 RSC Ord 17 r 2A(4).

10 CPR Sch 1 RSC Ord 17 r 2A(5). As to CPR Pt 23 see PARA 303 et seq.

11 CPR Sch 1 RSC Ord 17 r 2A(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1600. Exercise of sheriff's right to apply for relief.

1600. Exercise of sheriff's right to apply for relief.

The sheriff should exercise his right to apply for relief within a reasonable time of the expiry of the seven days within which the execution creditor is required to admit or dispute the claim¹. There is no necessity for the sheriff to wait until proceedings are taken against him², and a claimant should first allow the sheriff to interplead before himself bringing proceedings against a sheriff³.

The sheriff's application for protection where an execution creditor admits a claim and the sheriff has to withdraw from possession of money, goods or chattels claimed⁴ is to be regarded as an application for relief under the rules relating to interpleader⁵. If the sheriff fails to withdraw after receiving a notice of admission from the execution creditor, the court will not permit him to claim relief in order to obtain protection from an action by the claimant⁶, and even where the sheriff does withdraw the court will not grant him protection where it is apparent that the claimant has a real grievance⁷. In the absence of an admission by the execution creditor the sheriff withdraws in the face of a claim only at his peril, whether he withdraws without seizure⁸, or seizes and then withdraws⁹, or delivers up the goods or some of them¹⁰, or pays over the proceeds to a claimant or the execution creditor¹¹. In all the above cases he may be refused relief even if he offers to bring the amount into court¹².

If the sheriff relinquishes possession the goods are no longer in the custody of the law and may be distrained for rent¹³, but whilst the ownership of the goods is in issue before the court pending determination by the court any removal of those goods out of the sheriff's custody by a claimant is a contempt of court¹⁴.

1 See PARA 1598 text and note 5.

2 *Green v Brown* (1835) 3 Dowl 337.

3 *Hilliard v Hanson* (1882) 21 ChD 69, CA. The court may show its disapprobation of a hasty claimant by not awarding him costs in any action he may begin: *Hilliard v Hanson* (1882) 21 ChD 69, CA.

4 See PARA 1598 text to note 8.

5 *Cave v Capel* [1954] 1 QB 367, [1954] 1 All ER 428, CA.

6 *Sodeau v Shorey* (1896) 74 LT 240, CA.

7 *Cave v Capel* [1954] 1 QB 367, [1954] 1 All ER 428, CA.

8 *Holton v Guntrip* (1837) 6 Dowl 130.

9 *Crump v Day* (1847) 4 CB 760.

10 *Braine v Hunt* (1834) 2 Dowl 391.

11 *Anderson v Calloway* (1832) 1 Dowl 636; *Scott v Lewis* (1835) 4 Dowl 259.

12 *Inland v Bushell* (1836) 5 Dowl 147.

13 *Cropper v Warner* (1883) Cab & El 152; and see **DISTRESS** vol 13 (2007 Reissue) PARA 1035.

14 See **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 442.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1601. Wrongdoing by the sheriff or his under-sheriff.

1601. Wrongdoing by the sheriff or his under-sheriff.

The court may refuse a sheriff relief where the difficulty arises from his own wrongdoing¹. Thus relief will not be given where he has seized goods which he knew were not those of the execution debtor² or which were in the custody of a receiver appointed by the court³. The circumstances in which an order will be made directing that no action be brought against a sheriff who has acted in good faith but mistakenly are considered subsequently⁴.

An under-sheriff who is a solicitor cannot act as such on behalf of a claimant as against an execution creditor, but the fact that he has directed a claim to be made on behalf of a claimant for whom he had previously acted as solicitor is not sufficient, in the absence of collusion or dishonest conduct, or anything to prejudice the execution creditor, to prevent relief being given⁵. The case is otherwise where there is a clear degree of culpability on the under-sheriff's part. A sheriff must not 'play on the same side' as one of the parties to the proceedings⁶. Where, for instance, the under-sheriff postpones execution of the process entrusted to him in order that other creditors for whom he formerly acted as solicitor may take bankruptcy proceedings or gives information to other creditors for whom he has acted which may have the effect of defeating or delaying the execution creditor's rights, the sheriff may be disentitled to relief⁷. A sheriff has also been refused relief where the under-sheriff or his partner was himself the execution creditor⁸.

¹ See the dictum of Kindersley V-C in *Tufton v Harding* (1859) 29 LJ Ch 225; and *Winter v Bartholomew* (1856) 11 Exch 704.

² *Tufton v Harding* (1859) 29 LJ Ch 225; *Lewis v Jones* (1836) 2 M & W 203. If the sheriff considers he should not seize goods despite the execution creditor's instruction because he has grounds for believing the goods do not belong to the judgment debtor, he should obtain a claim from the claimant and issue a summons on goods intended to be seized.

³ *Russell v East Anglian Rly Co* (1850) 3 Mac & G 104.

⁴ See PARA 1615.

⁵ *Holt v Frost* (1858) 3 H & N 821. Formerly a stricter practice prevailed, but each case would now be dealt with on its own facts.

⁶ *Fredericks and Pelhams Timber Buildings v Wilkins (Read, Claimant)* [1971] 3 All ER 545, [1971] 1 WLR 1197, CA.

⁷ *Dudden v Long* (1834) 3 Dowl 139; *Cox v Balne* (1845) 14 LJQB 95; and see further PARA 1604.

⁸ *Ostler v Bower* (1836) 4 Dowl 605. Relief has also been refused to a sheriff to the extent of any loss sustained by an execution creditor because the sheriff had not appointed a London deputy: *Brackenbury v Laurie* (1834) 3 Dowl 180.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1602. Conditions of relief.

1602. Conditions of relief.

There are three conditions precedent to interpleader relief, and evidence of them must normally support an application¹. These conditions are that the applicant:

- 1194 (1) claims no interest in the subject matter in dispute other than for charges or costs²;
- 1195 (2) does not collude with any of the claimants to that subject matter³; and
- 1196 (3) is willing to pay or transfer that subject matter into court or to dispose of it as the court may direct⁴.

A stakeholder will file an affidavit, ordinarily to be deposed to by himself personally⁵, in support of his application dealing with these and any other matters; a sheriff⁶ will only provide that evidence if directed by the court to do so⁷, otherwise he may not obtain his costs of so doing. An affidavit on behalf of a corporation or company should be deposed to by the appropriate officer⁸. A partnership has been allowed to rely on an affidavit sworn by two only out of four partners⁹.

A sheriff interpleads on the footing that he is neutral as between the parties and acting as though an officer of the court, and his claim to costs depends on his conforming to that principle¹⁰.

1 CPR Sch 1 RSC Ord 17 r 3(4). See, however, CPR Sch 1 RSC Ord 17 r 3(5); and the text and note 7.

2 CPR Sch 1 RSC Ord 17 r 3(4)(a). See PARA 1603.

3 CPR Sch 1 RSC Ord 17 r 3(4)(b). See PARA 1604.

4 CPR Sch 1 RSC Ord 17 r 3(4)(c). See PARA 1605.

5 *Powell v Lock* (1835) 3 Ad & El 315. If the applicant personally cannot make the affidavit, for example because he is abroad, the reason for this must be explained fully in the affidavit that is filed. As to the meaning of 'affidavit' see PARA 540 note 5; and as to the meaning of 'filing' see PARA 1832 note 8.

6 As to the meaning of 'sheriff' see PARA 1589 note 1.

7 CPR Sch 1 RSC Ord 17 r 3(5). If an affidavit is required this may be sworn by the under-sheriff. The circumstances surrounding the seizure may be of use to the judge or master on the hearing of the summons.

8 A railway company was permitted in exceptional circumstances to rely on an affidavit by its solicitor instead of its secretary: *Great Southern and Western Rly Co v Corry* (1867) 15 WR 650. Where the applicant is the officer of a company specially authorised by Act of Parliament to bring proceedings in his own name, his affidavit should depose of an absence of interest or collusion both in himself and, to the best of his knowledge and belief, in the company: *Bignold v Audland* (1840) 11 Sim 23.

9 *Glover v Reynolds* (1867) 16 LT 84.

10 *Fredericks and Pelhams Timber Buildings v Wilkins (Read, Claimant)* [1971] 3 All ER 545, [1971] 1 WLR 1197, CA. As to costs generally see also PARA 1729 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1603. Absence of personal interest.

1603. Absence of personal interest.

It is unlikely that a sheriff, his under-sheriff or his officers will have any personal interest in the subject matter in dispute other than for charges or costs¹, but any such interest must be disclosed to the court². A stakeholder may have an interest so as to bar himself from obtaining relief even though he does not lay claim to any specific part of the subject matter if he has a financial stake in the result of the proceedings³. A mere affinity for one side rather than the other is of course insufficient to debar an applicant for relief⁴. The fact that the applicant has a lien over the goods in question for storage, or a claim to commission on the proceeds of sale, does not disentitle him to relief⁵.

1 See CPR Sch 1 RSC Ord 17 r 3(4)(a); and PARA 1602.

2 A sheriff cannot levy in his own county for his own judgment debt; the writ must be directed to the coroner: see *Mather on Sheriff and Execution Law* (3rd Edn) p 55.

3 *Murietta v South American etc Co Ltd* (1893) 62 LJQB 396.

4 See *Murietta v South American etc Co Ltd* (1893) 62 LJQB 396.

5 See *Cotter v Bank of England* (1833) 2 Dowl 728; *Harwood v Betham* (1832) 1 LJ Ex 180; *Attenborough v London and St Katharine's Dock Co* (1878) 3 CPD 450, CA; *Best v Hayes* (1863) 1 H & C 718, overruling *Mitchell v Hayne* (1824) 2 Sim & St 63; *Yates v Farebrother* (1819) 4 Madd 239. There are no modern reported cases where personal interest has been alleged against the applicant.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1604. Absence of collusion.

1604. Absence of collusion.

The second condition precedent to the granting of interpleader relief is that the applicant does not collude with any of the claimants to the subject matter¹. It is difficult to draw a clear line between interest and collusion, and the modern interpretation is that there must be no identification of interest between the applicant and the claimant. Collusion does not here necessarily entail anything morally wrong; it means that the applicant must not 'play on the same side' as one of the claimants². In executing a writ the sheriff is acting as an officer charged with the carrying out of the court's orders; he is in effect in the same position as an officer of the court, and should act as such³. The court is entitled to expect a high standard of conduct.

1 See CPR Sch 1 RSC Ord 17 r 3(4)(b); and PARA 1602.

2 *Murietta v South American etc Co Ltd* (1893) 62 LJQB 396; *Fredericks and Pelhams Timber Buildings v Wilkins (Read, Claimant)* [1971] 3 All ER 545, [1971] 1 WLR 1197, CA.

3 *Fredericks and Pelhams Timber Buildings v Wilkins (Read, Claimant)* [1971] 3 All ER 545, [1971] 1 WLR 1197, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1605. Willingness to bring subject matter into court.

1605. Willingness to bring subject matter into court.

The third condition for the granting of interpleader relief is that the applicant must be willing and able to pay or transfer the subject matter of the dispute into court, or to dispose of it as the court may direct¹. Where goods are the subject matter, the court may order them to be sold². A sheriff is never directed to bring the goods into court, but he may be ordered to move them to a place of safety³.

Where the subject matter is money or the proceeds of the sale of goods either seized and sold⁴, or ordered to be sold⁵, or where the claimant is prepared or ordered to pay the value of the goods to the sheriff and secure their release⁶, the court may give directions as to the trial of the issue, ordering either that the money be paid into court or that it be held by the sheriff pending further order, and releasing the applicant from any further part in the proceedings with an order that no action be brought against him⁷.

It is generally necessary that a stakeholder applicant should be able to bring the whole amount into court, and it is no excuse that, before the adverse claim was made, the applicant paid a part of the sum claimed to the claimant⁸.

1 See CPR Sch 1 RSC Ord 17 r 3(4)(c); and PARA 1602. Where the subject matter of the dispute is a chose (or thing) in action, its disposition is equivalent to payment in the case of money or transfer in the case of goods: *Robinson v Jenkins* (1890) 24 QBD 275, CA.

2 See PARAS 1616-1618.

3 This sanction is frequently applied where the claimant refuses to sign a 'walking possession agreement' which acknowledges the seizure by the sheriff and gives undertakings as to retention of the seized property in consideration of the sheriff not leaving an officer in possession.

4 See PARAS 1223 et seq.

5 See PARAS 1616-1618.

6 See PARA 1624.

7 See PARA 1622.

8 *Allen v Gilby* (1834) 3 Dowl 143.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1606. Respondents to the application.

1606. Respondents to the application.

Any person who alleges facts which, if true, would establish a cause of action against the applicant in respect of the subject matter of the application for relief, and who has asserted that claim by notice if the claim is against a sheriff¹, may be recognised as an interpleader claimant. The Crown may be made a party to interpleader proceedings².

There have been interpleader proceedings in respect of claims by minors³, beneficiaries even though the trustees were not joined⁴, administrators, executors or trustees of a settlement⁵, a person claiming a lien on the subject matter in dispute⁶, an agent who had leased goods to the execution debtor⁷, a liquidator of a foreign company⁸, the debtor's trustee in bankruptcy⁹, a trustee under a deed of assignment for the benefit of creditors¹⁰, debenture holders where the property seized was the company's property¹¹, a receiver appointed by the court¹², and an equitable mortgagee¹³. The execution debtor may be a claimant where he claims as executor or trustee for some other person, and not in his own right¹⁴.

If it is desired to add a company in liquidation as a respondent to an interpleader notice or issue, the leave of the Companies Court must first be obtained¹⁵.

1 See PARA 1598.

2 See the Crown Proceedings Act 1947 s 16 (amended by SI 2005/2712); and **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARAS 109, 113.

3 *Claridge v Collins* (1839) 7 Dowl 698. The sheriff may well be unaware that the claimant is a minor until after the summons is issued and served.

4 *Schroeder v Hanrott* (1873) 28 LT 704.

5 *Bradley v James* (1876) 10 ILT 180; *Fenwick v Laycock* (1841) 2 QB 108; *Burke v Routledge* (1851) 3 Ir Jur 148.

6 *Ford v Baynton* (1832) 1 Dowl 357; *Rogers v Kennay* (1846) 9 QB 592; *Jones v Turnbull* (1837) 2 M & W 601.

7 *Green v Stevens* (1857) 2 H & N 146.

8 *Levasseur v Mason and Barry Ltd* [1891] 2 QB 73, CA.

9 *Jones v Turnbull* (1837) 2 M & W 601; *Bradley v James* (1876) 10 ILT 180; *Bird v Mathews* (1882) 46 LT 512, CA; *Dibb v Brooke & Sons* [1894] 2 QB 338.

10 *Adnitt v Hands* (1887) 57 LT 370.

11 *Davey & Co v Williamson & Sons* [1898] 2 QB 194.

12 *Purkiss v Holland* (1887) 31 Sol Jo 702, CA.

13 *Usher v Martin* (1889) 24 QBD 272.

14 *Fenwick v Laycock* (1841) 2 QB 108.

15 *Eastern Holdings Establishment of Vaduz v Singer and Friedlander Ltd* [1967] 2 All ER 1192, [1967] 1 WLR 1017.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1607. Respondents outside the jurisdiction.

1607. Respondents outside the jurisdiction.

Service out of the jurisdiction may be allowed by the court of any claim, application, order or notice in any interpleader proceedings¹.

¹ See *Attenborough v London and St Katharine's Dock Co* (1878) 3 CPD 450, CA. As to service out of the jurisdiction see generally PARA 156 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/A. RELIEF IN THE HIGH COURT/1608. More than one claimant.

1608. More than one claimant.

The fact that there are several interpleader claimants is no bar to relief being granted, the principle being that an applicant ought to be relieved from the vexation attending the bringing of various suits against him¹. Nor is it an objection that all the claimants do not claim precisely the same amount². The court has power to substitute one claimant for another³ or to add a claimant⁴. Where different claimants claim different goods, or the same goods for different reasons, there may be more than one issue directed to be tried between the appropriate parties within the one trial.

1 See eg *Angell v Hadden* (1808) 15 Ves 244; *Farebrother v Beale* (1849) 3 De G & Sm 637.

2 *Hoggart v Cutts* (1841) Cr & Ph 197; *Carr (Kerr) v Edwards* (1839) 8 Dowl 29; and see PARA 1590.

3 Eg a liquidator for a provisional liquidator: see *Ibbotson v Chandler* (1841) 9 Dowl 250 (assignees in bankruptcy substituted for provisional assignee).

4 *Bird v Mathews* (1882) 46 LT 512, CA (trustee in bankruptcy); *Kirk v Clark* (1835) 4 Dowl 363; *Walker v Ker* (1843) 12 LJEx 204.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/B. APPLICATION FOR INTERPLEADER RELIEF/1609. Mode of application.

B. APPLICATION FOR INTERPLEADER RELIEF

1609. Mode of application.

An application for relief by way of interpleader must be made by claim form¹ using the Part 8 procedure² unless the application is made in an existing claim, in which case it must be made in accordance with Part 23 of the Civil Procedure Rules³.

Where the applicant is a sheriff who has withdrawn from possession of money, goods or chattels taken in execution and who is applying for relief⁴, the claim form must be served on any person who made a claim⁵ to or in respect of that money or those goods or chattels, and that person may attend the hearing of the application⁶. A sheriff's application is made in the proceedings in which the process has been directed to him and is made:

- 1197 (1) where the claim in question is proceeding in the Royal Courts of Justice, to a master⁷ (or, in the Family Division, a district judge or, in the Admiralty Court, the Admiralty Registrar⁸) or, if the execution to which the application relates has been or is to be levied in the district of a district registry, either to a master or to the district judge of that registry⁹;
- 1198 (2) where the claim is proceeding in a district registry, either to the district judge of that registry, or, if execution has been or is to be levied in the district of some other district registry or outside the district of any district registry, either to that district judge or to the district judge of that other registry or to a master, as the case may be¹⁰.

The first consideration is the convenience of the majority of the parties¹¹.

The application must be made as quickly as possible, or the applicant may be refused relief or may not obtain all his costs¹². The matter is urgent because in most cases the goods seized remain, throughout the application, under the control of the court, and in sheriff's interpleaders the goods are in the custody of the law awaiting the court's determination as to the person to whom the goods can be released¹³. A claimant may therefore be prevented from trading or dealing in goods which may subsequently be found to be his own. Delay may also increase the costs by storage charges or sheriff's possession fees.

It is normally too late for an applicant to apply after judgment in a claim, even if this were signed in default¹⁴.

Where the applicant, knowing of the adverse claims, allowed himself to be sued by one of the parties and advised the joinder in the action of the other claimant instead of resorting to interpleader proceedings, it was held that he had forfeited the usual privilege allowed to an applicant in interpleader of being awarded his costs, and that he must pay the costs of the successful claimant¹⁵.

A claim form or application notice in a stakeholder's interpleader application must be supported by evidence¹⁶, but in a sheriff's interpleader an affidavit should not be filed on behalf of the sheriff unless directed by the court¹⁷.

1 CPR Sch 1 RSC Ord 17 r 3(1).

2 See *Practice Direction--Alternative Procedure for Claims* PD 8 para 9.1, Table. As to the Part 8 procedure see PARA 127 et seq. See also Form PF 25 in *The Civil Court Practice*.

3 CPR Sch 1 RSC Ord 17 r 3(1). As to the procedure under CPR Pt 23 (applications) see PARA 303 et seq. Where there are existing proceedings Form PF 244/N244 is to be used: see Form PF 25 in *The Civil Court Practice*.

The owner of goods seized may not obtain his costs if he sues the sheriff without giving him time to interplead, or waiting until the interpleader is decided: *Hilliard v Hanson*(1882) 21 ChD 69, CA.

4 le for relief under CPR Sch 1 RSC Ord 17 r 2(4): see PARA 1598 text to note 8.

5 le under CPR Sch 1 RSC Ord 17 r 2(1): see PARA 1598.

6 CPR Sch 1 RSC Ord 17 r 3(2).

7 CPR Sch 1 RSC Ord 17 r 4(a).

8 CPR Sch 1 RSC Ord 17 r 4.

9 CPR Sch 1 RSC Ord 17 r 4(a).

10 CPR Sch 1 RSC Ord 17 r 4(b).

11 The most convenient court in which to issue the claim form or application notice will be that nearest to where the goods are seized, which will be local to the sheriff and his officers and to the claimant.

12 *Cook v Allen* (1833) 1 Cr & M 542; *Beale v Overton* (1837) 2 M & W 534; *Devereaux v John* (1833) 1 Dowl 548; *Mutton v Young* (1847) 4 CB 371; *Ridgway v Fisher* (1835) 3 Dowl 567. The courts recognise the urgency of these applications and have made arrangements for special appointments when the return date in the ordinary list would cause undue delay.

13 On this point generally see *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd*[1966] 1 QB 764, [1964] 2 All ER 732, where the judgment debtor sold a caravan which the sheriff had seized.

14 *H Stevenson & Son Ltd v Brownell*[1912] 2 Ch 344, CA; *Cornish v Tanner* (1827) 1 Y & J 333; *Larabrie v Brown* (1857) 1 De G & J 204; and cf *Plant v Collins*[1913] 1 KB 242, CA, cited in PARA 1631 note 3; but see *Hamilton v Marks* (1852) 5 De G & Sm 638, where a defendant obtained relief by bill after judgment in an action at law, the effect of which was merely to ascertain the quantum of demand.

15 *Crickmore v Freeston* (1870) 40 LJCh 137.

16 See CPR Sch 1 RSC Ord 17 r 3(4); and PARA 1602.

17 See CPR Sch 1 RSC Ord 17 r 3(5); and PARA 1602.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/B. APPLICATION FOR INTERPLEADER RELIEF/1610. Witness statement or affidavit of claims.

1610. Witness statement or affidavit of claims.

A claim form or application notice for interpleader relief calls upon the claimants to appear and state the nature and particulars of their respective claims. In both stakeholder's and sheriff's interpleaders the claimant¹ must within 14 days of service on him of the claim form² serve on the execution creditor and the sheriff a witness statement³ or affidavit⁴ specifying any money and describing any goods or chattels claimed and setting out the grounds upon which such a claim is based⁵.

Where the applicant is a sheriff the claim form served must give notice of this requirement⁶.

1 Ie the person who makes a claim under CPR Sch 1 RSC Ord 17 r 2: see PARA 1598.

2 Ie service under CPR Sch 1 RSC Ord 17 r 3: see PARA 1609. As to the meaning of 'service' see PARA 138 note 2.

3 As to the meaning of 'witness statement' see PARA 751 note 1.

4 As to the meaning of 'affidavit' see PARA 540 note 5.

5 CPR Sch 1 RSC Ord 17 r 3(6).

6 CPR Sch 1 RSC Ord 17 r 3(7).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/B. APPLICATION FOR INTERPLEADER RELIEF/1611. Sheriff's inventory of goods seized.

1611. Sheriff's inventory of goods seized.

It is for the claimant in a sheriff's interpleader to inform the court what goods he is claiming¹. The claimant may not call on the sheriff to deliver particulars of the goods seized so as to enable him to prepare his claim², but the master or district judge may order the sheriff to assist the court by producing an inventory of the goods he has seized, and it is for the master or district judge on the return of the claim form or application notice to consider ordering the sheriff to provide the parties with such an inventory in advance of the hearing. Whilst the sheriff is not normally required to provide the claimant with the inventory, where all the goods seized are claimed the sheriff should not provide an inventory to one side only³. For the sheriff to prepare an inventory is a step in the execution allowing him to charge a prescribed fee based on a percentage of the value of the goods seized⁴.

The issue of the interpleader application does not of itself stay further proceedings in respect of the goods claimed; but the court has power to grant a stay of proceedings⁵, and the sheriff cannot safely advance the execution while a claim⁶ remains undetermined.

1 See PARA 1610.

2 *Bauly v Krook* (1891) 65 LT 377.

3 The provision of a sheriff's inventory was considered in detail in the judgment of Sachs LJ in *Fredericks and Pelhams Timber Buildings v Wilkins (Read, Claimant)* [1971] 3 All ER 545, [1971] 1 WLR 1197, CA. Expense may be saved if a claimant formulates a clear itemised claim so that the court may order the sheriff to check that the claimant has included all the goods seized. If any items are omitted by the claimant, the claim may be barred as to those items.

4 As to sheriff's fees see PARA 1368.

5 CPR Sch 1 RSC Ord 17 r 7. As to the meaning of 'stay' see PARA 233 note 11.

6 In which satisfies CPR Sch 1 RSC Ord 17 r 2(1): see PARA 1598.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/C. ORDER ON THE APPLICATION/1612. In general.

C. ORDER ON THE APPLICATION

1612. In general.

If an interpleader claimant¹, having been duly served² with a claim form for interpleader relief, does not appear at the hearing of the application or, having appeared, fails or refuses to comply with an order made in the proceedings, the court may make an order declaring him forever barred from prosecuting his claim against the applicant for such relief and all persons claiming under him³.

Where on the hearing of a claim in interpleader proceedings all the interpleader claimants appear, the court may order that any such claimant be made a defendant in any claim pending with respect to the subject matter in dispute in substitution for or in addition to the applicant for interpleader relief⁴, or that an issue between the interpleader claimants be stated and tried, in which case it may direct which of those claimants is to be claimant and which defendant⁵. It may also order that any claim in which the applicant is defendant be stayed⁶, may make one order in several causes⁷, and may order the sale of goods taken in execution⁸. It may make provision for the safe keeping or payment into or deposit in court of the subject matter; and has general power to make such order as to costs or any other matter as it thinks just⁹.

1 For these purposes, all the persons by whom adverse claims to the subject matter in dispute are made are referred to as the 'interpleader claimants': see CPR Sch 1 RSC Ord 17 r 5(1).

2 As to the meaning of 'service' see PARA 138 note 2.

3 See CPR Sch 1 RSC Ord 17 r 5(3); and PARA 1613.

4 See CPR Sch 1 RSC Ord 17 r 5(1)(a); and PARA 1621.

5 See CPR Sch 1 RSC Ord 17 r 5(1)(b); and PARA 1622. In appropriate circumstances the court also has power under CPR Sch 1 RSC Ord 17 r 5(2) summarily to determine the question at issue in a sheriff's interpleader: see PARA 1620.

6 See CPR Sch 1 RSC Ord 17 r 7; and PARA 1615. As to the meaning of 'stay' see PARA 233 note 11.

7 See PARA 1614.

8 See PARA 1616.

9 CPR Sch 1 RSC Ord 17 r 8(1). As to costs generally see also PARA 1729 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/C. ORDER ON THE APPLICATION/1613. Failure of parties to appear.

1613. Failure of parties to appear.

Where an interpleader claimant¹ who has been duly served² does not appear on the hearing, or, having appeared, fails or refuses to comply with an order made in the proceedings, the court may make an order declaring the claimant, and all persons claiming under him, forever barred from prosecuting his claim against the applicant for interpleader relief and all persons claiming under him³. Such an order does not, however, affect the rights of the claimants as between themselves⁴.

An order under this rule cannot be made against a claimant who actually appears and makes out some sort of claim, however nebulous⁵; likewise such an order should not be made in a claimant's favour without giving the execution creditor a chance to test the claimant's evidence by cross-examination, and there should be disclosure of documents in order to test whether the claim is good⁶.

1 As to the meaning of 'interpleader claimant' see PARA 1612 note 1.

2 As to the meaning of 'service' see PARA 138 note 2.

3 CPR Sch 1 RSC Ord 17 r 5(3).

4 CPR Sch 1 RSC Ord 17 r 5(3).

5 *JRP Plastics Ltd v Gordon Rossall Plastics Ltd (Hexa Pen Co Ltd, Claimants)* [1950] 1 All ER 241, DC.

6 *PBJ Davis Manufacturing Co Ltd v Fahn (Fahn, Claimant)* [1967] 2 All ER 1274, [1967] 1 WLR 1059, CA. CPR Pt 31 (disclosure: see PARA 538 et seq) and CPR Pt 18 (further information: see PARA 611) apply, with the necessary modifications, in relation to an interpleader issue as they apply in relation to any other proceedings: CPR Sch 1 RSC Ord 17 r 10.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/C. ORDER ON THE APPLICATION/1614. One order in several proceedings.

1614. One order in several proceedings.

Where the court considers it necessary or expedient to make an order in any interpleader proceedings in several causes or matters pending in several Divisions of the High Court¹, or before different judges of the same Division, the court may make such an order². The order must be entitled in all those causes or matters and is binding on all the parties to them³.

1 As to the Divisions of the High Court see PARAS 43-46.

2 CPR Sch 1 RSC Ord 17 r 9.

3 See note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/C. ORDER ON THE APPLICATION/1615. Stay of proceedings.

1615. Stay of proceedings.

Where a defendant to a claim applies for relief by way of interpleader in the claim, the court may by order stay all further proceedings in that claim¹.

The court has power to stay an action by a claimant against a sheriff, not only for damages caused by seizure of the goods, but also for trespass, but only if no substantial injury has been done². Accordingly, where the applicant is a sheriff and the court either makes an order barring the claimant or ordering the sheriff to withdraw, the court usually directs that no claim is to be brought against the sheriff; but the sheriff will be directed to be protected only where he has made an honest mistake in executing the process of the court and where, but for the mistake, everything that he has done would have been justified³. In deciding whether there has been a substantial grievance the court will look at all the relevant facts surrounding the execution including the value of goods and also the claimant's conduct. The fact that the sheriff has sold the successful claimant's goods is not of itself a substantial grievance where the claimant does not prove that the prices obtained at public auction were unreasonable and where his own claim to the goods has been delayed⁴. Where substantial grievance has been caused, even though the seizure was in good faith, and particularly where there has been misconduct⁵, a claim against the sheriff ought not to be barred⁶. It is the quality of the sheriff's admitted wrong which is relevant.

Where the sheriff has sold goods found to be the property of the claimant, the court should make an order directing that no claim is to be brought against the sheriff unless it can be shown that the claimant had a fairly arguable case that the sheriff had no defence to the claimant's prima facie claim for conversion either at common law or by statute⁷.

The court also has power to restrain a claim against the execution creditor⁸.

An execution creditor may not be sued for a mistake on the sheriff's part where he has not done anything to authorise the sheriff's act, and his becoming a party to an issue is not such a ratification of the sheriff's act as to make him liable as the sheriff's principal⁹.

Where the execution creditor abandons the seizure and an order to bar a claim against the sheriff has been refused, the sheriff may still show, if he can, that the goods really belonged to the judgment debtor¹⁰.

1 CPR Sch 1 RSC Ord 17 r 7.

2 *Winter v Bartholomew* (1856) 11 Exch 704 (not following *Hillier v Laurie* (1846) 3 CB 334); *Smith v Critchfield* (1885) 14 QBD 873, CA; and see *Cave v Capel* [1954] 1 QB 367, [1954] 1 All ER 428, CA.

3 *Cave v Capel* [1954] 1 QB 367, [1954] 1 All ER 428, CA; *Smith v Critchfield* (1885) 14 QBD 873, CA; and see *Salberg v Morris* (1887) 4 TLR 47, DC; and PARA 1350.

4 *Neumann v Bakeaway Ltd (Ghotli, Claimant)* [1983] 2 All ER 935, [1983] 1 WLR 1016n, CA, where the only part of the master's order appealed against was that ordering that no action be brought against the sheriff.

5 *Winter v Bartholomew* (1856) 11 Exch 704; and see PARA 1601.

6 *Cave v Capel* [1954] 1 QB 367, [1954] 1 All ER 428, CA; *De Coppett v Barnett* (1901) 17 TLR 273, CA; *London, Chatham and Dover Rly Co v Cable* (1899) 80 LT 119, DC. As to what constitutes a substantial grievance see *Neumann v Bakeaway Ltd (Ghotli, Claimant)* [1983] 2 All ER 935, [1983] 1 WLR 1016n, CA.

7 *Observer Ltd v Gordon (Cranfield, Claimants)* [1983] 2 All ER 945, [1983] 1 WLR 1008, where the sheriff sold pianos seized in the debtor's work rooms.

8 *Carpenter v Pearce* (1858) 27 LJ Ex 143.

9 *Woollen v Wright* (1862) 1 H & C 554; following *Wilson v Tumman* (1843) 6 Man & G 236; *Whitmore v Greene* (1844) 13 M & W 104. See also *Smith v Keal* (1882) 9 QBD 340, CA; *Clissold v Cratchley* [1910] 2 KB 244, CA.

10 *Baynton v Harvey* (1835) 3 Dowl 344.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/C. ORDER ON THE APPLICATION/1616. Power to order sale.

1616. Power to order sale.

Where an application for relief by way of interpleader is made by a sheriff¹ who has taken possession of any goods or chattels in execution under any process, and an interpleader claimant² alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for a debt, the court may (and unless the claimant pays into court the value of the goods claimed or gives security, ordinarily will³), order those goods or chattels or any part of them to be sold and may direct that the proceeds of the sale be applied in such manner and on such terms as may be just and as may be specified in the order⁴. The court's power to order a sale is not, however, confined to that conferred by this provision. In or for the purpose of any interpleader proceedings the court may make such order as it thinks just as to any matter⁵, and it has a discretionary power to order sale which may be exercised whenever it appears just and reasonable⁶.

1 As to the meaning of 'sheriff' see PARA 1589 note 1.

2 As to the meaning of 'interpleader claimant' see PARA 1612 note 1.

3 *Paquin Ltd v Robinson* (1901) 85 LT 5, CA. Where, however, it would appear unjust to order a sale, and security is not given, the court may vary the usual practice: see *Victor v Cropper* (1886) 3 TLR 110, CA.

4 CPR Sch 1 RSC Ord 17 r 6.

5 See CPR Sch 1 RSC Ord 17 r 8(1). The court's power is to be construed as widely as possible: *BP Benzin und Petroleum AG v European-American Banking Corpn* [1978] 1 Lloyd's Rep 364, CA (mortgagees entitled to deduct expenses of running ships from charter hire when mortgagors fell into debt).

6 *Paquin Ltd v Robinson* (1901) 85 LT 5, CA. In *Twist v East African Airways Corpn* (May 1977, unreported), an order was made for the sheriff to sell a Boeing 707 airliner claimed by the receiver for the debenture holder, and when, thereafter, and before the sale was completed, the defendant company was wound up, an order was made in the Companies Court for the sale to proceed under the terms of the previous order, the sheriff to hold the proceeds of sale under the terms of the previous order pending the determination of the interpleader issue and further order.

As to the effect of bankruptcy on sale see the Insolvency Act 1986 s 346; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 679.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/C. ORDER ON THE APPLICATION/1617. Disposal of proceeds of sale.

1617. Disposal of proceeds of sale.

If in an interim order for sale no direction is made as to the application of the proceeds in the sheriff's hands after the sale, he is not bound to pay it over but may retain the amount until he obtains the final order to relieve him of his responsibility, and until then an action will not lie by the successful party to the issue against the sheriff for money had and received to his use¹.

¹ *Discount Banking Co of England and Wales v Lambarde* [1893] 2 QB 329, CA. The usual order directing a sale is either that the sheriff pay the net proceeds into court or that he retain the proceeds pending further order.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/C. ORDER ON THE APPLICATION/1618. Damages.

1618. Damages.

Neither the sheriff nor the execution creditor is liable to a claimant for damages sustained by him in consequence of a sale properly conducted under an interpleader order¹.

¹ *Abbot v Richards* (1846) 15 M & W 194 (sheriff); *Walker v Olding* (1862) 1 H & C 621 (execution creditor); *Martin v Tritton and Jameson* (1884) Cab & El 226, CA, where the order directing a sale was subsequently rescinded, and it was held that the sheriff was not liable, although the rescinding order did not, like the original order, contain a clause restraining an action.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/D. DISPUTES BETWEEN CLAIMANTS/1619. Available methods of trial.

D. DISPUTES BETWEEN CLAIMANTS

1619. Available methods of trial.

If the interpleader claimants¹ appear and it is considered that there is a dispute between them, however nebulous, to try², the court should first consider giving directions as to (1) whether a sufficiently detailed witness statement or affidavit³ has been supplied by the claimant⁴; (2) whether the court should direct the sheriff to provide an inventory⁵; and (3) the disclosure of documents⁶.

The dispute may then be determined in a number of alternative ways, including:

- 1199 (a) dismissal of the application⁷;
- 1200 (b) a summary determination on the merits of the claim⁸;
- 1201 (c) a reference of the matter to the judge⁹;
- 1202 (d) remission of the proceedings to the county court¹⁰;
- 1203 (e) a reference of the dispute to arbitration¹¹;
- 1204 (f) the substitution or addition of the claimant as defendant to proceedings already begun¹²;
- 1205 (g) an order that an issue be stated and tried¹³.

1 As to the meaning of 'interpleader claimants' see PARA 1612 note 1.

2 Cf *JRP Plastics Ltd v Gordon Rossall Plastics Ltd (Hexa Pen Co Ltd, Claimants)*[1950] 1 All ER 241, DC; *Re Sheriff of Oxfordshire* (1837) 6 Dowl 136.

3 As to such witness statements or affidavits see PARA 1610. As to the meaning of 'witness statement' see PARA 751 note 1; and as to the meaning of 'affidavit' see PARA 540 note 5.

4 Cf *JRP Plastics Ltd v Gordon Rossall Plastics Ltd (Hexa Pen Co Ltd, Claimants)*[1950] 1 All ER 241, DC.

5 *Fredericks and Pelhams Timber Buildings v Wilkins (Read, Claimant)*[1971] 3 All ER 545, [1971] 1 WLR 1197, CA. As to such inventories see PARA 1611.

6 As to the application of CPR Pt 31 (general rules about disclosure) see CPR Sch 1 RSC Ord 17 r 10; and PARA 1613 note 6. In a sheriff's interpleader the only disclosure which will normally be necessary is disclosure by the claimant. It will be unusual for the execution creditor to have any documents relevant to the claimant's claim to ownership of the chattels seized.

7 The application will be dismissed if the conditions of CPR Sch 1 RSC Ord 17 r 1 (see PARAS 1588-1589) or CPR Sch 1 RSC Ord 17 r 3(4) (see PARA 1602) have not been satisfied.

8 See CPR Sch 1 RSC Ord 17 r 5(2); and PARA 1620.

9 As to the power to refer a matter to a judge see CPR 3.2; and PARA 250.

10 As to the transfer of proceedings from the High Court to the county court see PARA 69.

11 See generally **ARBITRATION** vol 2 (2008) PARA 1201 et seq.

12 See PARA 1621.

13 See PARA 1622 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/D. DISPUTES BETWEEN CLAIMANTS/1620. Summary determination.

1620. Summary determination.

Where the applicant for interpleader relief is a sheriff¹, or, in a stakeholder's interpleader², where all the interpleader claimants³ or any of them so request⁴, or where the question at issue between the interpleader claimants is a question of law and the facts are not in dispute⁵, the court may summarily determine the question at issue between the claimants and make an order accordingly on such terms as may be just⁶.

Where the claimant's witness statement or affidavit⁷ raises on the face of it a serious claim to chattels of a considerable overall value and the prospect of difficult points of law, summary determination should not be ordered even if the claimants have consented⁸.

However, the great value of sums of money claimed is not of itself necessarily sufficient to preclude summary determination⁹.

1 CPR Sch 1 RSC Ord 17 r 5(2)(a). As to the meaning of 'sheriff' see PARA 1589 note 1.

2 As to stakeholder's interpleader see PARA 1588.

3 As to the meaning of 'interpleader claimants' see PARA 1612 note 1.

4 CPR Sch 1 RSC Ord 17 r 5(2)(b).

5 CPR Sch 1 RSC Ord 17 r 5(2)(c).

6 CPR Sch 1 RSC Ord 17 r 5(2). See *TSP Group Ltd v Globemark (UK) Ltd, Globemark (UK) Ltd v Timalex Ltd* [2005] EWHC 2396 (QB), [2005] All ER (D) 26 (Nov).

7 As to claimants' witness statements or affidavits see PARA 1610. As to the meaning of 'witness statement' see PARA 751 note 1; and as to the meaning of 'affidavit' see PARA 540 note 5.

8 *Fredericks and Pelhams Timber Buildings v Wilkins (Read, Claimant)* [1971] 3 All ER 545, [1971] 1 WLR 1197, CA.

9 *Commonwealth Bank v Banco de Bilbao* (1971) 115 Sol Jo 426, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/D. DISPUTES BETWEEN CLAIMANTS/1621. Substitution or addition of claimant as defendant.

1621. Substitution or addition of claimant as defendant.

If the interpleader claimants¹ appear on the hearing of an interpleader claim, the court may order that any such claimant be made a defendant² in any claim pending with respect to the subject matter in dispute in substitution for or in addition to the applicant for interpleader relief³. If a claimant is made defendant in lieu of the applicant he may set up any defence open to him, whether or not it would have been open to the original defendant⁴.

1 As to the meaning of 'interpleader claimants' see PARA 1612 note 1.

2 As to the meaning of 'defendant' see PARA 18.

3 CPR Sch 1 RSC Ord 17 r 5(1)(a).

4 *Gerhard v Montagu & Co (Low & Co, Claimants)* (1889) 61 LT 564.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/D. DISPUTES BETWEEN CLAIMANTS/1622. Trial of issue.

1622. Trial of issue.

Where the interpleader claimants¹ appear on the hearing of an interpleader claim and the matter is not dealt with in one of the ways described in the preceding paragraphs², the court may order that an issue between the claimants be stated and tried³, and may direct which of the interpleader claimants is to be claimant and which defendant⁴.

Part 39 of the Civil Procedure Rules⁵ applies, with the necessary modifications, to the trial of an interpleader issue as it applies to the trial of a claim⁶.

The court may try to provide for a convenient way of disposal of the subject matter of the dispute pending the trial of the issue by sale or otherwise, but if this is not possible the sheriff will have to remain in possession of the goods pending the final order. The court by whom an interpleader issue is tried may give such judgment or make such order as finally to dispose of all questions arising in the interpleader proceedings⁷. If the position of the applicant⁸ can be finally dealt with on the order directing an issue to be stated, for example by ordering him to deliver up the goods to a party to await the outcome of the issue, or to place them in store with provision made for storage fees⁹, or to withdraw from possession either unconditionally or after a party has given security for the goods, the order will also provide for the applicant's costs and include an order that no claim be brought against him. In these circumstances the applicant will not have to take any further part in the proceedings. If, as is frequently the case, the applicant's position cannot be fully provided for by the order directing the issue, the applicant will remain as a party before the court, if not a party to the dispute in the issue itself, and will have to appear before the court at the trial to secure a final order protecting his position and providing for costs¹⁰.

1 As to the meaning of 'interpleader claimants' see PARA 1612 note 1.

2 I.e. by summary decision, remission to the county court, reference to arbitration or the substitution or addition of the claimant as defendant: see PARAS 1620-1621.

3 CPR Sch 1 RSC Ord 17 r 5(1)(b).

4 See note 3. As to parties to the issue see PARA 1623. As to the meanings of 'claimant' and 'defendant' see PARA 18.

5 I.e. CPR Pt 39: see PARA 1117 et seq.

6 CPR Sch 1 RSC Ord 17 r 11(1).

7 CPR Sch 1 RSC Ord 17 r 11(2).

8 As to who may apply see PARAS 1588-1589.

9 In *Vyner v Buchanan-Michaelson* (13 February 1976, unreported), QBD, Nield J ordered the claimant to pay the sheriff the storage charges as they accrued on a monthly basis pending trial of the issue where goods of substantial value had been moved by the sheriff to a place of safety under an order of the master.

10 As to costs see PARA 1627; and see *The Civil Court Practice*. As to costs generally see also PARA 1729 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/D. DISPUTES BETWEEN CLAIMANTS/1623. Parties to the issue.

1623. Parties to the issue.

The question who is to be claimant and who defendant¹ in the issue² is one for the discretion of the court³, but usually the order directing the issue appoints as claimant the party on whom the burden of proof is considered to lie at the outset.

In a sheriff's interpleader this will ordinarily be the interpleader claimant, since the judgment debtor is usually in possession at the moment of seizure⁴. Where, however, it can be established that the interpleader claimant was in possession at the moment of seizure, and not the judgment debtor, the position is reversed, and it is the execution creditor who should be claimant, and the interpleader claimant who should be defendant, in the issue⁵. If it is not clear before the trial of the issue who was in possession at the moment of seizure, the interpleader claimant should normally be nominated as claimant.

Apart from the general rule enunciated above, it is less easy to be precise in cases of stakeholder's interpleader, since the exact circumstances vary more considerably in cases of this class. Where the applicant is a defendant to proceedings already begun, then in the absence of any special considerations the claimant in the claim is normally made claimant in the issue, but the decision will depend on the particular facts and the position may be reversed⁶.

Where a claim was made to stolen property in the hands of the police, and an issue was directed between the interpleader claimant and a convicted person, the interpleader claimant was made plaintiff (now known as 'claimant'), and that person defendant in the ensuing issue⁷. Where one of the interpleader claimants who would normally have been made plaintiff (now known as 'claimant') was an alien enemy, it was stated that, if it were desired to dispose of the claim before the cessation of hostilities, it would be desirable to make him defendant in the issue⁸.

A party aggrieved by an order nominating him as claimant or defendant has the same right of appeal as any other party to a discretionary interim order, and his grievance is not normally a ground for an application for a new trial once the issue is disposed of⁹.

There is power to add new parties both before and after the issue has been drawn up¹⁰, and to substitute a new interpleader claimant as claimant to the issue where the party originally made claimant refuses to proceed with the trial¹¹.

1 As to the meanings of 'claimant' and 'defendant' see PARA 18.

2 As to the issue see PARA 1622.

3 *Haddow v Morton (Trout, Claimant)* [1894] 1 QB 565, CA, a case decided under what is now the County Courts Act 1984 s 100: see PARA 1632.

4 *Yorke v Smith* (1851) 21 LJQB 53; *Bentley v Hook* (1834) 2 Dowl 339; and cf also *Chase v Goble* (1841) 2 Man & G 930; *Richards v Jenkins* (1887) 18 QBD 451, CA. As to the meaning of 'interpleader claimant' see PARA 1612 note 1.

5 See *Gerhard v Montagu & Co (Low & Co, Claimants)* (1889) 61 LT 564.

6 Cf *Rhodes v Dawson* (1886) 16 QBD 548, CA.

7 *Gordon v Metropolitan Police Comr* (1935) 79 Sol Jo 921, CA.

8 *Geiringer v Swiss Bank Corpn* [1940] 1 All ER 406.

9 *Edwards v Matthews* (1847) 16 LJ Ex 291. As to appeals generally see PARA 1657 et seq; and as to inclusion of an appeal against an interim order in the appellant's notice see PARA 1663 note 16.

10 *Bird v Mathews* (1882) 46 LT 512, CA.

11 *Lydal v Biddle* (1836) 5 Dowl 244. As to the addition and substitution of new parties see generally CPR 19.4; and PARA 214.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/D. DISPUTES BETWEEN CLAIMANTS/1624. Security by claimant in sheriff's interpleader.

1624. Security by claimant in sheriff's interpleader.

Where the applicant in a sheriff's interpleader is a sheriff in possession, the interpleader claimant may be ordered either to pay into court a sum of money equal to the value of the goods or to give security to the master's satisfaction for the payment of that amount in accordance with the orders of the court¹, and also, if he desires the sheriff to withdraw, to pay to the sheriff the possession money from the date of the order until payment into court or security is given.

Where the claimant is a receiver appointed by the court he may be directed to hold the goods and keep them subject to the further order of the court².

Where an issue has been directed between a claimant and the execution creditor and the claimant has paid into court the value of the goods, that sum takes the place of the goods for the purposes of the dispute, so that if the successful execution creditor takes the money out of court he cannot later seize the goods again if the sum is not sufficient to satisfy the judgment³. But if, subsequently to the payment in, another execution is levied at the instance of a different execution creditor, and the claimant makes another claim to the goods and the sheriff again interpleads, the claimant must pay into court another sum to abide the event of the trial of the issue between him and the second execution creditor⁴.

1 Each case will be considered on its merits. If the judgment debtor and claimant are associated companies, or members of the same family, or business associates, the court will be more ready to order a sale or security for costs and sheriff's charges than where there is no obvious connection between the judgment debtor and claimant and where there is no prima facie reason to doubt the validity of the claim.

2 *Purkiss v Holland* (1887) 31 Sol Jo 702, CA.

3 *Haddow v Morton (Trout, Claimant)* [1894] 1 QB 565, CA, a case decided under what is now the County Courts Act 1984 s 100: see PARA 1632.

4 *Kotchie v Golden Sovereigns Ltd* [1898] 2 QB 164, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/D. DISPUTES BETWEEN CLAIMANTS/1625. Security for costs of issue.

1625. Security for costs of issue.

As between the parties to an issue the ordinary rules relating to security for costs apply¹, but for the purpose of ascertaining whether a party is liable to give security for costs the court will be guided by the substantial position of the parties and not by their nominal position under the order². Therefore, the defendant to the issue may be ordered to give security, provided he is substantially the claimant³, or, at least, as much so as the nominal claimant⁴, and the nominal claimant may escape the obligation on the ground that he is substantially the defendant, or, at least, as much so as the nominal defendant⁵. Indeed the court has ordered each of two parties to an issue to give security on the ground that substantially each was making a claim and each, therefore, should be treated as a claimant⁶.

The matter is one purely for the court's discretion⁷. In a case where the security ordered was not given and the claimant six months afterwards applied for judgment in his favour, an order was made for security to be given within a fortnight, otherwise the claimant was to be at liberty to obtain his judgment⁸.

1 *Tudor Furnishers Ltd v Montague & Co and Finer Production Co Ltd* [1950] Ch 113, [1950] 1 All ER 65; see also *Maatschappij voor Fondsenbezit v Shell Transport and Trading Co* [1923] 2 KB 166, CA. The latter case was not a case of interpleader, but the authorities relating to interpleader were fully considered and applied by analogy. See further *Rhodes v Dawson* (1886) 16 QBD 548, CA; *Belmonte v Aynard* (1879) 4 CPD 221, on appeal 4 CPD 352, CA. In *Benazech v Bessett* (1845) 1 CB 313 the plaintiff in the action and issue was ordered to give security as he was a foreigner residing out of the jurisdiction. In *Webster v Delafield* (1849) 7 CB 187 the claimant was ordered to give security for a similar reason. In *Frost v Heywood* (1843) 2 Dowl NS 801 a bankrupt plaintiff was ordered to give security, but in *Ridgway v Jones* (1860) 29 LJB 97 insolvency was held an insufficient reason in itself for ordering security. In *Deller v Prickett* (1850) 15 QB 1081, where the claimant was substituted as defendant, security was ordered as her solvency was doubtful. As to security for costs generally see CPR 25.12-25.15; and PARAS 745-748. Note that in these and the other cases cited in this paragraph which pre-date the new civil procedure, the claimant (as opposed to the interpleader claimant) is described as the 'plaintiff': see PARA 18. As to the new civil procedure see PARA 24 et seq. As to the meaning of 'defendant' see PARA 18; and as to interpleader claimants see PARA 1612 note 1.

2 *Tudor Furnishers Ltd v Montague & Co and Finer Production Co Ltd* [1950] Ch 113, [1950] 1 All ER 65; *Rhodes v Dawson* (1886) 16 QBD 548, CA; *Tomlinson v Land and Finance Corp Ltd* (1884) 14 QBD 539, CA; *Maatschappij voor Fondsenbezit v Shell Transport and Trading Co* [1923] 2 KB 166, CA.

3 *Williams v Crosling* (1847) 3 CB 957, where the defendant to the issue residing out of the jurisdiction was ordered to give security because he was the real plaintiff; *Tomlinson v Land and Finance Corp Ltd* (1884) 14 QBD 539, CA, where the defendant, a limited company, was ordered to give security on a similar ground.

4 See *Tudor Furnishers Ltd v Montague & Co and Finer Production Co Ltd* [1950] Ch 113, [1950] 1 All ER 65; *Tomlinson v Land and Finance Corp Ltd* (1884) 14 QBD 539, CA, where it was held that both parties might be said to be plaintiffs and that security might be ordered from either. See also *Rhodes v Dawson* (1886) 16 QBD 548, CA; and *Re Cie Générale d'Eaux Minérales et de Bains de Mer* [1891] 3 Ch 451, where it was held that mutual security could be ordered where both parties were out of the jurisdiction.

5 *Belmonte v Aynard* (1879) 4 CPD 221, where a plaintiff out of the jurisdiction was not ordered to give security as substantially he was defendant. See also *Rhodes v Dawson* (1886) 16 QBD 548 at 553, CA, per Lindley LJ ('It may be that in some cases each party is as much a plaintiff as the other'); and see *Tomlinson v Land and Finance Corp Ltd* (1884) 14 QBD 539, CA, where it was held that the execution creditor and claimant were really both plaintiffs.

6 *Tudor Furnishers Ltd v Montague & Co and Finer Production Co Ltd* [1950] Ch 113, [1950] 1 All ER 65, where the plaintiff was ordered to give security conditionally on the payment into court of a like sum by the defendant; *Re Cie Générale d'Eaux Minérales et de Bains de Mer* [1891] 3 Ch 451.

7 *Workmeister v Healy* (1876) IR 10 CL 450, where the plaintiff to the issue applied that the defendant should give security as he resided out of the jurisdiction, but the plaintiff also resided out of the jurisdiction, and the application was refused. Cf *Tudor Furnishers Ltd v Montague & Co and Finer Production Co Ltd* [1950] Ch 113, [1950] 1 All ER 65; *Re Cie Générale d'Eaux Minérales et de Bains de Mer* [1891] 3 Ch 451, where mutual security was ordered. In *Ridgway v Jones* (1860) 29 LJQB 97, the court refused an application by a plaintiff to the issue for security by either the defendant to the issue, who was insolvent, or the defendant to the original action (applicant in the interpleader proceedings) on the grounds (1) that insolvency was an insufficient reason in itself; (2) that the defendant to the action ought not to be put in a worse position merely because the claimant was insolvent.

8 *Melin v Dumont* (1869) 20 LT 366; *Tassie v Kennedy* (1848) 5 Dow & L 587. In *Kelly v Brown* (1836) 5 Dowl 264, the court refused to add, to an order for security, leave to sign judgment if security was not given within the specified time.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/D. DISPUTES BETWEEN CLAIMANTS/1626. Evidence.

1626. Evidence.

The ordinary rules relating to evidence, burden of proof, presumptions and estoppels, both at trial and after it by way of *res judicata*, apply to interpleader issues as to other proceedings in the High Court¹.

A particular application of the rules of evidence concerns the right to set up *jus tertii*². An interpleader claimant who is bound to establish a better title than his adversary must do so, and may not in general set up *jus tertii*³. Moreover, he must usually show that he would have been in a position to sue the sheriff or stakeholder had he resisted the claim instead of seeking interpleader relief⁴. Conversely, his adversary may, in general, rely on *jus tertii*⁵. Thus, in a sheriff's interpleader, if the judgment debtor was in possession at the moment of seizure, the interpleader claimant may not rely on *jus tertii*⁶, while the execution creditor may⁷; but if that claimant was in possession at the time of seizure, the position is reversed and only that claimant may rely on *jus tertii*⁸. There is no difference of principle in these matters between sheriff's and stakeholder's interpleader. Thus, an interpleader claimant in a stakeholder's interpleader who was plaintiff (now known as 'claimant') in the issue was not allowed to raise *jus tertii* against the defendant in the issue who was claimant in the action (now known as the 'claim')⁹. It is sufficient that the party on whom the burden lies should establish a good possessory title as against his adversary without proving that he is absolute owner¹⁰. An equitable title may be sufficient, even if in the course of establishing it may be necessary to establish *jus tertii*, as where a second mortgagee has to establish the prior incumbrancer's position in order to prove that the equity of redemption has passed to him prior to the seizure¹¹. A lien may be sufficient provided it is good against the opposing party¹², and so may the equitable rights of debenture holders¹³.

1 *Emmott v Marchant* (1878) 3 QBD 555; *Yorke v Smith* (1851) 21 LJQB 53 (unstamped document); *Gugen v Sampson* (1866) 4 F & F 974; *Pooley v Goodwin* (1835) 5 Nev & M KB 466; and cf *Linnit v Chaffers* (1843) 4 QB 762; *Hornidge v Cooper* (1858) 27 LJEx 314. See generally PARAS 1162 et seq; 749 et seq.

2 I.e. the right or title of a third person.

3 *Carne v Brice* (1840) 7 M & W 183, as explained in *Richards v Jenkins* (1886) 17 QBD 544 at 547 per Wills J; *Green v Rogers* (1845) 2 Car & Kir 148.

4 *Gadsden v Barrow* (1854) 9 Exch 514, followed by Wills J in *Richards v Jenkins* (1886) 17 QBD 544; affd (1887) 18 QBD 451, CA. For further illustrations of the principle see *Chase v Goble* (1841) 2 Man & G 930; *Belcher v Patten* (1848) 6 CB 608; *Edwards v English* (1857) 7 E & B 564, as explained in *Richards v Jenkins* (1886) 17 QBD 544; affd (1887) 18 QBD 451, CA; *Green v Stevens* (1857) 2 H & N 146; *Daniel v Rogers* [1918] 2 KB 228, CA.

5 *Richards v Jenkins* (1886) 17 QBD 544; affd (1887) 18 QBD 451, CA.

6 See the cases cited in note 3.

7 See the case cited in note 5.

8 *Daniel v Rogers* [1918] 2 KB 228, CA.

9 *Peake v Carter* [1916] 1 KB 652, CA, distinguishing on the facts *Flude Ltd v Goldberg* [1916] 1 KB 662n. As to the meaning of 'claimant' see PARA 18. As to the new civil procedure, which has introduced this change in terminology, see PARA 24 et seq.

- 10 *De Borbon v Westminster Bank Ltd (Banco de Vizcaya, Claimants)* (1933) 49 TLR 414, CA.
- 11 *Usher v Martin* (1889) 24 QBD 272.
- 12 *Jennings v Mather* [1901] 1 KB 108; affd [1902] 1 KB 1, CA.
- 13 *Davey & Co v Williamson & Sons* [1898] 2 QB 194.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(ii) Interpleader in the High Court/E. COSTS/1627. In general.

E. COSTS

1627. In general.

In and for the purposes of any interpleader proceedings the court may make such order as to costs or any other matter¹ as it thinks just². Where the interpleader claimant³ fails to appear at the hearing, the court may direct that the sheriff's⁴ and execution creditor's costs are to be assessed by a master⁵ or, where the hearing was heard in a district registry, by a district judge of that registry⁶.

Detailed provisions about costs fall outside the scope of this title⁷.

1 The expression 'or any other matter' includes charges within the meaning of CPR Sch 1 RSC Ord 17 r 3(4) (a): see PARA 1602. Thus, an unsuccessful claimant may be ordered to pay a wharfinger's charges accruing after the summons: *De Rothschild Frères v Morrison, Kekewich & Co* (1890) 24 QBD 750, CA. Such charges may be paid out of the subject matter in dispute: see *Attenborough v London and St Katharine's Dock Co* (1878) 3 CPD 450, CA; cf *Harwood v Betham* (1832) 1 LJ Ex 180.

2 CPR Sch 1 RSC Ord 17 r 8(1). This power is subject to CPR Sch 1 RSC Ord 17 rr 1-7: CPR Sch 1 RSC Ord 17 r 8(1).

3 As to the meaning of 'interpleader claimant' see PARA 1612 note 1.

4 As to the meaning of 'sheriff' see PARA 1589 note 1.

5 For these purposes, references to a master are to be construed, where the claim in question is proceeding in the Admiralty Court or in the Family Division, as references to the Admiralty Registrar or to a district judge of that Division: CPR Sch 1 RSC Ord 17 r 8(3).

6 CPR Sch 1 RSC Ord 17 r 8(2). The following rules apply: CPR 44.4 (basis of assessment); CPR 44.5 (factors to be taken into account in deciding the amount of costs); and CPR 48.4 (limitations on court's power to award costs in favour of trustees or personal representative); CPR 48.6 (litigants in person): CPR Sch 1 RSC Ord 17 r 8(2). See further *The Civil Court Practice*.

7 As to costs generally see PARA 1729 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/A. IN GENERAL/1628. Jurisdiction.

(iii) Interpleader in County Courts

A. IN GENERAL

1628. Jurisdiction.

The jurisdiction of county courts to grant relief by way of interpleader is governed entirely by statute and by the preserved and amended County Court Rules governing the procedure which are set out in Schedule 2 to the Civil Procedure Rules¹. County courts have jurisdiction in the following two classes of case:

- 1206 (1) where a person makes a claim to or in respect of any goods seized under a warrant of execution, or in respect of the proceeds or value of the goods ('interpleader under execution'²); the district judge³ may, as well before as after any action is brought against him, call before the court the party at whose instance the process was issued and the party making the claim⁴;
- 1207 (2) where a person (the 'applicant') is under a liability in respect of any debt, money or goods and he is, or expects to be, sued⁵ for, or in respect of the debt, money or goods, by two or more persons (the 'interpleader claimants') making adverse claims, he may apply to the court for relief ('interpleader otherwise than under execution')⁶.

A person claiming under head (2) above may do so by virtue of the statutory provisions relating to interpleader where a chose (or thing) in action has been the subject of a legal assignment and its amount or value does not exceed the county court limit⁷, or otherwise⁸. To entitle the applicant to relief the claims must be adverse and conflicting in the sense that they are claims to the same thing and that the applicant is not liable to both claimants⁹. It is essential that where the application arises out of an assignment, the applicant should have due notice of it in writing¹⁰.

Particular provision is made where interpleader proceedings under execution are ordered to be transferred from the High Court¹¹.

¹ As to the relevant rules see CPR Sch 2 CCR Ord 33; the text and notes 5-10; and PARA 1630 et seq. As to the Scheduled rules see CPR Pt 50; and PARA 30 text and note 19.

² See CPR Sch 2 CCR Ord 33 Pt I (rr 1-5); and PARAS 1631-1638.

³ As to district judges see PARA 60.

⁴ County Courts Act 1984 s 101(1) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3)).

⁵ Relief will not be granted unless there appears to be some real foundation for the expectation of a rival claim: *Watson v Park Royal (Caterers) Ltd* [1961] 2 All ER 346, [1961] 1 WLR 727.

⁶ CPR Sch 2 CCR Ord 33 r 6(1). A district judge who, after executing a judgment obtained by the assignor of a debt, receives notice of the assignee's claim is not entitled to apply under this head: see PARA 1631 note 3.

7 See the Law of Property Act 1925 s 136(1) proviso; and PARA 1588. The county court has jurisdiction under this provision where the amount or value of the debt or thing in action does not exceed the county court limit: Law of Property Act 1925 ss 136(3), 205(1)(iiiA) (added by the County Courts Act 1984 s 148(1), Sch 2 Pt II paras 4, 9). The jurisdiction limit is £30,000; High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(5).

8 See PARA 1639. The High Court and County Courts Jurisdiction Order 1991, SI 1991/724, abolished the former limit.

9 *Greatorex & Co v Shackle*[1895] 2 QB 249; and see PARA 1590.

10 Law of Property Act 1925 s 136(1).

11 See CPR Sch 2 CCR Ord 16 r 7; and PARA 1644.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/A. IN GENERAL/1629. Crown proceedings.

1629. Crown proceedings.

The Crown may obtain relief by way of interpleader proceedings and may be made a party to such proceedings in the same manner as a subject¹.

¹ See the Crown Proceedings Act 1947 s 16 (amended by SI 2005/2712); and PARA 1606. All rules of court relating to interpleader proceedings have effect subject to the provisions of that Act: see s 15 (amended by SI 2005/2712).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/A. IN GENERAL/1630. Claims to damages.

1630. Claims to damages.

In two classes of case a county court has jurisdiction to adjudicate upon a claim to damages in the course of interpleader proceedings:

1208 (1) on a district judge's application for interpleader relief, the judge must adjudicate on any claim to damages arising or capable of arising out of the execution of the warrant by the district judge¹;

1209 (2) in transferred proceedings², where the High Court application originated by way of sheriff's interpleader, the county court has jurisdiction, subject to any directions to the contrary in the order of the High Court, to adjudicate on any claim for damages against an execution creditor³.

1 See the County Courts Act 1984 s 101(3); the Courts and Legal Services Act 1990 s 74; CPR Sch 2 CCR Ord 33 r 5; and PARA 1638.

2 See PARA 1644.

3 CPR Sch 2 CCR Ord 16 r 7(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/B. PROCEDURE ON DISTRICT JUDGE'S APPLICATION/1631. The claim.

B. PROCEDURE ON DISTRICT JUDGE'S APPLICATION

1631. The claim.

In order to found an application relating to interpleader by a district judge, a claim must have been made to or in respect of goods seized in execution or their proceeds or value¹. The claim must be in respect of the goods or chattels as such or the proceeds as representing them². If, after assigning his debt, a creditor recovers judgment against the debtor, and in execution of the judgment the district judge takes and sells the debtor's goods, the district judge, on receiving notice of the assignee's claim, may not seek interpleader relief, since the assignee's claim is a claim to be paid the debt and not a claim to the goods taken in execution or to their proceeds as such³.

The interpleader claimant⁴ must deliver to the bailiff holding the warrant of execution, or file⁵ in the office of the county court for the district in which the goods were seized, notice of his claim stating the grounds of the interpleader claim⁶ or, in the case of a claim for rent, the required particulars⁷, and the interpleader claimant's full name and address⁸. On receipt of the interpleader claim the court must send notice of it to the execution creditor⁹ and, except where the interpleader claim is to the proceeds or value of the goods, must send a further notice to the interpleader claimant requiring him to make a deposit or give security¹⁰.

Within four days of receiving the notice the execution creditor must give notice to the court informing the court whether he admits or disputes the interpleader claim, or requesting the district judge to withdraw from possession of the goods or money claimed¹¹. If, within the four day period, the execution creditor gives notice to the court admitting the interpleader claim or requesting the district judge to withdraw from possession of the goods or money claimed, the execution creditor will only be liable to the district judge for any possession fees or expenses incurred before the receipt by the district judge of his notice¹². Where the execution creditor gives such a notice admitting the claim or requesting the district judge to withdraw, the district judge must withdraw from possession of the goods or money claimed and may apply to the judge, on notice to the interpleader claimant, for an order restraining the bringing of a claim against the district judge for or in respect of his having taken possession of the goods or money¹³. On the hearing of the application the judge may make such order as may be just¹⁴.

1 County Courts Act 1984 s 101(1) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3)); CPR Sch 2 CCR Ord 33 r 1.

2 *Plant v Collins*[1913] 1 KB 242, CA.

3 *Plant v Collins*[1913] 1 KB 242, CA. In such a case the district judge is also disentitled to claim relief by way of interpleader otherwise than by execution under CPR Sch 2 CCR Ord 33 r 6(1), (2) (see PARA 1628), since he is not a person under liability for any debt, money or goods within the meaning of that rule (*Plant v Collins* [1913] 1 KB 242 at 246-247, CA); nor can he claim relief under the statutory provisions relating to interpleader in the case of a legal assignment of a chose (or thing) in action (*Plant v Collins* [1913] 1 KB 242 at 246, CA; and see PARA 1588 text and note 3). For the principle that the claim must relate to the goods or their proceeds as such cf PARA 1597. As to a claim by a landlord for rent see PARA 1597 the text and note 5.

4 In CPR Sch 2 CCR Ord 33 Pt I (rr 1-5), 'interpleader claimant' means any person making a claim to or in respect of goods seized in execution or the proceeds or value thereof, and 'interpleader claim' means that claim: CPR Sch 2 CCR Ord 33 r 1(A1).

5 As to the meaning of 'filing' see PARA 1832 note 8.

6 See note 4.

7 The particulars required by the County Courts Act 1984 s 102(2) (ie the amount of rent claimed to be in arrear and the period in respect of which the rent is due): see **COURTS**; and PARA 1353.

8 CPR Sch 2 CCR Ord 33 r 1(1).

9 CPR Sch 2 CCR Ord 33 r 1(2)(a).

10 CPR Sch 2 CCR Ord 33 r 1(2)(b). As to the requirement to make a deposit or give security see the County Courts Act 1984 s 100; PARA 1632; and **COURTS**.

11 CPR Sch 2 CCR Ord 33 r 2(1).

12 See CPR Sch 2 CCR Ord 33 r 2(2).

No possession fees are now prescribed by CPR Sch 2 CCR Ord 33 r 2, but if these fees become payable, it has been held that the district judge might be entitled to such fees even if the goods of which he was in purported possession were actually in the possession of the sheriff: *AW Ltd v Cooper and Hall Ltd* [1925] 2 KB 816. It was also held that an appeal would lie from an order of the judge directing payment of the district judge's fees.

13 CPR Sch 2 CCR Ord 33 r 3. As the rule gives protection in relation to any action in respect of the seizure, it is not limited to a claim brought by the interpleader claimant. Protection is only likely to be granted where that claimant has suffered no real grievance and his claim is only for nominal damages. The court is unlikely to protect the district judge where there is substantial grievance: see *Cave v Capel* [1954] 1 QB 367, [1954] 1 All ER 428, CA; and PARA 1598.

It is the quality of the district judge's act which is relevant, such as selling the goods at a gross undervalue: *Neumann v Bakeaway Ltd* [1983] 2 All ER 935, [1983] 1 WLR 1016n, CA. The test is whether the claimant can show that it is fairly arguable that his claim against the district judge overrides the district judge's defences under the County Courts Act 1984 s 98 (prospectively repealed), or at common law: see *Observer Ltd v Gordon (Cranfield, Claimants)* [1983] 2 All ER 945, [1983] 1 WLR 1008.

14 CPR Sch 2 CCR Ord 33 r 3. See also note 13.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/B. PROCEDURE ON DISTRICT JUDGE'S APPLICATION/1632. Security by claimant on claim.

1632. Security by claimant on claim.

On receipt of the prescribed notice from the court¹ the interpleader claimant may deposit with the bailiff² either (1) the amount of the value of the goods claimed³; or (2) the sum which the bailiff is allowed to charge as costs for keeping possession of the goods until the judge's decision can be obtained on the claim⁴; or may give the bailiff in the prescribed manner security for the value of the goods claimed⁵. For this purpose the amount of the value of the goods claimed is in case of dispute⁶ to be fixed by appraisal⁷, and where that amount is deposited it must be paid by the bailiff into court to abide the judge's decision upon the claim⁸. In default of the claimant's complying with these provisions the bailiff must sell the goods as if no claim had been made and must pay into court the proceeds of the sale to abide the judge's decision⁹, but notwithstanding this provision the goods must not be sold if the district judge decides that in all the circumstances the judge's decision on the claim ought to be awaited¹⁰.

Where the real owner claims the goods but makes no deposit and does not give security and the bailiff thereupon sells under this provision, the sale conveys a good title to the goods even though the judgment debtor is not the true owner¹¹. It is not, however, clear whether the purchaser obtains a good title to the goods where the claimant is not the real owner and the real owner makes no claim until after the sale¹², or whether, where the claimant is not the real owner, the bailiff is liable to the real owner for conversion in respect of the sale¹³.

1 See PARA 1631 the text and note 10.

2 As to the meaning of 'bailiff' see PARA 1258. As to district judges see PARA 60.

3 See the County Courts Act 1984 s 100(1)(a)(i) (s 100 repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 74, Sch 23 Pt 3; at the date at which this title states the law, no such day had been appointed). As to the effect of a deposit of the amount of the judgment debt and not the value of the goods see PARA 1633.

4 County Courts Act 1984 s 100(1)(a)(ii) (prospectively repealed: see note 3).

5 County Courts Act 1984 s 100(1)(b) (prospectively repealed: see note 3).

6 'Dispute' for this purpose means a dispute between the claimant and the execution creditor: *Miller & Co v Solomon* [1906] 2 KB 91.

7 As to appraisal see the County Courts Act 1984 ss 94-96; and **COURTS**.

8 County Courts Act 1984 s 100(2) (prospectively repealed: see note 3).

9 County Courts Act 1984 s 100(3) (prospectively repealed: see note 3).

10 County Courts Act 1984 s 100(4) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3); and prospectively repealed (see note 3)).

11 *Goodlock v Cousins* [1897] 1 QB 558, CA.

12 See *Goodlock v Cousins* [1897] 1 QB 558, CA; and see also *Crane & Sons v Ormerod* [1903] 2 KB 37, CA, where the effect of what is now the County Courts Act 1984 s 100 was considered, although the sale in question was not under the enactment. The provisions of the County Courts Act 1984 s 98 (prospectively repealed) (which validate the titles of purchasers and protect district judges and other officers from actions in cases where goods are sold without notice of a claim, and which overrule the actual decision in *Crane & Sons v*

Ormerod [1903] 2 KB 37, CA) will not, it seems, apply if a claim has been made, even though it was not made by the true owner.

13 See *Cramer v Matthews* (1881) 7 QBD 425; *Jelks v Hayward* [1905] 2 KB 460 (which was not a decision under what is now the County Courts Act 1984 s 100(3), and is overruled by s 98: see note 12). Where, after the goods have been sold under s 100(3), a district judge is faced with a claim by the true owner, he may claim relief by way of interpleader against the true owner (cf *Cramer v Matthews* (1881) 7 QBD 425, *Jelks v Hayward* [1905] 2 KB 460), and it seems that he will be entitled to such relief at least so far as it relates to the sale as distinct from the original seizure. As to the court's power to determine claims for damages see PARAS 1630, 1642. As to the staying of actions see PARA 1636 text and notes 9-10.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/B. PROCEDURE ON DISTRICT JUDGE'S APPLICATION/1633. Deposit of amount of judgment debt but less than value of goods.

1633. Deposit of amount of judgment debt but less than value of goods.

It is not quite clear what the position is where the interpleader claimant deposits¹ the amount of the judgment debt and costs where these are less than the value of the goods. Where such a claimant, whose title under a bill of sale was admitted, deposited the amount of the judgment debt and costs, and not the value of the goods, and the high bailiff² withdrew from possession without consulting the execution creditor, it was held that the high bailiff ought not to have withdrawn, and that, on the application of the execution creditor, the court had power to order the high bailiff to retake possession and to order a sale of the goods³ if there was evidence that the proceeds of such a sale might realise sufficient to discharge the bill of sale and leave a surplus towards the judgment debt and costs⁴.

In another case, however, where such a claimant deposited more than sufficient to cover the judgment debt and costs, although less than the value of the goods, and the execution creditor admitted that claimant's title before the return day of the summons (now the interpleader notice), it was held that the bailiff was not entitled to possession fees after the date of the deposit since, having taken the amount deposited, which he had no right to do except on the assumption that it represented the amount of the value of the goods, he ought to have withdrawn from possession and could not afterwards be heard to say that it did not represent the value⁵.

1 As to deposit by the interpleader claimant see PARA 1632.

2 As to references to a high bailiff see PARA 1258.

3 See under the power set out in PARA 1635.

4 *Miller & Co v Solomon* [1906] 2 KB 91.

5 *Newsum Sons & Co Ltd v James* [1909] 2 KB 384. It is somewhat difficult to reconcile this case with *Miller & Co v Solomon* [1906] 2 KB 91 on the question of principle as to how much should be deposited as security. The cases largely depend upon their special facts.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/B. PROCEDURE ON DISTRICT JUDGE'S APPLICATION/1634. Effect of deposit on second execution.

1634. Effect of deposit on second execution.

Where an amount equal to the value of the goods is paid into court¹, and the district judge² thereupon withdraws from possession, the goods may be seized again by another execution creditor. In such a case the remedy of the original execution creditor is against the money in court and not against the goods³. Where the amount deposited as the value of the goods is less than the amount of the judgment debt, and the amount in court is paid out to the execution creditor on the interpleader claimant's failing to establish his claim, the execution creditor is not entitled to the amount deposited as value of the goods a second time by the same claimant on a second execution upon the same judgment being levied by the execution creditor, since he has elected to accept the money deposited in the first instance in lieu of the goods⁴.

1 See PARA 1632.

2 As to district judges see PARA 60.

3 *Wells v Hughes* [1907] 2 KB 845, CA.

4 *Haddow v Morton (Trout, Claimant)* [1894] 1 QB 565, CA, where taking money out of court was held to be an election to accept it in lieu of the goods, and the execution creditor was therefore estopped from afterwards denying that as against himself the goods belonged to the claimants. The question as to what the result would have been if the judgment creditor had seized the goods the second time on another judgment was left open. Cf *Kotchie v Golden Sovereigns Ltd* [1898] 2 QB 164, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/B. PROCEDURE ON DISTRICT JUDGE'S APPLICATION/1635. Sale by order of the court.

1635. Sale by order of the court.

In addition to the bailiff's power of sale already noted¹, where a claimant alleges that he is entitled to the goods under a bill of sale or otherwise by way of security for a debt, the judge may order the goods or any part of them to be sold, and may direct the proceeds of sale to be applied in such manner as may be just².

A district judge cannot be compelled to interplead so as to give the execution creditor the right to invoke this power, even where the value of the goods exceeds the sum secured by it³; but the judge may exercise the jurisdiction, notwithstanding that the district judge has withdrawn, if satisfied that the execution creditor has not had an opportunity of disputing the value of the goods as against the claimant⁴.

1 See PARA 1632.

2 CPR Sch 1 RSC Ord 17 r 6, as applied by the County Courts Act 1984 s 76.

3 *Scarlett v Hanson* (1883) 12 QBD 213. As to district judges see PARA 60.

4 *Miller & Co v Solomon* [1906] 2 KB 91.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/B. PROCEDURE ON DISTRICT JUDGE'S APPLICATION/1636. Issue of interpleader proceedings by district judge.

1636. Issue of interpleader proceedings by district judge.

Where the execution creditor gives notice¹ disputing an interpleader claim², or where he fails within the four day period to give notice to the district judge admitting or disputing the title of the interpleader claimant, or requesting the district judge to withdraw from possession³, the district judge, unless the interpleader claimant has withdrawn his claim, must issue an interpleader notice to the execution creditor and the interpleader claimant⁴. On the issue of such an interpleader notice, the court officer⁵ must enter the proceedings in the records of the court, fix a day for the hearing by the judge and prepare sufficient copies of the notice for service⁶. The notice must be served on the execution creditor and the interpleader claimant⁷ and must be effected not less than 14 days before the return day⁸.

Upon the issue of the notice any claim brought in any county court, or other court, in respect of the interpleader claim or of any damage arising out of the execution of the warrant must be stayed⁹. The stay is limited to the persons who would be parties to the interpleader notice¹⁰.

1 Ie under CPR Sch 2 CCR Ord 33 r 2(1): see PARA 1631.

2 Ie a claim made under CPR Sch 2 CCR Ord 33 r 1: see PARA 1631. As to the meaning of 'interpleader claim' see PARA 1631 note 4.

3 Ie under CPR Sch 2 CCR Ord 33 r 2(1): see PARA 1631. As to district judges see PARA 60.

4 CPR Sch 2 CCR Ord 33 r 4(1).

5 As to the meaning of 'court officer' see PARA 49 note 3.

6 CPR Sch 2 CCR Ord 33 r 4(2). As to the meaning of 'service' see PARA 138 note 2.

7 CPR Sch 2 CCR Ord 33 r 4(3). Ie in the manner set out in CPR 6.20: see PARA 139.

8 CPR Sch 2 CCR Ord 33 r 4(4). As to time limits generally see PARA 88 et seq.

9 See the County Courts Act 1984 s 101(2).

10 Thus in *Hills v Renny* (1880) 5 ExD 313, CA, it was held that the provision did not apply to proceedings against purchasers who had bought under a sale by the bailiff which had occurred before the action. It was not argued in this case that there was a discretionary power to order a stay under the inherent jurisdiction of the court. As to the protection of purchasers of goods taken in execution see the County Courts Act 1984 s 98(1) (repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 74, Sch 23 Pt 3); and cf *Curtis v Maloney* [1951] 1 KB 736, [1950] 2 All ER 982, CA; *Dyal Singh v Kenyon Insurance Ltd* [1954] AC 287, [1954] 1 All ER 847, PC.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/B. PROCEDURE ON DISTRICT JUDGE'S APPLICATION/1637. Particulars of the interpleader claim.

1637. Particulars of the interpleader claim.

The interpleader claim should state the grounds of the claim or, in the case of a claim for rent, particulars stating (1) the amount of rent claimed to be in arrear; (2) the period in respect of which the rent is due¹ and, in every case, the interpleader claimant's full name and address². If damages are claimed, the amount and the grounds of the claim must also be stated³.

Particulars which merely state that the goods claimed are the property of the claimant without giving the grounds of the claim are insufficient⁴, but particulars giving the date of and parties to an assignment under which the claim is made are a sufficient compliance with the rule⁵. The goods claimed need not be specifically set out⁶ and slight errors in the particulars will not invalidate their sufficiency⁷. Where the particulars are insufficient or not delivered in time the judge should either amend them or order new interpleader proceedings to be issued as he is bound to adjudicate upon the claim on the merits⁸. Where he erroneously decides that the particulars are insufficient and orders the claimant to pay the costs, the High Court may order him to adjudicate upon the claim but has no jurisdiction to reverse the order as to costs⁹.

On receipt of the claim, the district judge must send notice of the claim to the execution creditor¹⁰ and, except where the claim is to the proceeds or value of the goods, send to the claimant a notice requiring him to make a deposit or give security¹¹.

1 CPR Sch 2 CCR Ord 33 r 1(1)(a); County Courts Act 1984 s 102(2)(a), (b) (repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 76, Sch 23 Pt 3; at the date at which this title states the law, no such day had been appointed).

2 CPR Sch 2 CCR Ord 33 r 1(1)(b).

3 CPR Sch 2 CCR Ord 33 r 5(a).

4 *R v Chilton* (1850) 15 QB 220. See also *Richardson v Wright* (1875) LR 10 Exch 367, where the court was equally divided.

5 *R v Richards* (1851) 20 LJQB 351.

6 *Heslop v McGeorge* (1851) 18 LTOS 109; *R v Stapylton* (1851) 2 LM & P 603.

7 See *Hardy v Walker, ex p M'Fee* (1853) 9 Exch 261, where the address given was 'Elizabeth Street' instead of 'Elizabeth Terrace'.

8 *Beswick v Baffey* (1854) 9 Exch 315.

9 *R v Richards* (1851) 2 LM & P 263; *Churchward v Coleman* (1866) LR 2 QB 18; but see *Whitehead v Proctor* (1858) 3 H & N 532. The High Court may also prohibit the judge from proceeding on the original complaint: *Hardy v Walker, ex p M'Fee* (1853) 9 Exch 261.

10 CPR Sch 2 CCR Ord 33 r 1(2)(a). As to district judges see PARA 60.

11 See CPR Sch 2 CCR Ord 33 r 1(2)(b); and PARA 1632.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/B. PROCEDURE ON DISTRICT JUDGE'S APPLICATION/1638. Claim for damages.

1638. Claim for damages.

Where, in interpleader proceedings under an execution, the interpleader claimant¹ claims damages from the district judge or from the execution creditor, or the execution creditor wishes to make a claim against the district judge for damages arising or capable of arising out of the execution, (1) the party claiming damages must, within eight days after service of the interpleader notice on him, give notice of his claim to the district judge and to any other party against whom the claim is made, stating the amount and the grounds of the claim; and (2) the party from whom damages are claimed may pay money into court in satisfaction of the claim as if the interpleader proceedings were a claim brought in accordance with Part 7 of the Civil Procedure Rules² by the person making the claim³.

A party entitled to damages which could have been made the subject of a claim in interpleader proceedings under these provisions cannot claim damages by a subsequent claim brought after the interpleader proceedings have been determined⁴.

Where goods are sold by the district judge or any officer charged with the enforcement of a warrant or other process of execution issued from a county court, which goods at the time of seizure were in the possession of the judgment debtor, without any claims being made to them, then damages will not be recoverable against the district judge or any person acting under his authority, unless it can be proved that notice had been given, or that it might by making reasonable inquiry have been ascertained, that the goods were not the property of the execution debtor⁵. The right of any claimant, who may prove that at the time of the sale he had a title to any goods so seized and sold, to any remedy to which he may be entitled against any person other than the district judge or other authorised officer, is not affected⁶.

A sale by public auction is not conclusive evidence of an allegation by the interpleader claimant that the goods have been sold at a gross undervalue⁷.

1 As to the meaning of 'interpleader claimant' see PARA 1631 note 4.

2 I.e. in accordance with CPR Pt 7: see PARA 116 et seq.

3 CPR Sch 2 CCR Ord 33 r 5. As to district judges see PARA 60.

4 *West v Automatic Salesman Ltd* [1937] 2 KB 398, [1937] 2 All ER 706, CA; *Death v Harrison* (1870) LR 6 Exch 15. *Salbstein v Isaacs & Son* [1916] 1 KB 1 was decided under the rules relating to remitted proceedings materially different from those in force now.

5 County Courts Act 1984 s 98(1) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3); and the Courts Act 2003 s 109(1), Sch 8 para 273). The County Courts Act 1984 s 98 is repealed, as from a day to be appointed, by the Tribunals, Courts and Enforcement Act 2007 ss 62(3), 146, Sch 13 paras 68, 74, Sch 23 Pt 3. At the date at which this title states the law, no such day had been appointed.

6 County Courts Act 1984 s 98(2) (amended by virtue of the Courts and Legal Services Act 1990, s 74(1), (3); and prospectively repealed (see note 5)). These provisions have effect subject to the Insolvency Act 1986 ss 183, 184, 346: County Courts Act 1984 s 98(3) (substituted by the Insolvency Act 1986 s 439(2), Sch 14; and prospectively repealed (see note 5)).

7 *Observer Ltd v Gordon (Cranfield, Claimants)* [1983] 2 All ER 945, [1983] 1 WLR 1008.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/C. PROCEDURE ON APPLICATION FOR AN INTERPLEADER OTHERWISE THAN UNDER EXECUTION/1639. Application for relief.

C. PROCEDURE ON APPLICATION FOR AN INTERPLEADER OTHERWISE THAN UNDER EXECUTION

1639. Application for relief.

Where the applicant for interpleader relief is a stakeholder¹ he must make application to the court in which the relevant claim² is pending against him or, if no claim is pending against him, in the court in which he might be sued³ by filing⁴ a witness statement or affidavit⁵ showing that he claims no interest in the subject matter in dispute other than for charges or costs⁶, that he does not collude with any of the interpleader claimants⁷, and that he is willing to pay or transfer the subject matter into court or dispose of it as the court may direct⁸. He must also file as many copies of the witness statement or affidavit as there are interpleader claimants⁹.

Where the applicant seeks relief in a pending claim in which he is a defendant¹⁰, the witness statement or affidavit and the required copies must be filed within 14 days after service on him of the claim form¹¹.

1 The distinction between different applications for interpleader relief is set out in CPR Sch 1 RSC Ord 17 r 1, where it is stated that interpleaders may be divided into two types. The first is where a sheriff seizes or intends to seize goods by way of execution and such goods are claimed by a person other than the judgment debtor; this is analogous to the application for interpleader relief in the county court under an execution. The second type comprises all other interpleader proceedings, which are generally known as stakeholder's interpleaders. See PARA 1585. For the purposes of CPR Sch 2 CCR Ord 33 Pt II (rr 6-11) (see the text and notes 2-11; and PARA 1640 et seq), the applicant is a person under a liability in respect of a debt or any money or goods who is, or expects to be, sued for or in respect of the debt, money or goods by two or more persons making adverse claims to them (the 'interpleader claimants'): see CPR Sch 2 CCR Ord 33 r 6(1).

2 The claim referred to in CPR Sch 2 CCR Ord 33 r 6(1); see note 1.

3 CPR Sch 2 CCR Ord 33 r 6(2).

4 As to the meaning of 'filing' see PARA 1832 note 8.

5 As to the meaning of 'witness statement' see PARA 751 note 1; and as to the meaning of 'affidavit' see PARA 540 note 5.

6 CPR Sch 2 CCR Ord 33 r 6(3)(a).

7 CPR Sch 2 CCR Ord 33 r 6(3)(b).

8 CPR Sch 2 CCR Ord 33 r 6(3)(c).

9 CPR Sch 2 CCR Ord 33 r 6(3).

10 As to the meaning of 'defendant' see PARA 18.

11 CPR Sch 2 CCR Ord 33 r 7(a). As to time limits generally see PARA 88 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/C. PROCEDURE ON APPLICATION FOR AN INTERPLEADER OTHERWISE THAN UNDER EXECUTION/1640. Relief in pending claim and otherwise.

1640. Relief in pending claim and otherwise.

On the filing of the applicant's witness statement or affidavit and the required copies¹, the procedure to be adopted depends on whether or not the applicant is a defendant² in proceedings already commenced.

Where the applicant is a defendant in a pending claim:

- 1210 (1) the return day of the application must be a day fixed for the pre-trial review of the claim including the interpleader proceedings and, if a day has already been fixed for the pre-trial review or hearing of the claim, the court must, if necessary, postpone it³;
- 1211 (2) the interpleader claimant⁴, the applicant, and the claimant in the claim must be given notice of the application, prepared by the court together with sufficient copies for service⁵;
- 1212 (3) the notice to the interpleader claimant must be served on him together with a copy of the applicant's witness statement or affidavit⁶ and of the claim form and particulars of claim in the claim⁷, not less than 21 days before the return day in the same manner as an interpleader notice issued on a district judge's application⁸;
- 1213 (4) the notices to the applicant and the claimant must be sent to them by the court and the notice to the claimant must be accompanied by a copy of the applicant's witness statement or affidavit⁹.

Where the applicant is not a defendant in a pending claim, the court must enter the proceedings in the records of the court¹⁰ and fix a day for a pre-trial review, or if the court so directs, a day for the hearing of the proceedings, and must prepare and issue an interpleader notice, together with sufficient copies for service¹¹. The notice, together with a copy of the witness statement or affidavit¹², must be served on each of the claimants not less than one day before the return day in the same manner as an interpleader notice issued on a district judge's application¹³. The court must deliver or send a notice of issue to the applicant¹⁴.

Before or after the court officer¹⁵ proceeds, the district judge may direct the applicant to bring the subject matter of the proceedings into court, or to dispose of it in such manner as the district judge thinks fit, to abide the order of the court¹⁶.

1 See PARA 1639.

2 As to the meaning of 'defendant' see PARA 18.

3 CPR Sch 2 CCR Ord 33 r 7(b).

4 As to the meaning of 'interpleader claimant' for these purposes see PARA 1639 note 1.

5 CPR Sch 2 CCR Ord 33 r 7(c). As to the meaning of 'service' see PARA 138 note 2.

6 I.e. the witness statement or affidavit filed under CRP Sch 2 CCR Ord 33 r 6(3): see PARA 1639. As to the meaning of 'witness statement' see PARA 751 note 1; and as to the meaning of 'affidavit' see PARA 540 note 5.

7 As to particulars of claim see PARA 123.

8 See CPR Sch 2 CCR Ord 33 r 7(d). As to the manner of service of a such a notice see CPR Sch 2 CCR Ord 33 r 4(3); and PARA 1636 note 7. As to district judges see PARA 60.

9 CPR Sch 2 CCR Ord 33 r 7(e).

10 CPR Sch 2 CCR Ord 33 r 8(a).

11 CPR Sch 2 CCR Ord 33 r 8(b).

12 See note 6.

13 CPR Sch 2 CCR Ord 33 r 8(c). See note 8.

14 CPR Sch 2 CCR Ord 33 r 8(d).

15 As to the meaning of 'court officer' see PARA 49 note 3.

16 CPR Sch 2 CCR Ord 33 r 9.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/C. PROCEDURE ON APPLICATION FOR AN INTERPLEADER OTHERWISE THAN UNDER EXECUTION/1641. Reply by the interpleader claimant.

1641. Reply by the interpleader claimant.

An interpleader claimant¹ must, within 14 days after service on him of the notice (if a claim is pending)², or of the interpleader notice (where no claim is pending)³, file⁴ either (1) a notice that he makes no interpleader claim; or (2) particulars stating the grounds of his interpleader claim to the subject matter⁵, together with sufficient copies for service⁶.

The court must send a copy of any notice or particulars so filed to each of the other parties⁷.

The court may, if it thinks fit, hear the proceedings even if no notice or particulars have been filed⁸.

1 As to the meaning of 'interpleader claimant' for these purposes see PARA 1639 note 1.

2 See PARA 1640 text and notes 2-9; and CPR Sch 2 CCR Ord 33 r 7.

3 See PARA 1640 text and notes 10-12; and CPR Sch 2 CCR Ord 33 r 8.

4 As to the meaning of 'filing' see PARA 1832 note 8.

5 CPR Sch 2 CCR Ord 33 r 10(1)(a), (b).

6 CPR Sch 2 CCR Ord 33 r 10(1). As to the meaning of 'service' see PARA 138 note 2.

7 CPR Sch 2 CCR Ord 33 r 10(2).

8 CPR Sch 2 CCR Ord 33 r 10(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/D. HEARING OF INTERPLEADER PROCEEDINGS/1642. Adjudication of claim on district judge's application.

D. HEARING OF INTERPLEADER PROCEEDINGS

1642. Adjudication of claim on district judge's application.

On the hearing of interpleader proceedings on the district judge's application, the judge must adjudicate upon the interpleader claim and must also adjudicate between the parties or between either of them and the district judge¹ upon any claim to damages arising or capable of arising out of the execution of the warrant by the district judge. The judge makes such order in respect of any such claim and the costs of the proceedings as he thinks fit².

Damages ought to be awarded against the district judge where the interpleader claimant can prove substantial loss or injury³, although if a claim for damages is not made during the proceedings it cannot be made afterwards⁴.

1 As to district judges see PARA 60.

2 See the County Courts Act 1984 s 101(3) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3)).

3 See eg *London, Chatham and Dover Rly Co v Cable* (1899) 80 LT 119, DC, where two gas stoves of the value of £18 18s (£18.90) exempt from execution were seized and sold for £1 14s (£1.70); *Jelks v Hayward*[1905] 2 KB 460, where furniture let out on hire was seized and sold by the high bailiff, who was held liable for damages for conversion. See also *De Coppett v Barnett* (1901) 17 TLR 273, CA, and cf *Cave v Cape*[1954] 1 QB 367, [1954] 1 All ER 428, CA; and PARA 1615.

4 *West v Automatic Salesman Ltd*[1937] 2 KB 398, [1937] 2 All ER 706, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/D. HEARING OF INTERPLEADER PROCEEDINGS/1643. Adjudication of claims in an application for interpleader relief otherwise than under execution.

1643. Adjudication of claims in an application for interpleader relief otherwise than under execution.

When the application for interpleader proceeds either in¹, or otherwise than in², a pending claim, then where the interpleader claimant³ does not appear at the pre-trial review or at the hearing of the interpleader proceedings, or fails or refuses to comply with an order made in the proceedings, the court may make an order barring his interpleader claim⁴.

If the applicant is a defendant⁵ in a pending claim⁶, and the claimant fails to appear at the pre-trial review or the hearing of the interpleader proceedings, the claim, including the interpleader proceedings, may be struck out⁷.

In any other case, where a day is fixed for the hearing of the interpleader proceedings, the court must hear and determine the proceedings and give judgment finally determining the rights and claims of the parties⁸.

Where the court makes an order barring the interpleader claim of an interpleader claimant, the order must declare the interpleader claimant, and all persons claiming under him, forever barred from prosecuting his interpleader claim against the applicant and all persons claiming under him⁹. Such an order will not, however, affect the rights of the interpleader claimants as between themselves except where a claimant has filed a notice¹⁰ that he makes no interpleader claim¹¹.

1 See CPR Sch 2 CCR Ord 33 r 7; and PARA 1640 the text and notes 2-9.

2 See CPR Sch 2 CCR Ord 33 r 8; and PARA 1640 the text and notes 10-12.

3 As to the meaning of 'interpleader claimant' for these purposes see PARA 1639 note 1.

4 CPR Sch 2 CCR Ord 33 r 11(1).

5 As to the meaning of 'defendant' see PARA 18.

6 See CPR Sch 2 CCR Ord 33 r 7(a); and PARA 1640.

7 CPR Sch 2 CCR Ord 33 r 11(2). As to the meaning of 'striking out' see PARA 218 note 2.

8 CPR Sch 2 CCR Ord 33 r 11(3).

9 CPR Sch 2 CCR Ord 33 r 11(4).

10 Ie under CPR Sch 2 CCR Ord 33 r 10(1)(a): see PARA 1641. As to the meaning of 'filing' see PARA 1832 note 8.

11 CPR Sch 2 CCR Ord 33 r 11(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/D. HEARING OF INTERPLEADER PROCEEDINGS/1644. Adjudication of claim in proceedings transferred from the High Court.

1644. Adjudication of claim in proceedings transferred from the High Court.

Where interpleader proceedings are ordered to be transferred from the High Court to the county court under an execution¹, a special procedure applies².

Notice of the hearing or pre-trial review of the proceedings must be given by the court officer³ to the sheriff⁴, as well as to every other party to the proceedings⁵. Within eight days of receipt of that notice, the interpleader claimant must file in triplicate particulars of any goods alleged to be his property and the grounds of his interpleader claim⁶. The court officer must send a copy of these particulars to the execution creditor and to the sheriff. The judge may hear the proceedings or the district judge may proceed with the pre-trial review, if he thinks fit, notwithstanding that the particulars have not been filed⁷.

On any day fixed for the pre-trial review of the proceedings, or for the hearing of any application by the sheriff or other party for directions, the court may order the sheriff (1) to postpone the sale of the goods seized; or (2) to remain in possession of such goods until the hearing of the proceedings; or (3) to hand over possession of such goods to the district judge⁸. Where a direction is given under head (3) above, the district judge will be allowed his reasonable charges for keeping possession of the goods, not exceeding those charges which might be allowed to the sheriff, and, if the district judge is directed to sell the goods, such charges for the sale as would be allowed under an execution issued by the county court⁹.

No order made in the interpleader proceedings transferred from the High Court will prejudice or affect the rights of the sheriff to any proper charges and the judge may make such order with respect to those charges as may be just¹⁰.

The order made at the hearing of the proceedings will direct how any money in the hands of the sheriff is to be disposed of¹¹.

Subject to any directions in the order of the High Court, damages may be claimed against the execution creditor in the same manner as in interpleader proceedings commenced in a county court¹².

1 le under the County Courts Act 1984 s 40: see PARA 69.

2 CPR Sch 2 CCR Ord 16 r 7(1). See the text and notes 3-11.

3 As to the meaning of 'court officer' see PARA 49 note 3.

4 In CPR Sch 2 CCR Ord 16 r 7, references to the sheriff are to be interpreted as including references to an individual authorised to act as an enforcement officer under the Courts Act 2003: CPR Sch 2 CCR Ord 16 r 7(1A). As to enforcement officers see PARA 1258.

5 CPR Sch 2 CCR Ord 16 r 7(2).

6 CPR Sch 2 CCR Ord 16 r 7(3). As to time limits generally see PARA 88 et seq. As to the meaning of 'filing' see PARA 1832 note 8.

7 CPR Sch 2 CCR Ord 16 r 7(3).

8 CPR Sch 2 CCR Ord 16 r 7(5)(a)-(c).

9 CPR Sch 2 CCR Ord 16 r 7(5).

10 CPR Sch 2 CCR Ord 16 r 7(6). The charges referred to in this note and in text to note 8 are ultimately to be borne in such manner as the judge directs: CPR Sch 2 CCR Ord 16 r 7(7).

11 CPR Sch 2 CCR Ord 16 r 7(8); cf *Discount Banking Co of England and Wales v Lambarde* [1893] 2 QB 329, CA. As to the costs of the proceedings see PARA 1645.

12 CPR Sch 2 CCR Ord 16 r 7(4); and see PARA 1630.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/D. HEARING OF INTERPLEADER PROCEEDINGS/1645. Costs.

1645. Costs.

In general costs in interpleader proceedings in a county court are in the discretion of the judge¹. Subject to any order of the High Court, the costs of the interpleader proceedings transferred from the High Court, both before and after the transfer to the county court, are in the discretion of the judge in the lower court². There is no power to order the sheriff to pay the costs of the interpleader proceedings which have been transferred from the High Court to the county court³.

1 As to costs generally see CPR Pts 43-48; and PARA 1729 et seq.

2 See the County Courts Act 1984 s 45(1) (amended by the Courts and Legal Services Act 1990 s 125(7), Sch 20); and **COURTS**.

3 *Temple v Temple* (1894) 63 LJQB 556.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(7) INTERPLEADER/(iii) Interpleader in County Courts/D. HEARING OF INTERPLEADER PROCEEDINGS/1646. Appeals.

1646. Appeals.

If any party to interpleader proceedings in a county court is dissatisfied with the determination of the judge, he may appeal from it in such manner and subject to such conditions as may be provided¹.

¹ See the County Courts Act 1984 s 77(1); and PARA 1679.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(8) EUROPEAN ORDER FOR PAYMENT PROCEDURE/1647. In general.

(8) EUROPEAN ORDER FOR PAYMENT PROCEDURE

1647. In general.

Section I of Part 78 of the Civil Procedure Rules¹ applies to applications for European orders for payment² and other related proceedings under the EOP Regulation³ creating a European order for payment procedure⁴. The EOP Regulation requires that the European order for payment procedure be established for the collection of pecuniary claims for a specific amount that have fallen due at the time when the application for a European order for payment is submitted⁵. The EOP Regulation applies to civil and commercial matters in cross-border cases⁶, whatever the nature of the court or tribunal⁷. It does not extend, in particular, to revenue, customs or administrative matters or the liability of the state for acts and omissions in the exercise of state authority ('acta jure imperii')⁸. It does not apply to (1) rights in property arising out of a matrimonial relationship, wills and succession; (2) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (3) social security; (4) claims arising from non-contractual obligations, unless they have been the subject of an agreement between the parties or there has been an admission of debt or they relate to liquidated debts arising from joint ownership of property⁹.

¹ I.e. CPR 78.2-78.11, in force from 12 December 2008: see the Civil Procedure (Amendment) Rules 2008, SI 2008/2178, r 1(3)(a).

² 'European order for payment' means an order for payment made by a court under the EOP Regulation art 12(1) (see PARA 1649); and 'EOP' means a European order for payment: CPR 78.2(2)(f), (c).

³ I.e. European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) creating a European order for payment procedure: CPR 78.2(2)(a). The purpose of the regulation is (1) to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims by creating a European order for payment procedure; and (2) to permit the free circulation of European orders for payment throughout the member states by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the member state of enforcement prior to recognition and enforcement: see art 1(1). The regulation does not prevent a claimant from pursuing a claim within the meaning of art 4 (see the text to note 5) by making use of another procedure available under the law of a member state or under Community law: art 1(2). The term 'member state' means member states of the European Union with the exception of Denmark: art 2(3); CPR 78.2(2)(g).

⁴ CPR 78.1(1), 78.2(1). See also *Practice Direction--European order for payment and European small claims procedures* PD 78. EOP applications are primarily governed by the EOP Regulation. Where the EOP Regulation is silent, the Civil Procedure Rules apply with necessary modifications: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 1.1.

⁵ European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 4. All procedural issues not specifically dealt with in the regulation must be governed by national law: art 26. Member states were required by 12 June 2008 to communicate to the Commission (1) which courts have jurisdiction to issue a European order for payment; (2) the review procedure and the competent courts for the purposes of the application of art 20 (see note 43); (3) the means of communication accepted for the purposes of the European order for payment procedure and available to the courts; (4) languages accepted pursuant to art 21(2)(b) (see PARA 1650 note 13); art 29.

⁶ For the purposes of European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11), a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a member state other than the member state of the court seised: art 3(1). Domicile is to be determined in accordance with EC Council Regulation 44/2001 (OJ L12, 16.1.2001, p 1) on jurisdiction and the recognition and enforcement of

judgments in civil and commercial matters, arts 59, 60 (see **CONFLICT OF LAWS**): European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 3(2). The relevant moment for determining whether there is a cross-border case is the time when the application for a European order for payment is submitted in accordance with European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11): art 3(3).

7 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 2(1). 'Court' means any authority in a member state with competence regarding European orders for payment or any other related matters: European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 5(3). For the purposes of applying that regulation, jurisdiction is to be determined in accordance with the relevant rules of Community law, in particular EC Council Regulation 44/2001 (OJ L12, 16.1.2001, p 1): European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 6(1). However, if the claim relates to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, and if the defendant is the consumer, only the court in the member state in which the defendant is domiciled, within the meaning of EC Council Regulation 44/2001 (OJ L12, 16.1.2001, p 1) art 59, has jurisdiction: European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 6(2).

8 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 2(1).

9 European Parliament and Council Regulation 1896/2006 (OJ L 399, 30.12.2006, p 11) art 2(2).

UPDATE

1647 In general

NOTE 5--The county court has jurisdiction in relation to the EOP Regulation: High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(1)(q) (added by SI 2008/2934).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(8) EUROPEAN ORDER FOR PAYMENT PROCEDURE/1648. Application for a European order for payment; defendant's response.

1648. Application for a European order for payment; defendant's response.

An application for a European order for payment¹ must be made using the specified standard form². The application must state:

- 1214 (1) the names and addresses of the parties, and, where applicable, their representatives, and of the court to which the application is made;
- 1215 (2) the amount of the claim, including the principal and, where applicable, interest, contractual penalties and costs;
- 1216 (3) if interest on the claim is demanded, the interest rate and the period of time for which that interest is demanded unless statutory interest is automatically added to the principal under the law of the member state of origin;
- 1217 (4) the cause of the action, including a description of the circumstances invoked as the basis of the claim and, where applicable, of the interest demanded;
- 1218 (5) a description of evidence supporting the claim;
- 1219 (6) the grounds for jurisdiction; and
- 1220 (7) the cross-border nature of the case³.

In the application, the claimant must declare that the information provided is true to the best of his knowledge and belief and must acknowledge that any deliberate false statement could lead to appropriate penalties under the law of the member state of origin⁴.

The defendant may lodge a statement of opposition to the European order for payment with the court of origin using the standard form⁵, which must be supplied to him together with the European order for payment⁶. The statement of opposition must be sent within 30 days of service of the order on the defendant⁷. The defendant must indicate in the statement of opposition that he contests the claim, without having to specify the reasons for this⁸. At any stage before a statement of opposition⁹ is filed, the claimant may notify the court¹⁰ that the claimant no longer wishes to proceed with the claim¹¹. Where the claimant so notifies the court, the court will notify the defendant that the application has been withdrawn and no order as to costs will be made¹².

Representation by a lawyer or another legal professional is not mandatory for the claimant in respect of the application for a European order for payment or for the defendant in respect of the statement of opposition to a European order for payment¹³.

The claimant may indicate¹⁴ to the court that he opposes a transfer to ordinary civil proceedings¹⁵ in the event of opposition by the defendant. This does not prevent the claimant from informing the court thereof subsequently, but in any event before the order is issued¹⁶. Where a statement of opposition is filed and the claimant has not opposed the transfer of the matter, the EOP application will be treated as if it had been started as a claim under Part 7 of the Civil Procedure Rules¹⁷ and the EOP application form A will be treated as a Part 7 claim form including particulars of claim, and thereafter, the Civil Procedure Rules apply with necessary modifications¹⁸. When the court notifies the claimant of the transfer to ordinary civil proceedings¹⁹ the court will also (a) notify the claimant (i) that the EOP application form A is now treated as a Part 7 claim form including particulars of claim; and (ii) of the time within which the defendant must respond²⁰; and (b) notify the defendant (i) that a statement of opposition has been received; (ii) that the application will not continue under Part 78 of the

Civil Procedure Rules; (iii) that the application has been transferred²¹; (iv) that the EOP application form A is now treated as a Part 7 claim form including particulars of claim; and (v) of the time within which the defendant must respond²².

The defendant must file a defence within 30 days of the date of the notice issued by the court²³ as above²⁴. If the defendant wishes to dispute the court's jurisdiction, the defendant must instead file an acknowledgment of service²⁵ within the period specified above and make an application disputing the court's jurisdiction²⁶ within the period specified²⁷ for such an application²⁸.

If the defendant fails to file an acknowledgment of service within the period specified and does not within that period file a defence²⁹ or file an admission³⁰, the claimant may obtain default judgment if Part 12 of the Civil Procedure Rules³¹ allows it³².

After the expiry of the time limit for sending a statement of opposition³³, the defendant is entitled to apply for a review of the European order for payment before the competent court in the member state of origin where either the order for payment was served by one of the methods provided for³⁴ and service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part, or the defendant was prevented from objecting to the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part, provided in either case that he acts promptly³⁵. After expiry of the time limit for sending a statement of opposition the defendant is also entitled to apply for a review of the European order for payment before the competent court in the member state of origin where the order for payment was clearly wrongly issued, having regard to the requirements laid down in the EOP Regulation, or due to other exceptional circumstances³⁶. If the court rejects the defendant's application on the basis that none of the grounds for review referred to above applies, the European order for payment will remain in force³⁷. If the court decides that the review is justified for one of the reasons laid down above, the European order for payment will be null and void³⁸.

The combined court fees³⁹ of a European order for payment procedure and of the ordinary civil proceedings that ensue in the event of a statement of opposition to a European order for payment in a member state must not exceed the court fees of ordinary civil proceedings without a preceding European order for payment procedure in that member state⁴⁰.

1 See PARA 1647.

2 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 7(1). The specified form is European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) Annex I Form A. An EOP application form A must be completed in English or accompanied by a translation into English and filed at court in person or by post: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 2.1. As to the meaning of 'filing' see PARA 1832 note 8. An EOP application made to the High Court will be assigned to the Queen's Bench Division, but that will not prevent the application being transferred where appropriate: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 2.2.

3 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 7(2). The application must be submitted in paper form or by any other means of communication, including electronic, accepted by the member state of origin and available to the court of origin: art 7(5). As to signature and electronic signature of the application see art 7(6). 'Court of origin' means the court which issues a European order for payment: art 5(4); CPR 78.2(2)(b). 'Member state of origin' means the member state in which a European order for payment is issued: art 5(1); CPR 78.2(2)(h).

4 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 7(3). Where a declaration provided by the claimant under the EOP Regulation art 7(3) contains any deliberate false statement, CPR 32.14 (see PARA 988) applies as if the EOP application form A were verified by a statement of truth: CPR 78.3. 'EOP application form A' means the Application for a European order for payment form A, annexed to the EOP Regulation at Annex I to that Regulation CPR 78.2(2)(e).

5 See European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) Annex I Form VI.

- 6 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 16(1). The statement of opposition must be submitted in paper form or by any other means of communication, including electronic, accepted by the member state of origin and available to the court of origin: art 16(4). As to signature and electronic signature of the statement of opposition see art 16(5). Documents other than the EOP application form A that are filed at or sent to the court in the EOP proceedings, including statements of opposition, may be filed, in addition to by post or in person, by fax or other electronic means where the facilities are available: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 3.
- 7 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 16(2).
- 8 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 16(3).
- 9 'Statement of opposition' means a statement of opposition filed in accordance with European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 16: CPR 78.2(2)(i).
- 10 As to the meaning of 'court' in the Civil Procedure Rules see PARA 22.
- 11 CPR 78.4(1).
- 12 CPR 78.4(2).
- 13 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 24.
- 14 Ie in an Appendix to the application.
- 15 Ie within the meaning of European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 17. If a statement of opposition is entered within the time limit laid down in art 16(2) (see the text to note 15), the proceedings will continue before the competent courts of the member state of origin in accordance with the rules of ordinary civil procedure unless the claimant has explicitly requested that the proceedings be terminated in that event: art 17(1). Where the claimant has pursued his claim through the European order for payment procedure, nothing under national law is to prejudice his position in subsequent ordinary civil proceedings: art 17(1). The transfer to ordinary civil proceedings is to be governed by the law of the member state of origin: art 17(2). The claimant must be informed whether the defendant has lodged a statement of opposition and of any transfer to ordinary civil proceedings: art 17(3).
- 16 See European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 7(4).
- 17 As to CPR Pt 7 see PARA 116 et seq. 'EOP application' means an application for an EOP: CPR 78.2(2)(d).
- 18 CPR 78.5(1). The CPR are to apply subject to CPR 78.4 and CPR 78.6 and 78.7: CPR 78.5(1).
- 19 Ie in accordance with European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 17(3).
- 20 Ie under CPR 78.6.
- 21 Ie under European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 17.
- 22 CPR 78.5(2).
- 23 Ie under CPR 78.5(2)(b).
- 24 CPR 78.6(1).
- 25 As to acknowledgment of service see PARAS 184-186.
- 26 Ie under CPR Pt 11: see PARA 206.
- 27 Ie specified in CPR Pt 11.
- 28 CPR 78.6(2). Where CPR 78.6 applies, the following rules do not apply: CPR 10.1(3) (see PARA 184), CPR 10.3 (see PARA 186) and CPR 15.4(1) (see PARA 201): CPR 78.6(3).
- 29 Ie in accordance with CPR Pt 15 (except CPR 15.4(1)) (see PARA 201) and CPR 78.6(1).
- 30 Ie in accordance with CPR Pt 14: see PARA 187 et seq.
- 31 Ie CPR Pt 12: see PARA 506 et seq.

- 32 CPR 78.7(1). Where CPR 78.7 applies, CPR 10.2 (see PARA 186) does not apply: CPR 78.7(2).
- 33 Ie under European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 16(2): see the text to note 15.
- 34 Ie in European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 14.
- 35 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 20(1). An application for a review under art 20 must be made in accordance with CPR Pt 23 (see PARA 303 et seq): CPR 78.8. Where an application is made under CPR Pt 78 Section I, there will not normally be an oral hearing: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 6.1. Where an oral hearing is to be held, it will normally take place by telephone or video conference: para 6.2.
- 36 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 20(2).
- 37 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 20(3) para 1.
- 38 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 20(3) para 3.
- 39 For the purposes of European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11), court fees comprise fees and charges to be paid to the court, the amount of which is fixed in accordance with national law: art 25(2).
- 40 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 25(1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(8) EUROPEAN ORDER FOR PAYMENT PROCEDURE/1649. Making of a European order for payment.

1649. Making of a European order for payment.

The court seised of an application for a European order for payment¹ must examine, as soon as possible and on the basis of the application form, whether the requirements² are met and whether the claim appears to be founded³. If the requirements as to the application⁴ are not met and unless the claim is clearly unfounded or the application is inadmissible, the court must give the claimant the opportunity to complete or rectify the application, using the standard form⁵. Where the court requests the claimant to complete or rectify the application, it must specify a time limit it deems appropriate in the circumstances; the court may at its discretion extend that time limit⁶.

If the requirements referred to above are met for only part of the claim, the court must inform the claimant to that effect, using the standard form⁷. The claimant must be invited to accept or refuse a proposal for a European order for payment for the amount specified by the court and must be informed of the consequences of his decision⁸. The claimant must reply by returning the standard form sent by the court within a time limit specified⁹ by the court¹⁰. If the claimant accepts the court's proposal, the court must issue a European order for payment¹¹ for that part of the claim accepted by the claimant¹². The consequences with respect to the remaining part of the initial claim are governed by national law¹³. If the claimant fails to send his reply within the time limit specified by the court or refuses the court's proposal, the court must reject the application for a European order for payment in its entirety¹⁴.

The court must reject the application if (1) the requirements¹⁵ are not met; or (2) the claim is clearly unfounded; or (3) the claimant fails to send his reply within the time limit specified by the court¹⁶; or (4) the claimant fails to send his reply within the time limit specified by the court or refuses the court's proposal¹⁷ for an order¹⁸. The claimant must be informed of the grounds for the rejection by means of the standard form¹⁹. There is no right of appeal against the rejection of the application²⁰. The rejection of the application does not prevent the claimant from pursuing the claim by means of a new application for a European order for payment or of any other procedure available under the law of a member state²¹.

If the requirements are met, the court must issue, as soon as possible and normally within 30 days of the lodging of the application, a European order for payment using the standard form²². The European order for payment must be issued together with a copy of the application form²³. In the European order for payment, the defendant must be advised of his options to (a) pay the amount indicated in the order to the claimant; or (b) oppose the order by lodging with the court of origin a statement of opposition, to be sent within 30 days of service of the order on him²⁴. In the European order for payment, the defendant must also be informed that (i) the order was issued solely on the basis of the information which was provided by the claimant and was not verified by the court; (ii) the order will become enforceable unless a statement of opposition has been lodged with the court²⁵; (iii) where a statement of opposition is lodged, the proceedings will continue before the competent courts of the member state of origin²⁶ in accordance with the rules of ordinary civil procedure unless the claimant has explicitly requested that the proceedings be terminated in that event²⁷. The court must ensure that the order is served on the defendant in accordance with national law by a method that meets the prescribed²⁸ minimum standards²⁹. The order must be served on the defendant or on a representative of the defendant, either with or without proof of receipt³⁰.

- 1 As to applications see PARA 1647.
- 2 Ie the requirements set out in European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) arts 2, 3, 4, 6 and 7: see PARA 1647.
- 3 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 8. This examination may take the form of an automated procedure: art 8.
- 4 Ie set out in European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 7.
- 5 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 9(1). The court must use standard form B as set out in Annex II: art 9(1).
- 6 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 9(2). The time specified for the purposes of art 9 will normally be within 30 days of the date of the request by the court to complete or rectify the EOP application form A (using form B annexed to the EOP Regulation): *Practice Direction--European order for payment and European small claims procedures* PD 78 para 5.2.
- 7 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 10(1). The court must use standard form C as set out in Annex III: art 10(1).
- 8 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 10(1).
- 9 Ie in accordance with European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 9(2).
- 10 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 10(1).
- 11 Ie in accordance with European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 12.
- 12 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 10(2).
- 13 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 10(2).
- 14 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 10(3).
- 15 See note 2.
- 16 Ie under European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 9(2).
- 17 Ie in accordance with European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 10.
- 18 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 11(1).
- 19 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 11(1). The court must use standard form D as set out in Annex IV: art 11(1).
- 20 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 11(2).
- 21 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 11(3). As to the meaning of 'member state' see PARA 1647 note 3.
- 22 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 12(1). The court must use standard form E as set out in Annex V: art 12(1). The 30-day period must not include the time taken by the claimant to complete, rectify or modify the application: art 12(1).
- 23 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 12(2). It must not comprise the information provided by the claimant in Appendices 1 and 2 to form A: art 12(2).
- 24 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 12(3). As to the meaning of 'court of origin' see PARA 1648 note 3.
- 25 Ie in accordance with European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 16.
- 26 As to the meaning of 'member state of origin' see PARA 1648 note 3.

27 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 12(4).

28 le the standards laid down in European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) arts 13-15.

29 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 12(5).

30 See European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) arts 13-15. The regulation does not affect the application of EC Council Regulation 1348/2000 (OJ L160, 30.06.2000, p 37) (repealed: see now EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79)) on the service in the member states of judicial and extrajudicial documents in civil and commercial matters: European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 27.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(8) EUROPEAN ORDER FOR PAYMENT PROCEDURE/1650. Enforcement of a European order for payment.

1650. Enforcement of a European order for payment.

If within the specified time limit¹, taking into account an appropriate period of time to allow a statement to arrive, no statement of opposition² has been lodged with the court of origin³, the court of origin must without delay declare the European order for payment⁴ enforceable using the standard form⁵. The court must verify the date of service⁶. Without prejudice to this, the formal requirements for enforceability are to be governed by the law of the member state of origin⁷, as are enforcement procedures⁸. The court must send the enforceable European order for payment to the claimant⁹. A European order for payment which has become enforceable in the member state of origin must be recognised and enforced in the other member states¹⁰ without the need for a declaration of enforceability and without any possibility of opposing its recognition¹¹.

A European order for payment which has become enforceable must be enforced under the same conditions as an enforceable decision issued in the member state of enforcement¹². For enforcement in another member state, the claimant must provide the competent enforcement authorities of that member state with (1) a copy of the European order for payment, as declared enforceable by the court of origin, which satisfies the conditions necessary to establish its authenticity; and (2) where necessary, a translation of the European order for payment into the official language of the member state of enforcement or, if there are several official languages in that member state, the official language or one of the official languages of court proceedings of the place where enforcement is sought, in conformity with the law of that member state, or into another language that the member state of enforcement has indicated it can accept¹³. The translation must be certified by a person qualified to do so in one of the member states¹⁴.

No security, bond or deposit, however described, may be required of a claimant who in one member state applies for enforcement of a European order for payment issued in another member state on the ground that he is a foreign national or that he is not domiciled or resident in the member state of enforcement¹⁵.

A person seeking to enforce an EOP¹⁶ in England and Wales must file¹⁷ at the court in which enforcement proceedings are to be brought the documents specified above¹⁸. Where a person applies to enforce an EOP expressed in a foreign currency, the application must contain a certificate of the sterling equivalent of the judgment sum at the close of business on the date nearest preceding the date of the application¹⁹.

Enforcement must, upon application by the defendant, be refused by the competent court in the member state of enforcement if the European order for payment is irreconcilable with an earlier decision or order previously given in any member state or in a third country, provided that (a) the earlier decision or order involved the same cause of action between the same parties; and (b) the earlier decision or order fulfils the conditions necessary for its recognition in the member state of enforcement; and (c) the irreconcilability could not have been raised as an objection in the court proceedings in the member state of origin²⁰. Enforcement must, upon application, also be refused if and to the extent that the defendant has paid the claimant the amount awarded in the European order for payment²¹. Under no circumstances may the European order for payment be reviewed as to its substance in the member state of enforcement²².

Where the defendant has applied for a review²³, the competent court in the member state of enforcement may, upon application by the defendant (i) limit the enforcement proceedings to protective measures; or (ii) make enforcement conditional on the provision of such security as it shall determine; or (iii) under exceptional circumstances, stay the enforcement proceedings²⁴.

1 le laid down in European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 16(2): see PARA 1648 text to note 7.

2 As to statements of opposition see PARA 1648 text and notes 6-15.

3 As to the meaning of 'court of origin' see PARA 1648 note 3.

4 As to the European order for payment see PARA 1649.

5 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 18(1). The court must use the standard form G as set out in Annex VII: art 18(1).

6 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 18(1).

7 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 18(2). As to the meaning of 'member state of origin' see PARA 1648 note 3.

8 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 21(1).

9 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 18(3).

10 As to the meaning of 'member state' see PARA 1647 note 3.

11 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 19. If judgment is set aside in the court of origin, the judgment creditor must notify all courts in which enforcement proceedings are pending in England and Wales under the EOP as soon as reasonably practicable after the order is served on the judgment creditor. Notification may be by any means available including fax, e-mail, post or telephone: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 7.3.

12 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 21(1).

13 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 21(2). Each member state may indicate the official language or languages of the institutions of the European Union other than its own which it can accept for the European order for payment: art 21(2).

14 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 21(2). Except where the EOP Regulation otherwise requires, every translation required by CPR Pt 78 or such regulation must be accompanied by a statement by the person making it that it is a correct translation. The statement must include that person's name, address and qualifications for making the translation: CPR 78.1(4).

15 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 21(3).

16 As to the meaning of 'EOP' see PARA 1647 note 2.

17 As to the meaning of 'filing' see PARA 1832 note 8.

18 CPR 78.9(1). When an EOP is filed at the High Court or county court in which enforcement proceedings are to be brought, it will be assigned a case number: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 7.1. A copy of a document will satisfy the conditions necessary to establish its authenticity if it is an official copy of the court of origin: para 7.2.

19 CPR 78.9(2).

20 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 22(1). An application under art 22 that the court should refuse to enforce an EOP must be made in accordance with CPR Pt 23 (see PARA 303 et seq; and PARA 1648 note 35) to the court in which the EOP is being enforced: CPR 78.10(1). The judgment debtor must, as soon as practicable, serve copies of any order made under European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 22 on (1) all other parties to the proceedings and any other person affected by the order (the 'affected persons'); and (2) any court in which enforcement proceedings of the EOP are pending in England and Wales (the 'relevant courts'); CPR 78.10(2). Upon service of the order on the affected persons, all enforcement proceedings of the EOP in the relevant

courts will cease: CPR 78.10(3). An application must be accompanied by an official copy of the earlier judgment, any other documents relied upon and any translations required by the EOP Regulation: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 8.1. Where the applicant relies on the EOP Regulation art 22(1), the application must be supported by written evidence showing (1) why the earlier judgment is irreconcilable with the judgment which the claimant is seeking to enforce; and (2) why the irreconcilability was not, and could not have been, raised as an objection in the proceedings in the court of origin: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 8.2.

21 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 22(2). Where the applicant relies on art 22(2), the application must be supported by written evidence of the extent to which the defendant has paid the claimant the amount awarded in the EOP: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 8.3.

22 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 22(3).

23 In accordance with European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 20.

24 European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 23. Where the defendant has sought a review and also applies for a stay of or limitation on enforcement in accordance with European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 23, such application must be made in accordance with CPR Pt 23 (see PARA 303 et seq; and PARA 1648 note 35) to the court in which the EOP is being enforced: CPR 78.11(1). The defendant must, as soon as practicable, serve a copy of any order made under European Parliament and Council Regulation 1896/2006 (OJ L399, 30.12.2006, p 11) art 23 on (1) all other parties to the proceedings and any other person affected by the order; and (2) any court in which enforcement proceedings are pending in England and Wales, and the order will not have effect on any person until it has been served in accordance with this rule and they have received it: CPR 78.11(2). Unless the court orders otherwise, an application must be accompanied by evidence of the review application in the court of origin, including (a) the review application or a copy of the review application certified by an appropriate officer of the court of origin; and (b) where that document is not in English, a translation of it into English: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 9.1. The written evidence in support of the application must state (i) that a review application has been brought in the member state of origin; (ii) the nature of that review application; and (iii) the date on which the review application was filed, the stage the application has reached and the date by which it is believed that the application will be determined: para 9.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(9) EUROPEAN SMALL CLAIMS PROCEDURE/1651. European small claims procedure.

(9) EUROPEAN SMALL CLAIMS PROCEDURE

1651. European small claims procedure.

A European procedure for small claims (referred to in this and the following paragraphs as the 'European small claims procedure'), intended to simplify and speed up litigation concerning small claims in cross-border cases¹, and to reduce costs, has been established². The European small claims procedure is required to be available to litigants as an alternative to the procedures existing under the laws of the member states³. The procedure applies, in cross-border cases, to civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed EUR 2,000 at the time when the claim form is received by the court or tribunal with jurisdiction, excluding all interest, expenses and disbursements⁴. It does not extend, in particular, to revenue, customs or administrative matters or to the liability of the state for acts and omissions in the exercise of state authority ('acta jure imperii')⁵. Nor does it apply to matters concerning (1) the status or legal capacity of natural persons; (2) rights in property arising out of a matrimonial relationship, maintenance obligations, wills and succession; (3) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (4) social security; (5) arbitration; (6) employment law; (7) tenancies of immovable property, with the exception of actions on monetary claims; or (8) violations of privacy and of rights relating to personality, including defamation⁶.

Section II of Part 78 of the Civil Procedure Rules⁷ makes provision for the European small claims procedure in England and Wales⁸. European small claims procedure ('ESCP') claims are treated as if they were allocated to the small claims track⁹.

1 For the purposes of European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) establishing a European small claims procedure, a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a member state other than the member state of the court or tribunal seised: art 3(1). Domicile is to be determined in accordance with EC Council Regulation 44/2001 (OJ L12, 16.1.2001, p 1) arts 59, 60 (see **CONFLICT OF LAWS**): European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 3(2). The relevant moment for determining whether there is a cross-border case is the date on which the claim form is received by the court or tribunal with jurisdiction: art 3(3). 'Member state' means member states of the European Union with the exception of Denmark: art 2(3); CPR 78.12(2)(g).

2 See European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 1(1). The regulation also eliminates the intermediate proceedings necessary to enable recognition and enforcement, in other member states, of judgments given in one member state in the European small claims procedure: art 1(1). Subject to the provisions of the regulation, the European small claims procedure is to be governed by the procedural law of the member state in which the procedure is conducted: art 19.

3 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 1(1).

4 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 2(1).

5 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 2(1).

6 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 2(2).

7 Ie CPR 78.12-78.22, in force from 1 January 2009: see the Civil Procedure (Amendment) Rules 2008, SI 2008/2178, r 1(3)(b).

8 CPR 78.1(2), 78.12(1). Claims under the ESCP are primarily governed by the ESCP Regulation. Where the ESCP Regulation is silent, the Civil Procedure Rules apply with necessary modifications. In particular, CPR Pt 52 (see PARA 1657 et seq) applies to any appeals: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 10. Where the ESCP Regulation is silent on service, the Service Regulation and the Civil Procedure Rules apply as appropriate: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 15. 'ESCP' means the European small claims procedure established by the ESCP Regulation (European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1)): CPR 78.12(2)(a), (c). The 'Service Regulation' means EC Parliament and Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) on service (see PARA 157 et seq): CPR 78.1(3)(b).

9 CPR 78.14(1). As to the small claims track see PARA 274 et seq. CPR Pt 27 applies, except CPR 27.14 (special rules about costs in cases allocated to the small claims track: see PARA 285): CPR 78.14(2). CPR 26.6(1) (scope of the small claims track: see PARA 37) is also disapplied because the ESCP Regulation art 2(1) has a different financial limit: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 13.2.

UPDATE

1651 European small claims procedure

NOTES 8, 9--The county court has jurisdiction in relation to the ESCP Regulation: High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(1)(r) (added by SI 2008/2934).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(9) EUROPEAN SMALL CLAIMS PROCEDURE/1652. Commencement and conduct of the procedure.

1652. Commencement and conduct of the procedure.

The claimant must commence the European small claims procedure¹ by filling in the standard claim form², and lodging it with the court or tribunal with jurisdiction directly, by post or by any other means of communication, such as fax or e-mail, acceptable to the member state³ in which the procedure is commenced⁴. The claim form must include a description of evidence supporting the claim and be accompanied, where appropriate, by any relevant supporting documents⁵.

Where a claim is outside the scope of the procedure⁶, the court or tribunal must inform the claimant to that effect⁷. Unless the claimant withdraws the claim, the court or tribunal must proceed with it in accordance with the relevant procedural law applicable in the member state in which the procedure is conducted⁸. Where the court or tribunal considers the information provided by the claimant to be inadequate or insufficiently clear or if the claim form is not filled in properly, it must, unless the claim appears to be clearly unfounded or the application inadmissible, give the claimant the opportunity to complete or rectify the claim form or to supply supplementary information or documents or to withdraw the claim, within such period as it specifies⁹. Where the claim appears to be clearly unfounded or the application inadmissible or where the claimant fails to complete or rectify the claim form within the time specified, the application must be dismissed¹⁰.

After receiving the properly filled in claim form, the court or tribunal must fill in Part I of the standard answer form¹¹. A copy of the claim form, and, where applicable, of the supporting documents, together with the answer form thus filled in, must be served on the defendant¹². These documents must be dispatched within 14 days of receiving the properly filled in claim form¹³.

The defendant must submit his response within 30 days of service of the claim form and answer form, by filling in Part II of the standard answer form¹⁴, accompanied, where appropriate, by any relevant supporting documents, and returning it to the court or tribunal, or in any other appropriate way not using the answer form¹⁵. Within 14 days of receipt of the response from the defendant, the court or tribunal must dispatch a copy of it, together with any relevant supporting documents to the claimant¹⁶. If, in his response, the defendant claims that the value of a non-monetary claim exceeds the limit for claims under the procedure¹⁷, the court or tribunal must decide within 30 days of dispatching the response to the claimant, whether the claim is within the scope of the for the European small claims procedure¹⁸. Such decision may not be contested separately¹⁹.

Any counterclaim to be submitted on the appropriate form²⁰ and any relevant supporting documents must be served on the claimant²¹. Those documents must be dispatched within 14 days of receipt, and the claimant must have 30 days from service to respond to any counterclaim²². If the counterclaim exceeds the limit for the European small claims, the claim and counterclaim may not proceed in the European small claims procedure but must be dealt with in accordance with the relevant procedural law applicable in the member state in which the procedure is conducted²³.

The claim form, the response, any counterclaim, any response to a counterclaim and any description of relevant supporting documents must be submitted in the language or one of the languages of the court or tribunal²⁴. If any other document received by the court or tribunal is

not in the language in which the proceedings are conducted, the court or tribunal may require a translation of that document only if the translation appears to be necessary for giving the judgment²⁵. Where a party has refused to accept a document because it is not in either of the following languages: (1) the official language of the member state addressed, or, if there are several official languages in that member state, the official language or one of the official languages of the place where service is to be effected or to where the document is to be dispatched; or (2) a language which the addressee understands, the court or tribunal must so inform the other party with a view to that party providing a translation of the document²⁶.

1 As to the European small claims procedure see PARA 1651.

2 The standard claim Form A, as set out in European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) Annex I. Member states must ensure that the claim form is available at all courts and tribunals at which the European small claims procedure can be commenced: art 4(5).

3 As to the meaning of 'member state' see PARA 1651 note 1.

4 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 4(1). Member states must inform the Commission which means of communication are acceptable to them. The Commission must make such information publicly available: art 4(2). In England and Wales, an ESCP claim form must be filed at court in person or by post: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 11. Where a declaration provided by the claimant in the ESCP claim form contains any deliberate false statement, CPR 32.14 (see PARA 988) applies as if the ESCP claim form were verified by a statement of truth: CPR 78.13. 'ESCP claim form' means the claim form completed and filed in the ESCP: CPR 78.12(2)(d).

5 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 4(1).

6 As to the scope of the procedure see PARA 1651.

7 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 4(3). Where the court identifies that the claim is outside the scope of the ESCP Regulation (ie European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1)), the court will notify the claimant of this in a transfer of proceedings notice: CPR 78.15(1). If the claimant wishes to withdraw the claim, the claimant must notify the court of this within 21 days of the date of the transfer of proceedings notice (CPR 78.15(2)) and where the claimant has so notified the court, the claim is automatically withdrawn (CPR 78.15(3)). Where the claimant has not notified the court that he wishes to withdraw the claim and the claim is instead to be transferred under the ESCP Regulation art 4(3), (1) the claim will be treated as if it had been started as a claim under CPR Pt 7 (see PARA 116 et seq) and the ESCP claim form will be treated as a Part 7 claim form including particulars of claim; and (2) thereafter, the Civil Procedure Rules apply with necessary modifications, and subject to CPR 78.15, and the court will notify the claimant of the transfer and its effect: CPR 78.15(4).

8 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 4(3).

9 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 4(4). The court or tribunal must use standard Form B, as set out in Annex II, for this purpose: art 4(4). The time specified for the purposes of art 4(4) is within 30 days of the date of the request by the court to complete or rectify the claim form (using Form B annexed to the ESCP Regulation): *Practice Direction--European order for payment and European small claims procedures* PD 78 para 12.2.

10 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 4(4).

11 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 5(2). The form is standard answer Form C, as set out in Annex III: art 5(2).

12 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 5(2). Service must be in accordance with art 13: art 5(2). Documents must be served by postal service attested by an acknowledgment of receipt including the date of receipt: art 13(1). If service in accordance with art 13(1) is not possible, service may be effected by any of the methods provided for in EC Regulation 805/2004 (OJ L143, 30.4.2004, p 15) creating a European Enforcement Order for uncontested claims, art 13 or 14: European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 13(2).

13 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 5(2).

14 The standard answer Form C.

15 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 5(3). Documents other than the ESCP claim form that are filed at or sent to the court in the ESCP proceedings, including the defendant's response, may be filed, in addition to by post or in person, by fax or other electronic means where the facilities are available: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 14. Where a declaration provided by the defendant in the defendant's response contains any deliberate false statement, CPR 32.14 (see PARA 988) applies as if the defendant's response were verified by a statement of truth: CPR 78.16. 'Defendant's response' means the response to the ESCP claim form: CPR 78.12(2)(b).

16 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 5(4).

17 Ie the limit set out in European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 2(1): see PARA 1651.

18 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 5(5). Where, under art 5(5), the defendant claims that the value of a non-monetary claim exceeds the limit in art 2(1), then when the court dispatches the defendant's response to the claimant, it will (1) notify the claimant that the court is considering whether the claim is outside the scope of the ESCP Regulation in a consideration of transfer notice; and (2) send a copy of the notice to the defendant: CPR 78.17(1), (2). If the claimant wishes to withdraw the claim in the event that the court decides that the claim is outside the scope of the ESCP Regulation the claimant must notify the court and the defendant of this within 21 days of the date of the consideration of transfer notice: CPR 78.17(3). The court will notify the defendant as well as the claimant of its decision whether the claim is outside the scope of the ESCP Regulation: CPR 78.17(4). If the court decides that the claim is outside the scope of the ESCP Regulation and the claimant has notified the court and defendant in accordance with CPR 78.17(3), the claim is automatically withdrawn: CPR 78.17(5). If the court decides that the claim is outside the scope of the ESCP Regulation and the claimant has not notified the court and defendant in accordance with CPR 78.17(3), (a) the claim will be treated as if it had been started as a claim under CPR Pt 7 and the ESCP claim form will be treated as a Part 7 claim form including particulars of claim; (b) the defendant's response will be treated as a defence; and (c) thereafter, the Civil Procedure Rules apply with necessary modifications and subject to CPR 78.17, and the court will notify the parties: CPR 78.17(6). CPR 78.17 applies to an ESCP counterclaim as if the counterclaim were an ESCP claim: CPR 78.17(7). 'ESCP counterclaim' has the meaning given to counterclaim by the ESCP Regulation recital (16), which provides that the concept of 'counterclaim' should be interpreted within the meaning of EC Regulation 44/2001 (OJ L12, 16.1.2001, p 1) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art 6(3) as arising from the same contract or facts on which the original claim was based. European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) arts 2 and 4 as well as art 5(3), (4) and (5) should apply, mutatis mutandis, to counterclaims: CPR 78.12(2)(e). Attention is also drawn to the ESCP Regulation art 5(7) first para (transfer of claim and counterclaim in certain circumstances: see the text and note 25): *Practice Direction--European order for payment and European small claims procedures* PD 78 para 16.2.

19 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 5(5).

20 Ie using standard Form A (see note 2).

21 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 5(6). Service must be in accordance with art 13: art 5(6); see note 14. Articles 2 and 4 as well as art 5(3)-(5) apply, mutatis mutandis, to counterclaims: art 5(7).

22 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 5(6).

23 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 5(7). Where the ESCP counterclaim exceeds the limit set in art 2(1), the court will notify the defendant of this in a transfer of proceedings notice and send a copy of the notice to the claimant, when the court dispatches the defendant's response to the claimant: CPR 78.18(1). If the defendant wishes to withdraw the ESCP counterclaim, the defendant must notify the court and the claimant of this within 21 days of the date of the transfer of proceedings notice: CPR 78.18(2). If the defendant so notifies the court and claimant, the ESCP counterclaim is automatically withdrawn: CPR 78.18(3). If the defendant does not notify the court and claimant, (1) the claim will be treated as if it had been started as a claim under CPR Pt 7 (see PARA 116 et seq) and the ESCP claim form will be treated as a Part 7 claim form including particulars of claim; (2) the defendant's response and ESCP counterclaim are to be treated as the defence and counterclaim; and (3) thereafter, the Civil Procedure Rules apply with necessary modifications and subject to CPR 78.18, and the court will notify the parties: CPR 78.18(4).

24 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 6(1).

25 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 6(2). Except where the ESCP Regulation otherwise requires, every translation required by CPR Pt 78 or such regulation must be

accompanied by a statement by the person making it that it is a correct translation. The statement must include that person's name, address and qualifications for making the translation: CPR 78.1(4).

26 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 6(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(9) EUROPEAN SMALL CLAIMS PROCEDURE/1653. Hearing and evidence.

1653. Hearing and evidence.

The European small claims procedure¹ is a written procedure, but the court or tribunal must hold an oral hearing if it considers this to be necessary or if a party so requests². The court or tribunal may refuse such a request if it considers that with regard to the circumstances of the case, an oral hearing is obviously not necessary for the fair conduct of the proceedings; the reasons for refusal must be given in writing and the refusal may not be contested separately³. The court or tribunal may hold an oral hearing through video conference or other communication technology if the technical means are available⁴.

The court or tribunal must determine the means of taking evidence and the extent of the evidence necessary for its judgment under the rules applicable to the admissibility of evidence; it may admit the taking of evidence through written statements of witnesses, experts or parties and it may also admit the taking of evidence through video conference or other communication technology if the technical means are available⁵. The court or tribunal may take expert evidence or oral testimony only if it is necessary for giving the judgment and in making its decision, the court or tribunal must take costs into account⁶. The court or tribunal must use the simplest and least burdensome method of taking evidence⁷.

Representation by a lawyer or another legal professional must not be mandatory⁸. The member states⁹ must ensure that the parties can receive practical assistance in filling in the forms¹⁰.

The court or tribunal must not require the parties to make any legal assessment of the claim¹¹. If necessary, the court or tribunal must inform the parties about procedural questions¹². Whenever appropriate, the court or tribunal must seek to reach a settlement between the parties¹³.

Where the court or tribunal sets a time limit, the party concerned must be informed of the consequences of not complying with it¹⁴. The court or tribunal may extend the time limits for specified steps¹⁵, in exceptional circumstances, if necessary in order to safeguard the rights of the parties¹⁶. If, in exceptional circumstances, it is not possible for the court or tribunal to respect the time limits provided for in serving documents and giving judgment or directions¹⁷, it must take the steps required by those provisions as soon as possible¹⁸.

1 As to the European small claims procedure see PARA 1651.

2 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 5(1). See PARA 1653.

3 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 5(1).

4 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 8. Where an oral hearing is to be held, it will normally take place by telephone or video conference: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 17.2.

5 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 9(1).

6 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 9(2).

7 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 9(3).

8 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 10.

9 As to the meaning of 'member state' see PARA 1651 note 1.

- 10 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 11.
- 11 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 12(1).
- 12 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 12(2).
- 13 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 12(3).
- 14 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 14(1).
- 15 le the time limits provided for in European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 4(4), art 5(3), (6) and art 7(1).
- 16 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 14(2).
- 17 le under European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 5(2)-(6) and art 7.
- 18 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 14(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(9) EUROPEAN SMALL CLAIMS PROCEDURE/1654. Conclusion of the procedure.

1654. Conclusion of the procedure.

Within 30 days of receipt of the response from the defendant or the claimant within the specified time limits¹, the court or tribunal must give a judgment, or demand further details concerning the claim from the parties within a specified period of time, not exceeding 30 days, take evidence² or summon the parties to an oral hearing to be held within 30 days of the summons³.

The court or tribunal must give the judgment either within 30 days of any oral hearing or after having received all information necessary for giving the judgment⁴. The judgment must be served on the parties⁵. If the court or tribunal has not received an answer from the relevant party within the specified time limits⁶, it must give a judgment on the claim or counterclaim⁷.

The judgment is enforceable notwithstanding any possible appeal⁸. The provision of a security may not be required⁹. The procedure for stay or limitation of enforcement¹⁰ also applies in the event that the judgment is to be enforced in the member state¹¹ where the judgment was given¹².

The unsuccessful party must bear the costs of the proceedings; however, the court or tribunal must not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim¹³.

1 Ie the time limits laid down in European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 5(3) or (6): see PARA 1652.

2 Ie in accordance with European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 9: PARA 1653.

3 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 7(1). As to oral hearings see PARA 1653.

4 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 7(2).

5 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 7(2). Service must be in accordance with art 13: art 7(2); see PARA 1652 note 14.

6 See note 1.

7 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 7(3).

8 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 15(1).

9 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 15(1).

10 Ie European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 23: see PARA 1656 text and notes 14-15.

11 As to the meaning of 'member state' see PARA 1651 note 1.

12 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 15(2).

13 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 16.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(9) EUROPEAN SMALL CLAIMS PROCEDURE/1655. Appeal and review.

1655. Appeal and review.

Member states¹ must inform the Commission whether an appeal is available under their procedural law against a judgment given in the European small claims procedure² and within what time limit such appeal must be lodged³. The Commission must make that information publicly available⁴. The unsuccessful party must bear the costs of the appeal; however, the court or tribunal must not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim⁵.

The defendant is entitled to apply for a review of the judgment given in the European small claims procedure before the court or tribunal with jurisdiction of the member state where the judgment was given where (1) the claim form or the summons to an oral hearing was served by a method without proof of receipt by him personally⁶ and service was not effected in sufficient time to enable him to arrange for his defence without any fault on his part; or (2) the defendant was prevented from objecting to the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part, provided in either case that he acts promptly⁷. If the court or tribunal rejects the review on the basis that none of the grounds referred to above applies, the judgment will remain in force⁸. If the court or tribunal decides that the review is justified for one of the reasons laid down above, the judgment given in the European small claims procedure will be null and void⁹.

1 As to the meaning of 'member state' see PARA 1651 note 1.

2 As to the European small claims procedure see PARA 1651.

3 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 17(1).

4 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 17(1).

5 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 16, applied by art 17(2).

6 *I*e as provided for in EC Regulation 805/2004 art 14.

7 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 18(1). An application for a review under art 18 must be made in accordance with CPR Pt 23 (see PARA 303 et seq): CPR 78.19. Where an application is made under CPR Pt 78 Section II there will not normally be an oral hearing: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 18.1. Where an oral hearing is to be held, it will normally take place by telephone or video conference: para 18.2.

8 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 18(2).

9 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 18(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/24. MISCELLANEOUS PROCEEDINGS/(9) EUROPEAN SMALL CLAIMS PROCEDURE/1656. Recognition and enforcement in another member state.

1656. Recognition and enforcement in another member state.

A judgment given in a member state¹ in the European small claims procedure² must be recognised and enforced in another member state without the need for a declaration of enforceability and without any possibility of opposing its recognition³. At the request of one of the parties, the court or tribunal must issue a certificate concerning a judgment in the European small claims procedure using the standard form⁴, at no extra cost⁵.

Without prejudice to the provisions of the Community legislation⁶, the enforcement procedures are to be governed by the law of the member state of enforcement⁷. Any judgment given in the European small claims procedure must be enforced under the same conditions as a judgment given in the member state of enforcement⁸. The party seeking enforcement must produce (1) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and (2) a copy of the certificate concerning the judgment referred above and, where necessary, the translation of it into the official language of the member state of enforcement or, if there are several official languages in that member state, the official language or one of the official languages of court or tribunal proceedings of the place where enforcement is sought in conformity with the law of that member state, or into another language that the member state of enforcement has indicated it can accept⁹.

The party seeking the enforcement of a judgment given in the European small claims procedure in another member state must not be required to have an authorised representative, or a postal address, in the member state of enforcement, other than with agents having competence for the enforcement procedure¹⁰.

No security, bond or deposit, however described, may be required of a party who in one member state applies for enforcement of a judgment given in the European small claims procedure in another member state on the ground that he is a foreign national or that he is not domiciled or resident in the member state of enforcement¹¹.

Upon application by the person against whom enforcement is sought, enforcement may be refused by the court or tribunal with jurisdiction in the member state of enforcement if the judgment given in the European small claims procedure is irreconcilable with an earlier judgment given in any member state or in a third country, provided that (a) the earlier judgment involved the same cause of action and was between the same parties; (b) the earlier judgment was given in the member state of enforcement or fulfils the conditions necessary for its recognition in the member state of enforcement; and (c) the irreconcilability was not and could not have been raised as an objection in the court or tribunal proceedings in the member state where the judgment in the European small claims procedure was given¹². Under no circumstances may a judgment given in the European small claims procedure be reviewed as to its substance in the member state of enforcement¹³.

Where a party has challenged a judgment given in the European small claims procedure or where such a challenge is still possible, or where a party has made an application for review¹⁴, the court or tribunal with jurisdiction or the competent authority in the member state of enforcement may, upon application by the party against whom enforcement is sought (i) limit the enforcement proceedings to protective measures; (ii) make enforcement conditional on the provision of such security as it shall determine; or (iii) under exceptional circumstances, stay the enforcement proceedings¹⁵.

- 1 As to the meaning of 'member state' see PARA 1651 note 1.
- 2 As to the European small claims procedure see PARA 1651.
- 3 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 20(1).
- 4 Ie standard Form D, as set out in European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) Annex IV.
- 5 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 20(2). If judgment is set aside in the member state of judgment, the judgment creditor must notify all courts in which proceedings are pending in England and Wales to enforce the ESCP judgment as soon as reasonably practicable after the order is served on the judgment creditor. Notification may be by any means available including fax, e-mail, post or telephone: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 19.3. 'Member state of judgment' is the member state in which the ESCP judgment is given: CPR 78.12(2)(i).
- 6 Ie European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) Ch III (arts 20-23).
- 7 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 21(1). In CPR Pt 78 Section II (CPR 78.12-78.22), 'member state of enforcement' is the member state in which the ESCP judgment is to be enforced: CPR 78.12(2)(h).
- 8 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 21(1). As to enforcement see further PARA 1223 et seq. Where a person applies to enforce an ESCP judgment expressed in a foreign currency, the application must contain a certificate of the sterling equivalent of the judgment sum at the close of business on the date nearest preceding the date of the application: CPR 78.20(2). 'ESCP judgment' means a judgment given in the ESCP: CPR 78.12(2)(f). When an ESCP judgment is filed at the High Court or county court in which enforcement proceedings are to be brought, it will be assigned a case number: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 19.1.
- 9 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 21(2). Each member state may indicate the official language or languages of the institutions of the European Union other than its own which it can accept for the European small claims procedure: art 21(2). The content of Form D (see note 4) must be translated by a person qualified to make translations in one of the member states: art 21(2). A person seeking to enforce an ESCP judgment in England and Wales must file at the court in which enforcement proceedings are to be brought the documents required by art 21: CPR 78.20(1). A copy of a document will satisfy the conditions necessary to establish its authenticity if it is an official copy of the courts of the member state of judgment: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 19.2.
- 10 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 21(3).
- 11 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 21(4).
- 12 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 22(1). An application under art 22 that the court should refuse to enforce an ESCP judgment must be made in accordance with CPR Pt 23 (see PARA 303 et seq; and PARA 1655 note 7) to the court in which the ESCP judgment is being enforced: CPR 78.21(1). The judgment debtor must, as soon as practicable, serve copies of any order made under European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 22 on (1) all other parties to the proceedings and any other person affected by the order (the 'affected persons'); and (2) any court in which enforcement proceedings are pending in England and Wales (the 'relevant courts'): CPR 78.21(2). Upon service of the order on the affected persons, all enforcement proceedings of the ESCP judgment in the relevant courts will cease: CPR 78.21(4). An application must be accompanied by an official copy of the earlier judgment, any other documents relied upon and any translations required by the ESCP Regulation: *Practice Direction--European order for payment and European small claims procedures* PD 78 para 20.1. The application must be supported by written evidence showing (a) why the earlier judgment is irreconcilable with the judgment which the claimant is seeking to enforce; and (b) why the irreconcilability was not, and could not have been, raised as an objection in the proceedings in the member state of judgment: para 20.2.
- 13 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 22(2).
- 14 Ie within the meaning of European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 18: see PARA 1655.
- 15 European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 23. An application by the defendant under art 23 must be made in accordance with CPR Pt 23 (see PARA 303 et seq; and PARA 1655

note 7) to the court in which the ESCP judgment is being enforced: CPR 78.22(1). The defendant must, as soon as practicable, serve a copy of any order made under European Parliament and Council Regulation 861/2007 (OJ L199, 31.7.2007, p 1) art 23 on (1) all other parties to the proceedings and any other person affected by the order; and (2) any court in which enforcement proceedings are pending in England and Wales, and the order will not have effect on any person until it has been served in accordance with these provisions and they have received it: CPR 78.22(2).

Where a defendant makes an application under the ESCP Regulation art 23 in circumstances where (a) an application for review has been made under art 18 ('review application'); or (b) the defendant has challenged the judgment, then unless the court orders otherwise, the application under art 23 must be accompanied by evidence of the review application or challenge in the member state of judgment. This must include a copy of the document initiating the review application or challenge or a copy of the review application or challenge, certified by an appropriate officer of the court in the member state of judgment: *Practice Direction--European order for payment and European small claims procedures* PD 78 paras 21.1, 21.2. Where a document is not in English, it must be accompanied by a translation of it into English: para 21.3. The written evidence in support of the application must state (i) that a review application or challenge has been brought in the member state of judgment; (ii) the nature of that review application or challenge; and (iii) the date on which the review application or challenge was filed, the state of the proceedings and the date by which it is believed that the application or challenge will be determined: para 21.4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1657. Introduction.

25. APPEALS AND REFERENCES

(1) GENERAL RULES

1657. Introduction.

An appeal is an application to a superior court or tribunal to reverse, vary or set aside the judgment, order, determination, decision or award of a lower court or tribunal in the hierarchy of courts or tribunals on the ground that it was wrongly made or that as a matter of justice or law it requires to be corrected¹. A right of appeal is conferred by statute or equivalent legislative authority; it is not a mere matter of practice or procedure, and neither the superior nor the lower court or tribunal nor both combined can create or take away such a right².

¹ The definition in the text is wide enough to cover all forms of appeal, whether on a point of law or of fact or of mixed fact and law or by way of case stated or by judicial review and whatever the nature of the lower court or tribunal, whether it be a master, district judge, referee, magistrate, arbitrator, umpire, tribunal other than a court of law, a judge in chambers, or a single judge sitting with or without a jury or even the Court of Appeal itself; but the definition has special appropriateness in this context: see *Furtado v City of London Brewery Co* [1914] 1 KB 709, CA, affg [1914] 1 KB 152. It should be noted that the Court of Appeal will not interfere with the decision of a lower court that it would not have interfered with before the coming into force of the Civil Procedure Rules: *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775, CA.

² See *R v Sillem* (1864) 10 HL Cas 704; *National Telephone Co Ltd v HM Postmaster-General* [1913] 2 KB 614, CA (affd [1913] AC 546, HL). If the statute creating the right of appeal does not provide a procedure for the appeal, it is the duty of the appellate tribunal to do so, so that the right may be effective and the appeal may be heard: *Smith v Williams* [1922] 1 KB 158. See, however, *Hoser v Ministry of Housing and Local Government* [1963] Ch 428, [1962] 3 All ER 945. The right of appeal may extend to hearing appeals on questions of law or questions of fact, as is the case on appeals from the High Court (see the Supreme Court Act 1981 ss 15, 16; and PARA 1702); or it may be excluded on a question of fact, as is the case on certain appeals from county courts (see the County Courts Act 1984 s 77; and PARA 1679). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. Under CPR Pt 52 (see PARA 1658 et seq) permission to appeal will be required from either the lower court or tribunal or from the Court of Appeal itself before the Court of Appeal will hear the appeal: see CPR 52.3, 52.13; and PARAS 1661, 1682.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1658. Routes of appeal.

1658. Routes of appeal.

The Lord Chancellor may by order provide¹ that appeals² which would otherwise lie to a county court, the High Court or the Court of Appeal are to lie instead to another of those courts, as specified in the order³.

Accordingly, provisions have been made⁴ applying to appeals⁵ to the county court⁶, the High Court⁷ and the Civil Division of the Court of Appeal⁸ in all cases in which a notice of appeal has been filed, or an application for permission to appeal has been made, on or after 2 May 2000⁹, with the exception of appeals in family proceedings¹⁰. Routes of appeal are also specified in a practice direction which supplements Part 52 of the Civil Procedure Rules¹¹.

Subject to what follows, an appeal lies to a judge of the High Court where the decision¹² to be appealed is made by a master or other person holding a specified office¹³, by a district judge of the High Court¹⁴ or by a person appointed to act as a deputy for any person holding such an office as is referred to above or to act as a temporary additional officer in any such office¹⁵.

In general¹⁶, an appeal lies from a decision of a county court to the High Court¹⁷; but where the decision to be appealed is made by a district judge or deputy district judge of a county court, an appeal lies to a judge of a county court¹⁸. Further, where the decision to be appealed is a final decision¹⁹ in a claim allocated to the multi-track²⁰, or is a final decision made in specialist proceedings²¹, an appeal lies to the Court of Appeal²².

Where an appeal is made to a county court or the High Court (other than from the decision of an officer of the court authorised to assess costs by the Lord Chancellor), and on hearing the appeal the court makes a decision, an appeal lies from that decision to the Court of Appeal and not to any other court²³.

These provisions are subject to any rule, enactment or practice direction which sets out special provisions with regard to any particular category of appeal²⁴. All parties to an appeal must comply with the relevant practice direction²⁵.

Appeal from the Court of Appeal lies to the House of Lords²⁶.

1 Before making such an order the Lord Chancellor must consult the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division and the Chancellor of the High Court: Access to Justice Act 1999 s 56(4) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 279, 280(1), (2)). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the Access to Justice Act 1999 s 56: s 56(8) (added by the Constitutional Reform Act 2005 Sch 4 para 280(3)).

2 For these purposes an application to have a case stated for the opinion of the High Court constitutes an appeal: Access to Justice Act 1999 s 56(7).

Access to Justice Act 1999 s 56(1). Section 56 does not apply to an appeal in a criminal cause or matter: s 56(2). An order under s 56(1) may make different provision for different classes of proceedings or appeals, and may contain consequential amendments or repeals of enactments: s 56(3). Such order must be made by statutory instrument, but no such order may be made unless a draft of it has been laid before and approved by resolution of each House of Parliament: s 56(5), (6). In the exercise of this power, the Lord Chancellor has made the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071 (amended by SI 2003/490), which came into force on 2 May 2000: see art 1(1) (see the text and notes 4-23); and the Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) Order 2005, SI 2005/3276, which came into force on 30 December 2005: see art 1(1).

4 See note 3; and see also CPR Pt 52; *Practice Direction--Appeals* PD 52; the text and notes 5-25; and PARA 1659 et seq. See also *Tanfern Ltd v Cameron-MacDonald (Practice Note)* [2000] 1 WLR 1311, CA.

5 'Appeal' includes an appeal by way of case stated: CPR 52.1(3)(a).

6 CPR 52.1(1)(c).

7 CPR 52.1(1)(b).

8 CPR 52.1(1)(a).

9 See the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 6. However, CPR Pt 52 applies as of 2 October 2000 in respect of cases allocated to the small claims track: Civil Procedure (Amendment No 4) Rules 2000, SI 2000/2092, r 21. The former RSC Ords 55, 56, 58, 59, 60 and 61 (revoked subject to these transitional provisions) continued to govern appeals in respect of which a notice of appeal was filed, or an application for permission to appeal was made, prior to 2 May 2000: see the Civil Procedure (Amendment) Rules 2000, SI 2000/221, r 39 (substituted by SI 2000/940). In respect of the transitional provisions see *Tanfern Ltd v Cameron-MacDonald (Practice Note)* [2000] 1 WLR 1311, CA.

10 See the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 1(4)(a). For these purposes, 'family proceedings' means proceedings which are business of any description which in the High Court is for the time being assigned to the Family Division and to no other division by or under the Supreme Court Act 1981 s 61, Sch 1 (see PARA 46): Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 1(2)(b) (amended, as from a day to be appointed, by virtue of the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2), to substitute a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981; at the date at which this title states the law, no such day had been appointed). The Civil Procedure Rules do not, in general, apply to such proceedings: see PARA 32. However, it is provided by *Practice Direction--Appeals* PD 52 para 2.2 that for the purpose only of appeals to the Court of Appeal from cases in family proceedings, that practice direction applies with such modifications as may be required. Separate provision has now been made for the destination of appeals in cases involving adoption and related matters: see the Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) Order 2005, SI 2005/3276.

11 See *Practice Direction--Appeals* PD 52 para 2A. Subject to paras 2A.2-2A.6 (see the text and notes 19, 23, 24), and subject to obtaining any necessary permission, appeal lies (1) from a decision of a district judge of a county court to a circuit judge; (2) from a master or district judge of the High Court to a High Court judge; (3) from a circuit judge to a High Court judge; and (4) from a High Court judge to the Court of Appeal: para 2.1, Tables 1-3.

12 'Decision' includes any judgment, order or direction of the High Court or a county court: Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 1(2)(a).

13 Is an office referred to in the Supreme Court Act 1981 ss 88, 89, Sch 2 Pt II (as substituted and amended): Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 2(a) (amended, as from a day to be appointed, by virtue of the Constitutional Reform Act 2005 Sch 11 Pt 1 para 1(2), to substitute a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981; at the date at which this title states the law, no such day had been appointed). The specified offices are: master, Queen's Bench Division; Queen's Coroner and Attorney and Master of the Crown Office (now the Administrative Court) and Registrar of Criminal Appeals; Admiralty Registrar; master, Chancery Division; registrar in bankruptcy of the High Court; taxing master of the Senior Courts; district judge of the principal registry of the Family Division: Supreme Court Act 1981 Sch 2 Pt 2 (substituted by the Tribunals, Courts and Enforcement Act 2007 s 50(6), Sch 10 Pt 1 para 13(1), (3)). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

14 As to district judges see PARA 55.

15 Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 2.

16 Is subject to the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, arts 4, 5 and to art 3(2): see the text and notes 17-23.

17 Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 3(1).

18 Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 3(2).

19 'Final decision' means a decision of a court that would finally determine (subject to any possible appeal or detailed assessment of costs) the entire proceedings whichever way the court decided the issues before it: Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 1(2)(c). A decision of a court

is to be treated as a final decision where it is made at the conclusion of part of a hearing or trial which has been split into parts and would, if made at the conclusion of that hearing or trial, be a final decision under art 1(2)(c): art 1(3). Identical provision is made by *Practice Direction--Appeals* PD 52 paras 2A.2, 2A.3.

20 As to allocation to the multi-track see PARAS 269, 293 et seq.

21 In proceedings under the Companies Act 1985 or the Companies Act 1989 or to which CPR Pt 57 Section I, II or III (probate claims, rectification of wills and substitution and removal of personal representatives: see **EXECUTORS AND ADMINISTRATORS**) or any of CPR Pts 58-63 apply: see PARAS 116, 1547.

22 Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 4 (amended by SI 2003/490). Note that claims where the Part 8 procedure is used are not included in these provisions, although they are treated as allocated to the multi-track by virtue of CPR 8.9(c) (see PARA 136). As to the Part 8 procedure see PARA 127 et seq.

23 Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 5. An order made on a summary or detailed assessment of costs or on an application to enforce a final decision is not a final decision and any appeal from such an order will follow the appeal routes set out in *Practice Direction--Appeals* PD 52 para 2A.1, Tables 1-3 (see note 10): para 2A.4. See also CPR 52.1(2) (CPR Pt 52 does not apply to an appeal in detailed assessment proceedings against a decision of an authorised court officer). As to appeals in detailed assessment proceedings see CPR 47.21-47.23; and see *The Civil Court Practice*. As to costs generally see also PARA 1729 et seq.

24 See CPR 52.1(4). See *El Du Pont de Nemours and Co v ST Dupont* (2002) Times, 7 November (appeal under the Trade Marks Act 1938 was governed by special provisions of that Act); and *Zissis v Lukomski* [2006] EWCA Civ 341, [2006] 1 WLR 2778 (appeal under Party Wall etc Act 1996 s 10(17) governed by CPR Pt 52).

25 CPR 52.2. The relevant general practice direction is *Practice Direction--Appeals* PD 52, although certain practice directions dealing with specific types of proceedings may contain additional or alternative provisions relating to appeals.

26 See PARA 1717. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

UPDATE

1658 Routes of appeal

NOTES 10, 13, 26--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1659. Power to impose requirement for permission to appeal.

1659. Power to impose requirement for permission to appeal.

Rules of court may provide that any right of appeal to a county court, the High Court¹, or the Court of Appeal², may be exercised only with permission³. For these purposes rules of court may make provision as to:

- 1221 (1) the classes of case in which a right of appeal may be exercised only with permission⁴;
- 1222 (2) the court or courts which may give permission for these purposes⁵;
- 1223 (3) any considerations to be taken into account in deciding whether permission should be given⁶; and
- 1224 (4) any requirements to be satisfied before permission may be given⁷,

and may make different provision for different circumstances⁸.

No appeal may be made against a decision of a court under these provisions to give or refuse permission, but this does not affect any right under rules of court to make a further application for permission to the same or another court⁹.

¹ For these purposes, a right to make an application to have a case stated for the opinion of the High Court constitutes a right of appeal: Access to Justice Act 1999 s 54(5).

² For these purposes a right of appeal to the Court of Appeal includes (1) the right to make an application for a new trial; and (2) the right to make an application to set aside a verdict, finding or judgment in any cause or matter in the High Court which has been tried, or in which any issue has been tried, by a jury: Access to Justice Act 1999 s 54(6). As to jury trial in civil cases see PARA 1132. As to the meaning of 'cause or matter' see PARA 44 note 1. However, the new civil procedure (see PARA 24 et seq) no longer employs this terminology: see PARA 18.

³ Access to Justice Act 1999 s 54(1). Section 54 does not apply to a right of appeal in a criminal cause or matter: s 54(2).

⁴ Access to Justice Act 1999 s 54(3)(a). See CPR 52.3(1); and PARA 1660.

⁵ Access to Justice Act 1999 s 54(3)(b). See CPR 52.3(2); and PARA 1660.

⁶ Access to Justice Act 1999 s 54(3)(c). See CPR 52.3(6); and PARA 1660.

⁷ Access to Justice Act 1999 s 54(3)(d); and see note 6.

⁸ Access to Justice Act 1999 s 54(3).

⁹ Access to Justice Act 1999 s 54(4). See CPR 52.3(3); and PARA 1660. See *R (on the application of Sivasubramaniam) v Wandsworth County Court*, *R (on the application of Sivasubramaniam) v Kingston upon Thames County Court* [2002] EWCA Civ 1738, [2003] 1 WLR 475. The Court of Appeal has the power to revoke the grant of permission to appeal where the judge granting permission has been misled: *Angel Airlines SA v Dean & Dean Solicitors* [2006] EWCA Civ 1505, [2006] All ER (D) 280 (Oct). See *R (on the application of Strickson) v Preston County Court* [2007] EWCA Civ 1132, [2008] All ER (D) 269 (Feb) (judicial review of permission to appeal decision available only in exceptional circumstances).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1660. General procedure for permission to appeal.

1660. General procedure for permission to appeal.

An appellant¹ or respondent² requires permission to appeal:

- 1225 (1) where the appeal is from a decision of a judge³ in a county court or the High Court, except where the appeal is against a committal order⁴, a refusal to grant habeas corpus⁵ or a secure accommodation order⁶; or
- 1226 (2) as provided by the relevant practice direction⁷.

An application for permission to appeal may be made to the lower court at the hearing at which the decision to be appealed was made⁸ or to the appeal court in an appeal notice⁹. Where the lower court refuses an application for permission to appeal, a further application for permission to appeal may be made to the appeal court¹⁰.

Applications for permission may be considered by the appeal court without a hearing¹¹. Where the appeal court, without a hearing, refuses permission to appeal, the person seeking permission may request the decision to be reconsidered at an oral hearing¹². Such a request must be filed within seven days after service¹³ of the notice that permission has been refused¹⁴. There is no appeal from a decision of the appeal court to allow or refuse permission to appeal to that court (although where the appeal court, without a hearing, refuses permission to appeal, the person seeking permission may request that decision to be reconsidered at a hearing)¹⁵.

Permission to appeal may be given only where the court considers that the appeal would have a real prospect of success¹⁶ or there is some other compelling reason why the appeal should be heard¹⁷. An order giving permission may limit the issues to be heard¹⁸ and be made subject to conditions¹⁹.

Except as provided above, or otherwise provided by statute, the permission of the Court of Appeal, or, where the lower court's rules allow, of the lower court, is required for all appeals to the Court of Appeal²⁰. Where the lower court is not required to give permission to appeal, it may give an indication of its opinion as to whether permission should be given²¹.

1 For the purposes of CPR Pt 52 'appellant' means a person who brings or seeks to bring an appeal: CPR 52.1(3)(d). As to the meaning of 'appeal' see PARA 1658 note 5. A person who seeks to bring an appeal is an appellant notwithstanding that he did not seek to be a party to the proceedings: *George Wimpey UK Ltd v Tewkesbury Borough Council (MA Holdings Ltd intervening)* [2008] EWCA Civ 12, [2008] 3 All ER 859, [2008] 1 WLR 1649.

2 For the purposes of CPR Pt 52 'respondent' means a person other than the appellant who was a party to the proceedings in the lower court and who is affected by the appeal (CPR 52.1(3)(e)(i)); and a person who is permitted by the appeal court to be a party to the appeal (CPR 52.1(3)(e)(ii)). 'Lower court' means the court, tribunal or other person or body from whose decision an appeal is brought (CPR 52.1(3)(c)); and 'appeal court' means the court to which an appeal is made (CPR 52.1(3)(b)). As to the meaning of 'court' see PARA 22.

3 As to the meaning of 'judge' see PARA 49.

4 CPR 52.3(1)(a)(i). Permission is required to appeal against a decision not to commit: *M v M (Breaches of Orders: Committal)* [2005] EWCA Civ 1722, [2006] 1 FLR 1154, [2006] Fam Law 259. See also *Wood v Collins* [2006] EWCA Civ 743, [2006] All ER (D) 165 (May). As to committal for contempt see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 491 et seq.

5 CPR 52.3(1)(a)(ii). As to habeas corpus see PARA 1531; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 207 et seq.

6 CPR 52.3(1)(a)(iii). The secure accommodation order referred to in the text is an order made under the Children Act 1989 s 25: see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1037 et seq.

7 CPR 52.3(1)(b). See *Practice Direction--Appeals* PD 52 para 4.2; and the text and note 20. Other enactments may provide that permission is required for particular appeals: see CPR 52.3(1).

8 CPR 52.3(2)(a). See, however, *Practice Direction--Appeals* PD 52 para 4.6 which uses mandatory language (providing that an application for permission to appeal *should*, rather than *may*, be made orally at the hearing at which the decision to be appealed against is made). The lower court may not extend time for permission to appeal after the hearing at which the decision was made: *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 2998 (Comm), [2006] All ER (D) 135 (Aug). Applications for permission to appeal are not to be adjourned for the convenience of counsel: *Bracknell Forest Borough v N* (2006) Times, 6 November, CA. If there is any doubt as to the judge's reasons, counsel has a responsibility to ask the judge for clarification before filing a notice of appeal: *Re A (a child)* [2007] EWCA Civ 1058, [2007] Fam Law 113. Where no application for permission to appeal has been made in accordance with CPR 52.3(2)(a) but a party requests further time to make such an application, the court may adjourn the hearing to give that party the opportunity to do so: *Practice Direction--Appeals* PD 52 para 4.3B.

9 CPR 52.3(2)(b); *Practice Direction--Appeals* PD 52 para 4.7. For the purposes of CPR Pt 52 (see PARAS 1658, 1662 et seq) 'appeal notice' means an appellant's or respondent's notice: CPR 52.1(2)(f). As to the time limits for filing an appellant's notice at the appeal court see CPR 52.4; and PARA 1663; and as to the time limits for filing a respondent's notice at the appeal court see CPR 52.5; and PARA 1664. As to the meaning of 'filing' see PARA 1832 note 8.

Where the appellant seeks the appeal court's permission to appeal it must be requested in the appellant's notice: CPR 52.4(1); *Practice Direction--Appeals* PD 52 para 5.1; and see PARA 1663. Similarly, a respondent must file a respondent's notice for permission to appeal: see CPR 52.5(2); and PARA 1664. CPR 52.13(1) provides that permission is required from the Court of Appeal for all appeals to that court from a decision of a county court or the High Court which was itself made on appeal: see PARA 1682.

10 CPR 52.3(3); *Practice Direction--Appeals* PD 52 para 4.7.

11 *Practice Direction--Appeals* PD 52 para 4.11. If permission is granted without a hearing the parties will be notified of that decision; if permission is refused, the parties will be notified, with reasons for the decision: see paras 4.12, 4.13.

Where the appellant is in receipt of services funded by the Legal Services Commission (or legally aided) and permission to appeal has been refused without a hearing, the appellant must send a copy of the reasons the appeal court gave for refusing permission to the relevant office of the Legal Services Commission as soon as it has been received from the court; the court will require confirmation that this has been done if a hearing is requested to reconsider the question of permission: para 4.17.

Where permission is refused, the judge may properly be brief in explaining his conclusion but it is not sufficient simply to state that there had been non-compliance with *Practice Direction--Appeals* PD 52; that non-compliance must be identified: *Hyams v Plender* [2001] 2 All ER 179, [2001] 1 WLR 32, CA.

12 CPR 52.3(4); *Practice Direction--Appeals* PD 52 para 4.14. Where the Court of Appeal refuses permission to appeal without a hearing, it may, if it considers that the application is totally without merit, make an order that the person seeking permission may not request the decision to be reconsidered at a hearing: CPR 52.3(4A). CPR 3.3(5) (see PARA 251) will not apply to an order that the person seeking permission may not request the decision to be reconsidered at a hearing made under CPR 52.3(4A): CPR 52.3(4B).

Where an appellant, who is represented, makes a request for a decision to be reconsidered at an oral hearing, the appellant's advocate must, at least four days before the hearing, in a brief written statement (1) inform the court and the respondent of the points which he proposes to raise at the hearing; (2) set out his reasons why permission should be granted notwithstanding the reasons given for the refusal of permission; and (3) confirm, where applicable, that the requirements of *Practice Direction--Appeals* PD 52 para 4.17 (see note 11) have been complied with (appellant in receipt of services funded by the Legal Services Commission): para 4.14A.

13 As to the meaning of 'service' see PARA 138 note 2.

14 CPR 52.3(5); *Practice Direction--Appeals* PD 52 para 4.14. A copy of the request must be served on the respondent at the same time: para 4.14. Notice of a permission hearing will be given to the respondent but he is not required to attend unless the court requests him to do so: see para 4.15. If the court requests the respondent's attendance at the permission hearing, the appellant must supply the respondent with a copy of the appeal bundle (see para 5.6A; and PARA 1663 note 11) within seven days of being notified of the request, or such other period as the court may direct. The costs of providing that bundle must be borne by the appellant.

initially, but will form part of the costs of the permission application: para 4.16. As to the respondent's entitlement to costs where an application for permission to appeal is successfully resisted, see *Jolly v Jay* [2002] EWCA Civ 277, [2002] All ER (D) 104 (Mar). As to costs generally see also PARA 1729 et seq.

15 *Practice Direction--Appeals* PD 52 para 4.8. See also the Access to Justice Act 1999 s 54(4); and PARA 1659. Under the previous rules it was held that it was an abuse of process for a defendant to seek to raise successive appeals in relation to different issues which had all been before the court on the first application and could have been considered at that time: see *Commercial Acceptances Ltd v Townsend Investments Inc* [2000] CPLR 421, CA. See *Gregory v Turner, R (on the application of Morris) v North Somerset Council* [2003] EWCA Civ 183, [2003] 2 All ER 1114 (Court of Appeal refused to hear appeal from appeal court's decision to refuse permission to appeal).

16 CPR 52.3(6)(a). As to the same test in relation to summary judgment applications see CPR 24.2(a); *Swain v Hillman* [2001] 1 All ER 91, [1999] CPLR 779, CA; *Tanfern Ltd v Cameron-MacDonald (Practice Note)* [2000] 1 WLR 1311, CA, at para 21; and PARA 524 note 7. Grounds of appeal should set out clearly the reasons why one or other of the rules contained in CPR 52 is said to apply: *R (on the application of nine Nepalese asylum seekers) v Immigration Appeal Tribunal* [2003] EWCA Civ 1892, [2004] All ER (D) 94 (Jan). See also *Convergence Group plc v Chantrey Vellacott (a firm)* [2005] EWCA Civ 290, (2005) Times, 25 April (appeal against amendment to pleadings).

17 CPR 52.3(6)(b). *Practice Direction--Appeals* PD 52 contains no guidance as to the applicability of the second limb or its relationship with the first limb. As to the possible rationale of the second limb see *Smith v Cosworth Casting Processes Ltd* [1997] 4 All ER 840, [1997] 1 WLR 1538, CA, where it was suggested that leave may be granted even though the court is not satisfied that the appeal has any prospect of success if, for example, the issue is one which should, in the public interest, be examined by the Court of Appeal. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

Where matters have already been litigated but one party was not privy to that litigation, it may be appropriate to grant leave to appeal where there is a possibility that the law may be extended: see *Manson v Barclays Bank plc* [1999] CPLR 825, CA. For a case where the Court of Appeal expressed the view that permission to appeal should never have been granted see eg *Pritchard v Jones* [2001] EWCA Civ 1536, [2001] All ER (D) 172 (Oct).

It has been held by the High Court of Australia that while case management is a relevant consideration in considering applications for leave to appeal, it should not be allowed to prevail over the injustice of shutting out an arguable defence: *State of Queensland v JL Holdings Pty Ltd* [1999] CPLR 1, Aust HC.

18 CPR 52.3(7)(a). Where a court under CPR 52.3(7) gives permission to appeal on some issues only, it will (1) refuse permission on any remaining issues; or (2) reserve the question of permission to appeal on any remaining issues to the court hearing the appeal: *Practice Direction--Appeals* PD 52 para 4.18. If the court reserves the question of permission under head (2), the appellant must, within 14 days after service of the court's order, inform the appeal court and the respondent in writing whether he intends to pursue the reserved issues; if the appellant does intend to pursue the reserved issues, the parties must include in any time estimate for the appeal hearing, their time estimate for the reserved issues: para 4.19.

If the appeal court refuses permission to appeal on the remaining issues without a hearing and the applicant wishes to have that decision reconsidered at an oral hearing, the time limit in CPR 52.3(5) will apply, and any application for an extension of this time limit should be made promptly: *Practice Direction--Appeals* PD 52 para 4.20. The court hearing the appeal on the issues for which permission has been granted will not normally grant, at the appeal hearing, an application to extend the time limit in CPR 52.3(5) for the remaining issues: *Practice Direction--Appeals* PD 52 para 4.20. If the appeal court refuses permission to appeal on remaining issues at or after an oral hearing, the application for permission to appeal on those issues cannot be renewed at the appeal hearing (see the Access to Justice Act 1999 s 54(4)): *Practice Direction--Appeals* PD 52 para 4.21. In most cases, applications for permission to appeal will be determined without the court requiring submissions from or, if there is an oral hearing, attendance by the respondent: para 4.22. Where the court does not request submissions from or attendance by the respondent, costs will not normally be allowed to a respondent who volunteers submissions or attendance: para 4.23. Where the court does request (a) submissions from or attendance by the respondent; or (b) attendance by the respondent with the appeal to follow if permission is granted, the court will normally allow the respondent his costs if permission is refused: para 4.24. See *Fieldman v Markovitch* [2001] All ER (D) 42 (Jul), (2001) Times, 31 July.

19 CPR 52.3(7)(b). CPR 3.1(3) also provides that the court may make an order subject to conditions: see PARA 247. As to the court's power to order security for costs of an appeal see CPR 25.15; and PARA 748.

20 *Practice Direction--Appeals* PD 52 para 4.2.

21 *Practice Direction--Appeals* PD 52 para 4.3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1661. Permission to appeal from case management decisions.

1661. Permission to appeal from case management decisions.

Where the application is for permission to appeal from a case management decision¹, the court² dealing with the application may take into account whether (1) the issue is of sufficient significance to justify the costs of an appeal; (2) the procedural consequences of an appeal (such as the loss of a trial date) outweigh the significance of the case management decision; and (3) it would be more convenient to determine the issue at or after trial³.

1 Case management decisions include decisions made under CPR 3.1(2) (general powers of case management: see PARA 247) and decisions about (1) disclosure (see PARAS 111-113, 538 et seq); (2) filing of witness statements (see PARA 981 et seq) or experts' reports (see PARA 838 et seq); (3) directions about the timetable of the claim (see PARA 287 et seq); (4) adding a party to the claim (see PARAS 210-212); and (5) security for costs (see PARAS 745-748): *Practice Direction--Appeals* PD 52 para 4.4.

2 As to the meaning of 'court' see PARA 22.

3 *Practice Direction--Appeals* PD 52 para 4.5.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1662. Grounds of appeal.

1662. Grounds of appeal.

The appeal court¹ will allow an appeal² where the decision of the lower court³ was (1) wrong⁴; or (2) unjust because of a serious procedural or other irregularity in the proceedings in the lower court⁵.

The grounds of appeal must set out clearly the reasons why head (1) or head (2) above is said to apply⁶.

1 As to the meaning of 'appeal court' see PARA 1660 note 2.

2 As to the meaning of 'appeal' see PARA 1658 note 5. In the absence of consent, the appeal court has no power to make a different type of order from the one originally sought in the lower court: *King v Telegraph Group Ltd* [2004] EWCA Civ 613, [2005] 1 WLR 2282; applied in *Henry v British Broadcasting Corp* [2005] EWHC 2503 (QB), [2006] 1 All ER 154.

3 As to the meaning of 'lower court' see PARA 1660 note 2.

4 CPR 52.11(3)(a). For consideration of the application of this rule see *Tanfern Ltd v Cameron-MacDonald (Practice Note)* [2000] 1 WLR 1311, CA, at para 32. See also eg *Khan v Merton London Borough Council* [2001] All ER (D) 335 (Jun); *Re Jacob (a bankrupt)* [2001] All ER (D) 349 (Jun). As to allowing unopposed appeals or applications on paper see *Practice Direction--Appeals* PD 52 para 13.1; and PARA 1670 text and note 8.

5 CPR 52.11(3)(b); and see *Storer v British Gas plc* [2000] 2 All ER 440, [2000] 1 WLR 1237; *Keith Davy (Crantock) Ltd v Ibatex Ltd* [2001] EWCA Civ 740, [2001] All ER (D) 31 (May).

6 *Practice Direction--Appeals* PD 52 para 3.2(1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1663. Appellant's notice.

1663. Appellant's notice.

The appellant¹ must file² an appellant's notice³ at the appeal court⁴ within such period as may be directed by the lower court (which may be longer or shorter than the period applicable where it makes no such direction)⁵ or, where the court⁶ makes no such direction, 21 days after the date of the decision of the lower court that the appellant wishes to appeal⁷. Unless the appeal court orders otherwise⁸, an appellant's notice must be served on each respondent as soon as practicable and in any event not later than seven days after it is filed⁹.

The fee must be paid at the time the notice is presented for filing¹⁰.

The documents which must accompany the appellant's notice are specified by the relevant practice direction¹¹. Particular provision is made with regard to appeals relating to a claim allocated to the small claims track¹², skeleton arguments¹³, suitable records or notes of the judgment¹⁴ and transcripts or notes of evidence¹⁵.

Notice of an application to be made to the appeal court for a remedy incidental to the appeal¹⁶ may be included in the appeal notice¹⁷ or in a notice of application for a court order¹⁸.

Where the appellant seeks the appeal court's permission to appeal it must be requested in the appellant's notice¹⁹.

Where the appellant is seeking to rely on any issue under the Human Rights Act 1998, or seeks a remedy available under that Act, for the first time in an appeal he must include specified information²⁰ in his appeal notice²¹.

1 As to the meaning of 'appellant' see PARA 1660 note 1.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 For the form of notice see Form N161 in *The Civil Court Practice*. Such a notice must be filed and served in all cases: *Practice Direction--Appeals* PD 52 para 5.1. As to the meaning of 'service' see PARA 138 note 2.

4 As to the meaning of 'appeal court' see PARA 1660 note 2.

5 CPR 52.4(2)(a). The lower court should not normally direct a period which exceeds 35 days: *Practice Direction--Appeals* PD 52 para 5.19. Where the lower court judge announces his decision and reserves the reasons for his judgment or order until a later date, he must, in exercising his power to fix a period for filing the appellant's notice at the appeal court, take this into account: *Practice Direction--Appeals* PD 52 para 5.20. As to the meaning of 'lower court' see PARA 1660 note 2.

6 As to the meaning of 'court' see PARA 22.

7 CPR 52.4(2)(b); *Practice Direction--Appeals* PD 52 para 5.19. As to the meaning of 'appeal' see PARA 1658 note 5. As to applications for varying the time limit for filing an appeal notice see PARA 1665. As to the meaning of 'appeal notice' see PARA 1660 note 9. A court should have regard to CPR 3.9 when considering an application, in a case of any complexity, for extension of time by an applicant who has failed to comply with the time limit under CPR 52.4(2): *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645, [2002] 3 All ER 490. As to the application of the principles in CPR 3.9(1) to the filing of a notice of appeal out of time, see *R (on the application of Awan) v Immigration Appeal Tribunal* [2004] EWCA Civ 922, (2004) Times, 24 June; and PARA 256.

The time limit for filing the appellant's notice is different in the case of a statutory appeal: see PARA 1684.

8 The court may dispense with the requirement for service of the notice on a respondent; any application notice seeking an order under CPR 6.28 (general power of court to dispense with service of a document: see

PARA 153) must set out the reasons relied on and be verified by a statement of truth: *Practice Direction--Appeals* PD 52 para 5.23. As to statements of truth see PARA 613.

9 CPR 52.4(3); and see *Practice Direction--Appeals* PD 52 para 5.21. Unless the court otherwise directs a respondent need not take any action when served with an appellant's notice until such time as notification is given to him that permission to appeal has been given: *Practice Direction--Appeals* PD 52 para 5.22. Copies of the documents which accompany an appellant's notice need not generally be served on the respondent where the appellant's notice is seeking permission to appeal: see note 19.

10 As to fees see PARA 87.

11 The appellant must file the following documents together with an appeal bundle with his appellant's notice in every case except where the appeal relates to a claim allocated to the small claims track (see note 12) and is being heard in a county court or the High Court: (1) two additional copies of the appellant's notice for the appeal court; and (2) one copy of the appellant's notice for each of the respondents; (3) one copy of any skeleton argument (see note 13) for each copy of the appellant's notice that is filed; (4) a sealed copy of the order being appealed; (5) a copy of any order giving or refusing permission to appeal, together with a copy of the judge's reasons for that decision; (6) any witness statements or affidavits in support of any application included in the appellant's notice; and (7) a copy of the order allocating the case to a track (if any): *Practice Direction--Appeals* PD 52 para 5.6(1)-(7). An appellant must include in his appeal bundle the following documents: (a) a sealed copy of the appellant's notice; (b) a sealed copy of the order being appealed; (c) a copy of any order giving or refusing permission to appeal, together with a copy of the judge's reasons for allowing or refusing permission to appeal; (d) any affidavit or witness statement filed in support of any application included in the appellant's notice; (e) a copy of his skeleton argument; (f) a transcript or note of judgment (see para 5.12), and in cases where permission to appeal was given by the lower court or is not required those parts of any transcript of evidence which are directly relevant to any question at issue on the appeal; (g) the claim form and statements of case (where relevant to the subject of the appeal); (h) any application notice (or case management documentation) relevant to the subject of the appeal; (i) in cases where the decision appealed was itself made on appeal (eg from district judge to circuit judge), the first order, the reasons given and the appellant's notice used to appeal from that order; (j) in the case of judicial review or a statutory appeal, the original decision which was the subject of the application to the lower court; (k) in cases where the appeal is from a tribunal, a copy of the tribunal's reasons for the decision, a copy of the decision reviewed by the tribunal and the reasons for the original decision and any document filed with the tribunal setting out the grounds of appeal from that decision; (l) any other documents which the appellant reasonably considers necessary to enable the appeal court to reach its decision on the hearing of the application or appeal; and (m) such other documents as the court may direct: para 5.6A(1). Documents which are extraneous to the issues to be considered must be excluded; the appeal bundle may include affidavits, witness statements, summaries, experts' reports and exhibits but only where these are directly relevant to the subject matter of the appeal: para 5.6A(2). Where the appellant is represented, the appeal bundle must contain a certificate signed by his solicitor, counsel or other representative to the effect that he has read and understood para 5.6A(2) and that the composition of the appeal bundle complies with it: para 5(6A)(3).

Where it is not possible to file all the above documents, the appellant must indicate which documents have not yet been filed and the reasons why they are not currently available. The appellant must then provide a reasonable estimate of when the missing document or documents can be filed and file them as soon as reasonably practicable: para 5.7. For further guidance see *Harvey Shopfitters Ltd v ADI Ltd* [2003] EWCA Civ 1757, [2004] 2 All ER 982.

12 Where the appeal relates to a claim allocated to the small claims track and the appeal is being heard in a county court or the High Court, an appellant's notice must be filed and served in Form N164, and the appellant must file the following documents with his appellant's notice: (1) a sealed copy of the order being appealed; (2) any order giving or refusing permission to appeal, together with a copy of the reasons for that decision: *Practice Direction--Appeals* PD 52 para 5.8(1), (1A), (2). The appellant may file any other document listed in para 5.6 or 5.6A (see note 11) in addition to the documents referred to in para 5.8(2): para 5.8(3). The appellant need not file a record of the reasons for judgment of the lower court with his appellant's notice unless sub-para 5.8(5) applies: para 5.8(4). The court may order a suitable record of the reasons for judgment of the lower court (see para 5.12) to be filed to enable it to decide if permission should be granted or if permission is granted to enable it to decide the appeal: para 5.8(5).

13 The appellant's notice must, subject as follows, be accompanied by a skeleton argument. Alternatively the skeleton argument may be included in the appellant's notice; where the skeleton argument is so included it will not form part of the notice for the purposes of CPR 52.8 (amendment of appeal notice: see PARA 1667): *Practice Direction--Appeals* PD 52 para 5.9(1). Where it is impracticable for the appellant's skeleton argument to accompany the appellant's notice it must be filed and served on all respondents within 14 days of filing the notice: para 5.9(2). An appellant who is not represented need not file a skeleton argument but is encouraged to do so since this will be helpful to the court: para 5.9(3). A skeleton argument must contain a numbered list of the points which the party wishes to make. These should both define and confine the areas of controversy. Each point should be stated as concisely as the nature of the case allows: para 5.10(1). A numbered point must be followed by a reference to any document on which the party wishes to rely: para 5.10(2). A skeleton argument

must state, in respect of each authority cited, the proposition of law that the authority demonstrates and the parts of the authority (identified by page or paragraph references) that support the proposition: para 5.10(3). If more than one authority is cited in support of a given proposition, the skeleton argument must briefly state the reason for taking that course (para 5.10(4)), which should not materially add to the length of the skeleton argument but should be sufficient to demonstrate, in the context of the argument the relevance of the authority or authorities to that argument and that the citation is necessary for a proper presentation of that argument (para 5.10(5)). The cost of preparing a skeleton argument which does not comply with the requirements set out above or which was not filed within the time limits provided by *Practice Direction--Appeals* PD 52 (or any further time granted by the court), will not be allowed on assessment except to the extent that the court otherwise directs: para 5.10(6). A skeleton argument filed in the Court of Appeal, Civil Division on behalf of the appellant should contain in para 1 the advocate's time estimate for the hearing of the appeal: para 5.10(7). The appellant should consider what other information the appeal court will need. This may include a list of persons who feature in the case or glossaries of technical terms. A chronology of relevant events will be necessary in most appeals: para 5.11. As to judicial decisions as authorities see PARA 91 et seq. See the comments made by the Court of Appeal warning against over-lengthy skeleton arguments: *Tombstone Ltd v Raja* [2008] EWCA Civ 1444 at [122]-[128], [2008] All ER (D) 180 (Dec) at [122]-[128] per Mummery LJ.

14 Where the judgment to be appealed has been officially recorded by the court, an approved transcript of that record must accompany the appellant's notice. Photocopies will not be accepted for this purpose: *Practice Direction--Appeals* PD 52 para 5.12. However, where there is no officially recorded judgment, the following documents will be acceptable:

- 99 (1) where the judgment was made in writing, a copy of that judgment indorsed with the judge's signature (para 5.12(1));
- 100 (2) when judgment was not officially recorded or made in writing a note of the judgment (agreed between the appellant's and respondent's advocates) should be submitted for approval to the judge whose decision is being appealed. If the parties cannot agree on a single note of the judgment, both versions should be provided to that judge with an explanatory letter. For the purpose of an application for permission to appeal the note need not be approved by the respondent or the lower court judge (para 5.12(2));
- 101 (3) when the appellant was unrepresented in the lower court it is the duty of any advocate for the respondent to make his/her note of judgment promptly available, free of charge to the appellant where there is no officially recorded judgment or if the court so directs. Where the appellant was represented in the lower court it is the duty of his/her own former advocate to make his/her note available in these circumstances. The appellant must submit the note of judgment to the appeal court (para 5.12(3));
- 102 (4) a sealed copy of the tribunal's reasons for the decision, in tribunal cases (para 5.12(4)).

An appellant may not be able to obtain an official transcript or other suitable record of the lower court's decision within the time within which the appellant's notice must be filed. In such cases the appellant's notice must still be completed to the best of the appellant's ability on the basis of the documentation available. However it may be amended subsequently with the permission of the appeal court: para 5.13.

An advocate's brief (or, where appropriate, refresher) fee includes (a) remuneration for taking a note of the judgment of the court; (b) having the note transcribed accurately; (c) attempting to agree the note with the other side if represented; (d) submitting the note to the judge for approval where appropriate; (e) revising it if so requested by the judge; (f) providing any copies required for the appeal court, instructing solicitors and lay client; and (g) providing a copy of his note to an unrepresented appellant: para 5.14.

15 When the evidence is relevant to the appeal an official transcript of the relevant evidence must be obtained. Transcripts or notes of evidence are generally not needed for the purpose of determining an application for permission to appeal: *Practice Direction--Appeals* PD 52 para 5.15. If evidence relevant to the appeal was not officially recorded, a typed version of the judge's notes of evidence must be obtained: para 5.16. Where the lower court or the appeal court is satisfied that an unrepresented appellant or an appellant whose legal representation is provided free of charge to the appellant and not funded by the Community Legal Service is in such poor financial circumstances that the cost of a transcript would be an excessive burden the court may certify that the cost of obtaining one official transcript should be borne at public expense: para 5.17. In the case of a request for an official transcript of evidence or proceedings to be paid for at public expense, the court must also be satisfied that there are reasonable grounds for appeal. Whenever possible a request for a transcript at public expense should be made to the lower court when asking for permission to appeal: para 5.18. See *Hyams v Plender* [2001] 2 All ER 179, [2001] 1 WLR 32, CA. A litigant in person who seeks to appeal but who has provided no grounds of appeal is not entitled to demand as of right a transcript of the relevant judgment at public expense: *Perotti v City of Westminster* [2005] EWCA Civ 581, [2005] RVR 321. As to grounds for appeal see PARA 1662.

16 Eg an interim remedy under CPR 25.1 (see PARA 315) or an order for security for costs. As to security for costs of an appeal see CPR 25.15; and PARA 748.

17 *Practice Direction--Appeals* PD 52 para 5.5. Note that 'appeal notice' means either an appellant's or a respondent's notice: see PARA 1660 note 9. As to a respondent's notice see PARA 1664.

18 *Practice Direction--Appeals* PD 52 para 5.5. Such applications are made under CPR Pt 23 (see PARA 303 et seq) and referred to as 'Part 23 applications'. Where a party to an appeal makes an application whether in an appeal notice or by Part 23 application notice, the provisions of CPR Pt 23 will apply: *Practice Direction--Appeals* PD 52 para 11.1. The applicant must file the following documents with the notice: (1) one additional copy of the application notice for the appeal court and one copy for each of the respondents; (2) where applicable a sealed copy of the order which is the subject of the main appeal; (3) a bundle of documents in support which should include the Part 23 application notice and any witness statements and affidavits filed in support of the application notice: para 11.2.

19 CPR 52.4(1); *Practice Direction--Appeals* PD 52 para 5.1. Where the appellant is applying for permission to appeal in his appellant's notice, there is no requirement at this stage for copies of the documents referred to in *Practice Direction--Appeals* PD 52 para 5.6 (see note 11) to be served on the respondents; however, if permission has been given by the lower court or permission is not required, copies of all the documents must be served on the respondents with the appellant's notice: *Practice Direction--Appeals* PD 52 para 5.24.

20 Ie the information required by *Practice Direction--Statements of Case* PD16 para 15.1: see PARA 596. *Practice Direction--Statements of Case* PD 16 para 15.2 also applies as if references to the statement of case were to the appeal notice: *Practice Direction--Appeals* PD 52 para 5.1A. CPR 19.4A and its supplementary practice direction (addition and substitution of parties in claims involving issues under the Human Rights Act 1998: see PARA 596) apply as if references to the case management conference were to the application for permission to appeal: *Practice Direction--Appeals* PD 52 para 5.1B.

21 *Practice Direction--Appeals* PD 52 para 5.1A. As to the applicability of the fair trial provisions of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)) art 6(1) (now incorporated into domestic law: see the Human Rights Act 1998 s 1, Sch 1 art 6) where a right of appeal is provided see *Helmert v Sweden* (1991) 15 EHRR 285, [1991] ECHR 11826/85, ECtHR; *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442, [1995] ECHR 18139/91, ECtHR; and PARA 5.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1664. Respondent's notice.

1664. Respondent's notice.

A respondent¹ may file² and serve³ a respondent's notice⁴ and must do so if he is seeking permission to appeal⁵ from the appeal court⁶ or if he wishes to ask the appeal court to uphold the order of the lower court⁷ for reasons different from or additional to those given by the lower court⁸.

A respondent who wishes to ask the appeal court to vary the order of the lower court in any way must appeal and permission will be required on the same basis as for an appellant⁹. A respondent who wishes only to request that the appeal court upholds the judgment or order of the lower court, whether for the reasons given in the lower court or otherwise, does not make an appeal and does not therefore require permission to appeal¹⁰.

Where the respondent is seeking to rely on any issue under the Human Rights Act 1998, or seeks a remedy available under that Act, for the first time in an appeal he must include specified information in his respondent's notice¹¹.

Where the respondent seeks permission from the appeal court it must be requested in the respondent's notice¹².

A respondent's notice must be filed within such period as may be directed by the lower court¹³ or, where the court¹⁴ makes no such direction, 14 days after the date the respondent is served:

- 1227 (1) with the appellant's notice¹⁵, where permission to appeal was given by the lower court or permission to appeal is not required¹⁶;
- 1228 (2) with notification that the appeal court has given the appellant permission to appeal¹⁷; or
- 1229 (3) with notification that the application for permission to appeal and the appeal itself are to be heard together¹⁸.

Where an extension of time is required the extension must be requested in the respondent's notice and the reasons why the respondent failed to act within the specified time must be included¹⁹.

Unless the appeal court orders otherwise a respondent's notice must be served on the appellant and any other respondent as soon as practicable and in any event not later than seven days after it is filed²⁰.

The documents which must accompany the respondent's notice are specified by the relevant practice direction²¹. Where the appeal relates to a claim allocated to the small claims track and is being heard in a county court or the High Court the respondent may provide a skeleton argument but is not required to do so²².

Notice of an application to be made to the appeal court for a remedy incidental to the appeal²³ may be included in the respondent's notice²⁴ or in a notice of application for a court order²⁵.

1 As to the meaning of 'respondent' see PARA 1660 note 2.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 As to the meaning of 'service' see PARA 138 note 2.

4 CPR 52.5(1).

5 As to the meaning of 'appeal' see PARA 1658 note 5.

6 As to the meaning of 'appeal court' see PARA 1660 note 2.

7 As to the meaning of 'lower court' see PARA 1660 note 2.

8 See CPR 52.5(2); *Practice Direction--Appeals* PD 52 para 7.3.

9 *Practice Direction--Appeals* PD 52 para 7.1. As to permission to appeal see PARA 1659 et seq.

10 *Practice Direction--Appeals* PD 52 para 7.2.

11 See *Practice Direction--Appeals* PD 52 para 7.3A, applying paras 5.1A, 5.1B; and PARA 1663 notes 20-21. The information referred to is that required by *Practice Direction--Statements of Case* PD16 para 15.1; para 15.2 also applies as if references to the statement of case were to the appeal notice: *Practice Direction--Appeals* PD 52 para 5.1A. As to the addition and substitution of parties in appeals involving human rights issues see para 5.1B; and PARA 1663 note 20.

12 CPR 52.5(3).

13 CPR 52.5(4)(a).

14 As to the meaning of 'court' see PARA 22.

15 As to the meaning of 'appellant' see PARA 1660 note 1. As to the appellant's notice see PARA 1663.

16 CPR 52.5(4), (b), (5)(a)(i), (ii).

17 CPR 52.5(4), (5)(b).

18 CPR 52.5(4), (5)(c). See also *Practice Direction--Appeals* PD 52 para 7.4.

19 *Practice Direction--Appeals* PD 52 para 7.5.

20 CPR 52.5(6). See also *Practice Direction--Appeals* PD 52 paras 7.7, 7.13; and note 22.

21 Except where *Practice Direction--Appeals* PD 52 para 7.7A applies (see the text and note 22), the respondent must provide a skeleton argument for the court where he proposes to address arguments to the court. The respondent's skeleton argument may be included within a respondent's notice. Where a skeleton argument is included within a respondent's notice it will not form part of the notice for the purposes of CPR 52.8 (amendment of appeal notice: see PARA 1667); *Practice Direction--Appeals* PD 52 para 7.6. A respondent who files a respondent's notice but does not include his skeleton argument within that notice, must file and serve his skeleton argument within 14 days of filing the notice: para 7.7(1). A respondent who does not file a respondent's notice but who files a skeleton argument must file and serve that skeleton argument at least seven days before the appeal hearing: para 7.7(2). The respondent must serve his skeleton argument on the appellant and any other respondent at the same time as he files it at the court, and file a certificate of service: para 7.7B. A respondent's skeleton argument must conform to the directions at paras 5.10, 5.11 (see PARA 1663 note 13) with any necessary modifications. It should, where appropriate, answer the arguments set out in the appellant's skeleton argument: para 7.8. The respondent must lodge the following documents with his respondent's notice in every case: (1) two additional copies of the respondent's notice for the appeal court; (2) one copy each for the appellant and any other respondents; and (3) two copies of any skeleton arguments: para 7.10. If the respondent wishes to rely on any documents in addition to those filed by the appellant he must prepare a supplemental bundle and lodge it at the appeal court with his respondent's notice. He must serve a copy of the supplemental bundle at the same time as serving the respondent's notice on the persons required to be served in accordance with CPR 52.5(6): *Practice Direction--Appeals* PD 52 para 7.12. The respondent's notice and any skeleton argument must be served in accordance with the time limits set out in CPR 52.5(6) except where this requirement is modified by *Practice Direction--Appeals* PD 52 para 7.7: para 7.13.

22 *Practice Direction--Appeals* PD 52 para 7.7A(1). A respondent who is not represented need not file a skeleton argument but is encouraged to do so in order to assist the court: para 7.7A(2). As to the small claims track see PARAS 267, 274 et seq.

23 Eg an interim remedy under CPR 25.1 (see PARA 315) or an order for security for costs: *Practice Direction--Appeals* PD 52 para 7.9, applying para 5.5 (see PARA 1663 note 18). As to security for costs of an appeal see CPR 25.15; and PARA 748.

24 Note that 'appeal notice' means either an appellant's or a respondent's notice: see PARA 1660 note 9.

25 See *Practice Direction--Appeals* PD 52 paras 5.5, 7.9. Such applications are made under CPR Pt 23 and referred to as 'Part 23 applications': see further PARA 303 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1665. Extension of time for appeal.

1665. Extension of time for appeal.

An application to vary the time limit for filing¹ an appeal notice² must be made to the appeal court³. The parties may not agree to extend any date or time limit set by the Civil Procedure Rules⁴, the relevant practice direction⁵ or an order of the appeal court or the lower court⁶.

Where the time for filing an appellant's notice⁷ has expired, the appellant must file the appellant's notice and include in that appellant's notice an application for an extension of time⁸. The appellant's notice should state the reason for the delay and the steps taken prior to the application being made⁹.

Where the appellant's notice includes an application for an extension of time and permission to appeal has been given or is not required, the respondent¹⁰ has the right to be heard on that application and must be served with a copy of the appeal bundle¹¹; however, a respondent who unreasonably opposes an extension of time runs the risk of being ordered to pay the appellant's costs of that application¹².

1 As to the meaning of 'filing' see PARA 1832 note 8.

2 As to the meaning of 'appeal notice' see PARA 1660 note 9.

3 CPR 52.6(1). As to the meaning of 'appeal court' see PARA 1660 note 2. As to the time limit for filing an appellant's notice see PARA 1663 the text and notes 1-7; and as to the time limit for filing a respondent's notice see PARA 1664 the text and notes 13-18. As to time limits generally see PARA 88 et seq.

Under the appellate regime provided by the Access to Justice Act 1999 and the Civil Procedure Rules, if both a lower court and an appeal court at a lower level of the judicial hierarchy have decided (or, indeed, if just an appeal court has decided) that a proposed appeal has no real prospect of success, and there is no other compelling reason why the appeal should be heard, that is the end of the matter, and the issue cannot be re-litigated higher up the judicial chain. That principle does not, however, apply to an order refusing permission to extend time for an appeal, which can, with permission, be appealed against in the Court of Appeal as can any other order made by a High Court judge. If a circuit judge or a High Court judge sitting in an appeal court has the choice of disposing of a belated and unmeritorious appeal either by refusing to extend time for appealing or by refusing permission to appeal, he or she should bear in mind that taking the latter course will bring the appellate proceedings to an end. The adoption of the former course, on the other hand, may entail further expense and delay while a challenge is launched at a higher appeal court against the decision not to extend time for appealing: see *Foender v Bond Lewis & Co* [2001] EWCA Civ 759, [2001] 2 All ER 1019, [2001] All ER (D) 286 (May).

4 CPR 52.6(2)(a). The relevant rules are CPR Pt 52: see PARA 1658 et seq, PARA 1666 et seq.

5 CPR 52.6(2)(b). The relevant practice direction is *Practice Direction--Appeals* PD 52: see PARAS 1658 et seq, 1666 et seq.

6 CPR 52.6(2)(c). As to the meaning of 'lower court' see PARA 1660 note 2. The court may extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired) and may adjourn or bring forward a hearing: see CPR 3.1(2)(a), (b); and PARA 247.

7 As to appellants' notices see PARA 1663. As to the meaning of 'appellant' see PARA 1660 note 1.

8 *Practice Direction--Appeals* PD 52 para 5.2. When considering an application for an extension of time made after the expiry of the time limit, the court must have regard to the checklist in CPR 3.9 (see PARA 256): *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645, [2002] 3 All ER 490. However, where the application for an extension of time is made before the period for appeal has expired, then CPR 3.9 does not apply: see *Robert v Momentum Services Ltd* [2003] EWCA Civ 299, [2003] 2 All ER 74. See also *Smith v Kvaerner Cementation Foundations Ltd* [2006] EWCA Civ 242, [2006] 3 All ER 593. Appeals out of time are discouraged: *Smith v*

Brough [2005] EWCA Civ 261 at [54] per Brooke LJ; *YD (Turkey) v Secretary of State for the Home Department* [2006] EWCA Civ 52, [2006] All ER (D) 107 (Feb).

9 *Practice Direction--Appeals* PD 52 para 5.2.

10 As to the meaning of 'respondent' see PARA 1660 note 2.

11 As to the appeal bundle see PARA 1663 note 11.

12 *Practice Direction--Appeals* PD 52 para 5.3. As to costs generally see also PARA 1729 et seq. If an extension of time is given following such an application the procedure at paras 6.1-6.6 (see PARA 1666) applies: para 5.4.

UPDATE

1665 Extension of time for appeal

NOTE 9--See *R (on the application of Birmingham City Council) v Crown Court at Birmingham*; *R (on the application of South Gloucestershire DC) v Crown Court at Bristol* [2009] EWHC 3329 (Admin), (2010) 174 JP 185 (age of applicant taken into account when considering reasons for delay).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1666. Initial procedure after permission is obtained.

1666. Initial procedure after permission is obtained.

Where permission to appeal is given by the appeal court¹, or the appellant's notice² is filed³ in the appeal court and either permission was given by the lower court⁴ or permission is not required⁵, the appeal court will send the parties:

- 1230 (1) notification of the date of the hearing or the period of time (the 'listing window') during which the appeal is likely to be heard, and, in the Court of Appeal, the date by which the appeal will be heard (the 'hear-by date')⁶;
- 1231 (2) where permission is granted by the appeal court, a copy of the order giving permission to appeal⁷; and
- 1232 (3) any other directions given by the court⁸.

The Court of Appeal will send an appeal questionnaire to the appellant when it notifies him of the matters referred to in heads (1) to (3) above⁹.

1 As to the meaning of 'appeal' see PARA 1658 note 5; and as to the meaning of 'appeal court' see PARA 1660 note 2. As to permission for appeals see PARAS 1659-1661.

2 As to the appellant's notice see PARA 1663.

3 As to the meaning of 'filing' see PARA 1832 note 8.

4 As to the meaning of 'lower court' see PARA 1660 note 2.

5 As to when permission to appeal is required see PARA 1660.

6 *Practice Direction--Appeals* PD 52 paras 6.1, 6.3(1). In the case of all appeals to the Court of Appeal filed on or after 1 October 2001, the longest hear-by date will be ten months: see *Practice Note* [2001] 3 All ER 479, CA, para 1. As to listing in the Court of Appeal see further PARA 1709.

7 *Practice Direction--Appeals* PD 52 paras 6.1, 6.3(2). If the appeal court gives permission to appeal, the appeal bundle (see PARA 1663 note 11) must be served on each of the respondents within seven days of receiving the order giving permission to appeal: para 6.2. Where the appeal court grants permission to appeal, the appellant must add the following documents to the appeal bundle (1) the respondent's notice and skeleton argument (if any); (2) those parts of the transcripts of evidence which are directly relevant to any question at issue on the appeal; (3) the order granting permission to appeal and, where permission to appeal was granted at an oral hearing, the transcript (or note) of any judgment which was given; and (4) any document which the appellant and respondent have agreed to add to the appeal bundle in accordance with para 7.11: para 6.3A(1). Where permission to appeal has been refused on a particular issue, the appellant must remove from the appeal bundle all documents that are relevant only to that issue: para 6.3A(2). If the respondent wishes to rely on any documents which he reasonably considers necessary to enable the appeal court to reach its decision on the appeal in addition to those filed by the appellant, he must make every effort to agree amendments to the appeal bundle with the appellant: para 7.11.

As to the meaning of 'respondent' see PARA 1660 note 2; and as to the meaning of 'service' see PARA 138 note 2.

8 *Practice Direction--Appeals* PD 52 paras 6.1, 6.3(3).

9 *Practice Direction--Appeals* PD 52 para 6.4. The questionnaire must be completed and returned within 14 days of the date of the letter of notification of the matters in para 6.3 (see heads (1)-(3) in the text): para 6.5. The appeal questionnaire must contain (1) if the appellant is legally represented, the advocate's time estimate for the hearing of the appeal; (2) where a transcript of evidence is relevant to the appeal, confirmation as to what parts of a transcript of evidence have been ordered where this is not already in the bundle of documents; (3) confirmation that copies of the appeal bundle are being prepared and will be held ready for the use of the

Court of Appeal and an undertaking that they will be supplied to the court on request; for the purpose of these bundles photocopies of the transcripts will be accepted; (4) confirmation that copies of the appeal questionnaire and the appeal bundle have been served on the respondents and the date of that service: para 6.5. The time estimate included in an appeal questionnaire must be that of the advocate who will argue the appeal. It should exclude the time required by the court to give judgment. If the respondent disagrees with the time estimate, the respondent must inform the court within seven days of receipt of the appeal questionnaire. In the absence of such notification the respondent will be deemed to have accepted the estimate proposed on behalf of the appellant: para 6.6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1667. Amendment of appeal notice.

1667. Amendment of appeal notice.

An appeal notice¹ may not be amended without the permission of the appeal court².

Such an application to amend, and any application in opposition, will normally be dealt with at the hearing unless that course would cause unnecessary expense or delay in which case a request should be made for the application to amend to be heard in advance³.

1 As to the meaning of 'appeal notice' see PARA 1660 note 9.

2 CPR 52.8; *Practice Direction--Appeals* PD 52 para 5.25. As to the meaning of 'appeal court' see PARA 1660 note 2.

3 *Practice Direction--Appeals* PD 52 para 5.25. As to applications see CPR Pt 23; and PARA 303 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1668. Striking out appeal notices and setting aside or imposing conditions on permission to appeal.

1668. Striking out appeal notices and setting aside or imposing conditions on permission to appeal.

The appeal court¹ may strike out² the whole or part of an appeal notice³. It may also set aside⁴ permission to appeal⁵ in whole or in part⁶ and impose or vary conditions upon which an appeal may be brought⁷. The court⁸ will only exercise these powers, however, where there is a compelling reason for doing so⁹.

Where a party was present at the hearing at which permission was given he may not subsequently apply for an order that the court exercise its powers under these provisions to set aside permission or to impose or vary conditions¹⁰.

1 As to the meaning of 'appeal court' see PARA 1660 note 2.

2 As to the meaning of 'strike out' see PARA 218 note 2.

3 CPR 52.9(1)(a). As to the meaning of 'appeal notice' see PARA 1660 note 9. As to the exercise of this power see eg *Turner v Haworth Associates* [2001] EWCA Civ 370, [2001] All ER (D) 309 (Feb). CPR 52.9 may be invoked as a method of enforcement notwithstanding that the normal processes of enforcement are available: *Bell Electric Ltd v Aweco Appliance Systems GmbH and Co KG* [2002] EWCA Civ 1501, [2003] 1 All ER 344. An application under CPR 52.9 must be made promptly: *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD, Moil-Coal Trading Co Ltd v Okta Crude Oil Refinery AD* [2003] EWCA Civ 617, [2003] All ER (D) 30 (Jun).

4 As to the meaning of 'set aside' see PARA 197 note 6. As to the exercise of this power see eg *Beedell v West Ferry Printers Ltd* [2001] EWCA Civ 400, [2001] ICR 962, [2001] All ER (D) 177 (Mar).

5 As to permission to appeal see PARA 1659 et seq. As to the meaning of 'appeal' see PARA 1658 note 5.

6 CPR 52.9(1)(b).

7 CPR 52.9(1)(c).

8 As to the meaning of 'court' see PARA 22.

9 CPR 52.9(2). As to the exercise of this discretion see eg *Aoun v Bahri* [2002] EWCA Civ 1141, [2002] All ER (D) 511 (Jul); *Hertsmere Borough Council v Harty* [2001] EWCA Civ 1238; *Barings plc (in liquidation) v Coopers and Lybrand (a firm)* [2002] EWCA Civ 1155, [2002] All ER (D) 278 (Jul).

10 CPR 52.9(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1669. Appeal not generally operating as a stay.

1669. Appeal not generally operating as a stay.

Unless the appeal court¹ or the lower court² orders otherwise or the appeal³ is from the Asylum and Immigration Tribunal, an appeal does not operate as a stay⁴ of any order or decision of the lower court⁵.

1 As to the meaning of 'appeal court' see PARA 1660 note 2.

2 As to the meaning of 'lower court' see PARA 1660 note 2.

3 As to the meaning of 'appeal' see PARA 1658 note 5.

4 As to the meaning of 'stay' see PARA 233 note 11.

5 CPR 52.7; and see *Hyams v Plender* [2001] 2 All ER 179, [2001] 1 WLR 32, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1670. Disposing of applications and appeals by consent.

1670. Disposing of applications and appeals by consent.

Where an appellant¹ does not wish to pursue an application or an appeal, he may request the appeal court² for an order that his application or appeal be dismissed³. If such a request is granted it will usually be on the basis that the appellant pays the costs of the application or appeal⁴. If the appellant wishes to have the application or appeal dismissed without costs, his request must be accompanied by a consent signed by the respondent or his legal representative stating that the respondent is not a child or protected party and consents to the dismissal of the application or appeal without costs⁵.

Where a settlement has been reached disposing of the application or appeal, the parties may make a joint request to the court stating that none of them is a child or protected party and that the appeal or application is not from a decision of the Court of Protection, and asking that the application or appeal be dismissed by consent. If the request is granted the application or appeal will be dismissed⁶.

The appeal court will not normally make an order allowing an application or appeal unless satisfied that the decision of the lower court was wrong⁷. Where the appeal court is requested by all parties to allow an application or an appeal the court may consider the request on the papers⁸.

Specific provision is made regarding the procedure for periodical payments for future pecuniary loss⁹ and consent orders involving children¹⁰ or protected parties¹¹. Such settlements which are agreed upon at the appeal stage require the court's approval¹².

1 As to the meaning of 'appellant' see PARA 1660 note 1.

2 As to the meaning of 'appeal' see PARA 1658 note 5; and as to the meaning of 'appeal court' see PARA 1660 note 2.

3 *Practice Direction--Appeals* PD 52 para 12.2. This does not apply where any party to the proceedings is a child or protected party or the appeal or application is to the Court of Appeal from a decision of the Court of Protection, and the request must contain a statement that the appellant is not a child or protected party: paras 12.1, 12.2. As to the meaning of 'child' see PARA 222 note 3; and as to the meaning of 'protected party' see PARA 222 note 1.

4 *Practice Direction--Appeals* PD 52 para 12.2. As to costs generally see also PARA 1729 et seq.

5 *Practice Direction--Appeals* PD 52 para 12.3. As to the meaning of 'legal representative' see PARA 1833 note 13.

6 *Practice Direction--Appeals* PD 52 para 12.4.

7 *Practice Direction--Appeals* PD 52 para 13.1.

8 *Practice Direction--Appeals* PD 52 para 13.1. The request should state that none of the parties is a child or protected party and that the application or appeal is not from a decision of the Court of Protection, and set out the relevant history of the proceedings and the matters relied on as justifying the proposed order and be accompanied by a copy of the proposed order: *Practice Direction--Appeals* PD 52 para 13.1.

9 Where periodical payments for future pecuniary loss have been negotiated in a personal injury case which is under appeal, the documents filed should include those which would be required in the case of a personal injury claim for damages for future pecuniary loss dealt with at first instance. Details can be found in *Practice Direction-- Children and Protected Parties* PD 21 which supplements CPR Pt 21: *Practice Direction--Appeals* PD 52 para 13.5. As to periodical payments see PARA 1222.

10 In cases involving a child a copy of the proposed order signed by the parties' solicitors must be sent to the appeal court, together with an opinion from the advocate acting on behalf of the child: *Practice Direction--Appeals* PD 52 para 13.3.

11 Where a party is a protected party the same procedure will be adopted as in cases involving a child (see note 10), but the documents filed must also include any relevant reports prepared for the Court of Protection: *Practice Direction--Appeals* PD 52 para 13.4.

12 See *Practice Direction--Appeals* PD 52 para 13.2. Where one of the parties is a child or protected party or the application or appeal is to the Court of Appeal from a decision of the Court of Protection, (1) a settlement relating to an appeal or application; (2) in a personal injury claim for damages for future pecuniary loss, an agreement reached at the appeal stage to pay periodical payments; or (3) a request by an appellant for an order that his application or appeal be dismissed with or without the consent of the respondent, requires the court's approval: para 13.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1671. Appeal court's powers.

1671. Appeal court's powers.

In relation to an appeal¹ the appeal court² has all the powers of the lower court³. The appeal court has power to:

- 1233 (1) affirm, set aside⁴ or vary any order or judgment made or given by the lower court⁵;
- 1234 (2) refer any claim or issue for determination by the lower court⁶;
- 1235 (3) order a new trial or hearing⁷;
- 1236 (4) make orders for the payment of interest⁸;
- 1237 (5) make a costs order⁹.

In an appeal from a claim tried with a jury¹⁰ the Court of Appeal may, instead of ordering a new trial, make an order for damages¹¹ or vary an award of damages made by the jury¹².

The appeal court may exercise its powers in relation to the whole or part of an order of the lower court¹³.

If the appeal court refuses an application for permission to appeal, strikes out an appellant's notice or dismisses an appeal, and it considers that the application, the appellant's notice or the appeal is totally without merit, the following provisions must be complied with¹⁴. In such a case, (a) the court's order must record the fact that it considers the application, the appellant's notice or the appeal to be totally without merit; and (b) the court must at the same time consider whether it is appropriate to make a civil restraint order¹⁵.

1 As to the meaning of 'appeal' see PARA 1658 note 5.

2 As to the meaning of 'appeal court' see PARA 1660 note 2.

3 CPR 52.10(1). As to the meaning of 'lower court' see PARA 1660 note 2. CPR Pt 52 (see PARA 1658 et seq, PARA 1672 et seq) is subject to any enactment that sets out special provisions with regard to any particular category of appeal--where such an enactment gives a statutory power to a tribunal, person or other body it may be the case that the appeal court may not exercise that power on an appeal: see CPR 52.1(4); and PARA 1658.

4 As to the meaning of 'set aside' see PARA 197 note 6.

5 CPR 52.10(2)(a).

6 CPR 52.10(2)(b). The appeal court has the power to remit for determination by the lower court an issue that is only contingently relevant in the context of an appeal that is pending: *Hicks v Russell Jones & Walker (a firm)* [2007] EWCA Civ 844, [2008] 2 All ER 1089, [2009] 1 WLR 487.

7 CPR 52.10(2)(c).

8 CPR 52.10(2)(d). As to interest on judgment debts see PARA 1149.

9 CPR 52.10(2)(e). As to costs generally see also PARA 1729 et seq.

10 As to jury trial in civil proceedings see PARA 1132.

11 CPR 52.10(3)(a). As to the meaning of 'damages' see PARA 37 note 1; and see generally **DAMAGES**.

12 CPR 52.10(3)(b).

13 CPR 52.10(4). As to the court's general case management powers see CPR Pt 3; and PARA 247 et seq. As to the meaning of 'court' see PARA 22.

14 CPR 52.10(5).

15 CPR 52.10(6). As to civil restraint orders see PARA 259.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1672. Hearing of appeals.

1672. Hearing of appeals.

An appeal¹ is generally limited to a review of the decision of the lower court².

Unless it orders otherwise³, the appeal court⁴ will not receive oral evidence⁵ or evidence which was not before the lower court⁶.

The appeal court may draw any inference of fact which it considers justified on the evidence⁷.

At the hearing of the appeal a party may not rely on a matter not contained in his appeal notice⁸ unless the appeal court gives permission⁹.

Costs are likely to be assessed by way of summary assessment in respect of contested directions hearings, applications for permission to appeal at which the respondent is present, dismissal list hearings in the Court of Appeal at which the respondent is present, appeals from case management decisions and appeals listed for one day or less¹⁰.

The grounds on which the appeal court will allow an appeal have already been set out¹¹.

1 As to the meaning of 'appeal' see PARA 1658 note 5.

2 See CPR 52.11(1); and PARA 1673. As to the meaning of 'lower court' see PARA 1660 note 2. As to the meaning of 'court' see PARA 22.

3 The circumstances in which further evidence will be received are not specified under CPR 52.11: cf RSC Ord 59 r 10(2) (revoked) which provided, in general, that no further evidence would be admitted except on special grounds. As to the admission of fresh evidence on appeal see PARA 1676 et seq.

4 As to the meaning of 'appeal court' see PARA 1660 note 2.

5 CPR 52.11(2)(a).

6 CPR 52.11(2)(b).

7 CPR 52.11(4).

8 As to the meaning of 'appeal notice' see PARA 1660 note 9.

9 CPR 52.11(5). As a matter of fairness to the court, an appellant should make it clear that a finding of fact is being challenged on appeal, particularly when that fact relates to the honesty of the respondent: *IS Innovative Software Ltd v Howes* [2004] EWCA Civ 275, (2004) Times, 10 March.

10 See *Practice Direction--Appeals* PD 52 paras 14.1, 14.2. As to summary assessment of costs see CPR 43.3; *Practice Direction about Costs* PD43-48; and see *The Civil Court Practice*. As to costs generally see also PARA 1729 et seq.

11 See PARA 1662.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1673. Appeal generally by way of a review not a re-hearing.

1673. Appeal generally by way of a review not a re-hearing.

Under the Civil Procedure Rules, every appeal¹ is limited to a review of the decision of the lower court² unless a practice direction makes different provision for a particular category of appeal³ or the court⁴ considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing⁵. Where there is a re-hearing, the appeal court forms its own judgment on the issues rather than simply reviewing the decision of the lower court⁶, but such appeals are now in the minority.

Thus the decision of the lower court has acquired greater significance⁷, since, in an appeal by way of review, the appeal court cannot disturb the lower court's decision unless the decision can be shown to be wrong or involved a serious procedural irregularity⁸. A decision based on the exercise of discretion is not wrong simply because the appellate court would have reached a different decision⁹, and generally an appeal court will not interfere with a lower court's findings of facts¹⁰ unless no reasonable judge could have reached the same conclusion or crucial factors were not taken into account¹¹; while for a decision to be disturbed on the ground of irregularity, the irregularity must not only be serious but must also render the decision unjust¹².

1 As to the meaning of 'appeal' see PARA 1658 note 5.

2 CPR 52.11(1). As to the meaning of 'lower court' see PARA 1660 note 2.

3 CPR 52.11(1)(a). The hearing of an appeal will be a re-hearing (as opposed to a review of the decision of the lower court) if the appeal is from the decision of a minister, person or other body and the minister, person or other body (1) did not hold a hearing to come to that decision; or (2) held a hearing to come to that decision, but the procedure adopted did not provide for the consideration of evidence: *Practice Direction--Appeals* PD 52 para 9.1.

4 As to the meaning of 'court' see PARA 22.

5 CPR 52.11(1)(b). Whether or not it is in the interests of justice to hold a re-hearing depends on the circumstances of the particular case: a re-hearing might be necessary, for example, if the lower court failed to take proper account of the evidence before it, or if there is fresh evidence, or if the lower court failed to give reasons for its decision.

As to procedure on a re-hearing see eg *Hertfordshire Investments Ltd v Bubb* [2000] All ER (D) 1052, [2000] 1 WLR 2318, CA. Where evidence is not re-heard, the court's approach should be the same whether conducting a review or re-hearing, as described in CPR 52.11: *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 All ER (Comm) 140. See *Yorkshire Water Services Ltd v Taylor Woodrow Construction Northern Ltd* [2005] EWCA Civ 894, [2005] BLR 395 (in general, the more complicated and technical the facts, the harder it would be for appellant to persuade appellate court to review of findings of fact); *Ansari v Wilof* [2002] EWHC 1243 (QB), [2002] CPLR 257 (re-hearing ordered notwithstanding that sole ground for appeal was that earlier court failed to give reasons for decision). See also *Ealing London Borough Council v Richardson* [2005] EWCA Civ 1798, [2005] All ER (D) 285 (Nov).

6 See eg *Coghlan v Cumberland* [1898] 1 Ch 704, CA; *Audergon v La Baguette Ltd* [2002] EWCA Civ 10, [2002] All ER (D) 166 (Jan).

7 See *Tanfern Ltd v Cameron-MacDonald* [2000] 2 All ER 801 at 809, [2000] 1 WLR 1311 at 1317, CA.

8 See CPR 52.11(3); and PARA 1662.

9 *G v G* [1985] 2 All ER 225, [1985] 1 WLR 647, HL; *Tanfern Ltd v Cameron-MacDonald* [2000] 2 All ER 801, [2000] 1 WLR 1311, CA; *Leizert v Kent Structural Engineering Ltd* [2002] EWHC 942 (QB) at [8], [2002] All ER (D) 76 (Apr) at [8] per Buckley J.

10 *Akerhelm v De Mare* [1959] 3 All ER 485, PC; *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700, HL; *Hicks v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65, HL.

11 *Dobie v Burns International Security Services (UK) Ltd* [1984] IRLR 329, [1984] 3 All ER 333, CA.

12 *Tanfern Ltd v Cameron-MacDonald* [2000] 2 All ER 801 at 809, [2000] 1 WLR 1311 at 1317, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1674. Re-opening of final appeals.

1674. Re-opening of final appeals.

Provision is made in relation to the re-opening of appeals by the Court of Appeal and the High Court¹. The rule does not, however, apply to appeals to a county court². The Court of Appeal or the High Court may re-open a final determination of any appeal, including an application for permission to appeal³, if (1) it is necessary to do so in order to avoid real injustice; (2) the circumstances are exceptional and make it appropriate to re-open the appeal; and (3) there is no alternative effective remedy⁴. Permission is needed to make an application to re-open a final determination of an appeal even in cases where permission was not needed for the original appeal⁵. There is no right to an oral hearing of an application for permission unless, exceptionally, the judge so directs⁶. The judge will not grant permission without directing the application to be served on the other party to the original appeal and giving him an opportunity to make representations⁷. The application for permission, and any written statements supporting or opposing it, will be considered on paper by a single judge, and will be allowed to proceed only if the judge so directs⁸. There is no right of appeal or review from the decision of the judge on the application for permission, which is final⁹.

¹ See CPR 52.17. The procedure for making an application for permission is set out in *Practice Direction--Appeals* PD 52 paras 25.1-25.7: CPR 52.17(8). The Court of Appeal possesses a residual jurisdiction inherent in its function as a court of justice to avoid real injustice in exceptional circumstances: *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528, [2002] 2 All ER 353 (jurisdiction to re-open a final decision); applied in *Re Uddin (A Child) (Serious Injury: Standard of Proof)* [2005] EWCA Civ 52, [2005] 3 All ER 550, [2005] 1 WLR 2398. The High Court, as an appeal court, possesses a similar jurisdiction: *Seray-Wurie v Hackney London Borough Council* [2002] EWCA Civ 909, [2002] 3 All ER 448, [2003] 1 WLR 257. The exceptional nature of this jurisdiction has been emphasised by the Court of Appeal: see *Matlaszek v Bloom Camillin (a firm)* [2003] EWCA Civ 154, [2003] All ER (D) 38 (Feb); and *Hardy v Pembrokeshire CC* [2006] EWCA Civ 1008, [2006] All ER (D) 252 (Jul).

² CPR 52.17(3).

³ CPR 52.17(2); *Practice Direction--Appeals* PD 52 para 25.2.

⁴ CPR 52.17(1). See *Feakins v Intervention Board for Agricultural Produce* [2006] EWCA Civ 699, [2006] All ER (D) 49 (Jun); *Jaffray v Society of Lloyd's* [2007] EWCA Civ 586, [2008] 1 WLR 75.

⁵ CPR 52.17(4). As to cases where permission is not needed for the original appeal, see CPR 52.3(1); and PARA 1660. Permission must be sought from the court whose decision the applicant wishes to re-open and must be made by application notice and supported by written evidence, verified by a statement of truth: *Practice Direction--Appeals* PD 52 paras 25.3, 25.4. As to statements of truth see PARA 613.

⁶ CPR 52.17(5).

⁷ CPR 52.17(6). See also *Practice Direction--Appeals* PD 52 para 25.5, which provides that a copy of the application for permission must not be served on any other party to the original appeal unless the court so directs. Where the court directs that the application for permission is to be served on another party, that party may within 14 days of the service on him of the copy of the application file and serve a written statement either supporting or opposing the application: para 25.6.

⁸ *Practice Direction--Appeals* PD 52 para 25.7.

⁹ CPR 52.17(7).

UPDATE

1674 Re-opening of final appeals

NOTE 1--*Uddin*, cited, applied in *Butland v Powys DC* [2009] EWHC 151 (Admin), [2009] All ER (D) 41 (Feb).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(1) GENERAL RULES/1675. Non-disclosure of Part 36 offers and payments.

1675. Non-disclosure of Part 36 offers and payments.

The fact that a Part 36 offer¹ or payment into court has been made must not be disclosed to any judge² of the appeal court³ who is to hear or determine an application for permission to appeal or an appeal⁴ until all questions (other than costs) have been determined⁵. This provision does not, however, apply if the Part 36 offer or payment into court is relevant to the substance of the appeal⁶. Nor does it prevent disclosure in any application in the appeal proceedings if disclosure of the fact that a Part 36 offer or payment into court has been made is properly relevant to the matter to be decided⁷.

1 As to the meaning of 'Part 36 offer' see PARA 730. CPR 36.3 (see PARA 729) has the effect that a Part 36 offer made in proceedings at first instance will not have consequences in any appeal proceedings. Therefore, a fresh Part 36 offer needs to be made in appeal proceedings. However, CPR 52.12 applies to a Part 36 offer whether made in the original proceedings or in the appeal.

2 As to the meaning of 'judge' see PARA 49.

3 As to the meaning of 'appeal court' see PARA 1660 note 2.

4 As to the meaning of 'appeal' see PARA 1658 note 5.

5 CPR 52.12(1).

6 CPR 52.12(2).

7 CPR 52.12(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(2) ADMISSION OF FRESH EVIDENCE ON APPEAL/1676. Civil appeals to the Court of Appeal, the High Court and county courts.

(2) ADMISSION OF FRESH EVIDENCE ON APPEAL

1676. Civil appeals to the Court of Appeal, the High Court and county courts.

Unless it orders otherwise¹, the appeal court² will not receive oral evidence³ or evidence which was not before the lower court⁴. For the court to allow further evidence to be adduced in support of an appeal against a decision of fact the evidence must be (1) evidence which could not have been obtained with reasonable diligence for use at the trial; (2) such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and (3) such as is presumably to be believed⁵. These criteria need to be applied as guidelines rather than rules and subject to the overriding objective⁶ of dealing with cases justly⁷. In addition the consequence of admitting the fresh evidence has to be taken into account. The critical question is whether the fresh evidence could have been obtained with reasonable diligence for use at the trial and if it could have been then permission to adduce it in evidence should be refused⁸.

In family cases, fresh evidence will be admitted by the Court of Appeal in the exercise of the court's discretion if it is necessary to inform the court of new facts and matters which have arisen since the decision under appeal; where the interests of a child are engaged, the court is not likely to refuse to admit that fresh evidence. The approach of the Court of Appeal is to consider first whether or not the appeal should be allowed on the facts as they appeared to the judge. If so, there is no need to take the fresh evidence into account. If, however, the appeal would otherwise be dismissed, then the court must assess whether the fresh evidence should lead to the appeal being allowed⁹.

The appeal court may draw any inference of fact which it considers justified on the evidence¹⁰.

At the hearing of the appeal a party may not rely on a matter not contained in his appeal notice¹¹ unless the appeal court gives permission¹².

1 The circumstances in which further evidence will be received are not specified under CPR 52.11 (see the text and notes 2-12); cf RSC Ord 59 r 10(2) (revoked), which provided, in general, that no further evidence would be admitted except on special grounds. The rules in CPR Pt 52 (appeals: see PARA 1657 et seq) apply to appeals to (1) the Civil Division of the Court of Appeal; (2) the High Court; and (3) a county court; but do not apply to an appeal in detailed assessment proceedings against a decision of an authorised court officer (as to which see PARAS 1800-1802): CPR 52.1(1), (2). As to the meaning of 'appeal' see PARA 1658 note 5. It has been held that the court's power to admit further evidence in an appeal from a decision of the Trade Marks Registry under the Trade Marks Act 1938 (repealed and replaced by the Trade Marks Act 1994) is not governed by CPR 52.11: see *El Du Pont de Nemours & Co v ST Dupont* [2002] All ER (D) 54 (Nov), (2002) Times, 7 November.

2 As to the meaning of 'appeal court' see PARA 1660 note 2.

3 CPR 52.11(2)(a).

4 CPR 52.11(2)(b).

5 *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, CA. The circumstances in which further evidence will be received are not specified under CPR 52.11: cf RSC Ord 59 r 10(2) (revoked) which provided, in general, that no further evidence would be admitted except on special grounds. See eg *Hertfordshire Investments Ltd v Bubb* [2000] All ER (D) 1052, [2000] 1 WLR 2318, CA; *Cooper v Reed* [2001] EWCA Civ 224, [2001] All ER (D) 175 (Feb); *Evans v Tiger Investments Ltd* [2002] EWCA Civ 161, [2002] 2 BCLC 185, [2002] All ER (D) 274 (Feb); *Saluja v Gill (t/a P Gill Estate Agents Property Services)* [2002] EWHC 1435 (Ch), [2002] All ER (D) 247 (Jul),

confirming that the principles reflected in *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, CA, as to the circumstances in which further evidence may be admitted remain relevant to the exercise of discretion under CPR 52.11. In *Taylor v Lawrence* [2002] EWCA Civ 90 at [6], [2003] QB 528 at [6], [2002] 2 All ER 353 at [6], the rule in *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, CA, was described by Lord Woolf CJ (delivering the judgment of the court) as 'an example of a fundamental principle of our common law--that the outcome of litigation should be final. Where an issue has been determined by a decision of the court, that decision should definitively determine the issue as between those who were party to the litigation. Furthermore, parties who are involved in litigation are expected to put before the court all the issues relevant to that litigation'. See also *Riyad Bank SAL v Ahli United Bank (UK) plc* [2005] EWCA Civ 1419, [2005] All ER (D) 299 (Nov) (fresh evidence relating to credibility of witness should be admitted only exceptionally); *Lifely v Lifely* [2008] EWCA Civ 904, [2008] All ER (D) 396 (Jul) (excluding arguably wrongfully obtained fresh evidence could lead to finding far removed from truth).

As to the applicability of *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, CA, to personal injury cases see *Mulholland v Mitchell* [1971] AC 666, [1971] 1 All ER 307, HL; *Hughes v Singh* (1989) Times, 21 April, CA. Different principles apply in appeals involving liberty: see *Miklis v Deputy Prosecutor General of Lithuania* [2006] EWHC 1032 (Admin), [2006] 4 All ER 808.

6 As to the overriding objective see PARA 33.

7 *Voaden v Champion* [2002] EWCA Civ 89, [2002] All ER (D) 305 (Jan), [2002] 1 Lloyd's Rep 623; *Gillingham v Gillingham* [2001] EWCA Civ 906, [2001] 4 CPLR 355; and see *Daly v Sheikh* [2002] All ER (D) 370 (Oct), CA (where the evidence sought to be adduced is credible and cogent evidence of an attempt by a party to deceive another party and the court so that a trial has, by that conduct, been rendered unfair, the requirements of doing justice are likely to point strongly to admitting that evidence).

8 *Townsend v Achilleas* [2000] All ER (D) 931, [2000] CPLR 490, CA. See also *Yukong Line Ltd (SK Shipping Ltd) v Rendsburg Investments Corp* [2001] 2 Lloyd's Rep 113, [2000] All ER (D) 2437, CA; *Cooper v Reed* [2001] EWCA Civ 224, [2001] All ER (D) 175 (Feb); *Haile v Immigration Appeal Tribunal* [2001] EWCA Civ 663, [2002] Imm AR 170, [2001] All ER (D) 54 (May); *Stanelco Fibre Optics Ltd's Applications (No 2)* [2005] RPC 348; *Toth v Jarman* [2006] EWCA Civ 1028, [2006] 4 All ER 1276.

9 *Re S (a child) (abduction: grave risk of harm)* [2002] EWCA Civ 908, [2002] 3 FCR 43.

10 CPR 52.11(4).

11 As to the meaning of 'appeal notice' see PARA 1660 note 9. As to such notices see PARAS 1663-1664.

12 CPR 52.11(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(2) ADMISSION OF FRESH EVIDENCE ON APPEAL/1677. Appeals to the House of Lords.

1677. Appeals to the House of Lords.

Fresh evidence may be adduced before the House of Lords but permission is required¹. A question of fact upon which no evidence was taken below is not arguable before the House². The practice and procedure before the House of Lords is discussed elsewhere in this work³.

1 Application for leave must be made either in the case or by lodging a petition for leave to adduce the fresh evidence: *HL Practice Directions and Standing Orders applicable to Civil Appeals* (June 2001) direction 15.3. When the time for appeal has expired, the onus on the appellant of satisfying the House that the case is a proper one to re-open on fresh evidence is higher than when he makes the application to admit fresh evidence within the time for bringing an appeal: *Murphy v Stone Wallwork (Charlton) Ltd* [1969] 2 All ER 949, [1969] 1 WLR 1023, HL. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

2 *Bromley v Tryon* reported, but not on this point, [1952] AC 265, [1951] 2 All ER 1058, HL; *Barkway v South Wales Transport Co Ltd* [1950] AC 185, [1950] 1 All ER 392, HL; cf *Marshall (Inspector of Taxes) v Kerr* [1995] 1 AC 148 at 165, [1994] 3 All ER 106 at 119, HL, per Lord Browne-Wilkinson.

3 See **COURTS** vol 10 (Reissue) PARA 351 et seq.

UPDATE

1677 Appeals to the [Supreme Court]

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(2) ADMISSION OF FRESH EVIDENCE ON APPEAL/1678. Appeals to the Judicial Committee of the Privy Council.

1678. Appeals to the Judicial Committee of the Privy Council.

The Judicial Committee of the Privy Council has power to take evidence¹, although the power is rarely used in appeals from Commonwealth courts². Evidence is usually by affidavit³, but may be given orally. If a party wishes to tender fresh evidence an application to the Committee by petition for leave to adduce the evidence must be made and the granting of the application lies at the discretion of the Committee. That discretion will, however, be exercised in accordance with established principles, namely that the fresh evidence may not be adduced unless it was not available to the party seeking to use it in the court appealed from, reasonable diligence would not have made it so available, and, if true, the fresh evidence would have had or would have been likely to have had a determining influence on the court appealed from⁴.

The practice and procedure before the Committee is discussed elsewhere in this work⁵.

1 See the Judicial Committee Act 1833 s 7 (evidence by word of mouth or on written depositions), s 8 (re-examination of witnesses) (both amended by the Statute Law Revision (No 2) Act 1888). As to the Judicial Committee of the Privy Council see **COURTS** vol 10 (Reissue) PARA 401 et seq.

2 As to Commonwealth appeals see **COURTS** vol 10 (Reissue) PARAS 404-408, 416 et seq.

3 The practice of the Committee is, where necessary, to accept an official translation of a document: *Rajendra Prasad Bose v Gopal Prasad Sen* (1930) LR 57 Ind App 296, PC.

4 *Shedden v Patrick and A-G* (1869) LR 1 Sc & Div 470; *Leeder v Ellis* [1953] AC 52, [1952] 2 All ER 814, PC; *Corbett v Corbett* [1953] P 205, [1953] 2 All ER 69, CA; *Andrew v Andrew* [1953] 1 WLR 1453, PC. These principles are those enunciated in *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, CA, which also remain relevant to the exercise of an appeal court's discretion under CPR 52.11: see PARA 1676.

5 See **COURTS** vol 10 (Reissue) PARA 401 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(3) COUNTY COURT AND HIGH COURT APPEALS/1679. Appeals from a decision of a county court; general provisions.

(3) COUNTY COURT AND HIGH COURT APPEALS

1679. Appeals from a decision of a county court; general provisions.

It is provided by the County Courts Act 1984 that, subject to the relevant provisions of that Act¹ and to any order made by the Lord Chancellor under the Access to Justice Act 1999 prescribing an alternative destination of appeals², if any party to any proceedings in a county court is dissatisfied with the determination of the judge or jury, he may appeal from it to the Court of Appeal in such manner and subject to such conditions as may be provided by Civil Procedure Rules³. Where an appeal is brought under this provision in any action (now known as a 'claim')⁴, an appeal may be brought thereunder in respect of any claim or counterclaim in the action notwithstanding that there could have been no such appeal if that claim had been the subject of a separate action⁵. However, in proceedings in which either the plaintiff (now known as the 'claimant')⁶ or the defendant⁷ is claiming possession of any premises this provision does not confer any right of appeal on any question of fact if, by virtue of certain specified statutory provisions⁸ or of any other enactment⁹, the court can only grant possession on being satisfied that it is reasonable to do so¹⁰.

The County Courts Act 1984 further provides that without prejudice to the generality of the power to make rules of court¹¹, such rules may make provision for any appeal from the exercise by a district judge, assistant district judge or deputy district judge of any power given to him by virtue of any enactment to be to a judge of a county court¹².

The provisions set out above do not confer any right of appeal from any judgment or order where a right of appeal is conferred by some other enactment or take away any right of appeal from any judgment or order where a right of appeal is so conferred, and have effect subject to any enactment other than the 1984 Act¹³.

By virtue of the Access to Justice Act 1999 (Destination of Appeals) Order 2000, where the decision to be appealed is a decision¹⁴ of a county court, an appeal lies to the High Court, subject to certain exceptions¹⁵. Appeal from a decision of a district judge or deputy district judge of a county court lies to a judge of a county court¹⁶ and appeal from a final decision¹⁷ in certain claims allocated to the multi-track¹⁸ or made in specialised proceedings¹⁹ lies to the Court of Appeal²⁰, subject to obtaining any necessary permission²¹.

The procedure for appeals from a decision of a county court is governed by Part 52 of the Civil Procedure Rules²² and permission to appeal is required²³, save in specific circumstances²⁴. Every appeal will be limited to a review, rather than a re-hearing, of the decision of the lower court, save in specified circumstances²⁵.

The designated civil judge in consultation with his presiding judges has responsibility for allocating appeals from decisions of district judges to circuit judges²⁶.

Where an appeal which is to be heard by a county court would raise an important point of principle or practice or there is some other compelling reason for the Court of Appeal to hear it, the county court may order the appeal to be transferred to the Court of Appeal²⁷. Where an appeal is so transferred, the Court of Appeal may give such additional directions as are considered appropriate²⁸.

An application for permission to appeal from a decision of a county court which was itself made on appeal must be made to the Court of Appeal²⁹. If permission is granted the appeal will be heard by the Court of Appeal³⁰.

No appeal lies from any judgment, direction, decision or order of a judge of county courts if, before the judgment, direction, decision or order is given or made, the parties agree, in writing signed by themselves or their legal representatives or agents, that it shall be final³¹.

At the hearing of any proceedings in a county court in which there is a right of appeal or from which an appeal may be brought with leave, the judge must, at the request of any party, make a note of any question of law raised at the hearing and of the facts in evidence in relation to any such question and of his decision on any such question and of his determination of the proceedings³². Where such a note has been taken, then on the application of any party to the proceedings, and on payment by that party of any prescribed fee, the judge must, whether notice of appeal has been served or not, furnish that party with a signed copy of the note, which is to be used at the hearing of the appeal³³.

Particular provision is made in relation to statutory appeals to the county court and the High Court³⁴.

1 le subject to the County Courts Act 1984 ss 77(1A)-(8), ss 78-84: see the text and notes 2-33; PARA 1717 note 1; and **COURTS**.

2 le any order made under the Access to Justice Act 1999 s 56: see PARA 1658.

3 County Courts Act 1984 s 77(1) (amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(1), (2), (7); and by SI 2000/1071). A decision of a court of first instance on a preliminary issue is a 'determination' within the meaning of the County Courts Act 1984 s 77(1): *Cie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd, Cie Noga d'Importation et d'Exportation SA v Government of the Russian Federation*[2002] EWCA Civ 1142, [2003] 1 WLR 307. As to the appropriate route of appeal following an order for committal for contempt of court see *Barnet London Borough Council v Hurst*[2002] EWCA Civ 1009, [2002] 4 All ER 457. For further guidance on determining the destination of appeals, see *Scribes West Ltd v Relsa Anstalt*[2004] EWCA Civ 965, [2004] 4 All ER 653.

4 See PARA 18.

5 County Courts Act 1984 s 77(5).

6 See PARA 18.

7 As to the meaning of 'defendant' see PARA 18.

8 le by virtue of the Landlord and Tenant Act 1954 s 13(4); or the Rent (Agriculture) Act 1976 s 6, Sch 4 Cases III-IX; or the Rent Act 1977 s 98, as it applies to Sch 15 Cases 1-6, 8, 9, or s 98 as extended or applied by any other enactment; or the Rent Act 1977 s 99, as it applies to Sch 15 Cases 1-6, 9; or the Housing Act 1985 s 84(2)(a); or the Housing Act 1988 s 7, as it applies to the grounds in Sch 2 Pt II; or the Local Government and Housing Act 1989 Sch 10 para 13(4): County Courts Act 1984 s 77(6) (amended by the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 57; the Housing Act 1988 s 140, Sch 17 Pt I; and, as from a day to be appointed, by the Local Government and Housing Act 1989 s 194, Sch 11 para 60). See further **LANDLORD AND TENANT**.

9 For these purposes, 'enactment' means an enactment whenever passed: County Courts Act 1984 s 77(8). As to the nature and classification of enactments see **STATUTES** vol 44(1) (Reissue) PARA 1232 et seq.

10 County Courts Act 1984 s 77(6) (as amended: see note 8).

11 The County Courts Act 1984 s 77(1A) (added by the Courts and Legal Services Act 1990, s 125(2), Sch 17 para 15; and amended by the Civil Procedure Act 1997 Sch 2 para 2(2)) refers to the rule-making power under the County Courts Act 1984 s 75, but this was repealed by the Civil Procedure Act 1997 s 10, Sch 2 para 2(1), (6). As to the power to make Civil Procedure Rules see PARAS 24-25.

12 County Courts Act 1984 s 77(1A) (as amended: see note 11); and see the text and note 16.

13 County Courts Act 1984 s 77(7).

- 14 As to the meaning of 'decision' see PARA 1658 note 12.
- 15 See the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 3(1); and PARA 1658 text and note 17.
- 16 See the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 3(2); and PARA 1658 text and note 18.
- 17 As to the meaning of 'final decision' see PARA 1658 note 19.
- 18 See the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 4 (amended by SI 2003/490); and PARA 1658 text and notes 19-22. As to the multi-track see PARAS 269, 293 et seq. This exception, under the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 4(a), has no application to a case which was not allocated to the multi-track, even where the district judge considered the case to be suitable for that track: *Clark (Inspector of Taxes) v Perks* [2000] 4 All ER 1, [2001] 1 WLR 17, CA.
- 19 Ie in proceedings under the Companies Act 1985 or the Companies Act 1989 or to which CPR Pt 57 Section I, II or III (probate claims, rectification of wills and substitution and removal of personal representatives: see **EXECUTORS AND ADMINISTRATORS**) or any of CPR Pts 58-63 apply: see PARA 116.
- 20 See the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 4 (amended by SI 2003/490); and PARA 1658 text and note 22.
- 21 See the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 1(4). As to the procedure for obtaining permission see PARAS 1660, 1661.
- 22 Ie CPR Pt 52: see PARAS 1658 et seq, 1680 et seq. As to the limited application of CPR Pt 52 to appeals in family proceedings see PARA 1658 note 10.
- 23 See CPR 52.3(1); and PARA 1660.
- 24 See CPR 52.3(1)(a), (b); and PARA 1660.
- 25 See CPR 52.11; *Practice Direction--Appeals* PD 52 para 9.1; and PARA 1672.
- 26 *Practice Direction--Appeals* PD 52 para 8A.1.
- 27 See CPR 52.14; the Access to Justice Act 1999 s 57; and PARA 1708. As to appeals from final decisions in Part 8 claims treated as allocated to the multi-track see PARA 1658 note 22.
- 28 See *Practice Direction--Appeals* PD 52 para 10.1.
- 29 See *Practice Direction--Appeals* PD 52 para 4.9.
- 30 *Practice Direction--Appeals* PD 52 para 4.10.
- 31 County Courts Act 1984 s 79 (amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 49(3)). As to the meaning of 'legal representative' see PARA 1833 note 13.
- 32 County Courts Act 1984 s 80(1).
- 33 See the County Courts Act 1984 s 80(2) (amended by the Courts Act 2003 s 109(1), Sch 8 para 271(b)).
- 34 See *Practice Direction--Appeals* PD 52 paras 22-24; and PARA 1686.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(3) COUNTY COURT AND HIGH COURT APPEALS/1680. Appeals to a judge of the High Court.

1680. Appeals to a judge of the High Court.

Subject to the provisions of the Supreme Court Act 1981 and to rules of court, the High Court has jurisdiction¹ to hear and determine any application, or any appeal, whether by way of case stated² or otherwise, which it has power to hear and determine under or by virtue of that or any other Act, and all such other appeals as it has jurisdiction to hear and determine immediately before 1 January 1982³. In addition to appeals from county court decisions, an appeal lies to a judge of the High Court where the decision⁴ to be appealed is made by a master or other person holding a specified office⁵, by a district judge of the High Court or by a person appointed to act as a deputy for such a person or to act as a temporary additional officer in any such office⁶.

The procedure for appeals is governed by Part 52 of the Civil Procedure Rules⁷ and permission to appeal is required⁸, save in specific circumstances⁹. Every appeal will be limited to a review, rather than a re-hearing, of the decision of the lower court, save in specified circumstances¹⁰.

Where, however, the decision to be appealed is a final decision¹¹ in a claim allocated by a court to the multi-track under certain specified provisions¹² or is a final decision made in specialist proceedings¹³, the appeal is to be made to the Court of Appeal¹⁴, subject to obtaining any necessary permission¹⁵.

Where an appeal which is to be heard by the High Court would raise an important point of principle or practice or there is some other compelling reason for the Court of Appeal to hear it, the High Court may order the appeal to be transferred to the Court of Appeal¹⁶.

The circumstances in which statutory appeals and appeals by way of case stated lie to the High Court are considered subsequently¹⁷.

1 lie in accordance with the Supreme Court Act 1981 s 19(2): see **COURTS**. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 As to appeals by way of case stated see PARA 1688 et seq.

3 Supreme Court Act 1981 s 19(3). 1 January 1982 is the commencement date of the Supreme Court Act 1981: see s 153(2). The High Court is a superior court of record: s 19(1). See *Slot v Isaac* [2002] EWCA Civ 481, [2002] All ER (D) 197 (Apr) (no jurisdiction to hear appeal against district judge's earlier refusal to grant leave to appeal).

4 As to the meaning of 'decision' see PARA 1658 note 12.

5 lie an office referred to in the Supreme Court Act 1981 ss 88, 89, Sch 2 Pt 2: see PARA 1658 note 13.

6 See the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 2; and PARA 1658 text and notes 12-15. Articles 2-6 do not apply to an appeal in family proceedings: see PARA 1658 text and note 10. Separate provision has now been made for the destination of appeals in cases involving adoption and related matters: see the Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) Order 2005, SI 2005/3276. As to the procedure on appeals to the Queen's Bench see *The Queen's Bench Guide* (2007 Edn) Ch 11; and as to the procedure on appeals to the Chancery Division see *The Chancery Guide* (2005 Edn) Ch 10. Contrast with pre-CPR practice where no appeal lay from a determination of a Chancery master, but the matter could be adjourned to the judge under RSC Ord 32 r 14(1) (revoked).

7 lie subject to transitional provisions: see PARA 1658 text and note 9. As to CPR Pt 52 see PARAS 1658 et seq, 1681 et seq. As to the limited application of CPR Pt 52 to appeals in family proceedings see PARA 1658 note 10.

8 See CPR 52.3(1); and PARA 1660.

9 See CPR 52.3(1)(a), (b); and PARA 1660.

10 See CPR 52.11; and PARA 1672. Prior to May 2000 appeals from district judges or masters to a judge in chambers were by way of a complete re-hearing, rather than a review; previous case law in relation to such appeals should therefore be approached with caution: see *Tanfern Ltd v Cameron-MacDonald (Practice Note)* [2000] 2 All ER 801, [2000] 1 WLR 1311, CA.

11 Ie even where, for example, the decision was that of a district judge of the High Court: see PARA 1679 note 18. As to the meaning of 'final decision' see PARA 1658 note 19.

12 See the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 4 (amended by SI 2003/490); and PARA 1658 text and notes 19-22. As to the multi-track see PARAS 269, 293 et seq.

13 Ie proceedings to which CPR 49(2) refers: see PARAS 116, 1547.

14 See the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 4 (amended by SI 2003/490); and PARA 1658.

15 See the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 1(4). As to the procedure for obtaining permission see PARAS 1660-1661.

16 See CPR 52.14; the Access to Justice Act 1999 s 57; and PARA 1708.

17 See PARA 1684 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(3) COUNTY COURT AND HIGH COURT APPEALS/1681. Where an appeal to the High Court is heard.

1681. Where an appeal to the High Court is heard.

Where an appeal lies to a High Court judge from the decision of a county court or a district judge of the High Court¹, the appellant's notice² must be filed (1) where the lower court³ is situated on a circuit other than the South Eastern Circuit, at an appeal centre⁴ on the circuit in which the lower court is situated; the appeal will be managed and heard at that appeal centre unless the appeal court⁵ orders otherwise⁶; (2) where the lower court is situated on the South Eastern Circuit, at an appeal centre on the South Eastern Circuit; the appeal will be managed and heard at the Royal Courts of Justice unless the appeal court orders otherwise⁷.

The appeal court may transfer an appeal to another appeal centre⁸ (whether or not on the same circuit)⁹ either on application by a party or of its own initiative. Where an appeal is so transferred, notice of transfer must be served on every person on whom the appellant's notice has been served¹⁰.

Directions may be given for an appeal to be heard at a hearing only centre¹¹ or for an application in an appeal to be heard at any other venue, instead of at the appeal centre managing the appeal¹². Unless such a direction has been made, any application in the appeal must be made at the appeal centre where the appeal is being managed¹³.

A respondent's notice¹⁴ must be filed at the appeal centre where the appellant's notice was filed, or at the Royal Courts of Justice, as appropriate, unless the appeal has been transferred to another appeal centre, in which case it must be filed at that appeal centre¹⁵.

Where the lower court is a county court, appeals and applications for permission to appeal will be heard by a High Court judge or by a person authorised¹⁶ to act as a judge of the High Court¹⁷. Other applications in the appeal may be heard and directions in the appeal may be given either by a High Court judge or by any person authorised¹⁸ to act as a judge of the High Court¹⁹. In the case of appeals from masters or district judges of the High Court, such appeals, applications for permission and any other applications in the appeal may be heard and directions in the appeal may be given by a High Court judge or by any person authorised²⁰ to act as a judge of the High Court, including a circuit judge or a recorder²¹.

The appeal court may send an appeal questionnaire to the appellant²².

1 See *Practice Direction--Appeals* PD 52 para 8.1. Paragraph 8.1 states that para 8 (see the text and notes 3-22) applies in respect of appeals from a decision of a county court or district judge of the High Court; however para 8.14 also refers to appeals from masters and district judges: see the text and notes 20-21.

2 As to appellants' notices see PARA 1663.

3 As to the meaning of 'lower court' see PARA 1660 note 2.

4 An 'appeal centre' is a court centre where appeals to which *Practice Direction--Appeals* PD 52 para 8 applies (see the text and note 1) may be managed and heard: para 8.2(a). The appeal centres for each circuit are as follows: (1) Midland Circuit: Birmingham and Nottingham; (2) North Eastern Circuit: Leeds, Newcastle and Sheffield; (3) Northern Circuit: Manchester, Liverpool, Preston and Chester; (4) Wales Circuit: Cardiff and Swansea; (5) Western Circuit: Bristol, Exeter and Winchester; (6) South Eastern Circuit: Royal Courts of Justice (for Central London), Lewes, Luton, Norwich, Reading, Chelmsford, St Albans, Maidstone and Oxford: see para 8.2, Table.

5 *Practice Direction--Appeals* PD 52 paras 8.3-8.4.

6 As to the meaning of 'appeal court' see PARA 1660 note 2.

7 *Practice Direction--Appeals* PD 52 paras 8.6-8.7.

8 In deciding whether to do so the court will have regard to the criteria in CPR 30.3 (criteria for a transfer order: see PARA 66): *Practice Direction--Appeals* PD 52 para 8.9.

9 An appeal may not be transferred to an appeal centre on another circuit, either for management or hearing, unless the consent of a presiding judge of that circuit has been obtained: *Practice Direction--Appeals* PD 52 para 8.9.

10 *Practice Direction--Appeals* PD 52 para 8.9. As to the meaning of 'service' see PARA 138 note 2.

11 A 'hearing only centre' is a court centre where appeals to which *Practice Direction--Appeals* PD 52 para 8 applies (see the text and note 1) may be heard by order made at an appeal centre: para 8.2(b). The hearing only centres for each circuit are as follows: (1) Midland Circuit: Lincoln, Leicester, Northampton and Stafford; (2) North Eastern Circuit: Teesside; (3) Northern Circuit: Carlisle; (4) Wales Circuit: Caernarfon; (5) Western Circuit: Truro and Plymouth; (6) South Eastern Circuit: none specified: see para 8.2, Table.

12 *Practice Direction--Appeals* PD 52 para 8.10.

13 *Practice Direction--Appeals* PD 52 para 8.11.

14 As to respondents' notices see PARA 1664.

15 *Practice Direction--Appeals* PD 52 paras 8.5, 8.8.

16 Is a person authorised under the Supreme Court Act 1981 s 9(1), Table para (1), para (2) or para (4): see **COURTS** vol 10 (Reissue) PARA 519. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

17 *Practice Direction--Appeals* PD 52 para 8.13(1). An appeal or application for permission to appeal from the decision of a recorder in the county court may be heard by a designated civil judge who is authorised under the Supreme Court Act 1981 s 9(1), Table para (5) to act as a judge of the High Court: *Practice Direction--Appeals* PD 52 para 8.13(1A).

18 Is authorised under the Supreme Court Act 1981 s 9: see **COURTS** vol 10 (Reissue) PARA 519.

19 See *Practice Direction--Appeals* PD 52 para 8.13(2).

20 See note 18.

21 See *Practice Direction--Appeals* PD 52 para 8.14.

22 See *Practice Direction--Appeals* PD 52 para 8.12, which allows the appeal court to adopt all or part of the procedure set out in paras 6.4-6.6 (see PARA 1666).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(3) COUNTY COURT AND HIGH COURT APPEALS/1682. Second appeals from appeals in county courts and High Court.

1682. Second appeals from appeals in county courts and High Court.

Where an appeal is made to a county court or the High Court in relation to any matter¹ and on hearing the appeal the court makes a decision in relation to that matter, a second appeal lies from that decision to the Court of Appeal and not to any other court². No appeal may be made to the Court of Appeal from such a decision³ unless the Court of Appeal considers that the appeal would raise an important point of principle or practice⁴ or there is some other compelling reason for the Court of Appeal to hear it⁵.

An application for permission to appeal from a decision of the High Court or a county court which was itself made on appeal must be made to the Court of Appeal⁶. If permission to appeal is granted the appeal will be heard by the Court of Appeal⁷.

1 The save in relation to a decision of an officer of the court authorised to assess costs by the Lord Chancellor: see the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 5; and PARA 1658 text and note 23. Article 5 does not apply to an appeal in family proceedings: see PARA 1658 note 10. As to costs generally see also PARA 1729 et seq.

2 See the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 5; and PARA 1658 text and note 23. Permission is required from the Court of Appeal for any appeal to that court from a decision of a county court or the High Court which was itself made on appeal: CPR 52.13(1). As to the appropriate route for second appeals following an order for committal for contempt of court see *Barnet London Borough Council v Hurst* [2002] EWCA Civ 1009, [2002] 4 All ER 457. As to applications made for permission to appeal from a decision of a social security commissioner see *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, [2002] 3 All ER 279 (since social security law is highly specialised branch of law, an appropriate degree of caution is to be exercised by court when hearing such appeals).

3 This provision does not apply in relation to an appeal in a criminal cause or matter: Access to Justice Act 1999 s 55(2). As to the meaning and effect of s 55 generally see *Tanfern Ltd v Cameron-MacDonald (Practice Note)* [2000] 2 All ER 801, [2000] 1 WLR 1311, CA and *Clark (Inspector of Taxes) v Perks* [2000] 4 All ER 1, [2001] 1 WLR 17, CA, particularly in relation to certain categories of appeal, including appeals by way of case stated and appeals from tribunals, which are to be treated as appeals to a county court or the High Court for the purposes of the Access to Justice Act 1999 s 55. See further PARA 1684 et seq.

4 Access to Justice Act 1999 s 55(1)(a); CPR 52.13(2)(a). The point of principle or practice must be a new one rather than one whose meaning and scope has already been determined: *Uphill v BRB (Residuary) Ltd* [2005] EWCA Civ 60, [2005] 3 All ER 264, [2005] 1 WLR 2070. See also *Cramp v Hastings Borough Council*; *Phillips v Camden London Borough Council* [2005] EWCA Civ 1005, [2005] HLR 786.

5 Access to Justice Act 1999 s 55(1)(b); CPR 52.13(2)(b); and see eg *Scott v Newton* [2001] EWCA Civ 833, [2001] CPLR 5. It is unlikely that a court will find that there is a compelling reason unless the prospects of success are very high; an exception is where there is a procedural irregularity in the first appeal: *Uphill v BRB (Residuary) Ltd* [2005] EWCA Civ 60, [2005] 3 All ER 264, [2005] 1 WLR 2070. See also *Convergence Group plc v Chantrey Vellacott (a firm)* [2005] EWCA Civ 290, (2005) Times, 25 April (appeal against amendment to pleadings; decision that appeal would be allowed would constitute compelling reason). Whilst the judgment in *Uphill v BRB (Residuary) Ltd* [2005] EWCA Civ 60, [2005] 1 WLR 2070 contained helpful guidance for the majority of cases, it was not intended to be exhaustive, and the Court of Appeal has some flexibility in the interpretation of the rules on second appeals in CPR 52.13(2): *Cramp v Hastings Borough Council* [2005] EWCA Civ 1005, [2005] 4 All ER 1014n; and see also *Strickson v Preston County Court* [2006] EWHC 3300 (Admin), [2006] All ER (D) 354 (Dec).

6 *Practice Direction--Appeals* PD 52 para 4.9.

7 *Practice Direction--Appeals* PD 52 para 4.10.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(3) COUNTY COURT AND HIGH COURT APPEALS/1683. Appeals to the Court of Appeal from decisions of the High Court.

1683. Appeals to the Court of Appeal from decisions of the High Court.

Subject to specific restrictions¹, an appeal from a decision² of a High Court judge lies to the Court of Appeal³.

An appeal also lies to the Court of Appeal:

1238 (1) where the decision to be appealed is a final decision⁴ in a claim allocated by a court to the multi-track under specified provisions or a final decision made in specialist proceedings⁵;

1239 (2) from a decision made on appeal in a county court or the High Court, subject to certain exceptions⁶.

1 The subject to the Administration of Justice Act 1960 s 13 (appeals in contempt proceedings: see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 512 et seq) and s 15 (appeals in habeas corpus proceedings: see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 247); and to the Supreme Court Act 1981 s 18(1) (see PARA 1705). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 As to the meaning of 'decision' see PARA 1658 note 12.

3 *Practice Direction--Appeals* PD 52 para 2A.1, Table 1. See also the Supreme Court Act 1981 ss 15, 16; and PARA 1702. The Administration of Justice Act 1969 s 13(2)(a) excludes appeals to the Court of Appeal in cases where leave to appeal from the High Court directly to the House of Lords is granted under Pt II (ss 12-16): see PARA 1718. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

4 As to the meaning of 'final decision' see PARA 1658 note 19.

5 See the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 4 (amended by SI 2003/490); and PARA 1658 text and notes 19-24.

6 See the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 5; and PARA 1658 text and note 25.

UPDATE

1683 Appeals to the Court of Appeal from decisions of the High Court

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(4) MISCELLANEOUS APPEALS/1684. Statutory appeals; in general.

(4) MISCELLANEOUS APPEALS

1684. Statutory appeals; in general.

Part 52 of the Civil Procedure Rules¹ applies to statutory appeals (that is to say, where under any enactment an appeal, other than by way of case stated², lies to the court from a minister of state, government department, tribunal or other person³), with the following amendments⁴:

- 1240 (1) the appellant⁵ must file the appellant's notice⁶ at the appeal court⁷ within 28 days after the date of the decision of the lower court⁸ he wishes to appeal⁹;
- 1241 (2) where a statement of the reasons for a decision is given later than the notice of that decision, the period for filing the appellant's notice is calculated from the date on which the statement is received by the appellant¹⁰;
- 1242 (3) in addition to the respondents¹¹ to the appeal, the appellant must serve the appellant's notice¹² on the chairman of the tribunal, minister of state, government department or other person from whose decision the appeal is brought¹³;
- 1243 (4) where the appeal is from an order or decision of a minister of state or government department, the minister or department, as the case may be, is entitled to attend the hearing and to make representations to the court¹⁴.

1 le CPR Pt 52; and *Practice Direction--Appeals* PD 52. See PARA 1657 et seq.

2 As to appeals by way of case stated see PARA 1688 et seq.

3 *Practice Direction--Appeals* PD 52 para 17.1(1).

4 *Practice Direction--Appeals* PD 52 paras 16.1, 17.2. This is also subject to specific provision made in relation to specific statutory appeals (see PARA 1686): para 17.1(2). On the proper construction of para 17.2, no requirement for permission to appeal in respect of statutory appeals has been imposed. The practice direction applies to statutory appeals but in no instance do the amendments it introduces include a requirement for permission to appeal which was not already required by the statutes in question: *Colley v Council for Licensed Conveyancers* [2001] EWCA Civ 1137, [2001] 4 All ER 998.

5 As to the meaning of 'appellant' see PARA 1660 note 1.

6 As to the appellant's notice see PARA 1663. As to the meaning of 'filing' see PARA 1832 note 8.

7 As to the meaning of 'appeal court' see PARA 1660 note 2.

8 As to the meaning of 'lower court' see PARA 1660 note 2.

9 *Practice Direction--Appeals* PD 52 para 17.3.

10 *Practice Direction--Appeals* PD 52 para 17.4.

11 As to the meaning of 'respondent' see PARA 1660 note 2.

12 le in accordance with CPR 52.4(3): see PARA 1663. As to the meaning of 'service' see PARA 138 note 2.

13 *Practice Direction--Appeals* PD 52 para 17.5(1). In the case of an appeal from the decision of a tribunal that has no chairman or member who acts as a chairman, the appellant's notice must be served on the member or members of the tribunal: para 17.5(2).

14 *Practice Direction--Appeals* PD 52 para 17.6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(4) MISCELLANEOUS APPEALS/1685. Statutory rights of appeal.

1685. Statutory rights of appeal.

Specific provision is made in Part 52 of the Civil Procedure Rules as to various appeals provided for by statute¹. An appeal against a decision of the Secretary of State as to a dispute concerning perpetually renewable leases and underleases² lies to the High Court³.

A person who was a party to proceedings before a tribunal⁴ and is dissatisfied in point of law with the decision of the tribunal may appeal to the High Court⁵. The tribunal may, of its own initiative or at the request of a party to the proceedings before it, state, in the form of a special case for the decision of the High Court, a question of law arising in the course of the proceedings⁶.

Where the Secretary of State has given a decision in proceedings on an appeal under Part VII of the Town and Country Planning Act 1990⁷ against an enforcement notice, the appellant, the local planning authority or another person having an interest in the land to which the notice relates may appeal to the High Court against the decision on a point of law⁸. Where the Secretary of State has given a decision in proceedings on an appeal under Part VIII of that Act⁹ against a notice of requiring the planting of trees¹⁰, the appellant, the local planning authority or any person (other than the appellant) on whom the notice was served may appeal to the High Court against the decision on a point of law¹¹.

Where the Secretary of State has given a decision in proceedings on an appeal¹² against a listed building enforcement notice, the appellant, the local planning authority or any other person having an interest in the land to which the notice relates may appeal to the High Court against the decision on a point of law¹³.

In addition, requirements for appeals under other statutes are set out in the relevant practice direction¹⁴.

1 See CPR 52.18-52.20.

2 *Ie* under the Law of Property Act 1922 Sch 15 para 16: see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 541-542.

3 CPR 52.18.

4 *Ie* a tribunal referred to in the Tribunals and Inquiries Act 1992 s 11(1).

5 CPR 52.19(1).

6 CPR 52.19(2).

7 *Ie* the Town and Country Planning Act 1990 Pt VII (ss 171A-196C): see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 551 et seq.

8 CPR 52.20(1).

9 *Ie* the Town and Country Planning Act 1990 Pt VIII (ss 197-214): see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 847 et seq.

10 *Ie* under the Town and Country Planning Act 1990 s 207: see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 874.

11 CPR 52.20(2).

12 le under the Planning (Listed Buildings and Conservation Areas) Act 1990 s 39: see **TOWN AND COUNTRY PLANNING** vol 46(3) (Reissue) PARAS 1191-1194.

13 CPR 52.20(3).

14 See *Practice Direction--Appeals* PD 52 Section III (paras 20-24); and PARA 1686.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(4) MISCELLANEOUS APPEALS/1686. Statutory appeals; specific appeals.

1686. Statutory appeals; specific appeals.

Provision is made in the relevant practice direction in relation to appeals in particular cases¹. Part 52 of the Civil Procedure Rules² applies to such appeals, subject to specific modifications³. The appeals for which such specific provision is made are as follows:

- 1244 (1) appeals to the Court of Appeal:
31
 53. (a) against a decree nisi of divorce or nullity of marriage or conditional dissolution or nullity order in relation to civil partnership⁴;
 54. (b) against an order for revocation of a patent⁵;
 55. (c) from the Patents Court on appeal from the Comptroller-General of Patents, Designs and Trade Marks⁶;
 56. (d) in cases of contempt of court⁷;
 57. (e) on questions of law from social security or child support commissioners under certain enactments⁸;
 58. (f) from value added tax and duties tribunals (where the appeal is direct to the Court of Appeal)⁹;
 59. (g) on a question of law from a final determination of the Immigration Appeal Tribunal or the Asylum and Immigration Tribunal¹⁰;
 60. (h) on a point of law from the special commissioners (where the appeal is direct to the Court of Appeal)¹¹;
 61. (i) from the Lands Tribunal¹²;
 62. (j) from the Competition Appeal Tribunal¹³;
 63. (k) relating to the application of the anti-competition provisions of the EC Treaty and the Competition Act 1998¹⁴;
 64. (l) from the Proscribed Organisations Appeal Commission¹⁵;
 65. (m) from the Court of Protection¹⁶; and
 66. (n) in relation to serious crime prevention orders¹⁷;
- 32
1245 (2) appeals to be heard in the Queen's Bench Division of the High Court¹⁸:
33
 67. (a) under the Merchant Shipping Act 1995¹⁹;
 68. (b) where the court's decision is final under specified provisions of the Architects Act 1997, the Medicines Act 1968, the Nurses, Midwives and Health Visitors Act 1997 and the Pharmacy Act 1954²⁰;
 69. (c) on a point of law from a decision of the Secretary of State under the Consumer Credit Act 1974²¹;
 70. (d) on a point of law from a decision of the Pensions Appeal Tribunal²²;
 71. (e) on a question of law from a decision of the Secretary of State under specified provisions of the Social Security Administration Act 1992²³;
 72. (f) under the Extradition Act 2003²⁴;
 73. (g) from the Solicitors Disciplinary Tribunal²⁵;
 74. (h) under specified provisions of the Town and Country Planning Act 1990 and the Planning (Listed Buildings and Conservation Areas) Act 1990²⁶;
 75. (i) from a national health service tribunal²⁷;
 76. (j) from the Employment Appeal Tribunal²⁸;

77. (k) on a reference of a question of law by way of case stated by an agricultural land tribunal²⁹;
 78. (l) on a case stated by a mental health review tribunal³⁰; and
 79. (m) on a case stated under the Town and Country Planning Act 1990 or the Planning (Listed Buildings and Conservation Areas) Act 1990³¹;
- 34
- 1246 (3) appeals, cases stated or questions referred for the opinion of the High Court to be heard in the Chancery Division of the High Court³²;
- 35
80. (a) under the provisions of the Law of Property Act 1922 relating to disputes in connection with perpetually renewable leases³³;
 81. (b) under the Industrial Assurance Act 1923³⁴;
 82. (c) under the Land Registration Act 1925³⁵;
 83. (d) under the provisions of the Water Resources Act 1991 relating to the confidentiality of underground water³⁶;
 84. (e) under specified provisions of the Clergy Pensions Measure 1961³⁷;
 85. (f) under the Industrial and Provident Societies Act 1965³⁸;
 86. (g) under specified provisions of the Pension Schemes Act 1993 and the Pensions Act 1995 relating to determinations of the Pensions Ombudsman and the Occupational Pensions Regulatory Authority³⁹;
 87. (h) under the Charities Act 1993⁴⁰;
 88. (i) under specified provisions of the Stamp Act 1891⁴¹;
 89. (j) under the Income and Corporation Taxes Act 1988⁴²;
 90. (k) under the General Commissioners (Jurisdiction and Procedure) Regulations 1994⁴³;
 91. (l) under specified provisions of the Taxes Management Act 1970⁴⁴;
 92. (m) under specified provisions of the Inheritance Tax Act 1984⁴⁵;
 93. (n) under the Stamp Duty Reserve Tax Regulations 1986⁴⁶;
 94. (o) under the Land Registration Act 2002⁴⁷;
 95. (p) under the European Public Limited-Liability Company Regulations 2004⁴⁸;
 96. (q) from a value added tax and duties tribunal⁴⁹;
- 36
- 1247 (4) appeals to a county court:
- 37
97. (a) against a notice under specified provisions of the Local Government (Miscellaneous Provisions) Act 1976 relating to the provision of sanitary appliances at places of entertainment, dangerous trees and obstruction of private sewers⁵⁰;
 98. (b) under specified provisions of the Housing Act 1996⁵¹;
 99. (c) as to carriers' liability under the Immigration and Asylum Act 1999⁵²;
 100. (d) under specified provisions of the Representation of the People Act 1983⁵³; and
 101. (e) under specified provisions of the UK Borders Act 2007⁵⁴.
- 38

1 See *Practice Direction--Appeals* PD 52 Section III (paras 20-24). Section III provides special provisions about the appeals listed therein (see the text and notes 4-35); however, Section III is not exhaustive and does not create, amend or remove any right of appeal: para 20.1.

2 I.e. CPR Pt 52; and *Practice Direction--Appeals* PD 52. See PARA 1658 et seq.

3 *Practice Direction--Appeals* PD 52 para 20.2. Where any of the provisions in Section III provide for documents to be filed at the appeal court, these documents are in addition to any documents required to be filed under CPR Pt 52 or under the other sections of the practice direction: *Practice Direction--Appeals* PD 52 para 20.3. As to the meaning of 'filing' see PARA 1832 note 8; and as to the meaning of 'appeal court' see PARA 1660 note 2.

- 4 See *Practice Direction--Appeals* PD 52 para 21.1; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.
- 5 See *Practice Direction--Appeals* PD 52 para 21.2; and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 642.
- 6 See *Practice Direction--Appeals* PD 52 para 21.3; and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 642; **TRADE MARKS AND TRADE NAMES**.
- 7 Ie under the Administration of Justice Act 1960 s 13: see *Practice Direction--Appeals* PD 52 para 21.4; and **CONTEMPT OF COURT**.
- 8 Ie under the Pensions Appeal Tribunals Act 1943 s 6C; the Child Support Act 1991 s 25; the Social Security Act 1998 s 15; and the Child Support, Pensions and Social Security Act 2000 Sch 7 para 9: see *Practice Direction--Appeals* PD 52 para 21.5; and **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1037 et seq; **SOCIAL SECURITY AND PENSIONS**.
- 9 See *Practice Direction--Appeals* PD 52 para 21.6; and **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 343 et seq.
- 10 Ie under the Nationality, Immigration and Asylum Act 2002 s 103, 103B, 103C, 103E or 104: see *Practice Direction--Appeals* PD 52 paras 21.7, 21.7A, 21.7B; and **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**.
- 11 Ie under the Taxes Management Act 1970 s 56A: see *Practice Direction--Appeals* PD 52 para 21.8; and **INCOME TAXATION**.
- 12 See *Practice Direction--Appeals* PD 52 para 21.9; and **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq.
- 13 See *Practice Direction--Appeals* PD 52 para 21.10; and **COMPETITION** vol 18 (2009) PARAS 13-17. The Court of Appeal is reluctant to review the findings of an expert and specialist tribunal appointed by Parliament to make judgments in an area in which judges have no expertise: *NAPP Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] EWCA Civ 796, [2002] 4 All ER 376.
- 14 Ie the EC Treaty (Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) arts 81, 82 and the Competition Act 1998 Pt I Ch I, II (ss 1-11, 17-19): see *Practice Direction--Appeals* PD 52 para 21.10A; and **COMPETITION** vol 18 (2009) PARAS 24 et seq, 115 et seq.
- 15 Ie under the Terrorism Act 2000: see *Practice Direction--Appeals* PD 52 para 21.11; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 386.
- 16 See *Practice Direction--Appeals* PD 52 para 21.12; and **MENTAL HEALTH**.
- 17 Ie under the Serious Crime Act 2007 s 23(1) or the Supreme Court Act 1981 s 16: see *Practice Direction--Appeals* PD 52 para 21.13; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARAS 355, 599. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.
- 18 See *Practice Direction--Appeals* PD 52 para 22.1.
- 19 See *Practice Direction--Appeals* PD 52 para 22.2; and **SHIPPING AND MARITIME LAW**.
- 20 See *Practice Direction--Appeals* PD 52 para 22.3. The provisions referred to are (1) the Architects Act 1997 s 22 (removal from register: see **BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS**); (2) the Medicines Act 1968 ss 82(3), 83(2) (disqualification and revocation of disqualification); the Nurses, Midwives and Health Visitors Act 1997 s 12 (prospectively repealed); the Nursing and Midwifery Order 2001, SI 2002/253, art 38; the Pharmacy Act 1954 s 10; the Medical Act 1983 s 40; the Dentists Act 1984 s 29 or 44; the Opticians Act 1989 s 23; the Osteopaths Act 1993 s 32; and the Chiropractors Act 1994 s 31 (see **MEDICAL PROFESSIONS**).
- 21 Ie under the Consumer Credit Act 1974 s 41 (as modified): see *Practice Direction--Appeals* PD 52 para 22.4; and **CONSUMER CREDIT**.
- 22 Ie under the Pensions Appeal Tribunals Act 1943: see *Practice Direction--Appeals* PD 52 para 22.5; and **SOCIAL SECURITY AND PENSIONS**.
- 23 Ie under the Social Security Administration Act 1992 s 18 (repealed), s 58(8) (repealed): see *Practice Direction--Appeals* PD 52 para 22.6; and **SOCIAL SECURITY AND PENSIONS**.

- 24 Ie under the Extradition Act 2003 ss 26, 28, 103, 105, 108, 110: see *Practice Direction--Appeals* PD 52 para 22.6A; and **EXTRADITION**.
- 25 Ie under the Solicitors Act 1974 s 49: see *Practice Direction--Appeals* PD 52 para 22.6B; and **LEGAL PROFESSIONS**.
- 26 Ie under the Town and Country Planning Act 1990 s 289(6) and the Planning (Listed Buildings and Conservation Areas) Act 1990 s 65(5): see *Practice Direction--Appeals* PD 52 para 22.6C; and **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 648, vol 46(3) (Reissue) PARAS 1195, 1295.
- 27 Ie a tribunal constituted under the National Health Service Act 1977 s 46 (repealed): see *Practice Direction--Appeals* PD 52 para 22.6D; and **HEALTH SERVICES**.
- 28 Ie a tribunal constituted under the Employment Tribunals Act 1996 s 1: see *Practice Direction--Appeals* PD 52 para 22.6E; and **EMPLOYMENT** vol 41 (2009) PARA 1363 et seq.
- 29 Ie under the Agriculture (Miscellaneous Provisions) Act 1954 s 6: see *Practice Direction--Appeals* PD 52 para 22.7; and **AGRICULTURAL LAND** vol 1 (2008) PARA 673.
- 30 Ie under the Mental Health Act 1983 s 78: see *Practice Direction--Appeals* PD 52 para 22.8; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 576.
- 31 Ie under the Town and Country Planning Act 1990 s 289(3) or the Planning (Listed Buildings and Conservation Areas) Act 1990 s 65(2): see *Practice Direction--Appeals* PD 52 para 22.8A; and **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 648, vol 46(3) (Reissue) PARAS 1195, 1295.
- 32 See *Practice Direction--Appeals* PD 52 para 23.1.
- 33 Ie under the Law of Property Act 1922 s 145, Sch 15 para 16: see *Practice Direction--Appeals* PD 52 para 23.2(1); and **REAL PROPERTY**.
- 34 See *Practice Direction--Appeals* PD 52 paras 23.2(2), 23.6, 23.7; and **INDUSTRIAL ASSURANCE**.
- 35 See *Practice Direction--Appeals* PD 52 para 23.2(3); and **LAND REGISTRATION**.
- 36 Ie under the Water Resources Act 1991 s 205(4): see *Practice Direction--Appeals* PD 52 para 23.2(4); and **WATER AND WATERWAYS** vol 100 PARA 192.
- 37 Ie under the Clergy Pensions Measure 1961 s 38(3): see *Practice Direction--Appeals* PD 52 para 23.2(5); and **ECCLESIASTICAL LAW**.
- 38 See *Practice Direction--Appeals* PD 52 paras 23.2(6), 23.7; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2422.
- 39 Ie under the Pension Schemes Act 1993 s 151, s 173 (repealed), and the Pensions Act 1995 s 97: see *Practice Direction--Appeals* PD 52 para 23.2(7)-(9); and **SOCIAL SECURITY AND PENSIONS**.
- 40 See *Practice Direction--Appeals* PD 52 paras 23.2(10), 23.8A; and **CHARITIES** vol 8 (2010) PARA 589.
- 41 Ie the Stamp Act 1891 ss 13, 13B: see *Practice Direction--Appeals* PD 52 para 23.2(11); and **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARA 1112.
- 42 Ie the Income and Corporation Taxes Act 1988 s 705A: see *Practice Direction--Appeals* PD 52 para 23.2(12); and **INCOME TAXATION**.
- 43 Ie the General Commissioners (Jurisdiction and Procedure) Regulations 1994, SI 1994/1812: see *Practice Direction--Appeals* PD 52 para 23.2(13); and **CAPITAL GAINS TAXATION; INCOME TAXATION**.
- 44 Ie under the Taxes Management Act 1970 ss 53, 56A, 100C(4): see *Practice Direction--Appeals* PD 52 paras 23.2(14), 23.4, 23.5; and **INCOME TAXATION**.
- 45 Ie under the Inheritance Tax Act 1984 ss 222, 225, 249(3), 251: see *Practice Direction--Appeals* PD 52 paras 23.2(15), 23.3-23.5; and **INHERITANCE TAXATION**.
- 46 Ie under the Stamp Duty Reserve Tax Regulations 1986, SI 1986/1711, reg 10: see *Practice Direction--Appeals* PD 52 paras 23.2(16), 23.5; and **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARA 1142.

47 See *Practice Direction--Appeals* PD 52 paras 23.2(17), 23.8B; and **LAND REGISTRATION**.

48 Ie under the European Public Limited-Liability Company Regulations 2004, SI 2004/2326, reg 74: see *Practice Direction--Appeals* PD 52 paras 23.2(18), 23.8C; and **COMPANIES** vol 15 (2009) PARAS 1633 et seq.

49 Ie under the Tribunals and Inquiries Act 1992 s 11(1): see *Practice Direction--Appeals* PD 52 para 23.8; and **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 343 et seq.

50 Ie the Local Government (Miscellaneous Provisions) Act 1976 s 21, 23 or 35: see *Practice Direction--Appeals* PD 52 para 24.1; and **LOCAL GOVERNMENT** vol 69 (2009) PARA 617.

51 Ie under the Housing Act 1996 ss 204, 204A: see *Practice Direction--Appeals* PD 52 para 24.2; and **HOUSING** vol 22 (2006 Reissue) PARA 295.

52 Ie under the Immigration and Asylum Act 1999 Pt II (ss 32-42): see *Practice Direction--Appeals* PD 52 para 24.3; and **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 203.

53 Ie under the Representation of the People Act 1983 s 56: see *Practice Direction--Appeals* PD 52 paras 24.4-24.6; and **ELECTIONS AND REFERENDUMS** vol 15(3) (2007 Reissue) PARA 189 et seq.

54 Ie under the UK Borders Act 2007 s 11: see *Practice Direction--Appeals* PD 52 para 24.7; and **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**.

UPDATE

1686 Statutory appeals; specific appeals

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

NOTE 49--Tribunals and Inquiries Act 1992 s 11(1) amended: Sea Fish (Conservation) Act 1992 s 9; Education Act 1993 s 181(2); SI 2001/3649, SI 2002/2217, SI 2008/2833, SI 2009/1307.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(4) MISCELLANEOUS APPEALS/1687. Appeal from the Lands Tribunal.

1687. Appeal from the Lands Tribunal.

A decision of the Lands Tribunal is final, except that any person who is aggrieved¹ by a decision of the tribunal as being erroneous in point of law may, in England and Wales, appeal² to the Court of Appeal³.

Part 52 of the Civil Procedure Rules applies to these appeals⁴ subject to the rule that the appellant's notice⁵ must be filed with the Court of Appeal within 28 days after the date of the decision of the tribunal⁶.

1 As to the meaning of 'person aggrieved' see **JUDICIAL REVIEW** vol 61 (2010) PARA 664. Where the tribunal's decision is given on a review by way of appeal of the previous decision of another person, that person, if dissatisfied with the decision, is treated for this purpose as a person aggrieved: Lands Tribunal Act 1949 s 3(4) proviso.

2 For the purposes of CPR Pt 52, which applies to appeals from the Lands Tribunal (see the text and notes 4-6), 'appeal' includes an appeal by way of case stated: see CPR 52.1(3)(a); and PARA 1658 note 5. However, in England and Wales appeals from the Lands Tribunal are no longer by way of case stated: see PARA 29 note 5 head (1).

3 Lands Tribunal Act 1949 s 3(4) proviso, (11)(a) (s 3(4) proviso amended by SI 2000/941). See further **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq; **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARA 168.

4 *Practice Direction--Appeals* PD 52 para 20.2.

5 As to the appellant's notice see PARA 1663.

6 *Practice Direction--Appeals* PD 52 para 21.9.

UPDATE

1687 Appeal from the Lands Tribunal

TEXT AND NOTES--The Lands Tribunal has been abolished and its functions have been transferred to the Upper Tribunal: Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments) Order 2009, SI 2009/1307, art 2 (see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq). Lands Tribunal Act 1949 s 3(4) repealed: SI 2009/1307.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(5) APPEALS BY WAY OF CASE STATED/1688. Appeal by case stated from the Crown Court; in principle.

(5) APPEALS BY WAY OF CASE STATED

1688. Appeal by case stated from the Crown Court; in principle.

With certain exceptions¹ any order, judgment or decision of the Crown Court may be questioned by any party to the proceedings, on the ground that it is wrong in law or is in excess of jurisdiction, by applying² to the Crown Court to have a case stated for the opinion of the High Court³. If the Crown Court considers that the application is frivolous, it may refuse to state a case⁴, in which event the High Court may by mandatory order require it to do so⁵. Where a case is stated for the opinion of the High Court, the High Court may, if it thinks fit, cause the case to be sent back for amendment and, where it does so, the case must be amended accordingly⁶.

The High Court must hear and determine the question arising on the case (or the case as amended)⁷ and must:

1248 (1) reverse, affirm or amend the determination in respect of which the case has been stated⁸; or

1249 (2) remit the matter to the Crown Court, with the opinion of the High Court⁹,

and may make such other order in relation to the matter (including as to costs) as it thinks fit¹⁰. With one exception¹¹, a decision of the High Court under these provisions is final¹².

1 This provision does not apply to a judgment or other decision of the Crown Court relating to trial on indictment: Supreme Court Act 1981 s 28(2)(a). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. The reference to a decision of the Crown Court relating to trial on indictment does not include a decision relating to an order under the Access to Justice Act 1999 s 17 (order requiring a person whose representation in respect of criminal proceedings in any court other than a magistrates' court is funded by the Legal Services Commission as part of the Criminal Defence Service to pay some or all of the cost of such representation: see **LEGAL AID** vol 65 (2008) PARA 174): Supreme Court Act 1981 s 28(4) (added by the Access to Justice Act 1999 s 24, Sch 4 paras 21, 22). Nor does it apply to any decision of that court under the Local Government (Miscellaneous Provisions) Act 1982 which, by any provision of any of that Act, is to be final: Supreme Court Act 1981 s 28(2)(b) (amended by the Local Government (Miscellaneous Provisions) Act 1982 s 2, Sch 3 para 27(6); the Licensing Act 2003 s 199, Sch 7; and the Gambling Act 2005 s 356(4), Sch 17).

2 The procedure for applying to have a case stated by the Crown Court is laid out in the Crown Court Rules 1982, SI 1982/1109, r 26; and the Criminal Procedure Rules 2005, SI 2005/384, r 64.7: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2005 et seq.

3 Supreme Court Act 1981 s 28(1). See *Harris Simon & Co Ltd v Manchester City Council*[1975] 1 All ER 412, [1975] 1 WLR 100, DC. As to the choice between case stated and judicial review see *R v Crown Court at Ipswich, ex p Baldwin*[1981] 1 All ER 596n, DC, where it was said that in a case involving factual difficulties the convenient and proper course is to appeal by way of case stated and not to apply for judicial review.

4 Crown Court Rules 1982, SI 1982/1109, r 26(6). If the applicant so requires, the Crown Court must certify its refusal: r 26(6). See also the Criminal Procedure Rules 2005, SI 2005/384, r 64.7(6).

5 See the Supreme Court Act 1981 s 29(3), (6) (s 29(3) amended by SI 2004/1033; Supreme Court Act 1981 s 29(6) added by the Access to Justice Act 1999 s 24, Sch 4, paras 21, 23). As to mandatory orders generally see **JUDICIAL REVIEW** vol 61 (2010) PARA 703 et seq.

6 Supreme Court Act 1981 s 28A(1)(b), (2) (s 28A added by the Statute Law (Repeals) Act 1993, s 1(2), Sch 2 Pt I para 9; substituted by the Access to Justice Act 1999 s 61).

7 Supreme Court Act 1981 s 28A(3) (as added and substituted: see note 6).

8 Supreme Court Act 1981 s 28A(3)(a) (as added and substituted: see note 6).

9 Supreme Court Act 1981 s 28A(3)(b) (as added and substituted: see note 6).

10 Supreme Court Act 1981 s 28A(3) (as added and substituted: see note 6).

11 le except as provided by the Administration of Justice Act 1960 (right of appeal to House of Lords in criminal cases): see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2020 et seq.

12 Supreme Court Act 1981 s 28A(4) (as added and substituted (see note 6); further amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 40(4), Sch 9 Pt 1 para 36(1), (4), to substitute a reference to the Supreme Court of the United Kingdom for the reference to the House of Lords; at the date at which this title states the law, no such day had been appointed).

UPDATE

1688 Appeal by case stated from the Crown Court; in principle

NOTE 12--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(5) APPEALS BY WAY OF CASE STATED/1689. Appeal by case stated from a magistrates' court; in principle.

1689. Appeal by case stated from a magistrates' court; in principle.

Any party to magistrates' court proceedings who is aggrieved¹ by the court's order, determination or other proceeding may question the proceeding on the ground that it is wrong in law or in excess of jurisdiction by applying² to the justices comprising the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved³. If the justices consider the application frivolous they may refuse to state a case⁴, in which event, on the application of the person who applied for the case, the High Court may by mandatory order require the justices to state a case⁵. Where a case is stated for the opinion of the High Court, the High Court may, if it thinks fit, cause the case to be sent back for amendment and, where it does so, the case must be amended accordingly⁶.

The High Court must hear and determine the question arising on the case (or the case as amended)⁷ and must:

- 1250 (1) reverse, affirm or amend the determination in respect of which the case has been stated⁸; or
- 1251 (2) remit the matter to the magistrates' court, with the opinion of the High Court⁹,

and may make such other order in relation to the matter (including an order as to costs) as it thinks fit¹⁰. With one exception¹¹, a decision of the High Court under the provisions described above is final¹².

1 As to the meaning of 'person aggrieved' see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.

2 The application must be made within 21 days after the decision was given: Magistrates' Courts Act 1980 s 111(2). The procedure for applying to have a case stated by a magistrates' court is laid out in the Magistrates' Courts Rules 1981, SI 1981/552, rr 76-81: see **MAGISTRATES**.

3 Magistrates' Courts Act 1980 s 111(1). See further **MAGISTRATES**. As to distress after an appeal by case stated see **DISTRESS** vol 13 (2007 Reissue) PARA 1139. As to a case stated by licensing justices see **INTOXICATING LIQUOR** vol 26 (2004 Reissue) PARA 287. The right is excluded if there is another right of appeal to the High Court or if by virtue of an enactment passed after 31 December 1879 the decision is final: Magistrates' Courts Act 1980 s 111(1).

4 See the Magistrates' Courts Act 1980 s 111(5). If the applicant so requires, the justices must certify their refusal: s 111(5).

5 Magistrates' Courts Act 1980 s 111(6). As to mandatory orders generally see **JUDICIAL REVIEW** vol 61 (2010) PARA 703 et seq.

6 Supreme Court Act 1981 s 28A(1)(a), (2) (s 28A added by the Statute Law (Repeals) Act 1993 s 1(2), Sch 2 para 9; substituted by the Access to Justice Act 1999 s 61). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

7 Supreme Court Act 1981 s 28A(3) (as added and substituted: see note 6).

8 Supreme Court Act 1981 s 28A(3)(a) (as added and substituted: see note 6).

9 Supreme Court Act 1981 s 28A(3)(b) (as added and substituted: see note 6).

10 Supreme Court Act 1981 s 28A(3) (as added and substituted: see note 6).

11 le except as provided by the Administration of Justice Act 1960 (right of appeal to House of Lords in criminal cases): see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2020 et seq.

12 Supreme Court Act 1981 s 28A(4) (as added and substituted (see note 6); further amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 40(4), Sch 9 Pt 1 para 36(1), (4), to substitute a reference to the Supreme Court for the reference to the House of Lords; at the date at which this title states the law, no such day had been appointed).

UPDATE

1689 Appeal by case stated from a magistrates' court; in principle

TEXT AND NOTES 1-6--1980 Act s 111 does not apply in relation to family proceedings within the meaning of s 111A: s 111(7) (added by SI 2009/871). As to appeals in family proceedings in a magistrates' court see the 1980 Act s 111A (added by SI 2009/871).

NOTE 12--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(5) APPEALS BY WAY OF CASE STATED/1690. Appeals by case stated from the Crown Court or magistrates' courts; in practice.

1690. Appeals by case stated from the Crown Court or magistrates' courts; in practice.

Part 52 of the Civil Procedure Rules and the practice direction supplementary thereto¹ apply where under any enactment (1) an appeal lies to the court by way of case stated²; or (2) a question of law may be referred to the court by way of case stated³, subject to any provision about a specific category of appeal⁴ and subject also to the following:

1252 (a) the procedure for applying to the Crown Court or a magistrates' court to have a case stated for the opinion of the High Court is set out in the Crown Court Rules 1982⁵ and the Magistrates' Courts Rules 1981⁶;

1253 (b) the appellant must file the appellant's notice⁷ at the appeal court⁸ within ten days after he receives the stated case⁹;

1254 (c) additional documents¹⁰ must be filed¹¹;

1255 (d) the appellant must serve the appellant's notice and accompanying documents on all respondents within four days after they are filed or lodged at the appeal court¹².

1 *Ie* CPR Pt 52; and *Practice Direction--Appeals* PD 52. See PARA 1658 et seq.

2 *Practice Direction--Appeals* PD 52 para 18.1(1)(a). See also CPR 52.1(3)(a) ('appeal' includes an appeal by way of case stated). As to appeals by way of case stated see PARAS 1688-1689.

3 *Practice Direction--Appeals* PD 52 para 18.1(1)(b). As to the meaning of 'court' see PARA 22.

4 *Practice Direction--Appeals* PD 52 para 18.2. The specific provision referred to is (1) provision in any enactment; or (2) provision in Section III (statutory appeals: see PARA 1686): para 18.1(2).

5 *Practice Direction--Appeals* PD 52 para 18.3. See the Crown Court Rules 1982, SI 1982/1109, r 26; PARA 1688; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2005 et seq.

6 *Practice Direction--Appeals* PD 52 para 18.3. See the Magistrates' Courts Rules 1981, SI 1981/552, rr 76-81; PARA 1689; and **MAGISTRATES**.

7 As to the appellant's notice see PARA 1663.

8 As to the meaning of 'appeal court' see PARA 1660 note 2.

9 *Practice Direction--Appeals* PD 52 para 18.4.

10 *Ie* additional to those required by CPR Pt 52 or *Practice Direction--Appeals* PD 52 (paras 1-15): see PARA 1663. The appellant must lodge the following documents with his appellant's notice: (1) the stated case; (2) a copy of the judgment, order or decision in respect of which the case has been stated; and (3) where the judgment, order or decision in respect of which the case has been stated was itself given or made on appeal, a copy of the judgment, order or decision appealed from: para 18.5.

11 See note 10. As to the meaning of 'filing' see PARA 1832 note 8.

12 *Practice Direction--Appeals* PD 52 para 18.6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(5) APPEALS BY WAY OF CASE STATED/1691. Appeal to the High Court by case stated from a minister, government department or tribunal.

1691. Appeal to the High Court by case stated from a minister, government department or tribunal.

Enactments may provide for an application to a minister, government department, tribunal or other person to have a case stated for the opinion of the court. The procedure may be set out in the enactment which provides for the right of appeal, or any rules of procedure relating to the minister or tribunal, department or other person¹. A case stated by a tribunal must be signed by the chairman or president of the tribunal; a case stated by any other person must be signed by that person or by a person authorised to do so². The minister or tribunal, department or other person must serve the stated case on the party who requests the case to be stated, or the party as a result of whose application to the court the case was stated³.

Where an enactment provides that a minister or tribunal, department or other person may state a case or refer a question of law to the court by way of case stated without a request being made, the minister or tribunal etc must serve the stated case on those parties that the minister or tribunal etc considers appropriate, and give notice to every other party to the proceedings that the stated case has been served on the party named and on the date specified in the notice⁴.

The party on whom the stated case was served must file the appellant's notice⁵ and the stated case at the appeal court⁶ and serve copies of the notice and stated case on the minister or tribunal etc who stated the case and on every party to the proceedings to which the stated case relates, within 14 days after the stated case was served on him⁷.

The court may amend the stated case or order it to be returned to the minister or tribunal etc for amendment and may draw inferences of fact from the facts stated in the case⁸.

Where the case is stated by a minister or government department, that minister or department, as the case may be, is entitled to appear on the appeal and to make representations to the court⁹.

An application to the court for an order requiring a minister or tribunal etc to state a case for the decision of the court, or to refer a question of law to the court by way of case stated, must be made to the court which would be the appeal court if the case were stated¹⁰.

The application notice must contain:

- 1256 (1) the grounds of the application¹¹;
- 1257 (2) the question of law on which it is sought to have the case stated¹²; and
- 1258 (3) any reasons given by the minister or tribunal etc for his or its refusal to state a case¹³.

It must be filed at the appeal court and served on the minister, department, secretary of the tribunal or other person as the case may be¹⁴ and on every party to the proceedings to which the application relates¹⁵, within 14 after the appellant receives notice of the refusal of his request to state a case¹⁶.

The jurisdiction of the High Court under any enactment to hear and determine a case stated or a question of law referred by way of case stated by a minister of the Crown, government

department, tribunal or other person is to be exercised by a single judge of the Queen's Bench Division except where it is otherwise provided by statute or the Civil Procedure Rules¹⁷.

1 *Practice Direction--Appeals* PD 52 para 18.7. The High Court has statutory jurisdiction to hear and determine a question of law on a case stated on a wide variety of subjects, including, inter alia a determination (1) as to the title to registered land (see the Land Registration Act 2002; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 1208); (2) of a tribunal of inquiry under the London Building Acts (Amendment) Act 1939 s 116, the case being heard and determined as if stated by magistrates (s 116(6)); (3) of a pensions appeal tribunal under the Pensions Appeal Tribunals Act 1943 ss 1-6 (see **ARMED FORCES**); (4) on an election petition (see the Representation of the People Act 1983 s 146(1)-(4); and **ELECTIONS AND REFERENDUMS** vol 15(4) (2007 Reissue) PARA 814); (5) of an agricultural land tribunal (see the Agriculture (Miscellaneous Provisions) Act 1954 s 6(1); and **AGRICULTURAL LAND** vol 1 (2008) PARA 673); (6) of a mental health review tribunal (see the Mental Health Act 1983 s 78(8); and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 575); (7) of a Commons Commissioner (see the Commons Registration Act 1965 s 18(1), (2); and **COMMONS** vol 13 (2009) PARA 425); (8) of commissioners relating to income or corporation tax (see the Taxes Management Act 1970 s 56; the Income and Corporation Taxes Act 1988 s 705A; the General Commissioners (Jurisdiction and Procedure) Regulations 1994, SI 1994/1812, reg 22; and **INCOME TAXATION**); and (9) of any tribunal mentioned in the Tribunals and Inquiries Act 1992 s 11(1).

The tribunals mentioned in head (9) include registered homes tribunals, independent schools tribunals, employment tribunals, financial services tribunals and VAT and duties tribunals.

Examples of enactments under which a minister or other person may state a case for the opinion of the High Court are the Water Industry Act 1991 s 137 (discharge of trade effluent: see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 1048); and the Town and Country Planning Act 1990 s 289 (various planning appeals: see **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARAS 648-649.

2 *Practice Direction--Appeals* PD 52 para 18.8.

3 *Practice Direction--Appeals* PD 52 para 18.9. As to the meaning of 'service' see PARA 138 note 2.

Where a stated case has been served by the minister or tribunal etc in accordance with this provision, and the party on whom the stated case was served does not file an appellant's notice (see the text and notes 5-7), any other party may file an appellant's notice with the stated case at the appeal court and serve a copy of the notice and the case on the persons listed in heads (1) and (2) in the text, within 14 days from the last day on which the party on whom the stated case was served may file an appellant's notice: *Practice Direction--Appeals* PD 52 paras 18.13, 18.14. As to the meaning of 'filing' see PARA 1832 note 8; and as to the meaning of 'appeal court' see PARA 1660 note 2.

4 *Practice Direction--Appeals* PD 52 para 18.10. Where this applies the minister or tribunal etc must, within 14 days after stating the case, file an appellant's notice and the stated case at the appeal court, and serve copies of those documents on the persons served under para 18.10: para 18.12.

5 As to the appellant's notice see PARA 1663.

6 *Practice Direction--Appeals* PD 52 para 18.11.

7 *Practice Direction--Appeals* PD 52 para 18.11. As to time limits generally see PARA 88 et seq.

8 *Practice Direction--Appeals* PD 52 para 18.15.

9 *Practice Direction--Appeals* PD 52 para 18.16.

10 *Practice Direction--Appeals* PD 52 para 18.17. Such an application must be made in accordance with CPR Pt 23 (see PARA 303 et seq): *Practice Direction--Appeals* PD 52 para 18.18.

11 *Practice Direction--Appeals* PD 52 para 18.19(1).

12 *Practice Direction--Appeals* PD 52 para 18.19(2).

13 *Practice Direction--Appeals* PD 52 para 18.19(3).

14 *Practice Direction--Appeals* PD 52 para 18.20(1).

15 *Practice Direction--Appeals* PD 52 para 18.20(2).

16 *Practice Direction--Appeals* PD 52 para 18.20.

17 See PARAS 1686, 1698.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(6) DIVISIONAL COURT APPEALS/1692. Appeal from a Divisional Court to the Court of Appeal.

(6) DIVISIONAL COURT APPEALS

1692. Appeal from a Divisional Court to the Court of Appeal.

Part 52 of the Civil Procedure Rules applies to appeals from a Divisional Court of the High Court to the Court of Appeal¹. Any appeal from the Divisional Court to which Part 52 applies can only be made with permission and it is submitted that this rule applies whether the Divisional Court acted under an original statutory or common law jurisdiction or not². Where the Divisional Court has dealt with a matter on appeal from another court, permission to appeal to the Court of Appeal is required³ as the appeal will be dealt with as a second appeal and this will be the case notwithstanding that the case was dealt with by way of case stated⁴.

Part 52 will not apply where the Divisional Court's order is final and no appeal lies to the Court of Appeal⁵.

1 CPR 52.1(1). No appeal lies to the Court of Appeal from any judgment of the High Court in any criminal cause or manner except where provided for under Administration of Justice Act 1960 (in matters concerning contempt of court: see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 513); Supreme Court Act 1981 s 18(1)(a). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 CPR 52.3 (requirement for permission) applies to all appeals from the High Court to the Court of Appeal unless other provisions of the CPR or another enactment state to the contrary: see PARA 1661. Permission to appeal should, in general, be sought, from the trial judge at the time of judgment: *Re T (A Child: Contact)*[2002] EWCA Civ 1736, [2003] 1 FCR 303.

3 Ie CPR 52.13 will apply: see PARA 1682.

4 *Clark (Inspector of Taxes) v Perks* [2000] 4 All ER 1, [2001] 1 WLR 17, CA.

5 See the Supreme Court Act 1981 s 28A (proceedings on a case stated by a magistrates' court or the Crown Court); PARAS 1688-1690; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2005; **MAGISTRATES**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(7) ASSIGNMENT OF MISCELLANEOUS APPLICATIONS AND APPEALS TO THE HIGH COURT/1693. Introduction.

(7) ASSIGNMENT OF MISCELLANEOUS APPLICATIONS AND APPEALS TO THE HIGH COURT

1693. Introduction.

In a few specialist areas of practice many of the sometimes complex rules which applied prior to introduction of the Civil Procedure Rules have been preserved in the Schedules by Part 50 of the rules¹. Additional guidance can now be found in *The Chancery Guide* and *The Queen's Bench Guide*². The procedure on such appeals, however, is now generally governed by Part 52 of the Civil Procedure Rules³.

The following paragraphs set out the various matters in which applications and appeals are assigned to the Chancery Division⁴ and Queen's Bench Division⁵ of the High Court. They do not, however, purport to offer an exhaustive list.

1 See PARA 30 the text and note 19.

2 As to the status of *The Chancery Guide* (2005 Edn) and *The Queen's Bench Guide* (2007 Edn) see PARA 16 text and notes 4-5.

3 See PARA 1700.

4 See PARAS 1694-1695.

5 See PARAS 1696-1699.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(7) ASSIGNMENT OF MISCELLANEOUS APPLICATIONS AND APPEALS TO THE HIGH COURT/1694. Applications and appeals to the Chancery Division.

1694. Applications and appeals to the Chancery Division.

Among the applications and appeals specifically assigned by the preserved Rules of the Supreme Court¹ to the Chancery Division² are:

- 1259 (1) an application by the Attorney General relating to the disposition of the property of a quasi-military organisation³;
- 1260 (2) certain proceedings under the Fair Trading Act 1973 and the Control of Misleading Advertisements Regulations 1988⁴.

In addition, certain proceedings are assigned to a Divisional Court of the Chancery Division and to a single Chancery judge⁵.

1 As to the preserved Rules of the Supreme Court see CPR Pt 50, Sch 1; and PARA 1693.

2 As to assignment of business to the Chancery Division under the Supreme Court Act 1981 s 61(1), Sch 1 para 1 see PARA 44. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

3 See the Public Order Act 1936 s 2(3); CPR Sch 1 RSC Ord 93 r 5(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 381.

4 See the Fair Trading Act 1973 s 85(7); the Control of Misleading Advertisements Regulations 1988, SI 1988/915; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 731 et seq.

5 See PARA 1695.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(7) ASSIGNMENT OF MISCELLANEOUS APPLICATIONS AND APPEALS TO THE HIGH COURT/1695. Applications and appeals to Chancery Divisional Court or judge.

1695. Applications and appeals to Chancery Divisional Court or judge.

Land registration appeals from a county court are assigned to a Divisional Court of the Chancery Division¹; and appeals, cases stated and references for the court's opinion under certain Acts are assigned to a single Chancery Division judge².

1 See the Land Registration Act 2002; CPR Sch 1 RSC Ord 93 r 10(1); and **LAND REGISTRATION** vol 26 (Reissue) PARAS 1244, 1252.

2 Eg under the Commons Registration Act 1965 s 18 (repealed, as from a day to be appointed, by the Commons Act 2006 s 53, Sch 6 Pt 1) (see CPR Sch 1 RSC Ord 93 r 16(1); and **COMMONS** vol 13 (2009) PARA 425).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(7) ASSIGNMENT OF MISCELLANEOUS APPLICATIONS AND APPEALS TO THE HIGH COURT/1696. Applications and appeals to the Queen's Bench Division.

1696. Applications and appeals to the Queen's Bench Division.

Among the applications and appeals specifically assigned by the preserved Rules of the Supreme Court to the Queen's Bench Division¹ are proceedings under the Representation of the People Acts² and certain other Acts³. In addition a large number of proceedings are specifically assigned to a Divisional Court of the Queen's Bench Division⁴, or a single judge⁵ or a master⁶ of that Division.

1 As to the preserved Rules of the Supreme Court see CPR Pt 50, Sch 1; and PARA 1693. As to assignment to the Queen's Bench Division under the Supreme Court Act 1981 s 61(1), Sch 1 para 2 see PARA 45. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 See CPR Sch 1 RSC Ord 94 r 5(1); and **ELECTIONS AND REFERENDUMS** vol 15(4) (2007 Reissue) PARA 770.

3 See the Tribunals and Inquiries Act 1992 s 11(1); CPR Sch 1 RSC Ord 94 rr 8, 9; and PARA 1691 note 1. See also the Town and Country Planning Act 1990 s 289(6); the Planning (Listed Buildings and Conservation Areas) Act 1990 s 65(5); CPR Sch 1 RSC Ord 94 r 12(1),(2); and **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 648, vol 46(3) (Reissue) PARA 1195.

4 See PARA 1697.

5 See PARA 1698.

6 See PARA 1699.

UPDATE

1696 Applications and appeals to the Queen's Bench Division

NOTE 3--Tribunals and Inquiries Act 1992 s 11(1) amended: Sea Fish (Conservation) Act 1992 s 9; Education Act 1993 s 181(2); SI 2001/3649, SI 2002/2217, SI 2008/2833, SI 2009/1307.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(7) ASSIGNMENT OF MISCELLANEOUS APPLICATIONS AND APPEALS TO THE HIGH COURT/1697. Applications and appeals to the Queen's Bench Divisional Court.

1697. Applications and appeals to the Queen's Bench Divisional Court.

The following proceedings are assigned by the preserved Rules of the Supreme Court to a Divisional Court of the Queen's Bench Division¹:

- 1261 (1) most proceedings for committal for contempt of court, subject to certain exceptions², and, save in vacation, applications for leave to apply to a Divisional Court for committal³;
- 1262 (2) an application for a writ of habeas corpus ad subjiciendum if the court directs that it be made to a Divisional Court⁴;
- 1263 (3) proceedings relating to parliamentary and local government elections, save where a judge or master has jurisdiction⁵;
- 1264 (4) an appeal or case stated relating to a planning or listed building enforcement notice if the court so directs⁶;
- 1265 (5) an application, unless made in vacation, to extend the time for appealing to the House of Lords in a criminal cause or matter⁷ or for a defendant to be present on the hearing of proceedings preliminary or incidental to such an appeal⁸;
- 1266 (6) an appeal from an order or decision of an inferior court relating to contempt of court⁹.

1 As to the preserved Rules of the Supreme Court see CPR Pt 50, Sch 1; and PARA 1693. As to assignment to the Queen's Bench Division under the Supreme Court Act 1981 s 61(1), Sch 1 para 2 see PARA 45. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 See CPR Sch 1 RSC Ord 52 r 1(2); and **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 493.

3 See CPR Sch 1 RSC Ord 52 r 2(2); and **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 496.

4 See CPR Sch 1 RSC Ord 54 r 1(1)(a); PARA 1531; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 231.

5 See CPR Sch 1 RSC Ord 94 r 5(2); and **ELECTIONS AND REFERENDUMS** vol 15(4) (2007 Reissue) PARA 770.

6 See the Town and Country Planning Act 1990 ss 289, 290; the Planning (Listed Buildings and Conservation Areas) Act 1990 s 65; CPR Sch 1 RSC Ord 94 r 13(4); and **TOWN AND COUNTRY PLANNING** vol 46(2) (Reissue) PARA 648, vol 46(3) (Reissue) PARA 1195.

7 See the Administration of Justice Act 1960 s 2; CPR Sch 1 RSC Ord 109 r 1(1)(a); and **COURTS**. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

8 See the Administration of Justice Act 1960 s 9(3); CPR Sch 1 RSC Ord 109 r 1(1)(b); and **COURTS**.

9 See the Administration of Justice Act 1960 s 13; CPR Sch 1 RSC Ord 109 r 2(1); and **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 514.

UPDATE

1697 Applications and appeals to the Queen's Bench Divisional Court

TEXT AND NOTES 7, 8--CPR Sch 1 RSC Ord 109 r 1(1)(a), (b) amended: SI 2009/2092.

NOTE 7--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(7) ASSIGNMENT OF MISCELLANEOUS APPLICATIONS AND APPEALS TO THE HIGH COURT/1698. Applications and appeals to a single Queen's Bench judge.

1698. Applications and appeals to a single Queen's Bench judge.

The following proceedings are assigned by the preserved Rules of the Supreme Court to a single judge of the Queen's Bench Division¹:

- 1267 (1) proceedings for committal for contempt of court in connection with High Court proceedings in the Queen's Bench Division, or with proceedings in relation to an inferior court, tribunal or person²;
- 1268 (2) an application in vacation for leave to apply to a Divisional Court for committal³;
- 1269 (3) an application for a writ of habeas corpus ad subjiciendum⁴ unless the court directs that the application be made to a Divisional Court⁵ or it concerns the residence (formerly the custody, care or control) of a minor⁶;
- 1270 (4) an application for a writ of habeas corpus ad testificandum or ad respondendum⁷, or for an order to bring up a prisoner, otherwise than by such a writ, to give evidence⁸;
- 1271 (5) proceedings under the Representation of the People Acts which are assigned by those Acts to a single judge⁹;
- 1272 (6) an appeal or case stated relating to a planning or listed building enforcement notice unless the court directs that it be heard by a Divisional Court¹⁰;
- 1273 (7) an application in vacation to extend the time for appealing to the House of Lords in a criminal cause or matter or for a defendant to be present on the hearing of proceedings preliminary or incidental to such an appeal¹¹.

In addition, an application in criminal proceedings to estreat a recognisance must be made to a judge¹².

1 As to the preserved Rules of the Supreme Court see CPR Pt 50, Sch 1; and PARA 1693. As to assignment to the Queen's Bench Division under the Supreme Court Act 1981 s 61(1), Sch 1 para 2 see PARA 45. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 See CPR Sch 1 RSC Ord 52 r 1(3), (4); and **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 493.

3 See CPR Sch 1 RSC Ord 52 r 2(2); and **CONTEMPT OF COURT** vol 9 PARA 495. The application is made to a judge in chambers.

4 See CPR Sch 1 RSC Ord 54 r 1(1); PARA 1531, and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 231. The application is made to a judge in court unless it is made on behalf of a minor or no judge is sitting in court: CPR Sch 1 RSC Ord 54 r 1(1)(b), (c).

5 See CPR Sch 1 RSC Ord 54 r 1(1)(a).

6 In such cases the application must be made in the Family Division: see CPR Sch 1 RSC Ord 54 r 11.

7 See CPR Sch 1 RSC Ord 54 r 9(1); and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 250. The application is made to a judge in chambers.

8 See CPR Sch 1 RSC Ord 54 r 9(2); PARA 1009; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 250. The application is made to a judge in chambers.

9 See CPR Sch 1 RSC Ord 94 r 5(3); and **ELECTIONS AND REFERENDUMS** vol 15(4) (2007 Reissue) PARA 770. Where the Acts confer jurisdiction relating to parliamentary elections on a judge, corresponding jurisdiction relating to local government elections is also exercisable by a judge: CPR Sch 1 RSC Ord 94 r 5(4).

10 See CPR Sch 1 RSC Ord 94 r 13(4); and PARA 1697 note 6.

11 See the Administration of Justice Act 1960 ss 2, 9(3); CPR Sch 1 RSC Ord 109 r 1(1); PARA 1697 text and notes 7-8; and **COURTS**. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

12 CPR Sch 1 RSC Ord 79 r 8(1), (2). The application is made by claim form, served at least two clear days before the day named therein for the hearing and supported by an affidavit showing in what manner the breach of recognisance was committed and proving due service of the claim form: CPR Sch 1 RSC Ord 79 r 8(2), (3). On the hearing the judge may, and if requested by any party must, direct any issue of fact in dispute to be tried by a jury: CPR Sch 1 RSC Ord 79 r 8(4). If it appears to the judge that default has been made in performing the conditions of the recognisance, he may order it to be estreated: CPR Sch 1 RSC Ord 79 r 8(5). As to recognisances generally see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1172 et seq.

UPDATE

1698 Applications and appeals to a single Queen's Bench judge

NOTE 11--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(7) ASSIGNMENT OF MISCELLANEOUS APPLICATIONS AND APPEALS TO THE HIGH COURT/1699. Applications to Queen's Bench masters.

1699. Applications to Queen's Bench masters.

The following proceedings are assigned by the preserved Rules of the Supreme Court to a master of the Queen's Bench Division¹:

- 1274 (1) an application for the rectification of the register of deeds of arrangement²;
- 1275 (2) proceedings under the Representation of the People Acts which are assigned by those Acts to a master³;
- 1276 (3) an application for the rectification of the register of bills of sale⁴;
- 1277 (4) an application to extend the time for making, or to rectify, an application to record a charge on the property of a registered industrial and provident society⁵.

1 As to the preserved Rules of the Supreme Court see CPR Pt 50, Sch 1; and PARA 1693. As to assignment to the Queen's Bench Division under the Supreme Court Act 1981 s 61(1), Sch 1 para 2 see PARA 45. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 See the Deeds of Arrangement Act 1914 s 7; CPR Sch 1 RSC Ord 94 r 4(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2003 Reissue) PARA 891. The application is made without notice by witness statement or affidavit: see CPR Sch 1 RSC Ord 94 r 4(1), (2). As to the meaning of 'witness statement' see PARA 751 note 1; and as to the meaning of 'affidavit' see PARA 540 note 5.

3 See CPR Sch 1 RSC Ord 94 r 5(3); and **ELECTIONS AND REFERENDUMS** vol 15(4) (2007 Reissue) PARA 770 (election court presided over by the Senior Master).

4 See the Bills of Sale Act 1878 s 14; CPR Sch 1 RSC Ord 95 r 1; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1779.

5 See the Industrial and Provident Societies Act 1967 s 1(5); CPR Sch 1 RSC Ord 95 r 5; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2454.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(7) ASSIGNMENT OF MISCELLANEOUS APPLICATIONS AND APPEALS TO THE HIGH COURT/1700. Procedure on appeals to the High Court.

1700. Procedure on appeals to the High Court.

Statutory appeals to the High Court are now dealt with by Part 52 of the Civil Procedure Rules and the general provisions of that Part apply to such appeals unless there is express provision to the contrary¹. Some additional general provisions for statutory appeals are made by Section II of the practice direction which is supplementary to Part 52 of the rules². Appellants' notices must normally be lodged with the High Court within 28 days of the date of the decision to be appealed³.

In addition to the general provisions for statutory appeals there are detailed provisions made relating to certain specific appeals, which must be consulted as they vary the general requirements in relation to time limits and documentation⁴.

1 CPR 52.1(4).

2 See *Practice Direction--Appeals* PD 52 Section II (paras 16.1-18.20); and PARA 1684.

3 See *Practice Direction--Appeals* PD 52 para 17.3; and PARA 1684.

4 See *Practice Direction--Appeals* PD 52 Section III (paras 20.1-24.7); and PARA 1686.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(8) APPEALS TO THE COURT OF APPEAL/1701. In general.

(8) APPEALS TO THE COURT OF APPEAL

1701. In general.

The Court of Appeal, which forms part of the Supreme Court of England and Wales¹, has two divisions, namely the Criminal Division and the Civil Division². It consists of ex-officio judges³ and not more than 38 ordinary judges⁴.

The Civil Division of the Court of Appeal is bound by its own decisions⁵, except (1) where there are conflicting decisions of the Court of Appeal; (2) where the earlier decision or decisions cannot stand with a decision of the House of Lords; or (3) where the court is satisfied that the previous decision was given per incuriam⁶.

The sittings of the Court of Appeal may be held, and any other business of the court may be conducted, at any place in England or Wales⁷.

Part 52 of the Civil Procedure Rules makes provision for procedure on appeals to the Court of Appeal⁸. The particular application of these rules to the Court of Appeal is discussed in the following paragraphs⁹.

1 Supreme Court Act 1981 s 1(1) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 4 para 26(1), (2) to substitute a reference to the Senior Courts for the reference to the Supreme Court; at the date at which this title states the law, no such day had been appointed). As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 Supreme Court Act 1981 s 3(1). The President of the Criminal Division is the Lord Chief Justice and the President of the Civil Division is the Master of the Rolls: s 3(2). The Lord Chief Justice may, after consulting the Lord Chancellor, appoint one of the ordinary judges of the Court of Appeal to be vice-president of both divisions or he may appoint a vice-president of each division (s 3(3) (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 paras 114, 116(1), (2)) who, in the absence of any ex-officio judge of the Court of Appeal, will preside at a sitting of the court (Supreme Court Act 1981 s 3(4)). Any number of courts of either division of the Court of Appeal may sit at the same time: s 3(5). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the Supreme Court Act 1981 s 3(3): s 3(6) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 116(3)).

3 The ex-officio judges are (1) any person who was Lord Chancellor before 12 June 2003; (2) any Lord of Appeal in Ordinary who at the date of his appointment was or was qualified for appointment as an ordinary judge of the Court of Appeal or who has held office under heads (3)-(6); (3) the Lord Chief Justice; (4) the Master of the Rolls; (5) the President of the Queen's Bench Division; (6) the President of the Family Division; and (7) the Chancellor of the High Court: Supreme Court Act 1981 s 2(2)(b)-(g) (amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 115(1), (2)(b)). A former Lord Chancellor or a Lord of Appeal in Ordinary need not sit and act in the Court of Appeal unless he consents to do so at the request of the Lord Chief Justice: Supreme Court Act 1981 s 2(2) (amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 115(2)(d)). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his function under the Supreme Court Act 1981 s 2(2) of making such requests: s 2(2A) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 115(3)). The Court of Appeal is to be taken as duly constituted notwithstanding any vacancy in any of the offices named above: Supreme Court Act 1981 s 2(6). For 'Lord of Appeal in Ordinary' there is prospectively substituted 'judge of the Supreme Court': s 2(2)(c) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 145, Sch 17 Pt 2 para 22(1), (2); at the date at which this title states the law, no such day had been appointed).

4 Supreme Court Act 1981 s 2(1) (amended by SI 2008/1777). An ordinary judge of the Court of Appeal (including the vice-president, if any, of either division) is styled 'Lord Justice of Appeal' or 'Lady Justice of

Appeal': Supreme Court Act 1981 s 2(3) (substituted by the Courts Act 2003 s 63(1)). Their number may be increased or further increased by Order in Council (Supreme Court Act 1981 s 2(4)) which must be laid before Parliament and approved by resolution of each House (s 2(5)). It is for the Lord Chancellor to recommend to Her Majesty the making of an Order under s 2(4): s 2(4A) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 115(4)). The present order is the Maximum Number of Judges Order 2008, SI 2008/1777. The Civil Division of the Court of Appeal also has masters and deputy masters of the Civil Appeals Office: see CPR 52.16; and PARA 1711.

5 A different rule prevails in the Criminal Division, which is not so bound: see *R v Gould*[1968] 2 QB 65, [1968] 1 All ER 849, CA; and PARA 96.

6 *Young v Bristol Aeroplane Co Ltd*[1944] KB 718, [1944] 2 All ER 293, CA (affd [1946] AC 163, [1946] 1 All ER 98, HL); *Morelle Ltd v Wakeling*[1955] 2 QB 379, [1955] 1 All ER 708, CA; *Gallie v Lee*[1969] 2 Ch 17, [1969] 1 All ER 1062, CA (affd sub nom *Saunders (Executrix of the Will of Gallie) v Anglia Building Society*[1971] AC 1004, [1970] 3 All ER 961, HL). See also *Davis v Johnson*[1979] AC 264, [1978] 1 All ER 1132, HL. It is not settled whether the full Court of Appeal is bound by a decision on an interlocutory appeal made by a court consisting of two Lords Justices: see *Boys v Chaplin*[1968] 2 QB 1, [1968] 1 All ER 283, CA (affd [1971] AC 356, [1969] 2 All ER 1085, HL; and PARA 96); but see the Supreme Court Act 1981 s 54(2)-(4A) (substituted and added by the Access to Justice Act 1999 s 59), under which a Court of Appeal consisting of one or more judges, as directed by the Master of the Rolls, is duly constituted for the purpose of exercising any of its jurisdiction; and PARA 1707. It should also be noted that where the House of Lords overturns a decision of the Court of Appeal but states that certain parts of its decision did not fall to be decided by the House of Lords then the reasoning of the Court of Appeal remains of a powerful persuasive influence on later Court of Appeal cases but is not binding: see *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876, [1989] 3 All ER 843, HL. The Court of Appeal is also free but not bound to depart from the ratio decidendi of its own earlier decision if it is satisfied that the European Patent Office Boards of Appeal have formed a settled view of European patent law which is inconsistent with that earlier decision: *Actavis UK Ltd v Merck & Co Inc*[2008] EWCA Civ 444, [2009] 1 All ER 196, [2008] IP & T 806. As to judgments of the Court of Appeal see further PARA 96. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

7 Supreme Court Act 1981 s 57(1). Subject to rules of court, the places and the days and times at which the Court of Appeal may sit outside the Royal Courts of Justice must be determined in accordance with directions given by the Lord Chancellor after consulting the Lord Chief Justice: s 57(2) (amended by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 128(1), (2)). The Lord Chief Justice may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4)) to exercise his functions under the Supreme Court Act 1981 s 57: s 57(5) (added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 128(3)). Vacations of the Court of Appeal and its offices are regulated by rules of court (see the Supreme Court Act 1981 s 57(3); and PARA 65), which may also provide for such sittings of the Civil Division of the Court of Appeal during vacation as the Master of the Rolls with the concurrence of the Lord Chancellor may determine (s 57(4)(a)), and they are required to provide for the transaction during vacation by judges of the Civil Division of the Court of Appeal of all such business as may require to be immediately or promptly transacted (s 57(4)(b)).

8 See CPR Pt 52; *Practice Direction--Appeals* PD 52; and PARA 1658 et seq.

9 Particular provision in relation to the Court of Appeal is made by CPR 52.13-52.16 (see PARAS 1682, 1702-1711); and by *Practice Direction--Appeals* PD 52 paras 6.4-6.6 (appeal questionnaire: see PARA 1666); para 10.1 (appeals transferred to the Court of Appeal: see PARA 1679); and paras 15.1-15.14 (see PARA 1710 et seq).

UPDATE

1701 In general

NOTES 1, 3, 6--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(8) APPEALS TO THE COURT OF APPEAL/1702. Jurisdiction of the Court of Appeal.

1702. Jurisdiction of the Court of Appeal.

Subject to the provisions of the Supreme Court Act 1981¹, the Court of Appeal, which is a superior court of record², may exercise (1) all such jurisdiction, whether civil or criminal, as is conferred on it by the 1981 Act or any other Act³; and (2) all such other jurisdiction, whether civil or criminal, as was exercisable by it immediately before the commencement of the 1981 Act⁴. For all purposes of or incidental to the hearing and determination of any appeal to the Civil Division of the Court of Appeal and the amendment, execution and enforcement of any judgment or order made on such an appeal, the Court of Appeal has all the authority and jurisdiction of the court or tribunal from which the appeal was brought⁵. Moreover, any provision in the Supreme Court Act 1981 or any other Act which authorises or requires the taking of any steps for the execution or enforcement of a judgment or order of the High Court applies in relation to a judgment or order of the Civil Division of the Court of Appeal as it applies in relation to a judgment or order of the High Court⁶.

Part 52 of the Civil Procedure Rules makes general provision as to the powers of an appeal court⁷. Particular provision is made with regard to judicial review appeals⁸.

The Civil Division of the Court of Appeal exercises the whole jurisdiction of that court which is not exercisable by the Criminal Division⁹. This jurisdiction must be exercised so as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided¹⁰.

1 See eg the Supreme Court Act 1981 s 18, which imposes certain restrictions on appeals to the Court of Appeal; and PARA 1705. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 Supreme Court Act 1981 s 15(1).

3 Supreme Court Act 1981 s 15(2)(a).

4 Supreme Court Act 1981 s 15(2)(b). The Supreme Court Act 1981 came into force on 1 January 1982: s 153(2).

5 Supreme Court Act 1981 s 15(3).

6 Supreme Court Act 1981 s 15(4). As to the enforcement of judgments and orders see PARA 1223 et seq.

7 See CPR 52.10; and PARA 1671.

8 See CPR 52.15; *Practice Direction--Appeals* PD 52 paras 15.3-15.6; and **JUDICIAL REVIEW** vol 61 (2010) PARA 672.

9 Supreme Court Act 1981 s 53(3). As to the jurisdiction of the Criminal Division see s 53(2); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARAS 1837, 1895, 1920.

10 Supreme Court Act 1981 s 49(2). The court must also take into account the overriding objective of the new civil procedure, which is expressed in similar terms: see PARA 33. The jurisdiction of the Court of Appeal extends to the re-opening of an appeal hearing which it has already determined and given judgment on, where justice requires it and where no alternative effective remedy exists: *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528, [2002] 2 All ER 353. Similarly, the Court of Appeal is not precluded from dealing with similar ancillary orders, especially where a party is not seeking to reverse any points already decided: *KR v Bryn Alyn*

Community (Holdings) Ltd (in liquidation) [2003] EWCA Civ 783, [2003] QB 1441. See also CPR 52.17 (PARA 1674), which now provides the procedure for re-opening an appeal or application for permission to appeal.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(8) APPEALS TO THE COURT OF APPEAL/1703. Who may appeal.

1703. Who may appeal.

Any of the parties to a claim or matter and any person served with notice of the judgment or order may appeal, by permission where permission is necessary¹. The Court of Appeal has jurisdiction to entertain an appeal where a party has had judgment given against him through his failure to attend the hearing, although the proper course is to apply first to the court below to restore the case². Where the claimant in a representative claim³ obtains an order, a member of the class represented cannot appeal from it⁴. One of two or more co-plaintiffs (now known as claimants) have been permitted to appeal, even though the others refused to join in the appeal⁵. If a defendant in a test case refuses to appeal, a defendant in one of the other cases may be given leave to prosecute the appeal on his own behalf⁶. A third party has been permitted to appeal provided an order was made that he should be bound by the result of the proceedings between the plaintiff and the defendant⁷.

The Civil Procedure Rules (CPR) provide that a person who is not a party but is directly affected by an order may apply to have it varied or set aside⁸ but do not deal with the situation where a non-party wishes to bring an appeal. However, it has been held that an interested person may obtain leave to appeal even if he was not a party to the proceedings in the lower court⁹. Leave is obtained by without notice (formerly known as *ex parte*) application to the Court of Appeal¹⁰ made within the time limited for appealing¹¹. A person who was not a party to the proceedings below may be added as a defendant to the action by the Court of Appeal in order to pursue the appeal by the original defendant, who may be granted leave to withdraw from the appeal¹². A person who could have been made a party, and who might have appealed, cannot afterwards bring proceedings for a declaration that the judgment or order is not binding on him¹³.

1 As to when permission is necessary see PARA 1659.

2 *Vint v Hudspith* (1885) 29 ChD 322, CA. See, however, *Re Edwards's Will Trusts, Edwards v Edwards* [1982] Ch 30, [1981] 2 All ER 941, CA. Where the case has not been heard, but merely struck out for non-attendance, the court below may restore and hear it, even after the order dismissing it has been drawn up (*Rackham v Tabrum* (1923) 129 LT 24), but if there has been a hearing (eg of an application to a Divisional Court in the respondent's absence), that court may not reinstate the case after judgment has been passed and entered (*Hession v Jones* [1914] 2 KB 421), and the remedy is by appeal (*Re Grove* (1888) 4 TLR 272, CA). See, however, *Walker v Budden* (1879) 5 QBD 267, CA. As to failure to appear at the hearing of a special case see *Allum v Dickinson* (1882) 9 QBD 632, CA. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

3 As to the meaning of 'claimant' and 'claim' and as to the replacement of the former terms 'plaintiff' and 'action' by 'claimant' and 'claim' see PARA 18. As to representative claims see PARA 229 et seq.

4 *Watson v Cave* (1881) 17 ChD 19, CA.

5 *Beckett v Attwood* (1881) 18 ChD 54, CA.

6 *Briton Medical and General Life Assurance Ltd v Jones* (1889) 60 LT 637.

7 *The Millwall* [1905] P 155, CA.

8 See CPR 40.9; and PARA 1143.

9 *George Wimpey UK Ltd v Tewkesbury Borough Council (MA Holdings Ltd intervening)* [2008] EWCA Civ 12, [2008] 3 All ER 859; and see also *Re B (an infant)* [1958] 1 QB 12, [1957] 3 All ER 193, CA; *Re Securities Insurance Co* [1894] 2 Ch 410, CA; *Re Hambrough's Estate, Hambrough v Hambrough* [1909] 2 Ch 620. It was formerly held that leave would not be given to a person who could not have been a party (see *Crawcour v Salter*

(1882) 30 WR 329, CA; *Re Youngs, Doggett v Revett* (1885) 30 ChD 421, CA; *The Millwall* [1905] P 155, CA), but this is now doubtful in light of *George Wimpey UK Ltd v Tewkesbury Borough Council (MA Holdings Ltd intervening)* [2008] EWCA Civ 12, [2008] 3 All ER 859.

10 *Re Markham, Markham v Markham* (1880) 16 ChD 1, CA; *A-G v Marquis of Ailesbury* (1885) 16 QBD 408, CA (revsd on another point (1887) 12 App Cas 672, HL).

11 *Re Madras Irrigation and Canal Co, Wood v Madras Irrigation and Canal Co* (1883) 23 ChD 248, CA. However, the court has power to enlarge time: see PARA 1665; see also *Re Ferdinand (Ex-Tsar of Bulgaria)* [1921] 1 Ch 107, CA.

12 *Astro Exito Navegacion SA v Southland Enterprise Co Ltd (No 2) (Chase Manhattan Bank NA intervening)* [1982] QB 1248, [1982] 3 All ER 335, CA; affd [1983] 2 AC 787, [1983] 2 All ER 725, HL.

13 *Re Hambrough's Estate, Hambrough v Hambrough* [1909] 2 Ch 620.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(8) APPEALS TO THE COURT OF APPEAL/1704. Effect of bankruptcy or death of appellant.

1704. Effect of bankruptcy or death of appellant.

A party who has become bankrupt may proceed with an appeal if it involves a question as to his status¹ or if the order appealed from imposes restraint upon him by injunction².

If an appellant dies, his legal personal representative may prosecute the appeal on obtaining an order to carry on the proceedings³.

1 *G v M* (1885) 10 App Cas 171, HL.

2 *Dence v Mason* (1879) 41 LT 573, CA; *United Telephone Co v Bassano* (1886) 31 ChD 630, CA. As to security for costs see PARA 748.

3 See CPR 19.2(4); and PARA 213. The procedure set out in CPR Pt 19 and *Practice Direction--Addition and Substitution of Parties* PD 19A should be used. See also the pre-CPR case of *Ranson v Patton* (1881) 17 ChD 767, CA. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(8) APPEALS TO THE COURT OF APPEAL/1705. Statutory restrictions on appeals to the Court of Appeal.

1705. Statutory restrictions on appeals to the Court of Appeal.

No appeal lies to the Court of Appeal:

- 1278 (1) from any judgment of the High Court in any criminal cause or matter¹ except in certain cases² of contempt of court and habeas corpus proceedings³;
- 1279 (2) from any order of the High Court or any other court or tribunal allowing an extension of time for appealing from a judgment or order⁴;
- 1280 (3) from any order, judgment or decision of the High Court or any other court or tribunal which, by virtue of any provision, however expressed, of the Supreme Court Act 1981 or any other Act, is final⁵;
- 1281 (4) from a decree absolute of divorce or nullity of marriage, by a party who, having had time and opportunity to appeal from the decree nisi on which that decree was founded, has not appealed from the decree nisi⁶;
- 1282 (5) from a dissolution order, nullity order or presumption of death order under Chapter 2 of Part 2 of the Civil Partnership Act 2004⁷ that has been made final, by a party who, having had time and opportunity to appeal from the conditional order on which that final order was founded, has not appealed from the conditional order⁸;
- 1283 (6) except as provided by Part I of the Arbitration Act 1996⁹, from any decision of the High Court under that Part¹⁰;
- 1284 (7) from a decision of the High Court refusing leave for the institution or continuance of, or for the hearing of an application in, legal proceedings by a person who is the subject of an order¹¹ restricting vexatious legal proceedings¹².

1 As to what is a criminal cause or matter see *Ex p Woodhall* (1888) 20 QBD 832, CA (extradition proceedings are criminal); *R v Governor of Brixton Prison, ex p Savarkar* [1910] 2 KB 1056, CA (proceedings under the Fugitive Offenders Act 1881 (repealed) were criminal). See also *Re Clifford and O'Sullivan* [1921] 2 AC 570, HL, and *Amand v Home Secretary and Minister of Defence of the Royal Netherlands Government* [1943] AC 147, [1942] 2 All ER 381, HL. See, however, *R v Board of Visitors of Hull Prison, ex p St Germain* [1979] QB 425, [1979] 1 All ER 701, CA, where it was held that offences under the Prison Rules 1964 were not criminal. See also *R v Lambeth Metropolitan Stipendiary Magistrate, ex p McComb* [1983] QB 551, [1983] 1 All ER 321, CA (order of Divisional Court did not of itself lead to trial or punishment; not a criminal cause or matter); *R v Secretary of State for the Home Department, ex p Dannenberg* [1984] QB 766, [1984] 2 All ER 481, CA (refusal to quash recommendation for deportation which followed conviction; criminal cause or matter); *Bonalumi v Secretary of State for the Home Department* [1985] QB 675, [1985] 1 All ER 797, CA (order for inspection of bank accounts for evidence in criminal proceedings in Sweden; criminal cause or matter). See also *Gooch v Ewing (Allied Irish Bank Ltd, garnishee)* [1986] QB 791, [1985] 3 All ER 654, CA (garnishee proceedings taken by magistrates' court's clerk to enforce payment of orders made on a conviction not criminal cause or matter); *R v Bolton Justices, ex p Graeme* (1986) 150 JP 190, CA (application relating to complaint under the Magistrates' Courts Act 1980 s 115 (binding over) was criminal cause or matter); *R v Secretary of State for the Home Department, ex p G* (1990) Times, 26 June, CA (a refusal by the Queen's Bench Divisional Court to grant judicial review of the Home Secretary's decision not to refer an appeal against sentence back to the Court of Appeal under the Criminal Appeal Act 1968 s 17 (repealed) was a criminal cause or matter); *R v Blandford Magistrates' Court, ex p Pamment* [1991] 1 All ER 218, sub nom *R v Blandford Justices, ex p Pamment* [1990] 1 WLR 1490, CA (decision relating to grant or refusal of bail to a defendant in criminal proceedings is part of the criminal proceedings even where they have been concluded and the decision is too late to affect them). See also *R (on the application of South West Yorkshire Mental Health NHS Trust) v Crown Court at Bradford* [2003] EWCA Civ 1857, [2004] 1 All ER 1311, [2004] 1 WLR 1664 (application for judicial review of Crown Court order was criminal cause or matter); and *R (on the application of Aru) v Chief Constable of Merseyside* [2004] EWCA Civ 199, [2004] 1 WLR 1697 (police caution was criminal cause or matter). See also PARA 2.

The nature of an order made or refused in judicial review proceedings depends on the order sought to be reviewed: *Carr v Atkins* [1987] QB 963, [1987] 3 All ER 684, CA (order made by circuit judge for production of documentary evidence to police during investigation was a criminal cause or matter although proceedings had not been started). See also *Day v Grant* [1987] QB 972, [1987] 3 All ER 678, CA.

2 le except as provided by the Administration of Justice Act 1960: see s 13; and **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 512 et seq; s 15 (appeals in habeas corpus proceedings); and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 247.

3 Supreme Court Act 1981 s 18(1)(a). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

4 Supreme Court Act 1981 s 18(1)(b).

5 Supreme Court Act 1981 s 18(1)(c). See *Westminster City Council v O'Reilly* [2003] EWCA Civ 1007, [2004] 1 WLR 195. See, however, *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208, HL (such a decision may be challenged by way of judicial review); the Foreign Compensation Act 1969 s 3; and see generally **JUDICIAL REVIEW**.

Rules of court may provide for orders or judgments of any prescribed description to be treated for any prescribed purpose connected with appeals to the Court of Appeal as final or as interlocutory: Supreme Court Act 1981 s 60(1). No appeal lies from a decision of the Court of Appeal as to whether a judgment or order is, for any purpose connected with an appeal to that court, final or interlocutory: s 60(2).

6 Supreme Court Act 1981 s 18(1)(d) (prospectively amended by the Family Law Act 1996 s 66(1), (3), Sch 8 para 30, Sch 10, removing the words 'divorce or' in the Supreme Court Act 1981 s 18(1)(d) and adding '(dd) from a divorce order', as from a day to be appointed). See, however, *Everitt v Everitt* [1948] 2 All ER 545, CA, where the petition had not been served. The Supreme Court Act 1981 s 18(1)(a)-(d) does not apply in relation to a decision to which the Criminal Justice Act 2003 s 274(3) (see **PRISONS** vol 36(2) (Reissue) PARA 557) applies: s 274(4) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 ss 40(4), 59(5), Sch 9 Pt 1 para 82(1), (5), Sch 11 Pt 1 para 1(2), to substitute a reference to the Supreme Court for the reference to the House of Lords and a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981; at the date at which this title states the law, no such day had been appointed).

7 le the Civil Partnership Act 2004 Pt 2 Ch 2 (ss 37-64): see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

8 Supreme Court Act 1981 s 18(1)(fa) (added by the Civil Partnership Act 2004 s 261(1), Sch 27 para 68).

9 le the Arbitration Act 1996 Pt I (ss 1-84).

10 Supreme Court Act 1981 s 18(1)(g) (substituted by the Arbitration Act 1996 s 107(1), Sch 3 para 37(2)). See the Arbitration Act 1996 ss 69(8), 70(2); and **ARBITRATION** vol 2 (2008) PARAS 1278, 1279.

11 le under the Supreme Court Act 1981 s 42(1): see PARA 258.

12 See the Supreme Court Act 1981 s 42(4) (amended by the Prosecution of Offences Act 1985 s 24); and PARA 258.

UPDATE

1705 Statutory restrictions on appeals to the Court of Appeal

NOTE 1--See also *JR 27's Application* [2009] NIQB 58, (5 June 2009, unreported) (proceedings concerning retention by police of fingerprints and DNA samples were criminal).

NOTE 6--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(8) APPEALS TO THE COURT OF APPEAL/1706. Other restrictions on appeals.

1706. Other restrictions on appeals.

An appeal will not lie where the parties have agreed not to appeal, where such agreement is embodied in an order¹, although a child will not be so bound where the agreement is not for his benefit². A party may be estopped from appealing by his conduct after the judgment or award, or may by that conduct have released the right of appeal at law or in equity³.

An appeal does not lie when the judge acts as arbitrator, not as a judge⁴, nor where his decision is not given in a judicial capacity⁵, or is given by way of an administrative decision⁶.

An appeal does not lie where the question or issue raised for the determination of the appellate court, whether it be the Court of Appeal or the House of Lords, has ceased to be a live issue, or where the parties have no longer any real interest in the result of the appeal, because of an agreement that the decision of the appellate court is not to affect their proprietary interest⁷ or for any other reasons, except in exceptional circumstances⁸. Nor does an appeal lie where the question or issue raised is or where the facts are hypothetical⁹.

The Court of Appeal may refuse to entertain an appeal where the amount or issue at stake is trifling¹⁰.

1 See *Jones v Victoria Graving Dock Co* (1877) 2 QBD 314, CA; *Re West Devon Great Consols Mine* (1888) 38 ChD 51, CA. See also *Re Hull and County Bank, Trotter's Claim* (1879) 13 ChD 261, CA. It is not certain whether the parties to proceedings in the High Court will be bound by their agreement not to appeal if it is not embodied in an order; as to agreements not to appeal from a county court, however, see the County Courts Act 1984 s 79; and PARA 1679.

2 *Rhodes v Swithenbank* (1889) 22 QBD 577, CA.

3 See *Lissenden v CAV Bosch Ltd* [1940] AC 412, [1940] 1 All ER 425, HL, overruling *Johnson v Newton Fire Extinguisher Co Ltd* [1913] 2 KB 111, CA. As to estoppel by conduct see **ESTOPPEL** vol 16(2) (Reissue) PARA 1058 et seq. Cf the common law doctrine of election, discussed in **ESTOPPEL** vol 16(2) (Reissue) PARA 1060.

4 See *Re Durham County Permanent Benefit Building Society, ex p Wilson* (1871) 7 Ch App 45, LJ; *Bustros v White* (1876) 1 QBD 423; *Burgess v Morton* [1896] AC 136, HL. As to such appointment see the Arbitration Act 1996 s 93; and **ARBITRATION** vol 2 (2008) PARA 1226. As to the limited right of appeal under the Arbitration Act 1996 see PARA 1705 head (6) in the text. The position is different where a Commercial Court judge sits as judge-arbitrator: see PARA 1544.

5 *Burgess v Morton* [1896] AC 136, HL.

6 *Hoare & Co v Morshead* [1903] 2 KB 359, CA. Such a decision may, however, be challenged by way of judicial review. As to judicial review see PARA 1530; and **JUDICIAL REVIEW**.

7 See *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111, [1944] 1 All ER 469, HL. It is the duty of counsel and solicitors in publicly funded litigation either to ensure that any such appeal is withdrawn by consent or to seek directions from the appellate court: *Ainsbury v Millington* [1987] 1 All ER 929, [1987] 1 WLR 379n, HL. As to appeals in which the only live issue relates to the question of costs see *R v Holderness Borough Council, ex p James Robert Developments Ltd* (1992) 66 P & CR 46, CA.

8 See *Tindall v Wright* (1922) 127 LT 149, DC. See also *Royster v Cavey* [1947] KB 204, [1946] 2 All ER 642, CA, where the pleadings had proceeded on a fictitious basis; and *Whall v Bulman* [1953] 2 QB 198, [1953] 2 All ER 306, CA, where the plaintiff's pleading disclosed no cause of action on the face of it, and Denning LJ said, at 202 and at 309, 'The parties cannot agree on a false hypothesis and ask the court to adjudicate upon it'. See also *Menary-Smith v Secretary of State for Work and Pensions* [2006] EWCA Civ 1751, [2006] All ER (D) 199 (Dec) (court not bound to determine academic point). But note *Practice Note* [1990] 1 WLR 1108, CA (Court of Appeal will exceptionally allow appeal to proceed which has become academic). As from a day to be appointed

the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

9 See *Glasgow Navigation Co v Iron Ore Co* [1910] AC 293, HL; *Stephenson, Blake & Co v Grant, Legros & Co* (1917) 86 LJ Ch 439, CA; *Sutch v Burns* [1944] KB 406, [1944] 1 All ER 520n, CA; *Sumner v William Henderson & Sons* [1963] 2 All ER 712n, [1963] 1 WLR 823, CA. See also the cases in note 8. In *Bowman v Fels* [2005] EWCA Civ 226, [2005] 4 All ER 609, Brooke LJ said (quoting Lord Slynn of Hadley in *R v Secretary of State for the Home Department, ex p Salem* [1999] 1 AC 450, [1999] 2 All ER 42) that a good reason for entertaining an academic appeal 'might be found where a discrete point of statutory construction arose which did not involve detailed consideration of facts and where a large number of similar cases existed, so that the issue would most likely need to be resolved in the near future in any event'.

10 See *Re National Assurance and Investment Association, Re Cross* (1872) 7 Ch App 221.

UPDATE

1706 Other restrictions on appeals

NOTE 8--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(8) APPEALS TO THE COURT OF APPEAL/1707. Composition of the Court of Appeal.

1707. Composition of the Court of Appeal.

The Civil Division of the Court of Appeal is duly constituted for the purpose of exercising any of its jurisdiction if it consists of one or more judges¹. The Master of the Rolls may, with the concurrence of the Lord Chancellor, give (or vary or revoke) directions about the minimum number of judges of which a court must consist if it is to be duly constituted for the purpose of any description of proceedings². The Master of the Rolls, or any Lord Justice of Appeal designated by him, may determine the number of judges of which a court is to consist for the purpose of any particular proceedings³. The Master of the Rolls may also give directions as to what is to happen in any particular case where one or more members of a court which has partly heard proceedings are unable to continue⁴.

Assessors⁵ may be called in to assist the Court of Appeal⁶, and scientific advisers⁷ may be called in to assist it in proceedings on appeal from the Patents Court⁸.

Where an appeal has been heard by a court consisting of an even number of judges and the members of the court are equally divided, then, on the application of any party to the appeal, the case must be reargued before and determined by an uneven number of judges not less than three, before any appeal to the House of Lords⁹.

No judge may sit as a member of the Civil Division of the Court of Appeal on the hearing of, or may determine any application in proceedings incidental or preliminary to, an appeal from a judgment or order made in any case by himself or by any court of which he was a member¹⁰.

1 Supreme Court Act 1981 s 54(1), (2) (s 54(2)-(4) substituted, and s 54(4A) added, by the Access to Justice Act 1999 s 59). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 Supreme Court Act 1981 s 54(3) (as substituted: see note 1). The Lord Chancellor's function under the s 54(3) is a protected function for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

3 Supreme Court Act 1981 s 54(4) (as substituted: see note 1).

4 Supreme Court Act 1981 s 54(4A) (as added: see note 1).

5 As to assessors see the Supreme Court Act 1981 s 70(1), (2); and as to assessors at trial see PARA 1133.

6 See the Supreme Court Act 1981 s 54(8).

7 See under the Supreme Court Act 1981 s 70(3), (4) (cf **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 638) which is applied in relation to the Civil Division of the Court of Appeal and proceedings on appeal from any decision of the Patents Court as they apply in relation to the Patents Court and proceedings under the Patents Acts 1949 and 1977: Supreme Court Act 1981 s 54(9).

8 See the Supreme Court Act 1981 s 54(9); and note 7.

9 Supreme Court Act 1981 s 54(5) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 40(4), Sch 9 Pt 1 para 36(1), (5) to substitute a reference to the Supreme Court for the reference to the House of Lords; at the date at which this title states the law, no such day had been appointed).

10 Supreme Court Act 1981 s 56(1).

UPDATE

1707 Composition of the Court of Appeal

NOTE 9--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(8) APPEALS TO THE COURT OF APPEAL/1708. Assignment of appeals to the Court of Appeal.

1708. Assignment of appeals to the Court of Appeal.

Where in any proceedings in a county court or the High Court a person appeals, or seeks permission to appeal, to a court other than the Court of Appeal or the House of Lords, then either the Master of the Rolls, or the court from which or to which the appeal is made, or from which permission to appeal is sought, may direct that the appeal is to be heard instead by the Court of Appeal¹.

Where the court² from or to which an appeal³ is made or from which permission to appeal is sought (the 'relevant court') considers that:

- 1285 (1) an appeal which is to be heard by a county court or the High Court would raise an important point of principle or practice; or
- 1286 (2) there is some other compelling reason for the Court of Appeal to hear it,

the relevant court may order the appeal to be transferred to the Court of Appeal⁴.

The Master of the Rolls or the Court of Appeal may remit an appeal to the court in which the original appeal was or would have been brought⁵.

1 Access to Justice Act 1999 s 57(1) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 68(1), (2), to substitute 'Supreme Court' for 'House of Lords'; at the date at which this volume states the law, no such day had been appointed). The power conferred on the court mentioned in the text is subject to rules of court: see the Access to Justice Act 1999 s 57(2).

2 As to the meaning of 'court' see PARA 22.

3 As to the meaning of 'appeal' see PARA 1658 note 5.

4 CPR 52.14(1). Where an appeal is transferred to the Court of Appeal under CPR 52.14 the Court of Appeal may give such additional directions as are considered appropriate: *Practice Direction--Appeals* PD 52 para 10.1. A case cannot be transferred under CPR 52.14 unless permission to appeal has been granted: see *7E Communications Ltd v Vertex Antennentechnik GmbH* [2007] EWCA Civ 140, [2007] 2 All ER (Comm) 798.

5 CPR 52.14(2). The exceptional power created by CPR 52.14 whereby a court lower than the Court of Appeal may transfer an appeal to the Court of Appeal on the ground that it satisfies one of the tests set out in that rule should be sparingly used and in any case of doubt the matter should be referred to the Master of the Rolls for consideration, since the Access to Justice Act 1999 s 57 confers an identical power on him: *Clark (Inspector of Taxes) v Perks* [2000] 4 All ER 1, [2001] 1 WLR 17, CA.

UPDATE

1708 Assignment of appeals to the Court of Appeal

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(8) APPEALS TO THE COURT OF APPEAL/1709. Listing.

1709. Listing.

The management of the Civil Appeals List of the Court of Appeal is dealt with by the listing officer under the direction of the master¹. The list is divided as follows²:

- 1287 (1) the applications list: applications for permission to appeal and other applications;
- 1288 (2) the appeals list: appeals where permission to appeal has been given or where an appeal lies without permission being required;
- 1289 (3) the expedited list: appeals or applications where the Court of Appeal has directed an expedited hearing³;
- 1290 (4) the stand-out list: appeals or applications which, for good reason, are not at present ready to proceed and have been stood out by judicial direction;
- 1291 (5) the fixtures list: where a hearing date for the appeal is fixed in advance;
- 1292 (6) the second fixtures list: if an appeal is designated as a 'second fixture' it means that a hearing date is arranged in advance on the express basis that the list is fully booked for the period in question and therefore the case will be heard only if a suitable gap occurs in the list;
- 1293 (7) the short-warned list: appeals which the court considers may be prepared for the hearing by an advocate other than the one originally instructed with a half day's notice or such other period as the court may direct⁴;
- 1294 (8) the special fixtures list: for cases needing particular arrangements, such as the need to list a number of cases before the same constitution, in a particular order, during a particular period or at a given location⁵.

1 *Practice Direction--Appeals* PD 52 para 15.7. As to lists see also PARA 116. Where the Civil Appeals Listing Office has failed to ascertain that leading counsel is prebooked, the fixture for hearing of an appeal need not be vacated: *Newport City Council v Chares* (2008) Times, 29 July, CA.

2 *Practice Direction--Appeals* PD 52 para 15.8.

3 The current practice of the Court of Appeal is summarised in *Unilever plc v Chefao Proprietaries Ltd* [1995] 1 All ER 587, [1995] 1 WLR 243, CA. See also *Practice Note* [2001] 3 All ER 479, CA.

4 Once an appeal is listed for hearing from the short warned list it becomes the immediate professional duty of the advocate instructed in the appeal, if he is unable to appear at the hearing, to take all practicable measures to ensure that his lay client is represented at the hearing by an advocate who is fully instructed and able to argue the appeal: *Practice Direction--Appeals* PD 52 para 15.9(6). See also paras 15.9(1)-15.9(5).

5 *Practice Direction--Appeals* PD 52 para 15.9A.

UPDATE

1709 Listing

NOTE 4--See *President's Guidance (Family Division) (listing in London)* [2009] 1 FLR 374.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(8) APPEALS TO THE COURT OF APPEAL/1710. Documentation etc.

1710. Documentation etc.

The documents relevant to proceedings in the Civil Division of the Court of Appeal must be filed in the Civil Appeals Office Registry¹. The Civil Appeals Office will not serve documents and where service is required² it must be effected by the parties³.

To ensure that all requests for directions are centrally monitored and correctly allocated, all requests for directions or rulings (whether relating to listing or any other matters) should be made to the Civil Appeals Office. Those seeking directions or rulings must not approach the supervising Lord Justice either directly, or via his clerk⁴.

Once the parties have been notified of the date fixed for hearing the appellant's⁵ advocate must, after consulting his opponent, file one bundle containing photocopies of the authorities upon which each side will rely at the hearing, with the relevant passages marked. There will in general be no need to include authorities for propositions not in dispute. This bundle must be filed at least seven days before the hearing or, where the period of notice of the hearing is less than seven days, immediately⁶.

In cases where the appeal bundle comprises more than 500 pages, exclusive of transcripts, the appellant's solicitors must, after consultation with the respondent's solicitors, also prepare and file with the court, in addition to copies of the appeal bundle⁷ the requisite number of copies of a core bundle⁸.

1 *Practice Direction--Appeals* PD 52 para 15.1(1). The registry is situated at Room E307, Royal Courts of Justice, Strand, London, WC2A 2LL: para 15.1(1). As to the meaning of 'filing' see PARA 1832 note 8. A party to an appeal in the Court of Appeal, Civil Division may, where permitted to do so by the relevant guidelines, file an appellant's notice, a respondent's notice or an application notice by e-mail or electronically using the online forms service on the Court of Appeal, Civil Division website at www.civilappeals.gov.uk: *Practice Direction--Appeals* PD 52: paras 15.1A(1), (2), 15.1B(1), (2). As to online filing see further para 15.1B(3)-(6).

2 *Ie* whether by the Civil Procedure Rules or by *Practice Direction--Appeals* PD 52: para 15.1(2). As to the meaning of 'service' see PARA 138 note 2.

3 *Practice Direction--Appeals* PD 52 para 15.1(2).

4 *Practice Direction--Appeals* PD 52 para 15.10. As to listing see PARA 1709.

5 As to the meaning of 'appellant' see PARA 1660 note 1.

6 *Practice Direction--Appeals* PD 52 para 15.11(1)-(3). Such bundles should not normally contain more than ten authorities unless the scale of the appeal warrants more extensive citation: para 15.11(2)(c). If, through some oversight, a party intends, during the hearing, to refer to other authorities, the parties may agree a second agreed bundle to be filed by the appellant's advocate at least 48 hours before the hearing commences: para 15.11(4). A bundle of authorities must bear a certification by the advocates responsible for arguing the case that the requirements of sub-para 5.10(3)-(5) as to authorities in skeleton arguments (see PARA 1663 note 13) have been complied with in respect of each authority included: para 15.11(5). As to judicial authorities see further PARA 91 et seq. See *Jeyapragash v Secretary of State for the Home Department* [2004] EWCA Civ 1260, [2005] 1 All ER 412 (the need to comply with the new time-limit regime established by amended *Practice Direction--Appeals* PD 52 underlined by the Court of Appeal). Only in the most exceptional circumstances can the papers for an appeal hearing be filed with the court less than seven days before the hearing, and even then both the court and the other parties must be told the reasons for any default: *Mlauzi v Secretary of State for the Home Department* [2005] EWCA Civ 128, (2005) Times, 7 February. The Court of Appeal has given guidance in relation to preparation of bundles where documentation is likely to be substantial, or where several appeals proceed together: *Leofelis SA v Lonsdale Sports Ltd* [2008] EWCA Civ 640, [2008] All ER (D) 87 (Jul).

- 7 Amended in accordance with *Practice Direction--Appeals* PD 52 para 7.11 (see PARA 1666 note 7).
- 8 *Practice Direction--Appeals* PD 52 para 15.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(8) APPEALS TO THE COURT OF APPEAL/1711. Who may exercise the powers of the Court of Appeal.

1711. Who may exercise the powers of the Court of Appeal.

A court officer¹ assigned to the Civil Appeals Office who is a barrister or a solicitor may exercise the jurisdiction of the Court of Appeal with regard to the matters set out below with the consent of the Master of the Rolls². Those matters are:

- 1295 (1) any matter incidental to any proceedings in the Court of Appeal³;
- 1296 (2) any other matter where there is no substantial dispute between the parties⁴; and
- 1297 (3) the dismissal of an appeal⁵ or application where a party has failed to comply with any order, rule or practice direction⁶.

A court officer may not, however, decide an application for permission to appeal⁷, bail pending an appeal⁸, an injunction⁹ or a stay¹⁰ of any proceedings, other than a temporary stay of any order or decision of the lower court¹¹ over a period when the Court of Appeal is not sitting or cannot conveniently be convened¹².

Decisions of a court officer may be made without a hearing¹³.

Rules of court may provide that decisions of the Court of Appeal which are taken by a single judge or any officer or member of staff of that court in proceedings incidental to any cause or matter pending before the Civil Division of that court and which do not involve the determination of an appeal, or of an application for permission to appeal, may be called into question in such manner as may be prescribed¹⁴. No appeal lies to the House of Lords from a decision which may be called into question pursuant to rules so made¹⁵.

A party may request any decision of a court officer to be reviewed by the Court of Appeal¹⁶. At the request of a party, a hearing will be held to reconsider a decision of a single judge¹⁷ or a court officer, made without a hearing¹⁸. A single judge may refer any matter for a decision by a court consisting of two or more judges¹⁹.

1 As to the meaning of 'court officer' see PARA 49 note 3.

2 CPR 52.16(1). When the Head of the Civil Appeals Office acts in a judicial capacity pursuant to CPR 52.16 he is known as 'master'. Other eligible officers may also be designated by the Master of the Rolls to exercise judicial authority under CPR 52.16 and are then to be known as 'deputy masters': *Practice Direction--Appeals* PD 52 para 15.5.

3 CPR 52.16(2)(a).

4 CPR 52.16(2)(b).

5 As to the meaning of 'appeal' see PARA 1658 note 5.

6 CPR 52.16(2)(c).

7 CPR 52.16(3)(a). As to permission to appeal see PARA 1659 et seq.

8 CPR 52.16(3)(b).

9 CPR 52.16(3)(c). As to the meaning of 'injunction' see PARA 315 note 2.

- 10 As to the meaning of 'stay' see PARA 233 note 11.
- 11 As to the meaning of 'lower court' see PARA 1660 note 2.
- 12 CPR 52.16(3)(d).
- 13 CPR 52.16(4).
- 14 Supreme Court Act 1981 s 58(1) (s 58 substituted by the Access to Justice Act 1999 s 60). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.
- 15 Supreme Court Act 1981 s 58(2) (as substituted (see note 14); and amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 40(4), Sch 9 Pt 1 para 36(1), (6) to substitute 'Supreme Court' for the 'House of Lords'; at the date at which this title states the law, no such day had been appointed).
- 16 CPR 52.16(5). Such a request under must be filed within seven days after the party is served with notice of the decision: CPR 52.16(6A).
- 17 As to the meaning of 'judge' see PARA 49.
- 18 CPR 52.16(6). Such a request under must be filed within seven days after the party is served with notice of the decision: CPR 52.16(6A).
- 19 CPR 52.16(7).

UPDATE

1711 Who may exercise the powers of the Court of Appeal

NOTE 15--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(8) APPEALS TO THE COURT OF APPEAL/1712. Reserved judgments of the Court of Appeal.

1712. Reserved judgments of the Court of Appeal.

Although previously special provision was made as to the availability of reserved judgments of the Court of Appeal before hand down, the procedure is now the same for all reserved judgments which the court intends to hand down in writing¹.

¹ *Practice Direction--Reserved Judgments* PD 40E para 1. That practice direction contains provisions relating to reserved judgments: *Practice Direction--Appeals* PD 52 para 15.12. See PARA 1138. Where any consequential orders are agreed in advance, the parties' advocates need not attend the handing down of reserved judgments of the Court of Appeal; if the parties' advocates do attend in circumstances which the Court of Appeal regard as not requiring such attendance, the costs of the attendance may be disallowed: see *Practice Note* [2002] 1 All ER 160.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(8) APPEALS TO THE COURT OF APPEAL/1713. The Court of Appeal's power to order a new trial by reason of course taken by judge.

1713. The Court of Appeal's power to order a new trial by reason of course taken by judge.

The Court of Appeal will grant an appeal if the decision of the lower court was wrong or if it was unjust because of serious procedural or other irregularity in the proceedings in the lower court¹. In the latter instance a new trial may be ordered² if some substantial wrong or miscarriage³ has been occasioned at the trial by the judge misdirecting the jury⁴, or improperly admitting or rejecting evidence⁵, or intervening in the proceedings so excessively as to affect the fairness of the trial⁶, or not leaving to the jury a question which he was asked to leave to them and which he ought to have left to them⁷, or giving judgment for the defendant upon the claimant's opening, without the claimant's consent and without allowing him to call evidence⁸, or improperly withdrawing the case from the jury⁹, or improperly attempting to coerce the jury¹⁰, or improperly allowing or refusing to allow an amendment, postponement or adjournment¹¹. A summing up by a judge may amount to a misdirection if, after having correctly stated the relevant law, he persistently violates that law in his examination of the evidence¹². A new trial may be ordered where on a claim and counterclaim the judge, having found that one of two conflicting stories must be true, has failed to decide between them¹³.

1 See CPR 52.11(3); and PARA 1662. See also *Vogon International Ltd v Serious Fraud Office* [2004] EWCA Civ 104, [2004] All ER (D) 58 (Feb) (judge should not have made adverse findings as to honesty of claimant when claimant had not had an opportunity to defend itself). As to the meaning of 'lower court' see PARA 1660 note 2.

2 See CPR 52.10(2)(c); and PARA 1671. A new trial will not generally be ordered upon grounds not raised in the court below and not included in the notice of appeal: *Wilson v United Counties Bank Ltd* [1920] AC 102, 139, HL. See also *Blewitt v Tritton* [1892] 2 QB 327, CA. In *Automatic Woodturning Co Ltd v Stringer* [1957] AC 544, [1957] 1 All ER 90, HL, it was held that there was no justification for a new trial since the trial judge had dealt with the issue in question and all relevant evidence had been before him. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

3 A new trial cannot be ordered on the ground of misdirection or the improper admission or rejection of evidence unless substantial wrong or miscarriage has been occasioned: see PARA 1716.

4 *Bray v Ford* [1896] AC 44, HL. The court should not speculate as to whether the verdict was affected by the misdirection: *Bray v Ford* [1896] AC 44, HL; *Hobbs v CT Tinling & Co Ltd*, *Hobbs v Nottingham Journal Ltd* [1929] 2 KB 1, CA. As to misdirection upon irrelevant matter see *White v Barnes* [1914] WN 74; *Dallimore v Williams and Jesson* (1914) 30 TLR 432, CA. As to misdirection upon facts where the jury has been warned that they are the judges of fact see *Ryan v Oceanic Steam Navigation Co Ltd* [1914] 3 KB 731, CA. A direction that, without doing violence to a reasoned conviction, the minority should try to agree with the majority has been held proper: see *Re Wright's Estate*, *Lambert v Woodham* [1936] 1 All ER 877, CA; and **JURIES** vol 61 (2010) PARA 850. If the jury's answers are sufficient to determine the case, the judge is not entitled to ask them further questions: see *Dew v United British Steamship Co Ltd* (1928) 98 LJB 88, CA. As to jury trial in civil cases see PARA 1132.

5 *Crease v Barrett* (1835) 1 Cr M & R 919; *Wright v Doe d Tatham* (1837) 7 Ad & El 313, Ex Ch; *Faund v Wallace* (1876) 35 LT 361; *Maclaren & Sons v Davis* (1890) 6 TLR 372, DC; *Manley v Palache* (1895) 73 LT 98, PC; *Tait v Beggs* [1905] 2 IR 525 (Ir CA). See also PARA 1716; and see *Thomas v Metropolitan Police Comr* [1997] QB 813, [1997] 1 All ER 747, CA (judge erred in law by holding in civil action that spent convictions could be put to the plaintiff (now known as the 'claimant': see PARA 18), but appeal dismissed because no substantial wrong or miscarriage of justice thereby occasioned).

6 *Jones v National Coal Board* [1957] 2 QB 55, [1957] 2 All ER 155, CA (excessive interruption by judge); *Anon* (1952) Times, 9 April; *Bunting v Thorne RDC* (1957) Times, 26 March, CA; cf *Yuill v Yuill* [1945] P 15, [1945] 1 All ER 183, CA; *Heayns v Heayns* (1952) Times, 12 March. See also *DN v Greenwich London Borough Council* [2004] EWCA Civ 1659, [2005] LGR 597 (trial process unsatisfactory due to serious deficiencies in pre-

trial preparations); and *Southwark London Borough Council v Kofi-Adu* [2006] EWCA Civ 281, [2006] HLR 599 (intervention by judge on examination of witnesses).

7 A new trial will not be ordered because the verdict of the jury was not taken upon a question which the judge was not asked to leave to it, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned: see *Nevill v Fine Art and General Insurance Co* [1897] AC 68, HL; *Seaton v Burnand*, *Burnand v Seaton* [1900] AC 135, HL; *Weiser v Segar* [1904] WN 93, CA.

8 *Fletcher v London and North Western Rly Co* [1892] 1 QB 122, CA; *Isaacs v Evans (No 2)* (1900) 16 TLR 480, CA; *Cross v Rix* (1912) 77 JP 84, DC. See also *Allen v Francis* [1914] 3 KB 1065, CA.

9 *Metropolitan Rly Co v Jackson* (1877) 3 App Cas 193, HL; *Kingston Race Stand v Kingston Corp*n [1897] AC 509, PC; *McGowan v Stott* (1930) 143 LT 219n, CA; *Halliwell v Venables* (1930) 143 LT 215, CA. Where the plaintiff (now the 'claimant': see PARA 18) shows a prima facie case of negligence against one or the other or both of two defendants, the judge should not dismiss either of them from the action (now the 'claim') until he has heard the defence: *Hummerstone v Leary* [1921] 2 KB 664, DC.

10 See *Shoukatallie v R* [1962] AC 81, [1961] 3 All ER 996, PC.

11 *Wilkin v Reed* (1854) 15 CB 192; *Jones v SR Anthracite Collieries Ltd* (1920) 90 LJBK 1315, CA; *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 3 All ER 540, [1958] 1 WLR 1216, CA.

12 *Wintle v Nye* [1959] 1 All ER 552, [1959] 1 WLR 284, HL.

13 See *Bray v Palmer* [1953] 2 All ER 1449, [1953] 1 WLR 1455, CA; and **NEGLIGENCE** vol 78 (2010) PARA 85. A new trial was ordered where it appeared that the judge might have missed the significance of the evidence offered: see *Bartley v Bartley* (1956) Times, 15 November.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(8) APPEALS TO THE COURT OF APPEAL/1714. New trial by reason of verdict or misconduct of jury.

1714. New trial by reason of verdict or misconduct of jury.

A new trial may be ordered if the jury gave a verdict which was against the weight of evidence, and such that a jury reviewing the whole of the evidence reasonably could not properly find¹, or if the jury arrived at its verdict by improper means² or during a trial was guilty of misconduct which was of a nature to affect its verdict³. However, the Court of Appeal can revoke the jury's verdict without then ordering a re-trial⁴.

1 *Metropolitan Rly Co v Wright* (1886) 11 App Cas 152, HL; *Phillips v Martin* (1890) 15 App Cas 193, PC; *Hampson v Guy* (1891) 64 LT 778, CA; *Allcock v Hall* [1891] 1 QB 444, CA; *Jones v Spencer* (1897) 77 LT 536, HL; *Cox v English, Scottish and Australian Bank Ltd* [1905] AC 168, PC; *Hulton v Hulton* [1917] 1 KB 813, CA; *Neville v London Express Newspapers Ltd* [1917] 2 KB 564, CA (revsd on other grounds [1919] AC 368, HL). The Court of Appeal will pay great attention to the view of the trial judge as to the verdict: *Neville v London Express Newspapers Ltd* [1917] 2 KB 564, CA; *Smith v Schilling* [1928] 1 KB 429, CA. If no verdict for the plaintiff (now known as the 'claimant': see PARA 18), on all the available evidence, could be supported, the appellate court may order judgment for the defendant instead of a new trial: *Mechanical and General Inventions Co Ltd and Lehwess v Austin and Austin Motor Co Ltd* [1935] AC 346, HL. A new trial may be ordered even though the parties have agreed to accept a majority verdict: *Groom v Shuker* (1893) 69 LT 293. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2. As to jury trial in civil cases see PARA 1132.

2 Eg by lot (*Harvey v Hewitt* (1840) 8 Dowl 598), or by compromise (*Hall v Poyser* (1845) 13 M & W 600; *Falvey v Stanford* (1874) LR 10 QB 54). See further **JURIES** vol 61 (2010) PARAS 841, 843.

3 *Hughes v Budd* (1840) 8 Dowl 315; *Allum v Boulton* (1854) 9 Exch 738; *Campbell v Hackney Furnishing Co Ltd* (1906) 22 TLR 318. See also *Biggs v Evans* (1912) 106 LT 796, DC (county court jury). As to premature verdict and communications from the jury to the judge see *Hobbs v CT Tinling & Co Ltd*, *Hobbs v Nottingham Journal Ltd* [1929] 2 KB 1, CA. The fact that a verdict of a jury is given to the associate in the absence of the judge is not in itself a ground for a new trial: *Hawksley v Fewtrell* [1954] 1 QB 228, [1953] 2 All ER 1486, CA.

4 *Grobbelaar v News Group Newspapers Ltd* [2001] EWCA Civ 33, [2001] 2 All ER 437, [2001] All ER (D) 83 (Jan). This power also applies to the House of Lords by virtue of the Appellate Jurisdiction Act 1876 s 4 (prospectively repealed by the Constitutional Reform Act 2005 Sch 17 para 9): *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40, [2002] 4 All ER 732, [2002] 1 WLR 3024 (reversing, on the facts, Court of Appeal decision). As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

UPDATE

1714 New trial by reason of verdict or misconduct of jury

NOTE 4--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(8) APPEALS TO THE COURT OF APPEAL/1715. Other grounds for a new trial.

1715. Other grounds for a new trial.

A new trial may be ordered if a substantially wrong verdict has been given owing to one party having been taken by surprise¹, or to the misconduct of a party or his solicitor², or to the absence of a party or his solicitor or counsel³, or to the discovery of fresh evidence which could not with reasonable diligence have been discovered before the trial⁴, or to the confession of a witness that his evidence was false⁵, or to some inadvertence, mistake or slip in the proceedings⁶.

1 *Hartwright v Badham* (1822) 11 Price 383; *Dillon v City of Cork Steam Packet Co* (1875) IR 9 CL 118; *Dow v Dickinson* [1881] WN 52, CA; *Dickenson v Fisher* (1887) 3 TLR 459, CA; *Fachris v De Rustaffell* (1908) Times, 14 February; *Isaacs v Hobhouse* [1919] 1 KB 398, CA; *Guest v Ibbotson* (1922) 91 LJB 558; *Golden v Swift of Coventry Ltd* (1924) 23 LJB 488, HL. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2.

2 *Wolff v Goldring* (1875) 44 LJP 214. Where fraud is alleged, the more convenient procedure is by action to set aside the judgment, but there is jurisdiction to order a new trial: *Hip Foong Hong v Neotia & Co* [1918] AC 888, PC; *Jonesco v Beard* [1930] AC 298, HL; *Stern v Friedmann* [1953] 2 All ER 565, [1953] 1 WLR 969. See also *Thomas v Metropolitan Police Comr* [1997] QB 813, [1997] 1 All ER 747, CA (judge erred in law by holding in civil action that spent convictions could be put to the plaintiff (now known as the 'claimant': see PARA 18), but appeal dismissed because no substantial wrong or miscarriage of justice thereby occasioned).

3 *Williams v Williams* (1834) 2 Dowl 350 (no notice of trial); *Townley v Jones* (1860) 29 LJP 299 (neglect to instruct counsel and appear: attorney ordered to pay costs of the day); *Wolff v Goldring* (1875) 44 LJP 214 (case in undefended list); *Holden v Holden and Pearson* (1910) 102 LT 398, DC (case in list earlier than anticipated; solicitor ordered to pay costs). Where a verdict or judgment has been given in the absence of a party, that party should in the first instance apply for the verdict or judgment to be set aside (now under CPR 52.10(2)(a): see PARA 1671): see *Vint v Hudspeth* (1885) 29 ChD 322, CA; *Re Edwards's Will Trusts, Edwards v Edwards* [1982] Ch 30, [1981] 2 All ER 941, CA. For instances in which the Court of Appeal ordered a new trial on appeal from a refusal of a judge in a county court to set aside a judgment by default see *Grimshaw v Dunbar* [1953] 1 QB 408, [1953] 1 All ER 350, CA; *Hayman v Rowlands* [1957] 1 All ER 321, [1957] 1 WLR 317, CA. As to default judgment see PARA 506 et seq.

4 *Anderson v Titmas* (1877) 36 LT 711; *Young v Kershaw* (1899) 81 LT 531, CA; *Turnbull & Co v Duval* [1902] AC 429, PC; *Robinson v Smith* [1915] 1 KB 711, CA (new trial confined to one issue); *Nash v Rochford RDC* [1917] 1 KB 384, CA (new trial refused). In the absence of surprise or fraud, it should be shown that the fresh evidence would be conclusive: *Warham v Selfridge & Co Ltd* (1914) 30 TLR 344, CA; *Brown v Dean* [1910] AC 373, HL (applied in *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, CA); *Hip Foong Hong v Neotia & Co* [1918] AC 888, PC.

5 *Worsley v Worsley and Worsley* (1904) 20 TLR 171, CA; *Piotrowska v Piotrowski* [1958] 2 All ER 729n, [1958] 1 WLR 797, CA.

6 *Germ Milling Co Ltd v Robinson* (1886) 3 TLR 71, CA; *Richardson v Fisher* (1823) 1 Bing 145.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(8) APPEALS TO THE COURT OF APPEAL/1716. When a new trial will not be granted.

1716. When a new trial will not be granted.

The Court of Appeal is not bound to order a new trial on the ground of misdirection¹, or of the improper admission or rejection of evidence, or because the jury's verdict was not taken upon a question which the trial judge was not asked to leave to it, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned². If it appears to the Court of Appeal that any such wrong or miscarriage affects part only of the matter in controversy, or one or some only of the parties, it may order a new trial as to that part only, or as to that party or those parties only, and give final judgment as to the remainder. A new trial will not generally be granted on a point which was not taken at the trial or was not taken until after the case on both sides was closed³.

1 The charge to the jury must be taken as a whole (*Jones v Canadian Pacific Rly Co* (1913) 83 LJPC 13), and each case depends on its own circumstances (*Bray v Ford* [1896] AC 44, HL). However, if there is a misdirection and the jury, properly directed, might have returned a different verdict, there is a miscarriage of justice: *Bray v Ford* [1896] AC 44, HL; *Hobbs v CT Tinling & Co Ltd*, *Hobbs v Nottingham Journal Ltd* [1929] 2 KB 1, CA. See, however, *Jefferson v Paskell* [1916] 1 KB 57, CA; *Burvill v Vickers Ltd* [1916] 1 KB 180, CA; *Thomas v Moore* [1918] 1 KB 555, CA; *Sutherland v Stopes* [1925] AC 47, HL; *Poliakoff v News Chronicle Ltd* [1939] 1 All ER 390, CA. The fact that a litigant cannot secure the production of a document withheld without just excuse by a third person is not a ground for directing a new trial: *Rowell v Pratt* [1938] AC 101, [1937] 3 All ER 660, HL. For an example of a substantial misdirection see *Braddock v Bevins* [1948] 1 KB 580, [1948] 1 All ER 450, CA; and **LIBEL AND SLANDER** vol 28 (Reissue) PARA 244. An erroneous direction as to the onus of proof is a ground for a new trial if it led to substantial injustice: see *Letchumanan Chettier v Sadayappa Chettier* [1953] 1 WLR 269, PC. As to the use of cases decided under the old rules as an aid to interpreting the Civil Procedure Rules see PARA 33 text and note 2. As to jury trial in civil cases see PARA 1132.

2 As to corresponding powers in the House of Lords see *Charrington & Co Ltd v Wooder* [1914] AC 71, HL; *Lionel Barber & Co v Deutsche Bank (Berlin) London Agency* [1919] AC 304, HL. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

3 *Eyre v New Forest Highway Board* (1892) 56 JP 517 (on appeal 8 TLR 648, CA); *Page v Bowdler* (1894) 10 TLR 423, DC; *Graham & Sons v Huddersfield Corpn* (1895) 12 TLR 36, CA; *Wilson v United Counties Bank Ltd* [1920] AC 102, HL. It has been held permissible at the new trial to take a point of law which had been abandoned at the former trial: *Venn v Tedesco* [1926] 2 KB 227. As to the granting of a new trial where there has been a submission of no case or an improper invitation to the jury to stop the case see eg *Parry v Aluminium Corpn Ltd* (1940) 162 LT 236, CA; *Laurie v Raglan Building Co Ltd* [1942] 1 KB 152, [1941] 3 All ER 332, CA; *Beevis v Dawson* [1957] 1 QB 195, [1956] 3 All ER 837, CA.

UPDATE

1716 When a new trial will not be granted

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(9) APPEALS TO THE HOUSE OF LORDS/1717. Appeal from the Court of Appeal.

(9) APPEALS TO THE HOUSE OF LORDS

1717. Appeal from the Court of Appeal.

Subject to certain restrictions¹, an appeal lies to the House of Lords from any order or judgment made or given by the Court of Appeal², but only with leave of that court or of the House of Lords³. The application for leave to appeal must first be made to the Court of Appeal⁴, and, if refused, may be made by petition for leave to appeal⁵ to be heard and determined by a committee of the House of Lords⁶, which sits in public. The appeal itself is by way of petition⁷. Presentation of an appeal does not entitle a respondent to present a cross-appeal and any respondent who wishes to reverse or vary the order appealed from must first obtain leave⁸. A petition for leave to appeal must be lodged in the Judicial Office of the House of Lords within one month of the date on which an order appealed was made⁹.

An appeal does not lie from any of the courts from which an appeal to the House of Lords is given by the Appellate Jurisdiction Act 1876 (see the text and notes 2-7), except in the manner provided by that Act, and subject to such conditions as to the value of the subject matter in dispute, and as to giving security for costs, and as to the time within which the appeal is to be brought, and generally as to all matters of practice and procedure, or otherwise, as may be imposed by orders of the House of Lords: s 11 (amended by the Statute Law Revision Act 1894). Certain Scottish cases are excluded: see the Appellate Jurisdiction Act 1876 s 12; and **COURTS**. The Appellate Jurisdiction Act 1876 is repealed by the Constitutional Reform Act 2005 ss 145, 146, Sch 17 Pt 2 para 9, Sch 18 Pt 5 as from a day to be appointed. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

No appeal lies from a decision of the Court of Appeal as to whether a judgment or order is interlocutory or final (see the Supreme Court Act 1981 s 60(2)); or from the decision of the Court of Appeal on any appeal from a county court in probate proceedings (see the County Courts Act 1984 s 82). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to the House of Lords directions and other provisions restricting appeals see *Practice Directions and Standing Orders applicable to Civil Appeals* (2007); the text and notes 4-9; PARA 1719; and **COURTS**. As to appeals to the House of Lords from Divisional Courts see PARA 1718.

Dismissal by the Court of Appeal of an appeal against refusal of leave to apply for judicial review is not an order or judgment of the Court of Appeal: *Re Poh* [1983] 1 All ER 287, HL, doubted in *Kemper Reinsurance Co v Minister of Finance (Bermuda)* [2000] 1 AC 1, [1998] 3 WLR 630, PC. The House of Lords has no jurisdiction to hear an appeal from the Court of Appeal against a refusal to grant permission to apply for judicial review: *R v Secretary of State for Trade and Industry, ex p Eastaway* [2001] 1 All ER 27, [2000] 1 WLR 2222, HL. A right of appeal to the House of Lords against the Court of Appeal's refusal to grant leave to apply for judicial review does exist, particularly where the Court of Appeal has granted permission for an appeal against a first instance refusal: *R (on the application of Burkett) v Hammersmith and Fulham London Borough Council* [2002] UKHL 23, [2002] 3 All ER 97, [2002] 1 WLR 1593.

2 Appellate Jurisdiction Act 1876 s 3(1) (prospectively repealed: see note 1).

3 Administration of Justice (Appeals) Act 1934 s 1(1) (s 1 repealed, as from a day to be appointed, by the Constitutional Reform Act 2005 ss 40(4), 146, Sch 9 Pt 1 para 3, Sch 18 Pt 5; at the date at which this title states the law, no such day had been appointed). Nothing in the Administration of Justice (Appeals) Act 1934 s 1 affects any restriction otherwise existing on the bringing of appeals from the Court of Appeal to the House of Lords: s 1(3) (as so prospectively repealed).

4 See *Practice Directions and Standing Orders applicable to Civil Appeals* (2007) direction 1.6.

5 Petitions for leave to appeal are not admissible in the circumstances set out in *Practice Directions and Standing Orders applicable to Civil Appeals* (2007) directions 1.14-1.16.

6 See the Administration of Justice (Appeals) Act 1934 s 1(2); and **COURTS**. The Appellate Jurisdiction Act 1876 s 5 (amended by SI 2006/1016) (attendance of certain number of Lords of Appeal required at hearing and determination of appeals) applies to the hearing and determination of any such petition by a committee of the House as it applies to the hearing and determination of an appeal by the House: Administration of Justice (Appeals) Act 1934 s 1(2). As to the appeal committee and the hearing of the petition see PARA 1719; and **COURTS**.

7 See the Appellate Jurisdiction Act 1876 s 4 (prospectively repealed: see note 1); and **COURTS**.

8 See *Practice Directions and Standing Orders applicable to Civil Appeals* (2007) direction 30.1. A petition for leave to cross-appeal may only be lodged after leave to appeal has been granted to the original petitioner for leave to appeal: direction 30.2.

9 See *Practice Directions and Standing Orders applicable to Civil Appeals* (2007) direction 2.1. Note, however, that the time limit is 14 days in cases of civil contempt: direction 2.4.

UPDATE

1717 Appeal from the Court of Appeal

NOTES 1, 3--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(9) APPEALS TO THE HOUSE OF LORDS/1718. Appeals direct from the High Court.

1718. Appeals direct from the High Court.

Subject to specified conditions¹, an appeal may be brought direct to the House of Lords from a decision of the High Court² in any civil proceedings³ before a single judge⁴ or a Divisional Court⁵. The initial condition which must be satisfied is that, on the application of a party to the proceedings⁶, either the judge or the Divisional Court, as the case may be, must grant a certificate to the effect that the relevant conditions⁷ in relation to the decision are fulfilled⁸, that a sufficient case for a direct appeal to the House of Lords has been made out to justify an application to bring such an appeal⁹ and that all the parties consent to the grant of the certificate¹⁰. No appeal lies against the grant or refusal of such a certificate¹¹, the grant being discretionary¹².

Within one month¹³ of the grant of the certificate, any party may apply to the House of Lords by petition¹⁴ for leave for the appeal to be brought directly to the House¹⁵, the application being determined by a committee of the House¹⁶ without a hearing¹⁷. If on such an application it appears to the House to be expedient to do so, it may grant leave for the appeal to be brought directly to it, whereupon no appeal from the decision of the High Court will lie to the Court of Appeal¹⁸, but an appeal from that decision will lie instead to the House of Lords¹⁹. Without prejudice to this provision, no appeal lies to the Court of Appeal from the decision of the court below in respect of which a certificate has been granted until (1) the time for applying for leave to the House of Lords has expired²⁰; and (2) where such an application is made, the application has been determined by the House²¹.

Application may be made²² for an order to make an order of the House of Lords an order of the High Court²³.

1 See the Administration of Justice Act 1969 ss 12-15; the text and notes 3-21; and **COURTS**.

2 This mode of direct appeal, popularly called a 'leapfrog appeal', bypasses the Court of Appeal.

3 'Civil proceedings' means any proceedings other than proceedings in a criminal cause or matter: Administration of Justice Act 1969 s 12(8). No certificate under s 12 (see the text and notes 4-11) may, however, be granted in respect of a decision of the judge in any proceedings where by virtue of any enactment, apart from the provisions of Pt II (ss 12-16), (1) no appeal would lie from that decision to the Court of Appeal, with or without the leave of the judge or of the Court of Appeal; or (2) no appeal would (with or without the leave of the Court of Appeal or of the House of Lords) lie from any decision of the Court of Appeal on an appeal from the decision of the judge: s 15(1), (2)(b) (s 15(2)(b) amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 40(4), Sch 9 Pt 1 para 20(1), (6), to substitute a reference to the Supreme Court for the reference to the House of Lords; at the date at which this title states the law, no such day had been appointed). Where by virtue of any enactment, apart from the provisions of Pt II, no appeal would lie to the Court of Appeal from the decision of the judge except with the leave of the judge or of the Court of Appeal, no certificate may be granted under s 12 in respect of that decision unless it appears to the judge that apart from the provisions of that Part it would be a proper case for granting such leave: Administration of Justice Act 1969 s 15(3). Further, no certificate may be granted under s 12 where the decision of the judge, or any order made by him in pursuance of that decision, is made in the exercise of jurisdiction to punish for contempt of court: s 15(4).

4 Administration of Justice Act 1969 s 12(2)(a) (amended by the Supreme Court Act 1981 s 152(4), Sch 7).

5 Administration of Justice Act 1969 s 12(2)(c).

6 The application must be made immediately after judgment is given (Administration of Justice Act 1969 s 12(4)), although a later application may be entertained (see s 12(4) proviso).

7 These are that a point of law of general public importance is involved and that that point either relates wholly or mainly to the construction of an enactment or of a statutory instrument and has been fully argued and has been considered in the judgment of the judge in the proceedings (see the Administration of Justice Act 1969 s 12(3)(a)), or is one in respect of which the court below is bound by a previous decision of the Court of Appeal or the House of Lords and was fully considered in the judgments given in those previous proceedings (see s 12(3)(b) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 Sch 9 Pt 1 para 20(3), to substitute references to the Supreme Court for the references to the House of Lords; at the date at which this title states the law, no such day had been appointed)).

8 Administration of Justice Act 1969 s 12(1)(a).

9 Administration of Justice Act 1969 s 12(1)(b) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 Sch 9 Pt 1 para 20(3), to substitute a reference to the Supreme Court for the reference to the House of Lords; at the date at which this title states the law, no such day had been appointed).

10 Administration of Justice Act 1969 s 12(1)(c).

11 Administration of Justice Act 1969 s 12(5).

12 *IRC v Church Comrs for England* [1974] 3 All ER 529, [1975] 1 WLR 251; affd [1975] 3 All ER 614, [1975] 1 WLR 1338, CA; and [1977] AC 329, [1976] 2 All ER 1037, HL.

13 The House of Lords may extend the time-limit: see the Administration of Justice Act 1969 s 13(1) (s 13(1), (2) amended, as from a day to be appointed, by the Constitutional Reform Act 2005 Sch 9 Pt 1 para 20(4) to substitute a reference to the Supreme Court for the reference to the House of Lords; at the date at which this title states the law, no such day had been appointed).

14 The petition should indicate whether the High Court certificate was granted under the Administration of Justice Act 1969 s 12(3)(a) or s 12(3)(b).

15 Administration of Justice Act 1969 s 13(1) (as prospectively amended: see note 13).

16 See the Administration of Justice Act 1969 s 13(4) (repealed, as from a day to be appointed, by the Constitutional Reform Act 2005 ss 40(4), 146, Sch 9 Pt 1, para 20(4), Sch 18 Pt 5; at the date at which this title states the law, no such day had been appointed).

17 Administration of Justice Act 1969 s 13(3).

18 Administration of Justice Act 1969 s 13(2)(a).

19 Administration of Justice Act 1969 s 13(2)(b) (as prospectively amended: see note 13). In relation to any appeal which lies to the House of Lords by virtue of s 13(2), the Appellate Jurisdiction Act 1876 s 4 (which provides for the bringing of appeals to the House of Lords by way of petition: see PARA 1717 text and note 7), s 5 (which regulates the composition of the House for the hearing and determination of appeals), and, except in so far as those orders otherwise provide, any orders of the House of Lords made with respect to the matters specified in s 11 (which relates to the procedure on appeals), have effect as they have effect in relation to appeals under that Act: Administration of Justice Act 1969 s 14 (repealed, as from a day to be appointed, by the Constitutional Reform Act 2005 Sch 9 Pt 1, para 20(5), Sch 18 Pt 5; at the date at which this title states the law, no such day had been appointed). Where a party obtains a certificate under the Administration of Justice Act 1969 s 12 to apply for leave to appeal on two issues directly to the House of Lords and the House grants permission to appeal in respect of only one of the issues, the party can appeal to the Court of Appeal on the other issue: *R (on the application of Jones) v Ceredigion County Council* [2007] UKHL 24, [2007] 3 All ER 781, [2007] 1 WLR 1400. As to the procedure on an appeal to the House of Lords see PARA 1719; and **COURTS**.

20 Administration of Justice Act 1969 s 13(5)(a).

21 Administration of Justice Act 1969 s 13(5)(b).

22 In accordance with CPR Pt 23: see PARA 303 et seq.

23 *Practice Direction--Judgments and Orders* PD 40B para 13.1. The application should be made to the procedural judge of the Division, district registry or court in which the proceedings are taking place and may be made without notice unless the court directs otherwise: para 13.1. The application should be supported by the following evidence: (1) details of the order which was the subject of the appeal to the House of Lords; (2) details of the order of the House of Lords, with a copy annexed; and (3) a copy annexed of the certificate of the Clerk of Parliaments of the assessment of the costs of the appeal to the House of Lords [stating the sum]: para 13.2. The order to make an order of the House of Lords an order of the High Court should be in form no PF68: para 13.3.

UPDATE

1718 Appeals direct from the High Court

NOTES 3, 7, 9, 13, 16, 19--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(9) APPEALS TO THE HOUSE OF LORDS/1719. Procedure.

1719. Procedure.

Unless the time for appealing is otherwise limited by statute or by an order of the House of Lords or of the court below, a petition of appeal must be lodged in the Judicial Office of the House of Lords within three months of the date on which the last order appealed from was made¹. Except in rare circumstances appellants must give security for costs by payment into the House of Lords Security Fund Account of a sum authorised by the House of Lords within one week of presentation of an appeal or the appeal will be dismissed².

The appellant must prepare a statement of facts and issues³ and an appendix⁴ containing documents used in evidence or recording proceedings in the courts below. These must be lodged within six weeks of presentation of the appeal⁵. The appellant must lodge his case⁶ no later than five weeks before the proposed date of the hearing and serve it on the respondent⁷; and the respondent must serve on the appellant a copy of his case in response no later than three weeks before the proposed date of the hearing and lodge copies of it⁸. Bound volumes containing the petition, statement of facts and issues, part of the appendix and an index of authorities must be prepared by the appellant as soon as all cases have been exchanged, and no later than 14 days before the proposed date of hearing⁹. The appellant must also lodge a bound volume of authorities¹⁰. Judgment is delivered in the chamber of the House of Lords¹¹.

1 See Standing Order I of Standing Orders of the House of Lords regulating Judicial Business. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

2 See Standing Order V(1) of Standing Orders of the House of Lords regulating Judicial Business.

3 See *Practice Directions and Standing Orders applicable to Civil Appeals* (2007) direction 11.

4 See *Practice Directions and Standing Orders applicable to Civil Appeals* (2007) direction 12.

5 See *Practice Directions and Standing Orders applicable to Civil Appeals* (2007) direction 13.1.

6 See *Practice Directions and Standing Orders applicable to Civil Appeals* (2007) direction 15. One master plus seven copies must be lodged: direction 15.13.

7 See *Practice Directions and Standing Orders applicable to Civil Appeals* (2007) direction 15.13.

8 See *Practice Directions and Standing Orders applicable to Civil Appeals* (2007) direction 15.14. One master plus seven copies must be lodged: direction 15.14. Any other party lodging a case (for example, an intervener or advocate to the court) must also serve and lodge their case within this time limit: direction 15.14.

9 See *Practice Directions and Standing Orders applicable to Civil Appeals* (2007) direction 16.

10 See *Practice Directions and Standing Orders applicable to Civil Appeals* (2007) direction 17.

11 See *Practice Directions and Standing Orders applicable to Civil Appeals* (2007) direction 20.

UPDATE

1719 Procedure

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(10) REFERENCES TO THE EUROPEAN COURT OF JUSTICE/1720. In general.

(10) REFERENCES TO THE EUROPEAN COURT OF JUSTICE

1720. In general.

In order to ensure the uniform interpretation and application of Community law, the Treaties¹ provide a mechanism for the courts and tribunals of member states to seek the guidance of the European Court of Justice (the 'European Court') on matters of law². The request for guidance by the national court is known as a preliminary reference, and the answer is known as a preliminary ruling.

The European Court³ has jurisdiction to give preliminary rulings on (1) the interpretation of the Treaties⁴; (2) the validity and interpretation of acts of the institutions of the Community⁵; and (3) the interpretation of the statutes of bodies established by an act of the Council of Ministers of the Community where those statutes so provide⁶.

Where such a question is raised before any court or tribunal of a member state, that court or tribunal may, if it considers that a decision on the question is necessary⁷ to enable it to give judgment, request the European Court to give a ruling on it⁸. Where any such question is raised before a court or tribunal against whose decision there is no judicial remedy under national law⁹, that court or tribunal must bring the matter before the European Court¹⁰, unless the European Court has already ruled on the point or unless the correct application of Community law is obvious¹¹.

The decision to refer a question to the European Court is made by the national court having regard to the views of the parties in the case. Questions referred for a preliminary ruling must be limited to the interpretation or validity of a provision of Community law, since the European Court does not have jurisdiction to interpret national law or assess its validity. On receipt of a preliminary ruling, it is for the referring court to apply the relevant rule of Community law to the facts of the specific case before it¹².

A preliminary reference will generally involve a stay of the national proceedings. The national court retains overall control of the case and can withdraw the reference at any time before a ruling is given¹³. If a case settles the referring court is under a duty to withdraw a reference¹⁴. The ruling of the European Court is preliminary in that it precedes the judgment of the referring court¹⁵. To the extent that it cannot be disturbed other than by a subsequent decision of the European Court, it is final. It binds all national courts in the European Union¹⁶.

Questions relating to the interpretation of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the 'Brussels Convention')¹⁷ and the Rome Convention on the Law Applicable to Contractual Obligations can also be addressed to the European Court¹⁸.

In cases concerning the interpretation of the competition rules of the EC Treaty¹⁹, an alternative reference procedure to the European Commission is available²⁰.

1 le the Treaty Establishing the European Economic Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179), as amended by the Treaty of Amsterdam and the Treaty of Nice (EC Treaty); the Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951; TS 16 (1979); Cmnd 7461) (as so amended) (ECSC Treaty); and the Treaty establishing the European Atomic Energy Community (Rome, 25 March 1957; TS 1 (1973) Cmnd 5179) (as so amended) (Euratom Treaty).

2 See Case 26/62 *Algemene Transport-en Expeditie Onderneming van Gend en Loos NV v Nederlandse Belastingadministratie* (Netherlands Inland Revenue Administration) [1963] ECR 1 at 12, [1963] CMLR 105 at 129, ECJ.

3 'European Court' means the Court of Justice of the European Communities: CPR 68.1(b).

4 EC Treaty art 234(1)(a) (previously art 177(1)(a)); ECSC Treaty art 35 (previously art 41); Euratom Treaty art 206(1)(a) (previously art 150(1)(a)). See *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ.

5 EC Treaty art 234(1)(b) (previously art 177(1)(b)); ECSC Treaty art 35 (previously art 41); Euratom Treaty art 206(1)(b) (previously art 150(1)(b)).

6 EC Treaty art 234(1)(c) (previously art 177(1)(c)); ECSC Treaty art 35 (previously art 41); Euratom Treaty art 206(1)(c) (previously art 150(1)(c)). Where the European Court of Justice makes findings of fact in a preliminary ruling, which are inevitable given the circumstances of a particular case, a domestic judge is still obliged to apply that court's guidance in his own ruling: *Arsenal Football Club plc v Reed* [2003] EWCA Civ 696, [2003] 3 All ER 865.

7 As to when it is necessary for a court to refer a question see PARAS 1722-1724.

8 EC Treaty art 234(2); ECSC Treaty art 35; Euratom Treaty art 206(2); and see note 6. A reference to the European Court must be made where a defendant's convictions may have been based on a misunderstanding of EC law, especially if the decision has a substantial impact across the European Union: *Murphy v Media Protection Services Ltd* [2008] EWHC 1666 (Admin), [2008] All ER (D) 206 (Jul), DC.

9 Such bodies are referred to as 'courts of last instance': see PARA 1724.

10 EC Treaty art 234(3); ECSC Treaty art 35; Euratom Treaty art 206(3); and see note 6.

11 As to the doctrine of 'acte clair' see PARA 1724.

12 See *Information Note on references from national courts for a preliminary ruling* (2005/C143/01) (*Practice Direction--References to the European Court* PD 68 para 3, Annex). See also eg Case 26/62 *Algemene Transport-en Expeditie Onderneming van Gend en Loos NV v Nederlandse Belastingadministratie* (Netherlands revenue Administration) [1963] ECR 1, [1963] CMLR 105, ECJ; Case 13/61 *Kledingverkoopbedrijf de Geus en Uitdenboger v Robert Bosch GmbH* [1962] ECR 45, [1962] CMLR 1, ECJ.

13 See *Royscot Leasing Ltd v Customs and Excise Comrs (Withdrawal of Reference)* [1999] 1 CMLR 903, 11 Admin LR 251, CA (where the court refused an application to withdraw a reference).

14 Case 166/73 *Rheinmühlen Düsseldorf v Einfuhr-und Vorratsstelle für Getriede Futtermittel* [1974] ECR 33, [1974] 1 CMLR 523, ECJ.

15 The ruling may be given at any time before the court finishes hearing the dispute by giving judgment: *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, [1974] 2 All ER 1226, CA.

16 Case 66/80 *International Chemical Corp'n SpA v Amministrazione delle Finanze dello Stato* [1981] ECR 1191, [1983] 2 CMLR 593, ECJ.

17 Ie the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (consolidated version, OJ C 27, 26.01.1998, p 1). See the Civil Jurisdiction and Judgments Act 1982 s 2(2), Sch 1 art 16; and **CONFLICT OF LAWS**.

18 Ie the Rome Convention on the Law Applicable to Contractual Obligations [1989] OJ L48. See the Contracts (Applicable Law) Act 1990 s 2, Sch 1; and **CONTRACT** vol 9(1) (Reissue) PARA 845 et seq.

19 EC Treaty arts 81, 82 (previously arts 85, 86).

20 See Case C-234/89 *Delimitis v Henniger Bräu AG* [1991] ECR I-935, [1992] 5 CMLR 210, ECJ; and *Practice Direction: Competition Law--Claims Relating to the Application of Articles 81 and 82 of the EC Treaty* PD 68B.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(10) REFERENCES TO THE EUROPEAN COURT OF JUSTICE/1721. Which bodies can refer.

1721. Which bodies can refer.

The question whether a referring body is a 'court or tribunal' is a matter of Community law¹. If a body enjoys official status² and exercises a judicial function³ it will usually be a 'court or tribunal'⁴. The class of 'courts or tribunals' from which the European Court will accept references is very wide. References have been made from statutory tribunals such as employment tribunals⁵, social security appeal tribunals⁶, and National Insurance Commissioners⁷. Government officials or departments which make administrative decisions are not 'courts or tribunals'⁸. Professional associations may, depending on the precise nature of their functions, be 'courts or tribunals'⁹, but privately appointed arbitrators are not¹⁰.

The Brussels and Rome Conventions only permit preliminary references to be made by appellate courts¹¹.

1 See the Advocate-General's opinion in Case 246/80 *Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311 at 2335-2336, [1982] 1 CMLR 91, ECJ. On receipt of a reference, the European Court is entitled to confirm whether it has emanated from a 'court or tribunal' but may not inquire whether the decision to refer was made in accordance with the national law of the referring body: Case 65/81: *Reina v Landeskreditbank Baden-Württemberg* [1982] ECR 33, [1982] 1 CMLR 744, ECJ.

2 See Case 246/80 *Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311, [1982] 1 CMLR 91, ECJ; Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG* [1982] ECR 1095 at 1110, ECJ.

3 A body established on a permanent basis with the task of resolving disputes through the application of rules and with the power to deliver binding judgments will normally be found to exercise a judicial function: Case 318/85 *Criminal Proceedings against Unterweger* [1986] ECR 955, ECJ; Case 138/80 *Borker* [1980] ECR 1975, [1980] 3 CMLR 638, ECJ.

4 Case 61/65 *Vaassen (née Göbbels) v Management for Beambtenfonds voor het Mijnbedrijf* [1966] ECR 261, [1966] CMLR 508, ECJ; Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1998] All ER (EC) 262, [1997] ECR I-4961, ECJ.

5 Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, [1986] 3 CMLR 240, ECJ; Case C-408/92 *Smith v Avdel Systems Ltd* [1995] All ER (EC) 132, [1994] ECR I-4435, ECJ.

6 Case C-62/91 *Gray v Adjudication Officer* [1992] ECR I-2737, [1992] 2 CMLR 584, ECJ.

7 Case 17/76 *Brack v Insurance Officer* [1976] ECR 1429, [1976] 2 CMLR 592, ECJ.

8 See Case C-24/92 *Corbiau v Administration des Contributions* [1993] ECR I-1277, ECJ; Case 318/85 *Criminal Proceedings against Unterweger* [1986] ECR 955, ECJ.

9 Case 246/80 *Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311, [1982] 1 CMLR 91, ECJ; Case C-166/91 *Bauer v Conseil National de l'Ordre des Architectes* [1992] ECR I-2797, [1993] 1 CMLR 141, ECJ; and Case 138/80 *Borker* [1980] ECR 1975, [1980] 3 CMLR 638, ECJ.

10 Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG* [1982] ECR 1095 at 1110, ECJ.

11 Protocol on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1983) (OJ C97, 11.04.1983, p 24); First Protocol on the Interpretation by the Court of Justice of the European Communities of the Convention on the Law applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (1989) (OJ L48, 20.02.1989, p 1). As to the Brussels and Rome Conventions see PARA 1720 text and notes 17-18.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(10) REFERENCES TO THE EUROPEAN COURT OF JUSTICE/1722. Jurisdiction to refer.

1722. Jurisdiction to refer.

Four jurisdictional requirements must be satisfied before a reference can be made to the European Court of Justice: (1) the question(s) must relate to provisions of Community law upon which the European Court has jurisdiction to give a ruling; (2) the questions(s) must relate to the interpretation and/or validity of those provisions; (3) the question(s) must have been raised before the national court or tribunal; (4) a decision on the question(s) must be necessary to enable the national court or tribunal to give judgment¹.

As well as ruling on the interpretation of the founding treaties and secondary legislation, the European Court has interpreted international agreements concluded by the European Community² and the 'general principles of law' derived from the laws of the member states³. The European Court has no jurisdiction to interpret the national laws of the member states⁴, even when those laws were introduced in order to give effect to Community law obligations⁵.

The European Court alone has the power to declare a Community act void. National courts may not declare provisions of Community law to be invalid without first having referred the matter to the European Court for a preliminary ruling⁶.

Community law does not stipulate at what stage in proceedings a question for reference must be raised⁷. A question is not 'raised' simply because one party has asserted it. If the court determines there to be no arguable point of Community law it will not have been raised⁸.

The requirement that a decision on Community law be 'necessary' is a test of relevance. The question referred must be at least potentially capable of resolving the case or substantially determinative of it⁹.

In principle the European Court is bound to give a ruling on the interpretation of a provision of Community law where it is sought¹⁰. However the European Court may disagree with the national court's assessment of necessity and refuse a reference on the grounds, inter alia, that the question is not relevant to the dispute. It may also decline jurisdiction if there is no real dispute between the parties¹¹.

The European Court has only limited jurisdiction over the provisions contained in the Treaty on European Union¹².

1 See the EC Treaty art 234 (previously art 177). See also Case 6/64 *Costa v ENEL* [1964] ECR 585 at 592, [1964] CMLR425, ECJ. As to the EC Treaty see PARA 1720 note 1.

2 Case 181/73 *R & V Haegeman Sprl v Belgium* [1974] ECR 449, [1975] 1 CMLR 515, ECJ; Case 104/81 *Hauptzollamt Mainz v C A Kupferberg & Cie KG* [1982] ECR 3641, [1983] 1 CMLR 1, ECJ; Cases 267/81-269/81 *Amministrazione delle Finanze dello Stato v Società Petrolifera Italiana SpA* [1983] ECR 801, [1984] 1 CMLR 354, ECJ; Joined Cases 290, 291/81 *Compagnia Singer SpA and Geigy SpA v Amministrazione delle Finanze dello Stato* [1983] ECR 847, ECJ; *Opinion on the Draft Agreement relating to the Creation of a European Economic Area* (1992) Times, 22 January, ECJ.

3 The best known such principles are legal certainty, legitimate expectations, proportionality, equal treatment and the concept of fundamental rights. See eg Case 316/86 *Hauptzollamt Hamburg-Jonas v Krücken* [1988] ECR 2213, ECJ.

4 Case C-37/92 *Criminal Proceedings against Vanacker and Lesage* [1993] ECR I-4947 at 4978, ECJ.

5 Case 23/75 *Rey Soda v Cassa Conguaglio Zuccheri* [1975] ECR 1279, [1976] 1 CMLR 185, ECJ. See, however, Case 166/84 *Thomasdünker GmbH v Oberfinanzdirektion Frankfurt-am-Main* [1985] ECR 3001, ECJ; Joined Cases C-297/88 and C-197/89 *Dzodzi v Belgium* [1990] ECR I-3763, ECJ; Case C-346/93 *Kleinwort Benson Ltd v City of Glasgow District Council* [1996] QB 57, [1995] All ER (EC) 514, ECJ.

6 See Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, [1988] 3 CMLR 57, ECJ.

7 Case 107/76 *Hoffman-La Roche AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* [1977] ECR 957, [1977] 2 CMLR 334, ECJ; *Thetford Corp v Fiamma SpA* [1987] 3 CMLR 266, CA; Case C-124/92 *An Bord Bainne Co-operative Ltd v Intervention Board for Agricultural Produce* [1993] ECR I-5061, [1993] 3 CMLR 856, ECJ.

8 Case 283/81 *CILFIT Srl and Lanificio di Gavardo v Ministry of Health* [1982] ECR 3415 at 3428, [1983] 1 CMLR 472 at 489 (paras 8, 9), ECJ.

9 The test laid down in *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401 at 427, [1974] 2 All ER 1226 at 1239, CA, per Lord Denning MR that the point must be conclusive of the case, is now considered to be too strict. See *Polydor Ltd and RSO Records Inc v Harlequin Record Shops and Simons Records* [1980] 2 CMLR 413, CA; *Customs and Excise Comrs v ApS Samex (Hanil Synthetic Fiber Industrial Co Ltd, third party)* [1983] 1 All ER 1042, [1983] 3 CMLR 194; *Thetford Corp v Fiamma SpA* [1987] 3 CMLR 266, CA. See also *P & O Ferries v Customs and Excise Comrs* [1991] 3 CMLR 683, VAT tribunal.

10 Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94, C-339/94 *Reti Televisive Italiane SpA v Ministero delle Poste e Telecomunicazioni* [1996] ECR I-6471, [1997] EMLR 368, ECJ.

11 Case 244/80 *Foglia v Novello (No 2)* [1981] ECR 3045, [1982] 1 CMLR 585, ECJ; Case C-286/88 *Falciola Angelo SpA v Comune di Pavia* [1990] ECR I-191, ECJ; Case C-343/90 *Louranço Dias v Director da Alfandega do Porto* [1992] ECR I-4673, ECJ; Case C-83/91 *Wienand Mielicke v ADV/ORGAG* [1992] ECR I-4871, ECJ; Case C-428/93 *Re Monin Automobiles* [1994] ECR I-1707, ECJ.

12 See the Treaty on European Union (Maastricht, 7 February 1992; Cm 1934; TS 12 (1994); Cm 2485) (consolidated version) art 46 (substituted by the Treaty of Nice art 1(15)).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(10) REFERENCES TO THE EUROPEAN COURT OF JUSTICE/1723. Discretion to refer.

1723. Discretion to refer.

Most courts and tribunals have a broad discretion in deciding whether or not to refer a question to the European Court of Justice¹. The European Court has refrained from offering guidance to the national courts on the exercise of this discretion². The most important factor in determining whether to make a preliminary reference will be the difficulty of the Community law point in issue³. Other factors include which court is 'best fitted to decide the question'⁴, the importance of the point⁵, delay⁶, the expense⁷, whether a similar question is pending before the European Court⁸ and the wishes of the parties⁹.

Even courts and tribunals which generally have a discretion to refer may find their discretion constrained if the validity of a Community act is challenged. Where the validity of a Community act is challenged before a national court, the power to declare the act invalid is reserved to the European Court¹⁰. A national court may reject a plea challenging the validity of such an act. Where the national court intends to question the validity of a Community act, the matter must be referred to the European Court¹¹. In certain circumstances, a national court is empowered to suspend the application of a Community act on an interim basis¹².

Just as the national court has a discretion in deciding whether to refer, it has an unfettered discretion to determine when to refer¹³. The European Court appears to favour references from lower courts but will not interfere with an appellate court's decision to quash the decision of a lower court to make a reference¹⁴. Both the European Court and national courts advise that reference should be made after the facts have been found, or identified, by the national court or agreed by the parties¹⁵. References are frequently made on the basis of statements of agreed facts.

1 See the EC Treaty art 234(2). As to mandatory references from courts of last resort see PARA 1724.

2 See Case 166/73 *Rheinmühlen Düsseldorf v Einfuhr-und Vorratstelle für Getriebe und Futtermittel* [1974] ECR 33, [1974] 1 CMLR 523, ECJ.

3 See *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, [1974] 2 All ER 1226, CA; and *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex p Else (1982) Ltd* [1993] QB 534, [1993] 1 All ER 420, CA.

4 This factor will generally favour a preliminary reference: *Customs and Excise Comrs v ApS Samex (Hanil Synthetic Fiber Industrial Co Ltd, third party)* [1983] 1 All ER 1042, [1983] 3 CMLR 194. See also *R v Pharmaceutical Society of Great Britain, ex p Association of Pharmaceutical Importers* [1987] 3 CMLR 951, CA; *R v Intervention Board for Agricultural Practice, ex p Fish Producers' Organisation Ltd* [1988] 2 CMLR 661; and *R v Secretary of State for Transport, ex p Factortame Ltd* [1989] 2 CMLR 353, DC.

5 Its importance for the parties and for the Community legal order will be relevant: *Van Duyn v Home Office* [1974] 3 All ER 178, [1974] 1 WLR 1107; *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, [1974] 2 All ER 1226; *R v Pharmaceutical Society of Great Britain, ex p Association of Pharmaceutical Importers* [1987] 3 CMLR 951, CA.

6 *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, [1974] 2 All ER 1226, CA.

7 *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, [1974] 2 All ER 1226, CA; *R v Inner London Education Authority, ex p Hinde* [1985] 1 CMLR 716, 83 LGR 695. See also *Customs and Excise Comrs v ApS Samex (Hanil Synthetic Fiber Industrial Co Ltd, third party)* [1983] 1 All ER 1042 at 1056, [1983] 3 CMLR 194 at 212 (para 42) per Bingham J (expressing the view that a preliminary reference may not cost more than an appeal).

8 *R v Minister of Agriculture, Fisheries and Food and Secretary of State for Social Services, ex p FEDESA* [1988] 3 CMLR 207, DC; see also *R v Pharmaceutical Society of Great Britain, ex p Association of Pharmaceutical Importers* [1987] 3 CMLR 951, CA.

9 The decision to refer is primarily a matter for the national court: *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, [1974] 2 All ER 1226, CA; *R v Pharmaceutical Society of Great Britain, ex p Association of Pharmaceutical Importers* [1987] 3 CMLR 951, CA; *Portsmouth City Council v Richards and Quietlynn Ltd* [1989] 1 CMLR 673, 87 LGR 757, CA. A reference to the European Court must be made where a defendant's convictions may have been based on a misunderstanding of EC law, especially if the decision has a substantial impact across the European Union: *Murphy v Media Protection Services Ltd* [2008] EWHC 1666 (Admin), [2008] All ER (D) 206 (Jul), DC.

10 Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, [1988] 3 CMLR 57, ECJ; *R v Minister of Agriculture, Fisheries and Food and Secretary of State for Social Services, ex p FEDESA* [1988] 3 CMLR 207, DC; *Note on references from national courts for a preliminary ruling* (2005/C143/01) para 15 (*Practice Direction--References to the European Court* PD 68 para 3, Annex).

11 See *Note on references from national courts for a preliminary ruling* (2005/C143/01) para 16 (*Practice Direction--References to the European Court* PD 68 para 3, Annex).

12 Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* [1991] ECR I-415, [1993] 3 CMLR 1, ECJ.

13 The European Court will accept a reference made at a without notice hearing (formerly known as an ex parte hearing): Case C-10/92 *Balocchi v Ministero delle Finanze dello Stato* [1993] ECR I-5105, [1997] STC 640, ECJ; Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia Srl v Ente Nazionale Risi* [1994] ECR I-711, [1994] 2 CMLR 580, ECJ; Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783 at 1818, ECJ. See also *Trent Taverns Ltd v Sykes* [1999] EuLR 492, (1999) Times, 5 March, CA.

14 Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, [1978] 3 CMLR 263, ECJ.

15 See *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, [1974] 2 All ER 1226; Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association v Ireland* [1981] ECR 735, [1981] 2 CMLR 455, ECJ; Case 72/83 *Campus Oil Ltd v Minister for Industry and Energy* [1984] ECR 2727, [1984] 3 CMLR 544, ECJ; *Boehringer Ingelheim v Swingard Ltd* [2000] EuLR 660, CA.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(10) REFERENCES TO THE EUROPEAN COURT OF JUSTICE/1724. Courts of last instance.

1724. Courts of last instance.

Courts or tribunals against whose decisions there is no judicial remedy in national law¹ do not enjoy the discretion granted to other courts to decide whether to refer to the European Court of Justice or not. A court of last instance must refer an appropriate question². It is not obliged to refer a question to the European Court if it does not require a ruling on the question in order to give judgment³.

The mandatory requirement that such courts or tribunals refer appropriate questions applies not only to courts whose decisions are always final but also to those against whose decision there is no judicial remedy in the case at issue⁴. The House of Lords is not the only English court which may be bound to refer a question to the European Court⁵. When determining an issue in respect of which there is no appeal to the House of Lords, the Court of Appeal will be a court of last instance⁶. The High Court will also fall within these provisions when there is no possibility of an appeal to the Court of Appeal. Even if the Court of Appeal refuses leave to appeal, it will not be a court of last instance if the right to petition the House of Lords for permission to appeal still exists⁷.

According to the doctrine of 'acte éclairé'⁸, where previous decisions of the European Court have already dealt with the point of law in question, a court of last instance will be relieved of the obligation to refer⁹. According to the related and better known doctrine of 'acte clair', even if there is no decision of the European Court directly on point, a court of last instance is not required to refer a question where the correct application of Community law is so obvious as to leave no scope for reasonable doubt¹⁰. The national court must be convinced that the matter is equally obvious to the courts of other member states and the European Court¹¹. It must also take account of the difficulties in interpreting Community law including the need to compare different language versions, the use of terminology distinct to Community law, and the need to view provisions of Community law in the context of the broad objectives of the Community law¹².

The Rome Convention makes no provision for mandatory references¹³.

1 Known variously as 'courts of last instance', 'courts of last resort' or 'courts falling within article 234(3)'.

2 See *Note on references from national courts for a preliminary ruling* (2005/C143/01) para 12 (*Practice Direction--References to the European Court* PD 68 para 3, Annex). An appropriate question is a question concerning the interpretation or validity of Community law raised before that court where a decision upon it is considered necessary in order that judgment can be given. See further PARA 1720; and as to jurisdictional issues see PARA 1722.

3 *Magnavision NV/SA v General Optical Council (No 2)* [1987] 2 CMLR 262, DC.

4 Case 6/64 *Costa v ENEL* [1964] ECR 585, [1964] CMLR 425, ECJ; Case 107/76 *Hoffmann-La Roche AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* [1977] ECR 957, [1977] 2 CMLR 334, ECJ; Joined Cases 35/82 and 36/82 *Morson and Jhanjan v Netherlands* [1982] ECR 3723, [1983] 2 CMLR 221, ECJ.

5 Case 6/64 *Costa v ENEL* [1964] ECR 585, [1964] CMLR 425, ECJ; Case 107/76 *Hoffmann-La Roche AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* [1977] ECR 957, [1977] 2 CMLR 334, ECJ; Joined Cases 35/82 and 36/82 *Morson and Jhanjan v Netherlands* [1982] ECR 3723, [1983] 2 CMLR 221, ECJ; contrast the view of Lord Denning MR in *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, [1974] 2 All ER 1226, CA. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new

Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

6 *Hagen v Fratelli D and G Moretti SNC and Molnar Machinery Ltd* [1980] 3 CMLR 253, CA; *R v Pharmaceutical Society of Great Britain, ex p Association of Pharmaceutical Importers* [1987] 3 CMLR 951, CA.

7 *Chiron Corp v Murex Diagnostics Ltd* [1995] All ER (EC) 88, 24 BMLR 114, CA.

8 See Joined Cases 28/62-30/62 *Da Costa en Schaake NV v Nederlandse Belastingadministratie* [1963] ECR 31, [1963] CMLR 224, ECJ; Case 283/81 *CILFIT Srl and Lanificio di Gavardo v Ministry of Health* [1982] ECR 3415, [1983] 1 CMLR 472, ECJ.

9 The rule of stare decisis cannot deprive lower courts of their power to refer appropriate questions involving such rulings: Case 146/73 *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 139, [1974] 1 CMLR 523, ECJ; *Trent Taverns Ltd v Sykes* [1999] EuLR 492, (1999) Times, 5 March, CA. As to stare decisis see PARA 91 et seq. See also **STATUTES** vol 44(1) (Reissue) PARA 1350.

10 Case 283/81 *CILFIT Srl and Lanificio di Gavardo v Ministry of Health* [1982] ECR 3415, [1983] 1 CMLR 472, ECJ.

11 *Boehringer Ingelheim v Swingard Ltd* [2000] EuLR 660, CA.

12 Case 283/81 *CILFIT Srl and Lanificio di Gavardo v Ministry of Health* [1982] ECR 3415, [1983] 1 CMLR 472, ECJ.

13 As to the Rome Convention see PARA 1720 note 18.

UPDATE

1724 Courts of last instance

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(10) REFERENCES TO THE EUROPEAN COURT OF JUSTICE/1725. Order of reference to the European Court.

1725. Order of reference to the European Court.

An order referring a question to the European Court for a preliminary ruling¹ to the European Court² may be made at any stage of the proceedings either by the court³ of its own initiative or on an application by a party⁴. An order may not be made, in the High Court, by a master or district judge or, in a county court, by a district judge⁵. The request to the European Court for a preliminary ruling must be set out in a schedule to the order, and the court may give directions on the preparation of the schedule⁶.

The order containing the reference, and the document scheduled to it, should be sent to the Senior Master⁷, who will send a copy of the order to the Registrar of the European Court⁸. Where an order is made by a county court, the proper officer will send a copy of it to the Senior Master for onward transmission to the European Court⁹. Unless the court orders otherwise, the Senior Master will not send a copy of the order to the European Court until (1) the time for appealing against the order has expired; or (2) any application for permission to appeal has been refused, or any appeal has been determined¹⁰.

Where an order is made, unless the court orders otherwise the proceedings will be stayed¹¹ until the European Court has given a preliminary ruling on the question referred to it¹².

The Crown Court may make a reference on its own motion or on application by any party¹³. The Criminal Division of the Court of Appeal may do so at any stage before an appeal or application for leave to appeal has been determined¹⁴. Specific provision may be made in relation to references from tribunals¹⁵ but there are no specific rules governing references from magistrates' courts.

1 See under (1) the EC Treaty (Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) art 234; (2) the Euratom Treaty art 150; (3) the ECSC Treaty art 41; (4) the Protocol of 3 June 1971 on the interpretation by the European Court of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters; or (5) the Protocol of 19 December 1988 on the interpretation by the European Court of the Convention of 19 June 1980 on the Law applicable to Contractual Obligations: CPR 68.1(c). In relation to references under the EC Treaty art 234 see *European Court information note on references from national courts for a preliminary ruling* (2005/C143/01), annexed to *Practice Direction--References to the European Court* PD 68 (see para 3, Annex).

2 As to the meaning of 'the European Court' see PARA 1720 note 3.

3 'Court' means the court making the order: CPR 68.1(a).

4 CPR 68.2(1). Application must be in accordance with CPR Pt 23 (see PARA 303 et seq): CPR 68.2(1). Where the court intends to refer a question to the European Court it will welcome suggestions from the parties for the wording of the reference. However the responsibility for settling the terms of the reference lies with the English court and not with the parties: see *Practice Direction--References to the European Court* PD 68 para 1.1. The reference should identify as clearly and succinctly as possible the question on which the court seeks the ruling of the European Court. In choosing the wording of the reference, it should be remembered that it will need to be translated into many other languages: para 1.2.

5 CPR 68.2(2). As to masters see PARA 49; and as to district judges see PARA 55.

6 CPR 68.2(3). The schedule should (1) give the full name of the referring court; (2) identify the parties; (3) summarise the nature and history of the proceedings, including the salient facts, indicating whether these are proved or admitted or assumed; (4) set out the relevant rules of national law; (5) summarise the relevant contentions of the parties; (6) explain why a ruling of the European Court is sought; and (7) identify the

provisions of Community law which it is being requested to interpret: *Practice Direction--References to the European Court* PD 68 para 1.3. Where, as will often be convenient, some of these matters are in the form of a judgment, passages of the judgment not relevant to the reference should be omitted: para 1.4.

7 *Practice Direction--References to the European Court* PD 68 para 2.1. As to the Senior Master see PARA 51. The relevant court file should also be sent to the Senior Master: para 2.2.

8 CPR 68.3(1).

9 CPR 68.3(2).

10 CPR 68.3(3).

11 As to the meaning of 'stay' see PARA 233 note 11.

12 CPR 68.4. See also *SmithKline Beecham plc v Dowelhurst Ltd (Disclosure Application)* (3 March 2000, unreported), CA; Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd*, *HB Ice Cream Ltd v Masterfoods Ltd (t/a Mars Ireland)* [2001] All ER (EC) 130, [2001] 4 CMLR 449, ECJ.

13 See the Crown Court Rules 1982, SI 1982/1109, r 29(2); and the Criminal Procedure Rules 2005, SI 2005/384, r 75.1.

14 See the Criminal Procedure Rules 2005, SI 2005/384, r 75.1; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 1873.

15 See eg the Competition Commission Appeal Tribunal Rules 2003, SI 2003/1372, r 60.

UPDATE

1725 Order of reference to the European Court

TEXT AND NOTES--CPR 68.2A (request to apply the urgent preliminary ruling procedure) added: SI 2009/2092.

NOTE 1--CPR 68.1(c) amended, CPR 68.1(d) (meaning of 'reference') added: SI 2009/2092.

TEXT AND NOTE 6--CPR 68.2(3) amended: SI 2009/2092.

TEXT AND NOTE 8--CPR 68.3(1) substituted: SI 2009/2092.

TEXT AND NOTE 9--CPR 68.3(2) amended: SI 2009/2092.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(10) REFERENCES TO THE EUROPEAN COURT OF JUSTICE/1726. Costs and funding.

1726. Costs and funding.

The preliminary reference is a step in the national proceedings¹. Costs of the procedure before the European Court of Justice are for the national referring court to determine². When a reference is made, costs to date are normally reserved, to be decided once the preliminary ruling has been received.

Funding by the Community Legal Service (formerly legal aid) granted in national proceedings generally covers the costs of the reference in both civil and criminal proceedings³. In 'special circumstances' funding may be available from the European Court if it is not available in the national court⁴.

1 See Case 41/74 *Van Duyn v Home Office* [1975] Ch 238, [1975] 3 All ER 190, ECJ; Case 62/72 *Paul G Bollmann v Hauptzollamt Hamburg-Watershof* [1973] ECR 269, ECJ; *R v Marlborough Street Stipendiary Magistrate, ex p Bouchereau* [1977] 3 All ER 365, [1977] 1 WLR 414, DC.

2 Proceedings for a preliminary ruling before the European Court are free of charge and the court does not rule on the costs of the parties to the main proceedings; it is for the national court to rule on those costs: see *European Court information note* para 27 (*Practice Direction 68--References to the European Court* t: see para 3, Annex).

3 See *R v Marlborough Street Stipendiary Magistrate, ex p Bouchereau* [1977] 3 All ER 365, [1977] 1 WLR 414, DC. See further **LEGAL AID**. As to costs generally see also PARA 1729 et seq.

4 See the Rules of Procedure of the Court of Justice of the European Community (19 June 1991) (OJ L176, 04.07.1991, p 7) art 104(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(10) REFERENCES TO THE EUROPEAN COURT OF JUSTICE/1727. Interim relief.

1727. Interim relief.

No interim relief is available from the European Court of Justice. However, any court seised of a dispute governed by Community law must have the jurisdiction to grant interim relief¹. It is for the national court to determine the criteria for the grant of interim relief. In the English courts the grant of interim relief is governed by the established guidelines, the first consideration being whether damages would be an adequate remedy².

However if a preliminary reference puts in issue the validity of a provision of secondary Community legislation, the referring court may only suspend the application or enforcement of that legislation (or that of a national measure based on it) in limited circumstances³. Suspension may only be granted if (1) the national court entertains serious doubts about the validity of the measure and the matter has been or is being referred; (2) there is urgency and a threat of serious and irreparable damage to the applicant; (3) the court takes due account of the Community interest; and (4) the court respects the European Court's ruling on the lawfulness of the measure or any similar application for interim relief at Community level⁴.

1 Case C-213/89 *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603, [1990] ECR I-2433, ECJ.

2 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL. See also Case C-213/89 *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603, [1990] ECR I-2433, ECJ; *R v HM Treasury, ex p British Telecommunications plc* [1994] 1 CMLR 621, CA; *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227, [1992] 3 All ER 717, HL; *R v Secretary of State for Trade and Industry, ex p Trades Union Congress* [2001] 1 CMLR 132, [2000] EuLR 698. As to interim relief see PARA 315 et seq.

3 Case C-213/89 *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603, [1990] ECR I-2433, ECJ.

4 See Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* [1991] ECR I-415, [1993] 3 CMLR 1, ECJ; Case C-465/93 *Atlanta Fruchthandelgesellschaft mbH v Bundesamt für Ernährung und Forstwirtschaft* [1996] All ER (EC) 31, [1995] ECR I-3761, ECJ.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/25. APPEALS AND REFERENCES/(10) REFERENCES TO THE EUROPEAN COURT OF JUSTICE/1728. Appeal against the making or refusal of a reference.

1728. Appeal against the making or refusal of a reference.

An appeal from the High Court against a decision to refer lies to the Court of Appeal¹. An appeal is subject to the ordinary 21-day time limit². An appeal against a decision of the Court of Appeal to refer or not to refer lies to the House of Lords³. An appeal against the decision of a county court judge lies to the Court of Appeal provided permission is granted either by the county court or Court of Appeal⁴. A refusal by a magistrates' court to refer may be appealed to the Crown Court after conviction. The Crown Court's decision in this context might be challenged by way of judicial review in the Divisional Court⁵.

1 For the principles governing such an appeal see *Boehringer Ingelheim v Swingard* [2000] EuLR 660, CA.

2 See PARA 1663.

3 As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

4 As to the procedure on appeals see CPR Pt 52; *Practice Direction--Appeals* PD 52; and PARA 1657 et seq.

5 See the Supreme Court Act 1981 s 29; and **JUDICIAL REVIEW** vol 61 (2010) PARA 602. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

UPDATE

1728 Appeal against the making or refusal of a reference

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(1) INTRODUCTION/(i) In general/1729. Scope of this part of the title.

26. COSTS

(1) INTRODUCTION

(i) In general

1729. Scope of this part of the title.

This part of the title is concerned with the costs of civil litigation in the Court of Appeal, the High Court and county courts. Costs in criminal proceedings are dealt with elsewhere in this work¹.

The details of court fees payable² and of the prescribed rates of remuneration for legal aid work and services funded by the Legal Services Commission³ fall outside the scope of this title, as do the professional obligations of barristers, solicitors and other legally qualified persons with regard to the fees charged to their clients⁴.

1 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2058 et seq.

2 As to court fees see PARA 87; and *The Civil Court Practice*.

3 See generally **LEGAL AID**.

4 See generally **LEGAL PROFESSIONS**.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(1) INTRODUCTION/(i) In general/1730. Meaning of 'costs'.

1730. Meaning of 'costs'.

There is no general statutory definition of costs. For the purposes of the Civil Procedure Rules¹, unless the context otherwise requires 'costs' includes fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant in person², any additional liability incurred under a funding arrangement³ and any fee or reward charged by a lay representative⁴ for acting on behalf of a party in proceedings allocated to the small claims track⁵. 'Fixed costs' means the amounts which are to be allowed in respect of solicitors' charges in the prescribed⁶ circumstances⁷.

1 As to the Civil Procedure Rules see PARA 1734 et seq.

2 Ie under CPR 48.6: see PARA 1809.

3 As to funding arrangements see PARA 1830.

4 As to the rights of audience of lay representatives in county courts see **COURTS** vol 10 (Reissue) PARA 706.

5 CPR 43.2(1)(a). As to allocation to the small claims track see PARAS 267, 274 et seq.

Where a costs order is made against a defendant as part of a 'Tomlin' order, it has been held that 'the costs of the action' include the fees reasonably incurred in reaching settlement, but not disbursements such as the hire of experts: *Wallace v Gale & Associates* [1998] 1 FLR 1091, CA. As to Tomlin orders see PARA 1141 note 11. It has also been held that costs do not include the expense incurred in making funds available to finance the action (now known as a 'claim': see PARA 18): *Hunt v RM Douglas (Roofing) Ltd* (1987) 132 Sol Jo 935, CA. However, any premium paid for an insurance policy against the risk of incurring liability for costs may now be recovered: see the Access to Justice Act 1999 s 29; and PARA 1830.

6 Ie in the circumstances set out in CPR Pt 45 Section I (CPR 45.1-45.6): see PARAS 1760-1768.

7 CPR 43.2(1)(j).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(1) INTRODUCTION/(ii) Costs Jurisdiction/1731. The House of Lords and the Judicial Committee of the Privy Council.

(ii) Costs Jurisdiction

1731. The House of Lords and the Judicial Committee of the Privy Council.

In civil proceedings the jurisdiction of the House of Lords with regard to costs, including costs in the courts below, is inherent in the House and does not depend on any statute¹. In the absence of submissions on questions of costs² the House will normally award costs to the successful party³, but this is not an invariable rule⁴. In all civil appeals, appellants must give security for costs by payment into the House of Lords Security Fund Account⁵ of the appropriate sum⁶ within one week of the presentation of an appeal. Failure to do so will result in the appeal being dismissed⁷. However, this requirement does not apply to certain classes of appellants⁸ and it may be waived with the agreement of the parties⁹.

The costs of appeals to the Judicial Committee of the Privy Council are in the discretion of the Judicial Committee¹⁰. Delay in setting down an appeal, for which no reasonable explanation is given, may result in a successful appellant not being allowed costs¹¹. It is the usual practice to make no order on costs in appeals involving constitutional questions between a central government and a province or state¹². The practice of the committee is against giving costs to the successful appellant in a criminal appeal, save in very special circumstances¹³. The Judicial Committee also has power to order an appellant to lodge security for costs¹⁴.

The practice and procedure in the House of Lords and in the Judicial Committee when costs are awarded is discussed elsewhere in this work¹⁵. The Civil Procedure Rules ('CPR') do not apply and the process of assessment of the costs to be allowed is still known as 'taxation', which was the terminology employed in the Court of Appeal, High Court and county courts before the introduction of the CPR¹⁶.

1 *West Ham Union Guardians v Churchwardens of St Matthew, Bethnal Green* [1896] AC 477, HL. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

2 The order which must be made at the hearing and again in writing within 14 days of the conclusion of the hearing: *HL Practice Directions and Standing Orders applicable to Civil Appeals* (October 2007) direction 19.1.

3 Before 1876 it was the practice never to give costs against a respondent: see *A-G v London Corpn* (1850) 2 H & Tw 1 at 31, HL, per Lord Cottenham LC. The practice was changed after the Appellate Jurisdiction Act 1876 came into force.

4 See eg *Cassell & Co Ltd v Broome (No 2)* [1972] AC 1136, [1972] 2 All ER 849, HL, where the successful respondent was awarded only one half of his costs.

5 No interest is payable on security money: *HL Practice Directions and Standing Orders applicable to Civil Appeals* (October 2007) direction 10.2.

6 Currently £25,000: see the *Sixth Report from the House of Lords Offices Committee* (Session 1999-2000), HL 97, agreed to by the House on 27 July 2000; and *HL Practice Directions and Standing Orders applicable to Civil Appeals* (October 2007) Appendix C. The level of security for costs is revised quinquennially to represent two-thirds of the average taxed costs of an appeal: see 604 HL Official Report (5th series), 26 July 1999, col 1292.

7 *HL Standing Orders (Judicial Business)* (2007) no V(1).

8 The following classes of appellant are not required to give security for costs and no waiver is necessary: (1) an appellant who has been granted a certificate of public funding or a legal aid certificate; (2) an appellant in an appeal under the Child Abduction and Custody Act 1985; and (3) a minister or Government department: see **COURTS** vol 10 (Reissue) PARA 376.

9 See **COURTS** vol 10 (Reissue) PARA 376.

10 Judicial Committee Act 1833 s 15 (amended by the Statute Law Revision (No 2) Act 1888); Judicial Committee Act 1843 s 12 (amended by the Statute Law Revision Act 1891); and see **COURTS** vol 10 (Reissue) PARA 462.

11 See **COURTS** vol 10 (Reissue) PARA 462 note 2.

12 See **COURTS** vol 10 (Reissue) PARA 462 note 3.

13 See **COURTS** vol 10 (Reissue) PARA 462 note 4.

14 See **COURTS** vol 10 (Reissue) PARAS 421, 477.

15 As to costs in civil proceedings in the House of Lords see **COURTS** vol 10 (Reissue) PARA 376; and as to costs in criminal proceedings see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (Reissue) PARA 1526 et seq. As to costs in the Judicial Committee of the Privy Council see **COURTS** vol 10 (Reissue) PARAS 462-464, 486.

16 As to costs under the Civil Procedure Rules see PARA 1734 et seq.

UPDATE

1731 The House of Lords and the Judicial Committee of the Privy Council

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 10--See *Seaga v Harper (No 2)* [2009] UKPC 26, [2010] 1 WLR 312 (conditional fee agreement and insurance regime should not be introduced into taxation of costs incurred in appeals without any prior attempt to ascertain wishes of parts of Commonwealth involved).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(1) INTRODUCTION/(ii) Costs Jurisdiction/1732. The Court of Appeal, the High Court and county courts.

1732. The Court of Appeal, the High Court and county courts.

Subject to the provisions of the Supreme Court Act 1981¹ or any other enactment², and to rules of court³, the costs⁴ of and incidental to⁵ all proceedings⁶ in the Civil Division of the Court of Appeal⁷, the High Court⁸ and any county court⁹ are in the discretion of the court¹⁰, and the court has full power to determine by whom¹¹ and to what extent the costs are to be paid¹². The court may disallow, or (as the case may be) order the legal or other representative¹³ concerned to meet, the whole of any wasted costs¹⁴ or such part of them as may be determined in accordance with rules of court¹⁵.

Costs may be dealt with by the court at any stage of the proceedings or after their conclusion. The general rule is that the costs of any proceedings or any part of the proceedings are not to be assessed by the detailed assessment procedure until the conclusion of the proceedings but the court may order them to be assessed immediately¹⁶.

In civil proceedings to which the Crown is a party the costs are in the discretion of the court to be exercised generally in the same manner and on the same principles as in cases between subjects¹⁷.

1 See the Supreme Court Act 1981 s 51 (substituted by the Courts and Legal Services Act 1990 s 4(1); and amended by the Access to Justice Act 1999 s 31). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

2 ie including an Act passed after the Supreme Court Act 1981: see s 151(1). See eg the Access to Justice Act 1999. The provisions of special statutes as to particular cases are unaffected by the general provisions as to costs: *Hasker v Wood* (1885) 54 LJQB 419, CA; *Reeve v Gibson* [1891] 1 QB 652, CA; *Re Butler's Will, ex p Metropolitan Board of Works* (1912) 106 LT 673.

3 Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings including, in particular, prescribing scales of costs to be paid to legal or other representatives or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs: Supreme Court Act 1981 s 51(2) (as substituted: see note 1; amended by the Access to Justice Act 1999 s 31). See CPR Pts 43-48; and PARAS 1734, 1737 et seq. The court's powers and discretion under the Supreme Court Act 1981 s 51 must be exercised subject to and in accordance with CPR 44.3: see PARAS 1738-1741. As to the meaning of 'legal or other representative' for these purposes see note 13; and as to the meaning of 'proceedings' see note 6.

4 'Costs' is not defined in the Supreme Court Act 1981. For the meaning of the term see CPR 43.2(1)(a); and PARA 1730.

5 Whereas the costs of and incidental to negotiations leading up to an order are confined to the costs consequent on the negotiations (*Re Fahy's Will Trusts* [1962] 1 All ER 73, [1962] 1 WLR 17), the words 'and incidental to' are words of extension rather than restriction, and 'costs of and incidental to the proceedings' include more than 'costs of the proceedings' (*Re Gibson's Settlement Trusts, Mellors v Gibson* [1981] Ch 179, [1981] 1 All ER 233, where costs incurred before the proceedings began were allowed). They embrace not only the costs, charges and expenses which directly and necessarily arise out of the subject matter but also those incurred casually or incidentally out of it (*Re Llewellyn, Llewellyn v Williams* (1887) 37 ChD 317) or which occur in subordinate conjunction with it (*Department of Health and Social Security v Envoy Farmers Ltd* [1976] 2 All ER 173, [1976] 1 WLR 1018), but the subject to which the costs are incidental must be defined in the order (*Wright v Bennett* [1948] 1 KB 601, [1948] 1 All ER 410, CA). As to the caution to be exercised in applying pre-CPR authorities see PARAS 33 text and note 2, 1736. Reasonable costs of a claimant's expert employees in investigating, formulating and presenting claims against the defendants from the time that the claimant formed its suspicions of the wrongs that became the subject of the claim may be payable under an order for costs 'of and incidental to the proceedings': *Admiral Management Services Ltd v Para-Protect Europe Ltd* [2002] EWHC 233 (Ch), [2003] 2 All ER 1017. Costs incurred by a defendant in responding to a claim brought in a pre-action

protocol may be recoverable as costs 'incidental to' any subsequent proceedings: *McGlenn v Waltham Contractors Ltd* [2005] EWHC 1419 (TCC), [2005] 3 All ER 1126. See also *Sisu Capital Fund Ltd v Tucker* [2005] EWHC 2321 (Ch), [2006] 1 All ER 167 (no recovery for expenditure of time by officeholders other than solicitors (such as professional consultants), even where possible to calculate financial cost of time spent). A failure to comply with the pre-action protocol will lead to an early adverse costs order: *Charles Church Developments Ltd v Stent Foundations Ltd* [2007] EWHC 955 (TCC), [2007] All ER (D) 104 (May).

6 For these purposes, 'proceedings' includes the administration of estates and trusts: Supreme Court Act 1981 s 51(4) (as substituted: see note 1). Nothing in s 51(1) (as so substituted) alters the practice in any criminal cause or matter, or in bankruptcy: s 51(5) (as so substituted). For the distinction between civil and criminal proceedings see PARA 2. As to the proceedings to which CPR Pts 43-48 apply see PARA 1734. As to costs in particular proceedings see eg **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANIES; COMPANY AND PARTNERSHIP INSOLVENCY; CROWN PROCEEDINGS AND CROWN PRACTICE; DAMAGES; EXECUTORS AND ADMINISTRATORS; LEGAL PROFESSIONALS; MATRIMONIAL AND CIVIL PARTNERSHIP LAW; MENTAL HEALTH** vol 30(2) (Reissue) PARA 740 (Court of Protection); **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARAS 553, 689; **SHIPPING AND MARITIME LAW; TRUSTS**.

7 As to the Civil Division of the Court of Appeal see **COURTS** vol 10 (Reissue) PARA 635. As to the Criminal Division see **COURTS** vol 10 (Reissue) PARA 636; and as to costs in the Criminal Division see PARA 1733; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2058 et seq. Provision for costs in the Crown Court is made by the Supreme Court Act 1981 s 52: see PARA 1733; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2058 et seq.

8 As to the High Court see **COURTS** vol 10 (Reissue) PARA 602 et seq. Rules of court may make provision for a right of appeal to the High Court in relation to certain decisions regarding Crown Court costs: see the Supreme Court Act 1981 s 52(1)(d) (amended by SI 2004/2035).

9 As to county courts see **COURTS** vol 10 (Reissue) PARA 701 et seq. As to the statutory restrictions on persons who may recover any fee or reward for acting on behalf of a party in proceedings in a county court see the County Courts Act 1984 s 143(1) (substituted by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 48); and **COURTS** vol 10 (Reissue) PARA 706.

10 Supreme Court Act 1981 s 51(1) (as substituted: see note 1). As to the exercise of the court's discretion see PARAS 1738-1741. As to the meaning of 'court' in the CPR see PARA 22. The use of the term 'the High Court' or 'the court' or 'the court or a judge' in any enactment requires the court's jurisdiction under the statute to be exercised only by a single judge of the High Court unless (1) by or by virtue of rules of court or any other statutory provision that jurisdiction is required to be exercised by a Divisional Court (see **COURTS** vol 10 (Reissue) PARA 605); or (2) by rules of court that jurisdiction is made exercisable by a master, district judge or other officer of the court, or by any other person: see the Supreme Court Act 1981 s 19(3).

11 See *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira* [1986] AC 965, [1986] 2 All ER 409, HL, in which it was held that the court had jurisdiction to order the unsuccessful party in one set of proceedings to pay the opponent's costs in bringing separate proceedings against a third party (overruling *John Fairfax & Sons Pty Ltd v EC de Witt & Co (Australia) Pty Ltd* [1958] 1 QB 323, [1957] 3 All ER 410, CA; applied in *Jackson v Thakrar* [2007] EWHC 626 (TCC), [2008] 1 All ER 601 (third party funding)); *Symphony Group plc v Hodgson* [1994] QB 179, [1993] 4 All ER 143, CA (costs against non-party refused where claimant at all times had cause of action against non-party and could have joined him as a party); *Wiggins v Richard Read (Transport) Ltd* (1999) Times, 14 January, CA (in determining whether to order costs against a non-party, the court ought to refer to the full guidelines as set out in *Symphony Group plc v Hodgson* [1994] QB 179, [1993] 4 All ER 143, CA); *Davies v Eli Lilly & Co* [1987] 3 All ER 94, [1987] 1 WLR 1136, CA (costs of lead actions against drug manufacturer to be apportioned between all claimants in dispute); *Carr v Allen-Bradley Electronics Ltd* [1980] ICR 603, [1980] IRLR 263, EAT; and *Singh v Observer Ltd* [1989] 2 All ER 751, 133 Sol Jo 485 (revsd on other grounds [1989] 3 All ER 777n, CA) (court has power to order maintainer to pay costs, and that his identity be disclosed; although in *Carr v Allen-Bradley Electronics Ltd* [1980] ICR 603, [1980] IRLR 263, EAT, the Employment Appeal Tribunal stated that the industrial tribunal (now known as the 'employment tribunal') should not necessarily follow the High Court practice); *Nordstern Allgemeine Versicherungs AG v Internav Ltd, Nordstern Allgemeine Versicherungs AG v Katsamas* [1999] 2 Lloyd's Rep 139, [1999] All ER (D) 530, CA (non-party liable for costs incurred as result of his wanton intermeddling in an action (now referred to as a 'claim': see PARA 18)). Such an order may only be made in exceptional circumstances: *Locabail (UK) Ltd v Bayfield Properties Ltd (No 3)* (2000) Times, 29 February; *Gardiner v FX Music Ltd* [2000] All ER (D) 144; *Cormack v Washbourne (formerly t/a Washbourne & Co (a firm))* [2000] All ER (D) 353, (2000) Times, 30 March, CA. A costs order may be made against a non-party if in all the circumstances it is just to do so: *Globe Equities Ltd v Globe Legal Services Ltd* [1999] BLR 232, [1999] All ER (D) 226, CA; *Re Aurum Marketing Ltd (in liquidation)* [2000] 2 BCLC 645, sub nom *Secretary of State for Trade and Industry v Aurum Marketing Ltd* [2000] All ER (D) 1009, CA. The power to award costs against a non-party will generally only be exercised against a person who has some connection with the proceedings: *Murphy v Young & Co's Brewery plc and Sun Alliance and London Insurance plc* [1997] 1 All ER 518, [1997] 1 WLR 1591, CA; applied in *Holden v Oyston* [2002] EWHC 819 (QB), [2002] All ER (D) 296 (Apr). Where the third party has a direct interest in the result of the litigation as, for instance, an insurer, an order can

be made: *TGA Chapman Ltd v Christopher* [1998] 2 All ER 873, [1998] 1 WLR 12, CA. A non-party who plays a role in the management of litigation is at greater risk but it is usually necessary to show that the third party who brought the proceedings did so in bad faith or with an ulterior motive: *Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd* [1997] 1 All ER 418, [1997] 1 WLR 1613, CA. The power to make an order against a director will not normally be exercised (*Taylor v Pace Developments Co Ltd* [1991] BCC 406, CA); but where a director had substantially financed the litigation and improperly caused the company to defend the claim and to prosecute a concocted counterclaim an order was made (*H Leverton Ltd v Crawford Offshore (Exploration) Services Ltd (in liquidation)* (1996) Times, 22 November). A conditional fee agreement (see PARA 1830) is not by itself enough to expose the solicitors for one party for the other's costs: *Hodgson v Imperial Tobacco Ltd* [1998] 2 All ER 673, [1998] 1 WLR 1056, CA. As to the liability of a solicitor see *Tolstoy-Miloslavsky v Lord Aldington* [1996] 2 All ER 556, [1996] 1 WLR 736, CA. See also *CIBC Mellon Trust Co v Stolzenberg* [2005] EWCA Civ 628, [2005] 2 BCLC 618 (order for costs against shareholder who had funded and controlled litigation by the company); and *BE Studios Ltd v Smith & Williamson Ltd* [2005] EWHC 2730 (Ch), [2006] 2 All ER 811 (no impropriety on part of director need be shown for non-party costs order to be made against him).

A non-existent person cannot receive or be ordered to pay costs: *Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse* [1923] 2 KB 630; revsd on the ground that the plaintiff bank still existed [1925] AC 112, HL.

A tribunal making itself a party to an appeal puts itself at risk as to an order for costs: see *Moore's (Wallisdown) Ltd v Pensions Ombudsman, Royal and Sun Alliance Life and Pensions Ltd v Pensions Ombudsman* [2002] 1 All ER 737, [2001] All ER (D) 372 (Dec); and PARA 1756.

12 Supreme Court Act 1981 s 51(3) (as substituted: see note 1). As to when a respondent who has successfully resisted an application for permission to appeal may be awarded costs see eg *Jolly v Jay* [2002] EWCA Civ 277, [2002] All ER (D) 104 (Mar).

13 For these purposes, 'legal or other representative', in relation to a party to proceedings, means any person exercising a right of audience or right to conduct litigation on his behalf: Supreme Court Act 1981 s 51(13) (as substituted: see note 1). As to rights of audience and rights to conduct litigation see **COURTS** vol 10 (Reissue) PARAS 331-332, 706; and **LEGAL PROFESSIONS**.

14 'Wasted costs' means any costs incurred by a party (1) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or (2) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay: Supreme Court Act 1981 s 51(7) (as substituted: see note 1). See eg *Abbassi v Secretary of State for the Home Department* [1992] Imm AR 349, sub nom *R v Secretary of State for the Home Department, ex p Abbassi* (1992) Times, 6 April, CA (counsel and solicitors personally liable for costs thrown away in frivolous appeal); *Fozal v Gofur* (1993) Times, 9 July, CA (a wasted costs order under the Supreme Court Act 1981 s 51(6), (7) can only be made against counsel in respect of acts done after 1 October 1991 when substitution came into force); *Re a Company (No 006798 of 1995)* [1996] 2 All ER 417, [1996] 1 WLR 491 (wasted costs order against a solicitor who supported a winding-up petition when he ought to have known it was bound to fail); *Re G (children) (care proceedings: wasted costs)* [2000] Fam 104, [1999] 4 All ER 371 (wasted costs order against counsel who failed to keep expert up to date). In exercising the power to award costs against a barrister personally, the court ought to have regard to errors of duty to the court, not errors of judgment: *Harley v McDonald, Glasgow Harley (a firm) v McDonald* [2001] UKPC 18, [2001] 2 AC 678, [2001] 5 LRC 82. An application for a wasted costs order is a summary procedure, which ought only to be used in simple and obvious cases, and which will generally be inappropriate for claims involving dishonesty, or breach of a solicitors' professional duty, where it is necessary to make detailed investigations of fact, resulting in complex proceedings: *Turner Page Music v Torres Design Associates Ltd* (1998) Times, 3 August, CA. The application is to be heard by the judge who heard the substantive proceedings; and the applicant ought to bear in mind the principle of proportionality to guard against longer being spent on the application than on the substantive proceedings: *Re Merc Property Ltd* [1999] 2 BCLC 286. As to the procedure on a wasted costs application see CPR 48.7; and PARA 1811.

15 Supreme Court Act 1981 s 51(6) (as substituted: see note 1). For the relevant rules see CPR 48.7; and PARA 1811. The Supreme Court Act 1981 s 51(6) applies in relation to any civil proceedings in the Crown Court as it applies to proceedings under s 51(1): s 52(2A) (added by the Courts and Legal Services Act 1990 s 4(2)). As to the civil jurisdiction of the Crown Court see **COURTS** vol 10 (Reissue) PARAS 626, 628-630.

16 See CPR 47.1; and PARA 1779. A costs judge or a district judge may make an order allowing detailed assessment proceedings to be commenced where there is no realistic prospect of the claim continuing: *Practice Direction about Costs* PD 43-48 para 28.1(5).

17 See the Administration of Justice (Miscellaneous Provisions) Act 1933 s 7(1); and **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 136.

UPDATE

1732 The Court of Appeal, the High Court and county courts

NOTE 5--See *Roach v Home Office; Matthews v Home Office* [2009] EWHC 312 (QB), [2009] 3 All ER 510 (public funding certificate had no bearing on recoverability of costs relating to inquest as costs of and incidental to claim).

NOTE 12--On an application under the Supreme Court Act 1981 s 51 (now Senior Courts Act 1981 s 51), the court has jurisdiction, pursuant to CPR Pt 32 (see PARA 979 et seq), to hear oral evidence in chief or in cross-examination: *Grecoair Inc v Tilling* [2009] EWHC 115 (QB), [2009] All ER (D) 64 (Apr).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(1) INTRODUCTION/(ii) Costs Jurisdiction/1733. Other courts and tribunals.

1733. Other courts and tribunals.

The Criminal Division of the Court of Appeal¹, the Crown Court², the Courts-Martial Appeal Court³, magistrates' courts⁴, ecclesiastical courts⁵ and a number of statutory and other tribunals⁶ have power to award costs. The practice and procedure in these courts and tribunals is dealt with elsewhere in this work⁷.

1 As to costs in the Criminal Division of the Court of Appeal see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (Reissue) PARA 1526 et seq.

2 The Supreme Court Act 1981 s 52 (amended by SI 2004/2035) provides that rules of court may authorise the Crown Court to award costs and may regulate any matters relating to costs of proceedings in that court. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to Crown Court costs see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (Reissue) PARA 1526 et seq.

3 As to the Courts-Martial Appeal Court see **ARMED FORCES**; and **COURTS** vol 10 (Reissue) PARAS 801-804; and as to its jurisdiction to award costs see the Courts-Martial (Appeals) Act 1968 ss 31, 32; and **ARMED FORCES**.

4 See **MAGISTRATES**.

5 As to ecclesiastical courts see **COURTS** vol 10 (Reissue) PARAS 805-808; and **ECCLESIASTICAL LAW**; and as to their jurisdiction to award costs see eg the Ecclesiastical Jurisdiction Measure 1963 Pt X (ss 58-63); and **ECCLESIASTICAL LAW**.

6 Eg the Employment Appeal Tribunal, the Immigration Appeal Tribunal, the Competition Appeal Tribunal, the Lands Tribunal, the Transport Tribunal, the Financial Services and Markets Tribunal: see **COURTS** vol 10 (Reissue) PARAS 809-814; and **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**; **COMPETITION** vol 18 (2009) PARAS 13-18; **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq; **EMPLOYMENT** vol 41 (2009) PARA 1384 et seq; **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 43 et seq; **ROAD TRAFFIC**.

7 See eg the titles referred to in notes 1-6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(1) INTRODUCTION/(iii) Costs under the Civil Procedure Rules/1734. General rules as to costs.

(iii) Costs under the Civil Procedure Rules

1734. General rules as to costs.

The costs rules now applying in the Civil Division of the Court of Appeal, the High Court and county courts are set out in Parts 43 to 48 of the Civil Procedure Rules ('CPR')¹ and the costs practice direction supplementary thereto². These Parts deal with the main provisions as to costs and the way in which the court will award and assess costs³. They do not provide a complete self-contained code as to costs in the High Court and the Civil Division of the Court of Appeal, unlike the former Order 62 of the Rules of the Supreme Court⁴, but for the first time there is a common set of rules governing costs in most civil proceedings in the courts⁵, which apply from 26 April 1999, both as to the procedure to be adopted and the way in which costs are to be assessed⁶.

Part 43 of the CPR contains definitions and interpretation of certain matters set out in the rules about costs⁷. The costs to which Parts 44 to 48 apply include:

- 1298 (1) the following costs where those costs may be assessed by the court⁸:
39
 - 102. (a) costs of proceedings before an arbitrator or umpire;
 - 103. (b) costs of proceedings before a tribunal or other statutory body; and
 - 104. (c) costs payable by a client to his solicitor⁹; and
- 40
1299 (2) costs which are payable by one party to another party under the terms of a contract, where the court makes an order for an assessment of those costs¹⁰.

Where advocacy or litigation services are provided to a client under a conditional fee agreement¹¹, costs are recoverable under Parts 44 to 48 notwithstanding that the client is liable to pay his legal representative's fees and expenses only to the extent that sums are recovered in respect of the proceedings, whether by way of costs or otherwise¹².

Parts 43, 44, 47 and 48 (but not Parts 45 and 46) of the CPR apply, with certain modifications¹³, to costs in family proceedings and in the Family Division assessed on or after 26 April 1999¹⁴, despite the fact that other Parts of the CPR do not apply to family proceedings¹⁵.

There are two methods by which costs may be assessed by the court: 'summary assessment' which means the procedure by which the court, when making an order about costs, orders payment of a sum of money instead of fixed costs or detailed assessment¹⁶; and 'detailed assessment' which means the procedure by which the amount of costs is decided by a costs officer¹⁷.

1 See CPR Pts 43-48; the text and notes 6-9; and PARA 1737 et seq.

2 See *Practice Direction about Costs* PD 43-48.

3 As to the meaning of 'costs' see PARA 1730.

4 Ie RSC Ord 62 (revoked).

5 See PARA 24.

6 See *Practice Direction--Transitional Arrangements* PD 51 para 18(1).

7 CPR 43.1. The rules referred to in the text are (1) CPR Pt 44 (general rules about costs: see PARA 1737 et seq); (2) CPR Pt 45 (fixed costs: see PARA 1760 et seq; and as to the meaning of 'fixed costs see PARA 1730 text and notes 6-7); (3) CPR Pt 46 (fast track trial costs: see PARAS 1775-1778); (4) CPR Pt 47 (detailed assessment of costs and related appeals: see PARA 1779 et seq); and (5) CPR Pt 48 (costs payable in special cases: see PARA 1803 et seq): see CPR 43.1 note.

8 As to the meaning of 'court' see PARA 22.

9 CPR 43.2(2)(a). As to detailed assessment of solicitor and client costs see CPR 48.8; and PARA 1812; and as to fixed costs allowed in respect of solicitors' charges see CPR Pt 45; and PARA 1760 et seq. As to bills of costs see PARA 1783; and see further **LEGAL PROFESSIONS**.

10 CPR 43.2(2)(b). As to the detailed assessment of costs payable under a contract see CPR 48.3; and PARA 1806.

11 The reference to a conditional fee agreement is to an agreement which satisfies all the conditions applicable to it by virtue of the Courts and Legal Services Act 1990 s 58 (see PARA 1830): CPR 43.2(4).

12 CPR 43.2(3).

13 CPR 44.9-44.12 do not apply; in CPR 43.2(1)(c)(ii) (definition of 'costs officer': see note 17), 'district judge' includes a district judge of the Principal Registry of the Family Division; CPR 44.3(2) (costs follow the event: see PARA 1738) does not apply; and CPR 44.3(1), (3)-(5) does not apply to an application to which the Family Proceedings Rules 1991, SI 1991/1247, r 2.71 (ancillary relief: costs: see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 1037 et seq) applies: see r 10.27(1) (added by SI 2003/184; and amended by SI 2006/352). As to the Principal Registry of the Family Division and the district judges therein see **COURTS** vol 10 (Reissue) PARAS 644, 658.

14 See the Family Proceedings Rules 1991 SI 1991/1247, r 10.27(1) (as added and amended: see note 13). As a general rule, no costs for work done before 26 April 1999 are to be disallowed if they would have been allowed on taxation (now known as 'assessment') before that date: Family Proceedings (Miscellaneous Amendments) Rules 1999, SI 1999/1012, r 4(3). As to costs in family proceedings see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 1037 et seq.

15 See CPR 2.1(2), Table item 5; PARA 32; and **COURTS** vol 10 (Reissue) PARA 575.

16 CPR 43.3. As to summary assessment of costs see PARA 1752.

17 CPR 43.4. As to detailed assessment of costs see PARA 1779 et seq. Detailed assessment is carried out under CPR Pt 47: see note 7. 'Costs officer' means a costs judge, a district judge and an authorised court officer (CPR 43.2(1)(c)); 'costs judge' means a taxing master of the Supreme Court (CPR 43.2(1)(b)); and see **COURTS** vol 10 (Reissue) PARA 656; and 'authorised court officer' means any officer of a county court, a district registry, the Principal Registry of the Family Division or the Supreme Court Costs Office, whom the Lord Chancellor has authorised to assess costs (CPR 43.2(1)(d)). As to the meaning of 'court officer' see PARA 49 note 3. As to the powers of authorised court officers on detailed assessment see PARA 1781. As to county court officers see **COURTS** vol 10 (Reissue) PARA 726 et seq; as to district registries and district judges therein see **COURTS** vol 10 (Reissue) PARAS 646, 661-662; and as to the Supreme Court Costs Office see **COURTS** vol 10 (Reissue) PARA 642. As to the Lord Chancellor see **COURTS** vol 10 (Reissue) PARA 501; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 477 et seq. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

UPDATE

1734 General rules as to costs

NOTE 17--Appointed day is 1 October 2009: SI 2009/1604. CPR 43.2(1)(b), (d) amended: SI 2009/2092.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(1) INTRODUCTION/(iii) Costs under the Civil Procedure Rules/1735. Other rules making specific provision about costs.

1735. Other rules making specific provision about costs.

In addition to the general rules about costs contained in Parts 43 to 48 of the Civil Procedure Rules ('CPR')¹, specific provision as to costs is made in other Parts of the CPR, including those dealing with: the court's² general management powers³; the court's power to strike out a statement of case⁴; judgment without trial after striking out⁵; sanctions for non payment of fees⁶; default provisions in relation to sanctions⁷; default judgments⁸; admissions⁹; litigation friends¹⁰; security for costs¹¹; costs on the small claims track¹²; fast track provisions¹³; expert evidence¹⁴; enforcing the attendance of witnesses¹⁵; fees and expenses of examiners of the court¹⁶; offers to settle and payments into court¹⁷; and discontinuance¹⁸.

Small claims and fast track trial costs are discussed elsewhere in this title¹⁹.

1 See PARA 1734. As to the meaning of 'costs' see PARA 1730.

2 As to the meaning of 'court' see PARA 22.

3 Eg when exercising its power under CPR 3.1(5) (court's power to order a party to pay money into court) the court must have regard to the costs which the parties have incurred or which they may incur: see CPR 3.1(6); and PARA 247.

4 Eg when the court strikes out a statement of case it may make any consequential order it considers appropriate: see CPR 3.4(3); and PARA 520. Where the court has struck out a claimant's statement of case, the claimant has been ordered to pay costs to the defendant and before the claimant pays those costs he starts another claim against the same defendant, arising out of facts which are the same or substantially the same as those relating to the claim in which the statement of case was struck out, the court may stay the second claim on the application of the defendant until the costs of the first claim have been paid: see CPR 3.4(4); and PARA 520.

5 Eg where the court makes an order which includes a term that the statement of case of a party must be struck out if the party does not comply with the order and the party against whom the order was made does not comply with it, any other party may obtain judgment with costs: see CPR 3.5(1); and PARA 521.

6 In circumstances where a claimant has not paid a court fee by a specified date and has not applied for exemption from or remission of such fee by that date, the claim will be struck out automatically without further notice of the court and the claimant will be liable for the costs which the defendant has incurred unless the court orders otherwise: see CPR 3.7(4); and PARA 523.

7 Eg where the sanction for a failure to comply with a rule, practice direction or court order is the payment of costs, the party in default may only obtain relief by appealing against the order for costs: see CPR 3.8(2); and PARA 255.

8 Eg default judgment on a claim for a specified amount of money obtained on the filing of a request will be judgment for the amount of the claim (less payments made) and costs: see CPR 12.5(2); and PARA 509.

9 Eg where judgment is entered on an admission of the whole of a claim where the remedy sought is for a specified amount of money only, the judgment will be for the amount of the claim (less payments made) and costs: see CPR 14.4(6); and PARA 191.

10 The liability of a litigation friend for costs continues until the person in respect of whom his appointment to act has ceased serves the notice that his appointment to act has ceased or the litigation friend serves notice on the parties that his appointment to act has ceased: see CPR 21.9(6); and PARA 222; **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1411 et seq.

11 As to security for costs see CPR 25.12; and PARAS 745-748.

12 In any case which has been allocated to the small claims track (see PARAS 267, 274 et seq) costs will be limited to fixed costs (see PARA 1730 text and notes 6-7) unless the paying party has behaved unreasonably; but this rule does not apply where the claim is allocated to the small claims track by consent and the value of the claim exceeds the limit for the small claims track. In such cases the claim is to be treated for the purposes of costs as if it were proceeding on the fast track: see CPR 27.14(2), (5); PARAS 1773-1774; and PARA 285.

13 In the case where the court's power to award costs is limited in accordance with CPR Pt 46 (see PARAS 1775-1778): see CPR 28.2(5); and PARA 292.

14 The court has the power to limit the amount of an expert's fees and expenses that the party who wishes to rely on the expert may recover from any other party: see CPR 35.4(4); and PARA 838. Unless the court otherwise directs, the instructing parties are jointly and severally liable for the payment of an expert's fees and expenses: CPR 35.8(5). Before a single joint expert is instructed the court may limit the amount that can be paid by way of fees and expenses to the expert: see CPR 35.8(4)(a); and PARA 847.

15 A person who fails to attend before an examiner or who refuses to be sworn for the purposes of the examination or to answer any lawful question or produce any document at the examination may be ordered to pay any costs resulting from his failure or refusal: see CPR 34.10(4); and PARA 996.

16 See PARA 994.

17 CPR 36.10, 36.11 set out the costs consequences of acceptance of a defendant's Part 36 offer: see PARAS 736-737. CPR 36.14 sets out the costs consequences where a claimant obtains a judgment more advantageous than a defendant's Part 36 offer or judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer: see PARA 740. As to the meaning of 'Part 36 offer' see PARA 730.

18 Unless the court otherwise orders (and excluding claims allocated to the small claims track), a claimant who discontinues is liable for the costs which a defendant against whom he discontinues incurred on or before the date on which notice of discontinuance was served on him: CPR 38.6(1). If the proceedings are only partly discontinued the claimant is liable for costs relating only to the parts of the proceedings which he is discontinuing: CPR 38.6(2). See also eg *Ansol Ltd v Taylor Joynson Garrett (a firm)* [2002] EWHC 1000 (Ch), [2002] All ER (D) 44 (Jan); *Slater Ellison v Law Society* [2002] All ER (D) 335 (Feb); and see further PARA 727.

19 See PARA 1773 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(1) INTRODUCTION/(iii) Costs under the Civil Procedure Rules/1736. Relevance of previous case law.

1736. Relevance of previous case law.

The Civil Procedure Rules¹ ('CPR') are a new procedural code with the overriding objective of enabling the court to deal with cases justly². Being a new procedural code, the CPR are not to be taken as embodying or taking on board the case law which developed under the former regime of the costs rules contained in Order 62 of the Rules of the Supreme Court³ or Order 38 of the County Court Rules⁴. Generally speaking, although there will undoubtedly be some exceptions, most of the procedural cases decided under the Rules of the Supreme Court or the County Court Rules will not be applied, but are, at most, only persuasive in interpreting and giving effect to the new provisions⁵. Caution therefore needs to be exercised when seeking to apply the old case law to the new costs rules.

1 As to the Civil Procedure Rules see PARAS 30, 1734.

2 As to the overriding objective see PARA 33.

3 Ie RSC Ord 62 (revoked).

4 Ie CCR Ord 38 (revoked).

5 In determining whether or not it was appropriate to award costs on the indemnity basis rather than the standard basis (see PARA 1747) the court is not constrained by the pre-CPR case law: *Reid Minty (a firm) v Taylor* [2001] EWCA Civ 1723, [2002] 2 All ER 150, [2001] All ER (D) 427 (Oct); explained in *Kiam v MGN Ltd (No 2)* [2002] EWCA Civ 66, [2002] 2 All ER 242, [2002] All ER (D) 65 (Feb) (although conduct, falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs, such conduct needs to be unreasonable to a high degree, not merely wrong or misguided in hindsight. It is not to be understood that under the CPR it is now generally appropriate to condemn in indemnity costs those who decline reasonable settlement offers). In the context of the application of the 'costs follow the event' principle the courts have tended to pay some regard to but not apply the rigidity of the former case law embodied in cases such as *Re Elgindata Ltd (No 2)* [1993] 1 All ER 232, [1992] 1 WLR 1207, CA, with a view to encouraging greater flexibility in the exercise of the court's discretion than was the case pre-CPR: *Phonographic Performance Ltd v AEI Rediffusion Music Ltd* [1999] 2 All ER 299, sub nom *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507, CA; *Harrison v Bloom Camillin (a firm) (No 2)* (4 February 2000, unreported on this point) per Neuberger J (subsequent proceedings [2000] All ER (D) 168); *DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH v Koshy* [2001] EWCA Civ 79, [2001] 3 All ER 878. See also PARA 33 note 2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(i) Introduction/1737. Scope of Part 44 of the Civil Procedure Rules.

(2) GENERAL RULES ABOUT COSTS

(i) Introduction

1737. Scope of Part 44 of the Civil Procedure Rules.

Part 44 of the Civil Procedure Rules¹ contains general rules about costs², entitlement to costs and orders in respect of pro bono representation³. The rules are supplemented by a practice direction⁴.

Part 44 does not apply to the assessment of costs in proceedings to the extent that the Access to Justice Act 1999⁵ and provisions made under that Act, or regulations made under the Legal Aid Act 1988⁶, make different provision⁷.

1 Ie CPR Pt 44: see PARA 1737 et seq.

2 As to the meaning of 'costs' see PARA 1730.

3 CPR 44.1. As to the meaning of 'pro bono representation' see PARA 611 note 20.

4 See *Practice Direction about Costs* PD 43-48, Sections 1-6 of which supplement CPR Pt 43 (definitions etc) and Sections 7-23 of which supplement CPR Pt 44; and see PARA 1737 et seq.

5 Ie the Access to Justice Act 1999 s 11 (costs in cases funded by the Legal Services Commission): see PARA 1814; and **LEGAL AID**.

6 Ie regulations made under the Legal Aid Act 1988 (repealed subject to transitional provisions, and the regulations made thereunder likewise revoked): see generally **LEGAL AID**.

7 CPR 44.17. See further *Practice Direction about Costs* PD 43-48 Section 21; and PARA 1814. See *Re B (Detailed Assessment of Costs)*[2005] EWCA Civ 779, [2005] All ER (D) 409 (May).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(i) Introduction/1738. Court's discretion; in general.

1738. Court's discretion; in general.

The court¹ has discretion as to whether costs² are payable by one party to another³, the amount of those costs⁴ and when they are to be paid⁵. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him⁶, and the court has an absolute and unfettered discretion to award or not to award them⁷. This discretion must be exercised judicially⁸; it must not be exercised arbitrarily but in accordance with reason and justice⁹.

If the court decides to make an order about costs the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party¹⁰; but the court may make a different order¹¹. The general rule does not apply to (1) family proceedings and proceedings in the Family Division¹²; (2) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division¹³; or (3) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings¹⁴.

The court may make an order about costs at any stage in a case¹⁵. In particular, it may make an order about costs when it deals with any application, makes any order or holds any hearing and that order about costs may relate to the costs of that application, order or hearing¹⁶. The court may also make an order for an estimate of base costs to be filed and served¹⁷.

In exceptional circumstances, the court has power to review a costs order it has made before the order is sealed¹⁸.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'costs' see PARA 1730.

3 CPR 44.3(1)(a).

4 CPR 44.3(1)(b). Where the court orders a party to pay costs to another party other than fixed costs it may either make a summary assessment of the costs or order a detailed assessment of the costs: see CPR 44.7; and PARA 1751. As to the meaning of 'fixed costs' see PARA 1730 text and notes 6-7; and as to the meaning of 'summary assessment' and 'detailed assessment' see PARA 1734; as to summary assessment see PARA 1752; and as to detailed assessment see PARA 1779 et seq.

5 CPR 44.3(1)(c). On an appeal as to costs, the court is generally very reluctant to interfere with the judge's discretion, particularly if to do so would result in satellite litigation at the interlocutory stage: *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, [2009] All ER (D) 14 (Mar).

Unless otherwise ordered costs become payable within 14 days of the date of judgment or order if it states the amount of those costs: see CPR 44.8; and PARA 1758. The general rule is that the costs of any proceedings or any part of the proceedings are not to be assessed by the detailed assessment procedure until the conclusion of the proceedings but the court may order them to be assessed immediately: see CPR 47.1; and PARA 1779. Where costs are subject to an order for detailed assessment the court may order a payment on account of costs pending the detailed assessment: see CPR 44.3(8); and PARA 1741 text and note 11. As to the court's discretion see also the Supreme Court Act 1981 s 51(1); and PARA 1732. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. In earlier days, before the Supreme Court of Judicature Act 1873 (repealed), the rule as to costs differed between the courts of equity, where the costs were in the discretion of the judge, and the common law courts, where, with complicated statutory exceptions, the costs followed the event: see *Garnett v Bradley* (1878) 3 App Cas 944, HL.

6 The parties may enter into a binding agreement beforehand as to costs: *Mansfield v Robinson* [1928] 2 KB 353. The right of a party to apply for an order for costs which the judge may or may not make is not a thing in

action within the meaning of the Law of Property Act 1925 s 136(1): see *Re Marly Laboratory Ltd's Application* [1952] 1 All ER 1057, (1952) 96 Sol Jo 261, CA; and **CHOSÉS IN ACTION** vol 13 (2009) PARA 75.

7 *Donald Campbell & Co Ltd v Pollak* [1927] AC 732, HL; *Jones v McKie and Mersey Docks and Harbour Board* [1964] 2 All ER 842, [1964] 1 WLR 960, CA.

8 *Donald Campbell & Co Ltd v Pollak* [1927] AC 732, HL; *Jones v McKie and Mersey Docks and Harbour Board* [1964] 2 All ER 842, [1964] 1 WLR 960, CA. The discretion is not exercised judicially where costs are ordered against a party who has been completely successful and is guiltless of any misconduct (*Kierson v Joseph L Thompson & Sons Ltd* [1913] 1 KB 587, CA; *Higgins v L Higgins & Co* [1916] 1 KB 640, CA) or where the exercise of the discretion is based on considerations wholly irrelevant to the determination of the question as to the incidence of costs (*Baylis Baxter Ltd v Sabath* [1958] 2 All ER 209, [1958] 1 WLR 529, CA; *Jones v McKie and Mersey Docks and Harbour Board* [1964] 2 All ER 842, [1964] 1 WLR 960, CA). The fact that the exercise of the discretion in a particular way would relieve the taxpayer as against the person in whose favour the order for costs was made is an irrelevant consideration: *Howell v Howell* [1953] 2 All ER 628, [1953] 1 WLR 1024, CA. As to the caution to be exercised in applying pre-CPR authorities see PARAS 33 text and note 2, 1736.

9 *Ottway v Jones* [1955] 2 All ER 585, [1955] 1 WLR 706, CA; *Bourne v Stanbridge* [1965] 1 All ER 241, [1965] 1 WLR 189, CA (overruled on other grounds by *Hobbs v Marlowe* [1978] AC 16, [1977] 2 All ER 241, HL). The principles of reason and justice clearly demand that a claimant who embarks on a piece of fruitless litigation should not be entitled to his costs as of right: see *Bourne v Stanbridge* [1965] 1 All ER 241 at 247, [1965] 1 WLR 189 at 198, CA, per Salmon LJ, approved in *Hobbs v Marlowe* [1978] AC 16, [1977] 2 All ER 241, HL, per Lord Elwyn-Jones LC. In *SCT Finance Ltd v John Bolton* [2002] EWCA Civ 56, [2002] All ER (D) 75 (Jan), it was held that the judge at first instance had erred in the exercise of his discretion when placing a cap on the claimant's costs to be assessed on the standard basis. Judges must ensure that their reasons for costs orders are clear: *Lavelle v Lavelle* [2004] EWCA Civ 223, [2004] 2 FCR 418. See also *Re B (indemnity) (costs)* [2007] EWCA Civ 921, [2008] 2 FCR 327 (order inappropriate where judge had not received medical certificate and letter explaining person's absence from court in family proceedings).

10 CPR 44.3(2)(a). This rule preserves the general rule that the unsuccessful party will be ordered to pay the costs of the successful party. However, generality of the rule enables flexibility in the approach to the determination of liabilities for costs: *Phonographic Performance Ltd v AEI Rediffusion Music Ltd* [1999] 2 All ER 299, sub nom *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507, CA. The rule in *Re Elgindata Ltd (No 2)* [1993] 1 All ER 232, [1992] 1 WLR 1207, CA, that a successful party should not be deprived of the costs of pursuing unsuccessful issues provided that they were reasonably and properly brought is to be applied with great caution: *Harrison v Bloom Camillin (a firm) (No 2)* (4 February 2000, unreported on this point), per Neuberger J (subsequent proceedings [2000] All ER (D) 168). As a consequence of authorities since the decision of *Re Elgindata Ltd (No 2)* [1993] 1 All ER 232, [1992] 1 WLR 1207, CA, it is no longer necessary for the court to be satisfied that a successful party had acted unreasonably or improperly by raising an issue in order to deprive it of its costs and order it to pay the unsuccessful party's costs of that particular issue: *Summit Property Ltd v Pitmans (a firm)* [2001] EWCA Civ 2020, [2002] CPLR 97; *Johnsey Estates (1990) Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 535, [2001] 2 EGLR 128, [2001] All ER (D) 135 (Apr). Where a claimant and defendant both succeeded on their claim and counterclaim though the claimant was the overall winner, a judge could award the successful claimant his costs or a proportion thereof to reflect the issues involved: *Universal Cycles plc v Grangebriar Ltd* (9 February 2000, unreported), CA, per Lord Woolf MR. The provisions of CPR 44.3 enable the court to do greater justice in a case where a successful party has caused an unsuccessful party to incur costs on an issue which later fails: *Winter v Winter* [2000] All ER (D) 1791, CA. There is a distinction between cases brought for injunctive relief for its own sake and cases which concern a true commercial issue: *Tameres (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* [2007] All ER (D) 257 (Nov), CA. In a probate claim where a defendant has in his defence given notice that he requires the will to be proved in solemn form, the court will not make an order for costs against the defendant unless it appears that there was no reasonable ground for opposing the will: *Practice Direction about Costs* PD 43-48 para 8.2.

The starting point is the same in judicial review proceedings as in other types of cases: *R (on the application of Smeaton) v Secretary of State for Health (No 2)* [2002] 2 FLR 146, [2002] All ER (D) 147 (May) per Munby J.

11 CPR 44.3(2)(b); and see note 10.

12 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.27; and PARA 1734 note 13. See also *Q v Q (Costs: Summary Assessment)* [2002] 2 FLR 668 (summary assessment of costs in family proceedings).

13 CPR 44.3(3)(a).

14 CPR 44.3(3)(b). See also note 10.

15 *Practice Direction about Costs* PD 43-48 para 8.3(1).

16 *Practice Direction about Costs* PD 43-48 para 8.3(2). See also, however, CPR 44.3A(1); and PARA 1833.

17 See PARA 1740.

18 See *South Coast Investments Ltd v Axisa* [2002] All ER (D) 123 (Jan) per Jacob J.

UPDATE

1738 Court's discretion; in general

NOTE 9--See also *R (on the application of Mendes) v Southwark LBC* [2009] All ER (D) 231 (Mar), CA.

NOTE 10--See also *Buildability Ltd v O'Donnell Developments Ltd* [2009] EWHC 3196 (TCC), [2010] BLR 122, [2009] All ER (D) 135 (Dec); *Sulaman v Axa Insurance plc* [2009] EWCA Civ 1331, [2009] All ER (D) 116 (Dec) (judge entitled to make order depriving successful party of some part of costs otherwise recoverable because of lies told during trial).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(i) Introduction/1739. Circumstances to be taken into account when exercising court's discretion.

1739. Circumstances to be taken into account when exercising court's discretion.

In deciding what order (if any) to make about costs¹, the court² must have regard to all the circumstances, including:

- 1300 (1) the conduct of all the parties³;
- 1301 (2) whether a party has succeeded on part of his case, even if he has not been wholly successful⁴; and
- 1302 (3) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention and which is not an offer to which costs consequences under Part 36⁵ apply⁶.

The conduct of the parties includes: (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction on Pre-Action Conduct or any relevant pre-action protocol⁷; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue⁸; (c) the manner in which a party has pursued or defended his case or a particular allegation or issue⁹; and (d) whether a claimant¹⁰ who has succeeded in his claim, in whole or in part, exaggerated his claim¹¹.

1 As to the meaning of 'costs' see PARA 1730.

2 As to the meaning of 'court' see PARA 22.

3 CPR 44.3(4)(a); and see heads (a)-(d) in the text. Where a party succeeds on some issues, fails on others and abandoned others, it is open to the court to award that party a proportion of the costs but in respect of the abandoned issues these are to be left to the costs judge to reduce on assessment: *Shirley v Caswell* [2000] Lloyd's Rep PN 955, [2000] All ER (D) 807, CA. Parties and their lawyers must ensure that they are aware that it is one of their duties to fully consider alternative dispute resolution ('ADR'), especially when the court has suggested it, and not merely to turn it down flatly which may place the party doing so at risk of adverse consequences in costs: *Dunnett v Railtrack plc (in railway administration)* [2002] EWCA Civ 302, [2002] All ER (D) 314 (Feb). See also *Hurst v Leeming* [2002] EWHC 1051 (Ch), [2003] 1 Lloyd's Rep 379, [2002] All ER (D) 135 (May) (professional negligence claim; critical factor was whether the defendant had taken an objective view that mediation had no reasonable prospect of success, as a party could refuse mediation on those grounds).

Refusal of a settlement offer will rarely attract an order for costs on an indemnity basis: *Kiam v MGN Ltd (No 2)* [2002] EWCA Civ 66, [2002] 2 All ER 242. When a court is considering depriving a successful litigant of some or all of his costs on the basis that he has failed to participate in alternative dispute resolution, it has to be borne in mind that this is an exception to the general rule that costs follow the event: *Halsey v Milton Keynes General NHS Trust*, *Steel v Joy* [2004] EWCA Civ 576, [2004] 4 All ER 920 (see also *Seventh Earl of Malmesbury v Strutt and Parker* [2008] EWHC 424 (QB), (2008) 118 ConLR 68 (party who agreed to mediation, but caused mediation to fail because of his unreasonable position was in the same position as a party who refused to mediate)). The court may not order the disclosure of without prejudice negotiations even though in the absence of such disclosure the court may be unable to determine whether one party unreasonably refused mediation: *Reed Executive plc v Reed Business Information Ltd (No 2)* [2004] EWCA Civ 887, [2004] 4 All ER 942. A judge is not obliged to make an issue-based costs order where parties provide imprecise information on an issue and a percentage-based order is practicable: *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125, (2002) Times, 9 September. A party wishing to raise the conduct of the other party must do so before the judge making the costs order rather than at the detailed assessment: *Aaron v Shelton* [2004] EWHC 1162 (QB), [2004] 3 All ER 561. There is no general rule that a losing party who can establish dishonesty has to receive all his costs of establishing such dishonesty, however disproportionate those costs may be: *Ultraframe (UK) Ltd v Fielding* [2006] EWCA Civ 1660, [2007] 2 All ER 983, [2006] All ER (D) 81 (Dec).

Misconduct that was part of a transaction giving rise to the litigation is irrelevant to the issue of costs: *Hall v Rover Financial Services (GB) Ltd (t/a Land Rover Financial Services)* [2002] EWCA Civ 1514, [2002] All ER (D) 129 (Oct).

4 CPR 44.3(4)(b). Under this rule the reasonableness of the party taking a particular point is not necessarily relevant; the rule is distinct from the provisions relating to conduct under CPR 44.3(5): *Stocznia Gdanska SA v Latvian Shipping Co* (2001) Times, 25 May, Thomas J, disagreeing with Rimer J in *DEG-Deutsche Investitions und Entwicklungsgesellschaft MBH v Koshy* (2001) Times, 20 February (revsd [2001] EWCA Civ 79, [2001] 3 All ER 878). The surest indication of success and failure in commercial litigation is which party has to pay money to the other: see *AL Barnes Ltd v Time Talk (UK) Ltd* [2003] EWCA Civ 402, [2003] BLR 331. An issue-by-issue approach to the case should not be applied rigorously; a judge should stand back from the mathematical result of such an approach and ask himself whether, in all the circumstances of the case, it is the right result: *Kastor Navigation Co Ltd v AGF MAT* [2004] EWCA Civ 277, [2005] 2 All ER (Comm) 720. See also *West (t/a Eastenders) v Fuller Smith & Turner plc* [2003] EWCA Civ 429, [2004] FSR 692 (case raised distinct issues; appropriate to apportion costs on issue-by-issue basis); followed in *Kavanagh Balloons Pty Ltd v Cameron Balloons Ltd* [2003] EWCA Civ 1952, [2004] FSR 698. See also *Smithkline Beecham plc v Apotex Europe Ltd (No 2)* [2004] EWCA Civ 1703, [2005] FSR 559 (general rules as to costs applied as much to patent actions as to any other action); *Devon County Council v Clarke* [2005] EWCA Civ 266, [2005] 1 FCR 752, sub nom *Clark v Devon County Council* [2005] 2 FLR 747 (claimant alleged duty of care owed by five of defendant's employees, but claim succeeded only in respect of one; order for full costs not appropriate); and *Rambus Inc v Hynix Semiconductor UK Ltd* [2004] EWHC 2313 (Pat), [2005] FSR 417 (court should be slow to deprive successful party of costs of an issue because nature of defeat went to some fundamental element which could be related only to some issues).

5 As to the costs consequences under CPR Pt 36 see PARAS 736-737, 740.

6 CPR 44.3(4)(c). There are compelling reasons why offers of monetary settlement should be made by way of Part 36 payments rather than by written offers (*Amber v Stacey* [2001] 2 All ER 88, [2001] 1 WLR 1225, CA) but see note 5; and see eg *Neave v Neave (No 2)* [2002] EWHC 966 (QB), [2002] All ER (D) 211 (May). The refusal of a settlement offer will rarely attract an adverse order for costs on an indemnity basis rather than a standard basis: *Kiam v MGN Ltd (No 2)* [2002] EWCA Civ 66, [2002] 2 All ER 242, [2002] All ER (D) 65 (Feb). There is no general principle that a claimant would be the successful party in terms of costs where he accepted a Part 36 payment after the expiry of the time limit for acceptance following a significant amendment to the defence case based on information always known to the defendant: *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions* [2002] EWCA Civ 22, [2002] 2 All ER 838. The court is entitled to take into account non-disclosure or lack of proper disclosure which prevented a party from properly assessing whether to make or accept a Part 36 offer: *Ford v GKR Construction Ltd* [2000] 1 All ER 802, [2000] 1 WLR 1397, CA. CPR Pt 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part: see PARA 730 et seq. In deciding what order to make about costs the court is required to have regard to all the circumstances including any payment into court or admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under CPR Pt 36 apply: see *Practice Direction about Costs* PD 43-48 para 8.4.

Although waiting until expert evidence has been exchanged or until the experts have met and discussed the matters upon which they are agreed or remain in disagreement may be understandable from a claimant's point of view because the strengths and weaknesses of the respective cases of the parties may be much clearer than when a Part 36 payment into court was made, it is only in a very exceptional case that the judge will be justified in not making the usual order for costs in favour of the defendant on an application by the claimant for permission to take out money paid in court after the 21-day period for acceptance under CPR 36 (see PARA 729 et seq): *Plymouth and Torbay Health Authority v Glanfield* [2002] All ER (D) 313 (Mar). Even though a claimant beats a payment in, the court is still required to consider the conduct of all the parties, including whether the claimant exaggerated his claim: *Painting v University of Oxford* [2005] EWCA Civ 161, [2005] PIQR Q77. Until the court knows how generous or otherwise a payment in is, it will not normally be fair to exercise a discretion in relation to costs: *HSS Hire Services Group plc v BMB Builders Merchants Ltd* [2005] EWCA Civ 636, [2005] 3 All ER 486, [2005] 1 WLR 3158.

7 CPR 44.3(5)(a). As to the meaning of 'pre-action protocol' see PARA 13. Where a successful defendant is a substantial public body, and has unreasonably refused to negotiate a settlement, the court can make a costs order partly in favour of an unsuccessful claimant: *Daniels v Metropolitan Police Comr* [2005] All ER (D) 225 (Oct), (2005) Times, 28 October.

8 CPR 44.3(5)(b). See *Cantor Gaming Ltd v Gameaccount Global Ltd* [2007] EWHC 1914 (Ch), [2008] FSR 83 (infringement of copyright admitted; copyright owner entitled to reasonable and proportionate costs of verifying no further infringement took place).

9 CPR 44.3(5)(c).

10 As to the meaning of 'claimant' see PARA 18.

11 CPR 44.3(5)(d). In a claim for damages for personal injury where a claimant had deceived the court by exaggerating the extent of his injuries the court awarded the defendant the whole of its costs: *Molloy v Shell UK Ltd* [2001] EWCA Civ 1272, [2002] PIQR P7, [2001] All ER (D) 79 (Jul). The court will examine the circumstances of each case when determining whether a claim has been exaggerated: *Quorum A/S v Schramm (No 2)* [2002] 2 All ER (Comm) 179. See also *Painting v University of Oxford* [2005] EWCA Civ 161, [2005] PIQR Q77. See *Business Environment Bow Lane v Deanwater Estates Ltd* [2008] EWHC 2003 (TCC), [2008] All ER (D) 78 (Oct) (claimant ordered to pay defendant's costs after finding claimant made exaggerated dilapidation claim for works which were never carried out).

UPDATE

1739 Circumstances to be taken into account when exercising court's discretion

NOTE 8--A party successfully resisting a claim of fraud cannot automatically expect to recover all of its costs; the judge must take into account all the circumstances, including the conduct of the parties: *Cheltenham BC v Laird* [2010] All ER (D) 50 (Feb), CA.

NOTE 11--See *Business Environment Bow Lane v Deanwater Estates Ltd* [2009] EWHC 2014 (Ch), [2009] All ER (D) 363 (Jul) (costs of hearing preliminary issue not reduced to nil where claim turned out to be exaggerated).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(i) Introduction/1740. Costs estimates.

1740. Costs estimates.

The court¹ may, at any stage in a case, order any party to file² an estimate of base costs³ and to serve⁴ copies of the estimate on all other parties⁵. The court may direct that the estimate be prepared in such a way as to demonstrate the likely effects of giving or not giving a particular case management direction which the court is considering, for example a direction for a split trial or for the trial of a preliminary issue. The court may specify a time limit for filing and serving the estimate; if no time limit is specified the estimate must be filed and served within 28 days of the date of the order⁶. An estimate of base costs must also be filed and a copy served on every other party (1) when a party to a claim which is outside the financial scope of the small claims track⁷ files an allocation questionnaire⁸; and (2) where a party to a claim which is being dealt with on the fast track⁹ or on the multi-track¹⁰, or under the alternative procedure for claims under Part 8 of the Civil Procedure Rules¹¹, files a pre-trial checklist (listing questionnaire)¹², unless the court otherwise directs¹³ or unless the party in question is a litigant in person¹⁴.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 'Estimate of costs' means: (1) an estimate of costs of (a) base costs (including disbursements) already incurred; and (b) base costs (including disbursements) to be incurred, which a party, if successful in the proceedings, intends to seek to recover from any other party under an order for costs; or (2) in proceedings where the party has pro bono representation and intends, if successful in the proceedings, to seek an order under the Legal Services Act 2007 s 194(3) (see PARA 1824), an estimate of the sum equivalent to (a) the base costs (including disbursements) that the party would have already incurred had the legal representation provided to that party not been free of charge; and (b) the base costs (including disbursements) that the party would incur if the legal representation to be provided to that party were not free of charge: *Practice Direction about Costs* PD 43-48 para 6.2(1). 'Base costs' means costs other than the amount of any additional liability under a funding arrangement: para 2.2. As to the meaning of 'pro bono representation' see PARA 611 note 20. As to funding arrangements see PARA 1830 et seq. A party who intends to recover an additional liability (defined in CPR 43.2: see PARA 1830 note 20) need not reveal the amount of that liability in the estimate: *Practice Direction about Costs* PD 43-48 para 6.2(2).

4 As to the meaning of 'service' see PARA 138 note 2. As to service of documents generally see PARA 138 et seq.

5 *Practice Direction about Costs* PD 43-48 para 6.3. The estimate must be substantially in the form illustrated in Precedent H in the Schedule of Costs Precedents annexed to *Practice Direction about Costs* PD 43-48: para 6.5.

6 *Practice Direction about Costs* PD 43-48 para 6.3. As to the court's general powers to extend or shorten the time for compliance with rules and practice directions see PARA 249.

7 The normal financial scope of the small claims track is £5,000: see PARA 267.

8 *Practice Direction about Costs* PD 43-48 para 6.4(1). As to allocation questionnaires see PARA 263. The legal representative must in addition serve an estimate upon the party he represents: para 6.4(1). As to the meaning of 'legal representative' see PARA 1833 note 13.

9 As to the fast track see PARAS 268, 286 et seq.

10 As to the multi-track see PARAS 269, 293 et seq.

11 As to the Part 8 procedure see PARA 127 et seq.

- 12 As to pre-trial check list (listing questionnaires) see PARAS 290, 299.
- 13 *Practice Direction about Costs* PD 43-48 para 6.4(1), (2).
- 14 *Practice Direction about Costs* PD 43-48 para 6.4(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(i) Introduction/1741. Orders which the court may make.

1741. Orders which the court may make.

The orders which the court¹ may make² include an order that a party must pay:

- 1303 (1) a proportion of another party's costs³;
- 1304 (2) a stated amount in respect of another party's costs⁴;
- 1305 (3) costs from or until a certain date only⁵;
- 1306 (4) costs incurred before proceedings have begun⁶;
- 1307 (5) costs relating to particular steps taken in the proceedings⁷;
- 1308 (6) costs relating only to a distinct part of the proceedings⁸; and
- 1309 (7) interest on costs from or until a certain date, including a date before judgment⁹.

Where the court would otherwise consider making an order under head (6) above, it must instead, if practicable, make an order under head (1) or head (3) above¹⁰.

Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed¹¹. Where a party entitled to costs is also liable to pay costs, the court may assess the costs which that party is liable to pay and either set off the amount assessed against the amount the party is entitled to be paid and direct him to pay any balance¹² or delay the issue of a certificate for the costs to which the party is entitled until he has paid the amount which he is liable to pay¹³.

¹ As to the meaning of 'court' see PARA 22.

² In the exercise of its discretion under CPR 44.3: see PARA 1739.

³ CPR 44.3(6)(a). As to the meaning of 'costs' see PARA 1730.

⁴ CPR 44.3(6)(b).

⁵ CPR 44.3(6)(c).

⁶ CPR 44.3(6)(d).

⁷ CPR 44.3(6)(e).

⁸ CPR 44.3(6)(f).

⁹ CPR 44.3(6)(g). As to interest on costs see further PARA 1759. Circumstances that depart from the norm in a significant way or to a significant extent are necessary for a court to award interest on costs before judgment; factors which lead to an award of indemnity costs would make the case exceptional: *Rambus Inc v Hynix Semiconductor UK Ltd* [2004] EWHC 2313 (Pat), [2005] FSR 417.

¹⁰ CPR 44.3(7); and see eg *Humphreys v Cedef Assets Ltd* [2002] All ER (D) 46 (Mar); *Burchell v Bullard* [2005] EWCA Civ 358, [2005] BLR 330.

¹¹ CPR 44.3(8). The court should ordinarily make an order for payment on account of moneys that a party would almost certainly collect: *Mars UK Ltd v Tecknowledge Ltd (No 2)* [1999] IP & T 26, [1999] 2 Costs LR 44 per Jacob J (distinguished in *Dyson Ltd v Hoover Ltd* [2003] EWHC 624 (Ch), [2003] 2 All ER 1042, sub nom *Dyson Ltd v Hoover Ltd* (No 4) [2004] 1 WLR 1264 (order for interim payment of costs refused where court had limited knowledge of case issues and evidence)). See also *Nabila Kamal Soliman v Islington London Borough Council* (16 July 2001, unreported), QBD. Cf *Rambus Inc v Hynix Semiconductor UK Ltd* [2004] EWHC 2313 (Pat),

[2005] FSR 417 (if reason court has less knowledge of issues is that party has won elsewhere and hence trial is unnecessary, anomalous to refuse interim payment). Where the court orders an amount to be paid before costs are assessed the order will state that amount and, if no other date for payment is specified in the order, CPR 44.8 (time for complying with orders: see PARA 1758) will apply: *Practice Direction about Costs* PD 43-48 para 8.6.

12 CPR 44.3(9)(a).

13 CPR 44.3(9)(b).

UPDATE

1741 Orders which the court may make

NOTE 11--See also *German Property 50 SARL v Summers-Inman Construction and Property Consultants LLP* [2009] EWHC 2968 (TCC), (2009) 128 ConLR 85.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(i) Introduction/1742. Costs orders in interim proceedings and applications.

1742. Costs orders in interim proceedings and applications.

There are certain costs orders which the court¹ will commonly make in proceedings before trial². They include the following:

- 1310 (1) an order for costs³ or for costs in any event: the effect of such an order is that the party in whose favour the order is made is entitled to the costs in respect of the part of the proceedings to which the order relates, whatever other costs orders are made in the proceedings;
- 1311 (2) an order for costs in the case or costs in the application: the effect of such an order is that the party in whose favour the court makes an order for costs at the end of the proceedings is entitled to his costs of the part of the proceedings to which the order relates;
- 1312 (3) an order that costs be reserved: the effect of such an order is that the decision about costs is deferred to a later occasion, but if no later order is made the costs will be costs in the case;
- 1313 (4) an order for claimant's⁴ or defendant's⁵ costs in the case or application: the effect of such an order is that if the party in whose favour the costs order is made is awarded costs at the end of the proceedings, that party is entitled to his costs of the part of the proceedings to which the order relates. If any other party is awarded costs at the end of the proceedings, the party in whose favour the final costs order is made is not liable to pay the costs of any other party in respect of the part of the proceedings to which the order relates;
- 1314 (5) an order for costs thrown away: the effect of such an order is that where, for example, a judgment or order is set aside, the party in whose favour the costs order is made is entitled to the costs which have been incurred as a consequence⁶;
- 1315 (6) an order for costs of and caused by: the effect of such an order is that where, for example, the court makes this order on an application to amend a statement of case⁷, the party in whose favour the costs order is made is entitled to the costs of preparing for and attending the application and the costs of any consequential amendment to his own statement of case;
- 1316 (7) an order for costs here and below: the effect of such an order is that the party in whose favour the costs order is made is entitled not only to his costs in respect of the proceedings in which the court makes the order but also to his costs of the proceedings in any lower court. In the case of an appeal from a Divisional Court⁸, however, the party is not entitled to any costs incurred in any court below the Divisional Court;
- 1317 (8) no order as to costs, in which case each party is to bear his own costs of the part of the proceedings to which the order relates whatever costs order the court makes at the end of the proceedings; and
- 1318 (9) an order that each party is to pay his own costs: as to the effect of such an order see head (8) above⁹.

The court has the power to make an order as to costs where a matter has been resolved without a trial and in making such an order, the following considerations may be of assistance: (a) it is irrelevant whether a party was legally aided¹⁰ or not; (b) the overriding objective¹¹ is to do justice between the parties without incurring unnecessary court time and additional cost; (c)

it will sometimes be obvious which party, absent the settlement, would have won, although where it is not, how far the court will look into previously unresolved substantive issues will depend on the circumstances of the case, including the amount of costs at stake and the conduct of the parties; and (d) the fall back position will be to make no order as to costs¹².

1 As to the meaning of 'court' see PARA 22.

2 See *Practice Direction about Costs* PD 43-48 para 8.5. As to proceedings before trial see PARAS 111-115 (pre-action disclosure etc), 213-218 (change of parties), 246 et seq (case management, progress of proceedings and applications and interim proceedings and remedies).

3 As to the meaning of 'costs' see PARA 1730.

4 As to the meaning of 'claimant' see PARA 18. Where a claimant ceased to trade before the trial of the substantive claim and assigned its equitable right to the interim relief which it had obtained, it was not to be deprived of its costs for making the applications for search orders and injunctive relief, but such costs were only to be assessed up to the date when it ceased to trade: *Harrison (Logistics) Ltd (in liquidation) v Global Freight International Ltd* [2002] All ER (D) 135 (Apr).

5 As to the meaning of 'defendant' see PARA 18.

6 This includes the costs of (1) preparing for and attending any hearing at which the judgment or order which has been set aside was made; (2) preparing for and attending any hearing to set aside the judgment or order in question; (3) preparing for and attending any hearing at which the court orders the proceedings or the part in question to be adjourned; and (4) any steps taken to enforce a judgment or order which has subsequently been set aside: see *Practice Direction about Costs* PD 43-48 para 8.5, Table. As to the meaning of 'set aside' see PARA 197 note 6.

7 As to the meaning of 'statement of case' see PARA 584; and as to statements of case see further PARA 584 et seq.

8 As to Divisional Courts see **COURTS** vol 10 (Reissue) PARA 605.

9 *Practice Direction about Costs* PD 43-48 para 8.5, Table.

10 As to legal aid and funding by the Legal Services Commission see generally **LEGAL AID**.

11 As to the overriding objective see CPR 1.1(1); and PARA 33.

12 See *Brawley v Marczyński* [2002] EWCA Civ 756, [2002] 4 All ER 1060. Unless the court is satisfied that it has a proper basis for agreed or determined facts on which it can make an order as to costs, it has to accept that it is not in a position to make such an order: *BCT Software Solutions Ltd v C Brewer & Sons Ltd* [2003] EWCA Civ 939, [2004] FSR 150; *Promar International Ltd v Clarke* [2006] EWCA Civ 332, [2006] All ER (D) 35 (Apr).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(i) Introduction/1743. Cost-capping orders.

1743. Cost-capping orders.

A costs capping order is an order limiting the amount of future costs¹ (including disbursements) which a party may recover pursuant to an order for costs subsequently made². A costs capping order may be made in respect of the whole litigation or any issues which are ordered to be tried separately³, and the court⁴ may at any stage of proceedings make a costs capping order against all or any of the parties if: (1) it is in the interests of justice to do so; (2) there is a substantial risk that without such an order costs will be disproportionately incurred; and (3) it is not satisfied that the risk in head (2) can be adequately controlled by case management directions or orders⁵ and detailed assessment of costs⁶. In considering whether to exercise its discretion under these provisions, the court will consider all the circumstances of the case, including: (a) whether there is a substantial imbalance between the financial position of the parties; (b) whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation; (c) the stage which the proceedings have reached; and (d) the costs which have been incurred to date and the future costs⁷.

A costs capping order, once made, will limit the costs recoverable by the party subject to the order unless a party successfully applies to vary the order⁸. No such variation will be made unless: (i) there has been a material and substantial change of circumstances since the date when the order was made; or (ii) there is some other compelling reason why a variation should be made⁹.

1 For these purposes, 'future costs' means costs incurred in respect of work done after the date of the costs capping order but excluding the amount of any additional liability: CPR 44.18(2). As to the meaning of 'costs' see PARA 1730.

2 CPR 44.18(1). CPR 44.18 does not apply to protective costs orders: CPR 44.18(3). As to protective costs orders see PARA 1744.

An application for a costs capping order must be made on notice in accordance with CPR Pt 23 (see PARA 303 et seq): CPR 44.19(1). The application notice must:

- 103 (1) set out: (a) whether the costs capping order is in respect of the whole of the litigation or a particular issue which is ordered to be tried separately; and (b) why a costs capping order should be made (CPR 44.19(2)(a)); and
- 104 (2) be accompanied by an estimate of costs setting out: (a) the costs (and disbursements) incurred by the applicant to date; and (b) the costs (and disbursements) which the applicant is likely to incur in the future conduct of the proceedings (CPR 44.19(2)(b)).

The court may give directions for the determination of the application, and such directions may:

- 105 (i) direct any party to the proceedings to file: (A) a schedule of costs in the form set out in the practice direction supplementing CPR 44.19; (B) written submissions on all or any part of the issues arising (CPR 44.19(3)(a));
- 106 (ii) fix the date and time estimate of the hearing of the application (CPR 44.19(3)(b));
- 107 (iii) indicate whether the judge hearing the application will sit with an assessor at the hearing of the application (CPR 44.19(3)(c));
- 108 (iv) include any further directions as the court see fit (CPR 44.19(3)(d)).

3 CPR 44.18(4).

- 4 As to the meaning of 'court' see PARA 22.
- 5 le made under CPR Pt 3: see PARA 247 et seq.
- 6 CPR 44.18(5). As to detailed assessment of costs see PARA 1779 et seq.
- 7 CPR 44.18(6).
- 8 CPR 44.18(7). An application to vary a costs capping order must be made by application notice pursuant to CPR Pt 23 (see PARA 303 et seq): CPR 44.20.
- 9 CPR 44.18(7).

UPDATE

1743 Cost-capping orders

NOTES 6, 7--See *Barr v Biffa Waste Services Ltd* [2009] EWHC 2444 (TCC), [2009] All ER (D) 176 (Oct).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(i) Introduction/1744. Protective costs orders.

1744. Protective costs orders.

The court's¹ wide discretion in exercising its power to make orders relating to costs² extends to the making of protective costs orders³. The general purpose of a protective costs order is to allow a claimant of limited means access to the court to advance his case without the fear of an order for substantial costs being made against him⁴. The governing principles in relation to the making of protective costs orders are:

- 1319 (1) an order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
- 41
- 105. (a) the issues raised are of general public importance⁵;
 - 106. (b) the public interest requires that those issues should be resolved;
 - 107. (c) the applicant has no private interest in the outcome of the case⁶;
 - 108. (d) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order; and
 - 109. (e) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing;
- 42
- 1320 (2) if those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a protective costs order;
- 1321 (3) it is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above⁷.

There is judicial guidance as to the procedure to be followed when an application is made for a protective costs order⁸.

1 As to the meaning of 'court' see PARA 22.

2 See PARA 1731 et seq.

3 As to protective costs orders see eg *R v Lord Chancellor, ex p Child Poverty Action Group* [1998] 2 All ER 755, [1999] 1 WLR 347; *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 4 All ER 1; *R (on the application of Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749, [2008] All ER (D) 12 (Jul); *R (on the application of Buglife, The Invertebrate Conservation Trust) v Thurock Thames Gateway Development Corp*n [2008] EWCA Civ 1209, [2008] All ER (D) 30 (Nov).

4 *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 at [6], [2005] 4 All ER 1 at [6] per Lord Phillips of Worth Matravers MR.

5 It has been said that the two tests of general public importance and the public interest in the issue being resolved are difficult to separate (*R (on the application of Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749 at [21], [2008] All ER (D) 12 (Jul) at [21] per Waller LJ), but the paragraphs are not to be read as statutory provisions nor in an over-restrictive way (*R (on the application of Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749 at [23], [2008] All ER (D) 12 (Jul) at [23] per Waller LJ; and see *R (on the application of Bullmore) v West Hertfordshire Hospitals NHS Trust* [2007] EWHC 1350 (Admin), [2007] All ER (D) 216 (May); *R (on the application of Buglife, The Invertebrate Conservation Trust) v Thurock Thames Gateway Development Corp*n [2008] EWCA Civ 1209, [2008] All ER (D) 30 (Nov)). It is open to a judge to hold that there is a public interest in resolution of the issues and that the issues are ones of general public importance: *R (on*

the application of Compton) v Wiltshire Primary Care Trust [2008] EWCA Civ 749 at [23], [2008] All ER (D) 12 (Jul) at [23] per Waller LJ.

The use of the word 'general' does not mean that the matter must be of interest to all the public nationally; whether or not an issue is of general public importance is a question of degree for the judge to resolve: see *R (on the application of Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749 at [24], [2008] All ER (D) 12 (Jul) at [24] per Waller LJ.

6 This criterion has been criticised: see eg *R (on the application of Derek England) v Tower Hamlets Borough Council* [2006] EWCA Civ 1742, [2006] All ER (D) 314 (Dec).

7 *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 at [74], [2005] 4 All ER 1 at [74] per Lord Phillips of Worth Matravers MR; and see *R v Lord Chancellor, ex p Child Poverty Action Group* [1998] 2 All ER 755, [1999] 1 WLR 347. See also *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 4 All ER 1; *R (on the application of Buglife, The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209, [2008] All ER (D) 30 (Nov).

8 See *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 at [78]-[79], [2005] 4 All ER 1 at [78]-[79] per Lord Phillips of Worth Matravers MR; and as to the procedure to be followed in the Court of Appeal see *R (on the application of Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749 at [47]-[49], [2008] All ER (D) 12 (Jul) at [47]-[49] per Waller LJ. See also *R (on the application of Buglife, The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209, [2008] All ER (D) 30 (Nov) at [29]-[36].

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(i) Introduction/1745. Solicitor's duty to notify client.

1745. Solicitor's duty to notify client.

Where the court¹ makes a costs² order against a legally represented³ party, and the party is not present when the order is made, the party's solicitor must notify his client⁴ in writing of the costs order no later than seven days after the solicitor receives notice of the order⁵. He must also explain why the order came to be made⁶.

Although no sanction for breach of this rule is specified, the court may, either in the order for costs itself or in a subsequent order, require the solicitor to produce to the court evidence showing that he took reasonable steps to comply with the rule⁷.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'costs' see PARA 1730.

3 As to the meaning of 'legal representative' see PARA 1833 note 13.

4 For these purposes 'client' includes a party for whom a solicitor is acting and any other person, eg an insurer, a trade union or the Legal Services Commission, who has instructed the solicitor to act or who is liable to pay his fees: *Practice Direction about Costs* PD 43-48 para 7.1. As to the Legal Services Commission see generally **LEGAL AID**. In the *Practice Direction about Costs* PD 43-48, 'solicitor' means a solicitor of the Supreme Court or other person with a right of audience in relation to proceedings, who is conducting the claim or defence as the case may be on behalf of a party to the proceedings and, where the context admits, includes a patent agent: para 1.4. As to rights of audience see **COURTS** vol 10 (Reissue) PARAS 331, 706; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 1109 et seq. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

5 CPR 44.2.

6 *Practice Direction about Costs* PD 43-48 para 7.2.

7 *Practice Direction about Costs* PD 43-48 para 7.3.

UPDATE

1745 Solicitor's duty to notify client

NOTE 4--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(i) Introduction/1746. Costs on the small claims track and fast track.

1746. Costs on the small claims track and fast track.

The rules as to costs¹ on the small claims track² and fast track³ contain special rules about liability for costs⁴, the amount of costs which the court⁵ may award⁶ and the procedure for assessing costs⁷. Once a claim is allocated to a particular track, those special rules apply to the period before, as well as after, allocation except where the court or a practice direction provides otherwise⁸ and save to the extent (if any) that an order for costs in respect of that work was made before allocation⁹. The rules referred to are discussed in detail elsewhere in this title¹⁰.

Before a claim is allocated to one of those tracks the court is not restricted by any of the special rules that apply to that track¹¹.

Where a claim, issued for a sum in excess of the normal financial scope of the small claims track¹², is allocated to that track only because an admission of part of the claim by the defendant¹³ reduces the amount in dispute to a sum within the normal scope of that track, then on entering judgment for the admitted part before allocation of the balance of the claim the court may allow costs in respect of the proceedings down to that date¹⁴.

Where the court assesses costs in relation to a claim which has been allocated to the fast track¹⁵ and settles before the start of the trial, and is considering the amount of costs to be allowed in respect of a party's advocate¹⁶ for preparing for the trial, it may not allow, in respect of such advocate's costs, an amount that exceeds the amount of fast track trial costs¹⁷ which would have been payable in relation to the claim had the trial taken place¹⁸. When deciding the amount to be allowed in respect of the advocate's costs, the court must have regard to when the claim was settled and when the court was notified that the claim had settled¹⁹.

1 As to the meaning of 'costs' see PARA 1730.

2 I.e. the rules as to costs contained in CPR Pt 27: see PARAS 1773-1774.

3 I.e. the rules as to costs contained in CPR Pt 46: see PARAS 1775-1778.

4 CPR 44.9(1)(a). See CPR 27.14, CPR 46.2-46.3; and PARAS 1773-1774, 1776-1777.

5 As to the meaning of 'court' see PARA 22.

6 CPR 44.9(1)(b); and see note 4.

7 CPR 44.9(1)(c); and see note 4.

8 CPR 44.9(2).

9 *Practice Direction about Costs* PD 43-48 para 15.1(2). As to allocation to track see PARA 260 et seq.

10 See PARA 1773 et seq.

11 *Practice Direction about Costs* PD 43-48 para 15.1(1).

12 The normal financial scope of the small claims track is £5,000: see PARA 267.

13 As to the meaning of 'defendant' see PARA 18.

14 *Practice Direction about Costs* PD 43-48 para 15.1(3). See also PARA 270 note 16.

- 15 As to the fast track see CPR Pt 28; and PARAS 268, 286 et seq.
- 16 As to the meaning of 'advocate' see, by virtue of CPR 44.10(3), CPR 46.1(2)(a); and PARA 1775 note 4.
- 17 As to the meaning of 'fast track trial costs' see, by virtue of CPR 44.10(3), CPR 46.1(2)(b); and PARA 1775.
- 18 CPR 44.10(1).
- 19 CPR 44.10(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(ii) Assessment of Costs/1747. Basis of assessment.

(ii) Assessment of Costs

1747. Basis of assessment.

Where the court¹ is to assess the amount of costs² (whether by summary³ or detailed assessment⁴) it will assess those costs on the standard basis or on the indemnity basis, but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount⁵. Where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue⁶ and will resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party⁷. Where the amount of costs is to be assessed on the indemnity basis⁸, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party⁹.

Where the court makes an order about costs without indicating the basis on which the costs are to be assessed or makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the costs will be assessed on the standard basis¹⁰.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'costs' see PARA 1730.

3 As to the meaning of 'summary assessment' see PARA 1734; and as to such assessment see PARA 1752.

4 As to the meaning of 'detailed assessment' see PARA 1734; and as to such assessment see PARA 1779 et seq.

5 CPR 44.4(1). Where the amount of a solicitor's remuneration in respect of non-contentious business is regulated by any general orders made under the Solicitors Act 1974 (see **LEGAL PROFESSIONS**), the amount of the costs to be allowed in respect of any such business which falls to be assessed by the court will be decided in accordance with those general orders rather than CPR 44.4 (see the text and notes 6-10) and CPR 44.5 (see PARA 1748); CPR 44.4(6). As to how the court decides the amount of costs payable under a contract see CPR 48.3; and PARA 1806.

6 CPR 44.4(2)(a). In applying the test of proportionality the court will have regard to CPR 1.1(2)(c) (dealing with a case justly in pursuance of the overriding objective: see PARA 33 head (3) in the text): *Practice Direction about Costs* PD 43-48 para 11.1. The relationship between the total costs incurred and the financial value of the claim may not be a reliable guide. A fixed percentage cannot be applied in all cases to the value of the claim in order to ascertain whether or not the costs are proportionate: para 11.1. In a modest claim the proportion of costs is likely to be higher than in a large claim, and may even equal or possibly exceed the amount in dispute: para 11.2. Proportionality is an important feature of the new costs regime: *Lownds v Home Office* [2002] EWCA Civ 365, [2002] 4 All ER 775; followed in *Mattel Inc v RSW Group plc* [2004] EWHC 1610 (Ch), [2005] FSR 38; and applied in *Simms v Law Society* [2005] EWCA Civ 849, [2005] All ER (D) 131 (Jul). It is reasonable for a libel claimant to incur significant costs to recover a modest monetary award where his reputation is vindicated by a reasoned judgment: *Rackham v Sandy* [2005] EWHC 1354 (QB), [2005] All ER (D) 326 (Jun). See also *Lahey v Pirelli Tyres Ltd* [2007] EWCA Civ 91, [2007] 1 WLR 998. As to the application of proportionality in the context of a minor personal injury claim see *Jefferson v National Freight Carriers plc* [2001] EWCA Civ 2082, [2001] All ER (D) 411 (Feb) per Woolf LC. Case management powers allow a judge to exercise the powers of limiting costs either indirectly or even directly so that they are proportionate to the amount involved: *Griffiths v Solutia UK Ltd (formerly Monsanto Chemicals Ltd)* [2001] EWCA Civ 736, [2001] All ER (D) 196 (Apr), per Sir Christopher Staughton. As to proportionality and additional liabilities see *Practice Direction about Costs* PD 43-48 paras 11.5, 11.7; and see PARAS 1833-1835.

7 CPR 44.4(2)(b). As to the meaning of 'paying party' see PARA 1836 note 14. Factors which the court may take into account are set out in CPR 44.5 (see PARA 1748): see CPR 44.4(2) note.

8 The award for costs on the indemnity basis is often, but not always, reserved to cases where the court wishes to indicate its disapproval of the conduct of the paying party. Indemnity costs may be awarded against a party whose conduct has been unreasonable, even though the conduct could not properly be regarded as lacking moral probity or deserving moral condemnation: *Reid Minty (a firm) v Taylor* [2001] EWCA Civ 1723, [2002] 2 All ER 150, [2001] All ER (D) 427 (Oct); explained in *Kiam v MGN Ltd (No 2)* [2002] EWCA Civ 66, [2002] 2 All ER 242, [2002] All ER (D) 65 (Feb). The thrust of the CPR regime is to require the parties to behave reasonably towards each other: *Baron v Lovell* [2000] PIQR P20, (1999) Times, 14 September, CA (late service of expert's report). Indemnity costs are not intended to be penal but compensatory: *Petrotrade Inc v Texaco Ltd* [2001] 4 All ER 853, [2002] 1 WLR 947, CA; *McPhilemy v Times Newspapers Ltd (No 2)* [2001] EWCA Civ 933, [2001] 4 All ER 861, [2002] 1 WLR 934. See also *Kiam v MGN Ltd (No 2)* [2002] EWCA Civ 66, [2002] 2 All ER 242, [2002] All ER (D) 65 (Feb), where it was held that the refusal of a settlement offer would rarely attract an adverse order for costs on the indemnity rather than the standard basis; *MGN Ltd v Holborn* [2002] All ER (D) 176 (Apr), where Jacob J held that the defendant had behaved unreasonably and that an award of indemnity costs was appropriate; *Craig v Railtrack plc (in railway administration)* [2002] EWHC 168 (QB), [2002] All ER (D) 212 (Feb) (defendants' approach in taking five years to resolve the liability issue unreasonable, considering that it was certain that at least one of the defendants would be held liable; indemnity basis for costs appropriate). Indemnity costs will not be awarded on the ground that a party has brought proceedings which have failed or have little chance of success: *Shaina Investment Corp v Standard Bank London Ltd* [2002] CPLR 14. An award of costs on an indemnity basis may be made to a party in receipt of legal aid: *Brawley v Marczyński (Nos 1 and 2)* [2002] EWCA Civ 756, [2002] EWCA Civ 1453, [2002] 4 All ER 1060, [2003] 1 WLR 813. In deciding whether to award costs on an indemnity basis it is immaterial that the claim arises out of very serious conduct: *Coca-Cola Co v Raymond Ketteridge* [2003] EWHC 2488 (Ch), [2004] FSR 608. See also *Jones v Associated Newspapers Ltd* [2007] EWHC 1489 (QB), [2008] 1 All ER 240.

9 CPR 44.4(3). As to the meaning of 'receiving party' see PARA 1833 note 14.

10 CPR 44.4(4).

UPDATE

1747 Basis of assessment

NOTE 6--See also *O'Beirne v Hudson* [2010] EWCA Civ 52, [2010] PIQR P190, [2010] All ER (D) 91 (Feb) (costs judge entitled to take account of fact that case would have been allocated to small claims track); and *Drew v Whitbread* [2010] EWCA Civ 53, [2010] PIQR P198, [2010] All ER (D) 104 (Feb).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(ii) Assessment of Costs/1748. Factors to be taken into account in deciding the amount of costs.

1748. Factors to be taken into account in deciding the amount of costs.

The court¹ is to have regard to all the circumstances² in deciding whether costs³ were proportionately and reasonably incurred⁴ or were proportionate and reasonable in amount⁵, if it is assessing costs on the standard basis⁶. If it is assessing costs on the indemnity basis⁷, it must also have regard to all the circumstances in deciding whether costs were unreasonably incurred⁸ or unreasonable in amount⁹. In particular the court must give effect to any orders which have already been made¹⁰. The court must also have regard to:

- 1322 (1) the conduct of all the parties, including in particular conduct before, as well as during, the proceedings and the efforts made, if any, before and during the proceedings in order to try to resolve the dispute¹¹;
- 1323 (2) the amount or value of any money or property involved¹²;
- 1324 (3) the importance of the matter to all the parties¹³;
- 1325 (4) the particular complexity of the matter or the difficulty or novelty of the questions raised¹⁴;
- 1326 (5) the skill, effort, specialised knowledge and responsibility involved¹⁵;
- 1327 (6) the time spent on the case¹⁶; and
- 1328 (7) the place where, and the circumstances in which, work or any part of it was done¹⁷.

On an assessment of the costs of a party the court may also have regard to any estimate previously filed¹⁸ by that party, or by any other party in the same proceedings. Such an estimate may be taken into account as a factor among others when assessing the reasonableness of any costs claimed¹⁹. Additionally, the Supreme Court Act 1981 provides that where a person has commenced proceedings in the High Court but those proceedings should, in the opinion of the court, have been commenced in a county court²⁰, the person responsible for determining the amount which is to be awarded to that person by way of costs must have regard to those circumstances²¹.

1 As to the meaning of 'court' see PARA 22.

2 The provisions set out in the text concern the factors to be taken into account in deciding the amount of costs, rather than the liability for costs, as to which see PARAS 1738-1741. See also *Practice Direction about Costs* PD 43-48 Section 11. Costs as between the parties are given by the law as an indemnity to the person entitled to them; they are not given as a bonus to the party who receives them: *Harold v Smith* (1860) 5 H & N 381; *Gundry v Sainsbury* [1910] 1 KB 645. The indemnity principle is to be applied on an item by item basis rather than a global basis: *General of Berne Insurance Co v Jardine Reinsurance Management Ltd* [1998] 2 All ER 301, [1998] 1 WLR 123, CA; *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow* [1998] 2 Costs LR 32, CA, per Tucker J. As to the reasonableness of hourly rates see *Johnson v Reed Corrugated Cases Ltd* [1992] 1 All ER 169 ('A' and 'B' factors) citing with approval the decision in *Re Eastwood, Lloyds Bank Ltd v Eastwood* [1975] Ch 112, [1973] 3 All ER 1079 (revsd [1975] Ch 112, [1974] 3 All ER 603, CA); *Leopold Lazarus Ltd v Secretary of State for Trade and Industry* (1976) 120 Sol Jo 268, (1976) Times, 9 April; *R v Wilkinson* [1980] 1 All ER 597, [1980] 1 WLR 396. As to the reasonableness of instructing leading counsel or two counsel see *Juby v London Fire and Civil Defence Authority*, *Saunders v Essex County Council* (24 April 1990, unreported). It is relevant to take into account the fact that the other party has instructed leading counsel: *British Metal Corp Ltd v Ludlow Bros (1913) Ltd* [1938] Ch 787, [1938] 3 All ER 194. The correct test is to ask whether or not it was reasonable to instruct leading counsel, not whether the case was well within the capabilities of junior counsel: *R v Dudley Magistrates' Court, ex p Power City Stores Ltd* (1990) 154 JP 654, [1990] NLJR 361, DC. As to the reasonableness of the level of counsel's fees see *Simpsons Motor Sales (London)*

Ltd v Hendon Corpn [1964] 3 All ER 833, [1965] 1 WLR 112; *Loveday v Renton (No 2)* [1992] 3 All ER 184. As to the reasonableness of success fees in conditional fee cases and of the reasonableness of after the event insurance premiums see *Callery v Gray* [2001] EWCA Civ 1117, [2001] 3 All ER 833, [2001] 1 WLR 2112; *Callery v Gray (No 2)* [2001] EWCA Civ 1246, [2001] 4 All ER 1, [2001] 1 WLR 2142 (affd [2002] UKHL 28, [2002] All ER (D) 233 (Jun)); and *Sarwar v Alam* [2001] EWCA Civ 1401, [2001] 4 All ER 541, [2002] 1 WLR 125. See *Habib Bank Ltd v Ahmed* [2004] EWCA Civ 805, (2004) Independent, 30 June (issues within grasp of competent junior counsel; cost of hiring leading counsel not allowed). As to the caution to be exercised in applying the pre-CPR authorities cited in this note see PARAS 33 text and note 2, 1736.

3 As to the meaning of 'costs' see PARA 1730. In *Francis v Francis and Dickerson* [1956] P 87, [1953] 3 All ER 836, it was held that the correct viewpoint from which to judge reasonableness is that of a sensible solicitor considering what, in the light of his then knowledge, was reasonable in the interests of his client. In summarily assessing costs it was wrong in principle for the judge not to have gone into any sort of detailed analysis of the costs claimed and it was wrong for the judge to have applied his own tariff as to what costs were appropriate for a 'one day, paper only' appeal: *800 Flowers, Trade Mark Application, 1-800 Flowers Inc v Phonenames Ltd* [2001] EWCA Civ 721, [2001] IP & T 839, [2001] All ER (D) 218 (May). As to the assessment of additional liabilities in funded cases see PARAS 1833-1835.

4 CPR 44.5(1)(a)(i).

5 CPR 44.5(1)(a)(ii).

6 CPR 44.5(1). As to the standard basis see PARA 1747. Guidance has been given on the issue of proportionality when determining costs: *Giambrone v JMC Holidays Ltd (formerly Sunworld Holidays Ltd)* [2002] EWHC 2932 (QB), [2003] 1 All ER 982.

7 As to the indemnity basis see PARA 1747.

8 CPR 44.5(1)(b)(i).

9 CPR 44.5(1)(b)(ii).

10 CPR 44.5(2).

11 CPR 44.5(3)(a). Costs will be awarded on an indemnity basis against a party who has brought proceedings where he has placed his own concerns, such as commercial interests, above the appropriateness of the proceedings in question: *Amoco (UK) Exploration Co v British American Offshore Ltd* [2002] BLR 135. See also *Blakes Estates Ltd v Government of Montserrat* [2005] UKPC 46, [2006] 1 WLR 297.

12 CPR 44.5(3)(b).

13 CPR 44.5(3)(c).

14 CPR 44.5(3)(d).

15 CPR 44.5(3)(e).

16 CPR 44.5(3)(f). Where a trial takes place, the time taken by the court in dealing with a particular issue may not be an accurate guide to the amount of time properly spent by the legal or other representatives in preparation for the trial of that issue: *Practice Direction about Costs* PD 43-48 para 11.3.

17 CPR 44.5(3)(g). Different hourly rates apply depending upon the location in which the work was done and national guideline rates have been published by the Supreme Court Costs Office. In a claim connected only with Manchester the rates applicable to Manchester rather than London were allowed: *Sullivan v Co-operative Insurance Society Ltd* (1999) Times, 19 May, CA; and see *Wraith v Sheffield Forgemasters Ltd* [1998] 1 All ER 82, [1998] 1 WLR 132, CA. The expense rates of a specialist provincial firm may be higher than the average for other non-specialist local firms but if it was reasonable for the specialist firm to have been instructed the higher rates may be allowed: *Jones v Secretary of State for Wales* [1997] 2 All ER 507, [1997] 1 WLR 1008. Salaried solicitors employed by a party to whom they are expected to pay over any costs recovered are normally entitled to be allowed the rates commonly allowed on assessment to a fee earner of similar standing in private practice: *Re Eastwood, Lloyds Bank Ltd v Eastwood* [1975] Ch 112, [1974] 3 All ER 603, CA; *Cole v British Telecommunications plc* [2000] All ER (D) 917, CA. CPR 35.4(4) gives the court power to limit the amount that a party may recover with regard to the fees and expenses of an expert: see PARA 838. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

18 As to when an estimate of costs must be filed, and when the court may order its filing, see PARA 1740. As to the meaning of 'filing' see PARA 1832 note 8.

19 *Practice Direction about Costs* PD 43-48 para 6.6(1).

20 In accordance with any provision made under the Courts and Legal Services Act 1990 s 1 (see **COURTS** vol 10 (Reissue) PARA 579) or by or under any other enactment: Supreme Court Act 1981 s 51(8)(b) (s 51 substituted by the Courts and Legal Services Act 1990 s 4(1)). As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1. As to the commencement of proceedings see PARA 116 et seq.

21 Supreme Court Act 1981 s 51(8) (as substituted: see note 12). Where, in complying with this provision, the responsible person reduces the amount which would otherwise be awarded to the person in question, the amount of that reduction must not exceed 25% and on any detailed assessment of the costs payable by that person to his legal representative, regard must be had to the amount of the reduction: see s 51(9) (as so substituted). The Lord Chancellor may by order amend s 51(9)(a) by substituting, for the percentage for the time being mentioned there, a different percentage: s 51(10) (as so substituted). Any such order must be made by statutory instrument and may make such transitional or incidental provision as the Lord Chancellor considers expedient; but no such statutory instrument may be made unless a draft of the instrument has been approved by both Houses of Parliament: s 51(11), (12) (as so substituted). At the date at which this title states the law, no such order had been made. As to the meaning of 'legal representative' for these purposes see PARA 1833 note 13; and as to the Lord Chancellor see **COURTS** vol 10 (Reissue) PARA 501; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 477 et seq.

UPDATE

1748 Factors to be taken into account in deciding the amount of costs

NOTE 17--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(ii) Assessment of Costs/1749. VAT on costs.

1749. VAT on costs.

When claims for VAT are made in respect of costs¹ being dealt with by way of summary² or detailed assessment³, the following provisions apply⁴. The number allocated by HM Revenue and Customs to every person registered for VAT⁵ (except a government department) must appear in a prominent place at the head of every statement⁶, bill of costs⁷, fee sheet, account or voucher⁸ on which VAT is being included as part of a claim for costs⁹.

VAT should not be included in a claim for costs if the receiving party¹⁰ is able to recover the VAT as input tax¹¹. Where the receiving party is able to obtain credit from HM Revenue and Customs for a proportion of the VAT as input tax, only that proportion which is not eligible for credit should be included in the claim for costs¹². The receiving party has responsibility for ensuring that VAT is claimed only when the receiving party is unable to recover the VAT or a proportion thereof as input tax¹³.

Where there is a dispute as to whether VAT is properly claimed the receiving party must provide a certificate signed by that party's solicitors or auditors¹⁴. Where the receiving party is a litigant in person who is claiming VAT¹⁵, reference should be made by him to HM Revenue and Customs and wherever possible a statement to similar effect produced at the hearing at which the costs are assessed¹⁶.

Where there is a dispute as to whether any service in respect of which a charge is proposed to be made in the bill is zero-rated¹⁷ or exempt¹⁸, reference must be made to HM Revenue and Customs and wherever possible the view of HM Revenue and Customs obtained and made known at the hearing at which the costs are assessed¹⁹. Such application should be made by the receiving party. In the case of a bill from a solicitor to his own client²⁰, such application should be made by the client²¹.

On an assessment between parties, where costs are being paid to a government department in respect of services rendered by its legal staff, VAT should not be added²². Where an order is made for the payment of a sum to the prescribed charity²³ any bill presented for agreement or assessment pursuant to that order must not include a claim for VAT²⁴.

VAT will be payable in respect of every supply made pursuant to a legal aid or Legal Services Commission ('LSC') certificate where the person making the supply is a taxable person and the assisted person²⁵ or LSC funded client²⁶ belongs in the United Kingdom or another member state of the European Union and is a private individual or receives the supply for non-business purposes²⁷. Where the assisted person or LSC funded client belongs outside the European Union, VAT is generally not payable unless the supply relates to land in the United Kingdom²⁸. Where the assisted person or LSC funded client is registered for VAT and the legal services paid for by the LSC are in connection with that person's business, the VAT on those services will be payable by the LSC only²⁹. Any summary of costs payable by the LSC must be drawn so as to show the total VAT on counsel's fees as a separate item from the VAT on other disbursements and the VAT on profit costs³⁰.

Should there be a change in the rate of VAT between the conclusion of a detailed assessment and the issue of the final costs certificate³¹, any interested party may apply for the detailed assessment to be varied so as to take account of any increase or reduction in the amount of tax payable. Once the final costs certificate has been issued, no such variation will be permitted³².

In a costs certificate payable by the LSC, the VAT on solicitor's costs, counsel's fees and disbursements will be shown separately³³.

- 1 As to the meaning of 'costs' see PARA 1730.
- 2 As to the meaning of 'summary assessment' see PARA 1734; and as to such assessment see PARA 1752.
- 3 As to the meaning of 'detailed assessment' see PARA 1734; and as to such assessment see PARA 1779 et seq.
- 4 *Practice Direction about Costs* PD 43-48 para 5.1.
- 5 As to registration for VAT see **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 64.
- 6 As to statements of costs see PARA 1752.
- 7 As to bills of costs see PARA 1783.
- 8 Where receipted accounts for disbursements made by the solicitor or his client are retained as tax invoices, a photostat copy of any such receipted account may be produced and will be accepted as sufficient evidence of payment when disbursements are vouched: *Practice Direction about Costs* PD 43-48 para 5.16.
- 9 *Practice Direction about Costs* PD 43-48 para 5.2.
- 10 As to the meaning of 'receiving party' see PARA 1833 note 14.
- 11 *Practice Direction about Costs* PD 43-48 para 5.3. As to recovery of input tax see **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 216 et seq.
- 12 *Practice Direction about Costs* PD 43-48 para 5.3.
- 13 *Practice Direction about Costs* PD 43-48 para 5.4.
- 14 *Practice Direction about Costs* PD 43-48 para 5.5. The certificate should be substantially in the form illustrated in Precedent F in the Schedule of Costs Precedents annexed to the costs practice direction: *Practice Direction about Costs* PD 43-48 para 5.5.
- 15 Where a litigant acts in litigation on his own behalf he is not treated for the purposes of VAT as having supplied services and therefore no VAT is chargeable in respect of work done by that litigant even where, eg, he is a solicitor or other legal representative: *Practice Direction about Costs* PD 43-48 para 5.18. As to the meaning of 'legal representative' see PARA 1833 note 13.
- 16 *Practice Direction about Costs* PD 43-48 para 5.5.
- 17 As to zero-rated services see **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 174 et seq.
- 18 As to exempt services see **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 155 et seq.
- 19 *Practice Direction about Costs* PD 43-48 para 5.6.
- 20 As to detailed assessment of solicitor and client costs see PARA 1812.
- 21 See note 19.
- 22 *Practice Direction about Costs* PD 43-48 para 5.20.
- 23 Ie under the Legal Services Act 2007 s 194(3); see PARA 1824. As to the meaning of 'prescribed charity' see PARA 611 note 20.
- 24 *Practice Direction about Costs* PD 43-48 para 5.21.
- 25 As to the meaning of 'assisted person' see PARA 241 note 12.
- 26 As to the meaning of 'LSC funded client' see PARA 241 note 12.
- 27 *Practice Direction about Costs* PD 43-48 para 5.13(1). As to costs where a party is in receipt of funding by the Legal Services Commission see further PARA 1814 et seq.

28 *Practice Direction about Costs* PD 43-48 para 5.13(2). For the purpose of para 5.13(1), (2), the place where a person belongs is determined by the Value Added Tax Act 1994 s 9 (see **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 53): *Practice Direction about Costs* PD 43-48 para 5.13(3).

29 *Practice Direction about Costs* PD 43-48 para 5.13(4).

30 *Practice Direction about Costs* PD 43-48 para 5.14.

31 As to the final costs certificate see PARA 1797.

32 *Practice Direction about Costs* PD 43-48 para 5.10.

33 *Practice Direction about Costs* PD 43-48 para 5.17. As to counsel's fees generally see PARA 1750.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(ii) Assessment of Costs/1750. Solicitor's charges and fees of counsel.

1750. Solicitor's charges and fees of counsel.

A party may recover the fixed costs¹ in respect of solicitors' charges specified in Part 45 of the Civil Procedure Rules² in accordance with that Part³. Fixed costs are discussed elsewhere in this title⁴.

Where the court⁵ orders the detailed assessment⁶ of costs⁷ of a hearing at which one or more counsel⁸ appeared for a party and where the order for costs states the opinion of the court as to whether or not the hearing was fit for the attendance of one or more counsel⁹, a costs officer¹⁰ conducting a detailed assessment of costs to which that order relates will have regard to the opinion stated¹¹.

Where the court refers any matter to the conveyancing counsel of the court¹² the fees payable to counsel in respect of the work done or to be done will be assessed by the court¹³.

1 As to the meaning of 'fixed costs' see PARA 1730 text and notes 6-7.

2 Ie CPR Pt 45 (see PARAS 1760-1762): see CPR 44.6.

3 CPR 44.6.

4 See PARAS 1760-1768.

5 As to the meaning of 'court' see PARA 22.

6 As to the meaning of 'detailed assessment' see PARA 1734; and as to such assessment see PARA 1779 et seq.

7 As to the meaning of 'costs' see PARA 1730.

8 As to the meaning of 'counsel' see PARA 1834 note 11.

9 The court will generally express an opinion only where the paying party asks it to do so or where more than one counsel appeared for a party or where the court wishes to record its opinion that the case was not fit for the attendance of counsel: *Practice Direction about Costs* PD 43-48 para 8.7(3).

10 As to the meaning of 'costs officer' see PARA 1734 note 17.

11 *Practice Direction about Costs* PD 43 s 8.7(1), (2).

12 As to the conveyancing counsel of the court see **COURTS** vol 10 (Reissue) PARA 664; and **SALE OF LAND** vol 42 (Reissue) PARA 136.

13 *Practice Direction about Costs* PD 43-48 para 8.8(1). The assessment will be in accordance with CPR 44.3 (see PARAS 1738-1741): *Practice Direction about Costs* PD 43-48 para 8.8(1). See also PARA 1216. An appeal from a decision of the court in respect of the fees of such counsel will be dealt with under the general rules as to appeals set out in CPR Pt 52 (see PARA 1658 et seq); if the appeal is against the decision of an authorised court officer, it will be dealt with in accordance with CPR 47.20-47.23 (see PARAS 1801-1802): *Practice Direction about Costs* PD 43-48 para 8.8(2). As to the meaning of 'authorised court officer' see PARA 1734 note 17.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(ii) Assessment of Costs/1751. Procedure for assessing costs; in general.

1751. Procedure for assessing costs; in general.

Where the court¹ orders a party to pay costs² to another party (other than fixed costs³) it may either make a summary assessment⁴ of the costs or order detailed assessment⁵ of the costs by a costs officer⁶, unless any rule, practice direction or other enactment provides otherwise⁷. An order for costs will be treated as an order for the amount of costs to be decided by a detailed assessment unless the order otherwise provides⁸. The procedure for detailed assessment is set out in Part 47 of the Civil Procedure Rules and is discussed elsewhere in this title⁹.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'costs' see PARA 1730.

3 As to the meaning of 'fixed costs' see PARA 1730 text and notes 6-7.

4 As to the meaning of 'summary assessment' see PARA 1734; and as to summary assessment see PARA 1752.

5 As to the meaning of 'detailed assessment' see PARA 1734; and see the text and note 9.

6 As to the meaning of 'costs officer' see PARA 1734 note 17.

7 CPR 44.7.

8 *Practice Direction about Costs* PD 43-48 para 12.2. Whenever the court awards costs to be assessed by way of detailed assessment it should consider whether to exercise the power in CPR 44.3(8) (court's discretion as to costs) to order the paying party to pay such sum of money as it thinks just on account of those costs (see PARA 1741): *Practice Direction about Costs* PD 43-48 para 12.3.

9 See PARA 1779 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(ii) Assessment of Costs/1752. Summary assessment.

1752. Summary assessment.

Whenever a court¹ makes an order about costs² which does not provide for fixed costs³ to be paid, the court must consider whether to make a summary assessment⁴ of costs⁵. The general rule is that the court should make a summary assessment of the costs at the conclusion of a case which has been dealt with on the fast track⁶, in which case the order will deal with the costs of the whole claim, and at the conclusion of any other hearing which has lasted not more than one day, in which case the order will deal with the costs of the application or matter to which the hearing related⁷. The court should also make a summary assessment of the costs in the following hearings in the Court of Appeal: (1) contested directions hearings; (2) applications for permission to appeal at which the respondent is present; (3) dismissal list hearings at which the respondent is present; and (4) appeals from case management decisions, as well as appeals listed for one day or less⁸. The general rule does not, however, apply if there is good reason not to make a summary assessment, for example where the paying party⁹ shows substantial grounds for disputing the sum claimed for costs that cannot be dealt with summarily or there is insufficient time to carry out a summary assessment¹⁰. Nor does it apply to a mortgagee's costs incurred in mortgage possession proceedings or other proceedings relating to a mortgage unless the mortgagee asks the court to make an order for his costs to be paid by another party¹¹.

The court will not make a summary assessment of the costs of a receiving party¹² who is an assisted person¹³ or LSC funded client¹⁴. Nor will it make a summary assessment of the costs of a receiving party who is a child or protected party¹⁵ unless the solicitor acting for the child or protected party has waived the right to further costs¹⁶; but it may make a summary assessment of costs payable by a child or protected party¹⁷.

It is the duty of the parties and their legal representatives¹⁸ to assist the judge¹⁹ in making a summary assessment of costs in any case to which the general rule applies, in accordance with the following provisions²⁰. Each party who intends to claim costs must prepare a written statement of the costs he intends to claim showing separately in the form of a schedule:

- 1329 (a) the number of hours to be claimed;
- 1330 (b) the hourly rate to be claimed;
- 1331 (c) the grade of fee earner;
- 1332 (d) the amount and nature of any disbursement to be claimed, other than counsel's fee for appearing at the hearing;
- 1333 (e) the amount of solicitor's costs to be claimed for attending or appearing at the hearing;
- 1334 (f) the fees of counsel to be claimed in respect of the hearing; and
- 1335 (g) any value added tax ('VAT') to be claimed on these amounts²¹.

The statement of costs must follow as closely as possible the prescribed form²² and must be signed by the party or his legal representative²³. The statement of costs must be filed²⁴ at court and copies of it must be served on any party against whom an order for payment of those costs is intended to be sought. The statement of costs must be filed and the copies of it must be served as soon as possible and in any event not less than 24 hours before the date fixed for the hearing²⁵. The failure by a party, without reasonable excuse, to comply with these requirements will be taken into account by the court in deciding what order to make about the costs of the

claim, hearing or application, and about the costs of any further hearing or detailed assessment²⁶ hearing that may be necessary as a result of that failure²⁷.

If the court makes a summary assessment of costs at the conclusion of proceedings²⁸ the court will specify separately the base costs, and if appropriate, the additional liability allowed as solicitor's charges, counsel's fees, other disbursements and any VAT and the amount of fast track trial costs which is awarded under Part 46 of the Civil Procedure Rules ('CPR')²⁹. The court awarding costs cannot make an order for a summary assessment of costs by a costs officer³⁰. If a summary assessment of costs is appropriate but the court awarding costs is unable to do so on the day, the court must give directions as to a further hearing before the same judge³¹.

Where an application has been made and the parties to the application agree an order by consent without any party attending, the parties should agree a figure for costs to be inserted in the consent order or agree that there should be no order for costs. If the parties cannot agree the costs position, attendance on the appointment will be necessary but, unless good reason can be shown for the failure to deal with costs as set out above, no costs will be allowed for that attendance³². The court will not give its approval to disproportionate and unreasonable costs; accordingly when the amount of the costs to be paid has been agreed between the parties the order for costs must state that the order is by consent³³. If the judge is to make an order which is not by consent, the judge will, so far as possible, ensure that the final figure is not disproportionate and/or unreasonable having regard to the overriding objective³⁴. The judge will retain this responsibility notwithstanding the absence of challenge to individual items in the make-up of the figure sought, but the fact that the paying party is not disputing the amount of costs can be taken as some indication that the amount is proportionate and reasonable. The judge will therefore intervene only if satisfied that the costs are so disproportionate that it is right to do so³⁵.

Particular provision is made with respect to parties in receipt of funding by the Legal Services Commission³⁶.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'costs' see PARA 1730.

3 As to the meaning of 'fixed costs' see PARA 1730 text and notes 6-7.

4 As to the meaning of 'summary assessment' see PARA 1734.

5 *Practice Direction about Costs* PD 43-48 para 13.1. If appropriate, the judge may summarily assess costs in a multi-track case: see *Practice Direction--The Multi-track* PD 29 para 10.5; and PARA 302. See also the *Guide to the Summary Assessment of Costs* on the Court Service website at www.courtservice.gov.uk.

6 As to the fast track see PARA 1122.

7 *Practice Direction about Costs* PD 43-48 para 13.2(1), (2). If this hearing disposes of the claim, the order may deal with the costs of the whole claim: para 13.2(2).

8 See *Practice Direction about Costs* PD 43-48 para 13.2(3); *Practice Direction--Appeals* PD 52 para 14; and PARA 1672.

9 As to the meaning of 'paying party' see PARA 1836 note 14.

10 *Practice Direction about Costs* PD 43-48 para 13.2.

11 *Practice Direction about Costs* PD 43-48 para 13.3. As to costs relating to mortgages see *Practice Direction about Costs* PD 43-48 paras 50.3-50.4; and PARA 1806.

12 As to the meaning of 'receiving party' see PARA 1833 note 14.

13 As to the meaning of 'assisted person' see PARA 241 note 12.

14 *Practice Direction about Costs* PD 43-48 para 13.9. As to the meaning of 'LSC funded client' see PARA 241 note 12. A summary assessment of costs payable by an assisted person or LSC funded client is not by itself a determination of that person's liability to pay those costs: *Practice Direction about Costs* PD 43-48 para 13.10. See further CPR 44.17; *Practice Direction about Costs* PD 43-48 paras 21.1-23.17; and PARAS 1737, 1814 et seq.

15 le within the meaning of CPR Pt 21: see PARA 222.

16 *Practice Direction about Costs* PD 43-48 para 13.11(1).

17 *Practice Direction about Costs* PD 43-48 para 13.11(2).

18 As to the meaning of 'legal representative' see PARA 1833 note 13.

19 As to the meaning of 'judge' see PARA 49.

20 *Practice Direction about Costs* PD 43-48 para 13.5(1).

21 *Practice Direction about Costs* PD 43-48 para 13.5(2).

22 For the prescribed form see Form N260 in *the Civil Court Practice*. Where a litigant is an assisted person or is a LSC funded client or is represented by a solicitor in the litigant's employment the statement of costs need not include the certificate appended at the end of Form N260: *Practice Direction about Costs* PD 43-48 para 13.5(3).

23 *Practice Direction about Costs* PD 43-48 para 13.5(3). In respect of any document which is required by *Practice Direction about Costs* PD 43-48 to be signed by a party or his legal representative, *Practice Direction-- Statements of Truth* PD 22 (which makes provision for cases in which a party is a child, a protected party or a company or other corporation and cases in which a document is signed on behalf of a partnership: see PARA 613) will apply as if the document in question was a statement of truth: *Practice Direction about Costs* PD 43-48 para 1.5.

24 As to the meaning of 'filing' see PARA 1832 note 8.

25 *Practice Direction about Costs* PD 43-48 para 13.5(4). Where the litigant is or may be entitled to claim an additional liability in respect of a funding arrangement (see PARA 1830), the statement filed and served need not reveal the amount of that liability: para 13.5(5). In *Macdonald v Taree Holdings Ltd* [2000] All ER (D) 2204, (2000) Times, 28 December, Neuberger J held that a party's failure to serve a schedule of costs 24 hours before a hearing did not justify the refusal of an application for the summary assessment of that party's costs.

26 As to the meaning of 'detailed assessment' see PARA 1734; and as to such assessment see PARA 1779 et seq.

27 *Practice Direction about Costs* PD 43-48 para 13.6.

28 For these purposes and the purposes of CPR 44.3A(1) (see PARA 1833), proceedings are concluded when the court has finally determined the matters in issue in the claim, whether or not there is an appeal. The making of an award of provisional damages under CPR Pt 41 (see PARA 1217) will also be treated as a final determination of the matters in issue: *Practice Direction about Costs* PD 43-48 para 2.4. The court may order, or the parties may agree in writing, that although the proceedings are continuing they will nevertheless be treated as concluded: para 2.5.

29 See *Practice Direction about Costs* PD 43-48 para 13.7. As to the meaning of 'base costs' see PARA 1738 note 18; as to the meaning of 'additional liability' see PARA 1830 note 20; and as to fast track trial costs see PARAS 1775-1778. Permission is needed to appeal against a summary assessment of costs even where the assessment is made in the course of insolvency proceedings: *Hosking v Michaelides* (2003) Times, 17 December.

30 *Practice Direction about Costs* PD 43-48 para 13.8. As to the meaning of 'costs officer' see PARA 1734 note 17.

31 *Practice Direction about Costs* PD 43-48 para 13.8.

32 *Practice Direction about Costs* PD 43-48 para 13.4.

33 *Practice Direction about Costs* PD 43-48 para 13.13(a).

34 See *Practice Direction about Costs* PD 43-48 para 13.13(b). As to the overriding objective see PARA 33.

35 *Practice Direction about Costs* PD 43-48 para 13.13(b).

36 See PARA 1814 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(iii) Costs in Particular Situations/1753. Costs following allocation and re-allocation.

(iii) Costs in Particular Situations

1753. Costs following allocation and re-allocation.

Any costs¹ orders made before a claim is allocated will not be affected by allocation². Where a claim is allocated to a track and the court³ subsequently re-allocates that claim to a different track, then unless the court orders otherwise, any special rules about costs applying to the first track will apply to the claim up to the date of re-allocation⁴ and any such rules applying to the second track will apply from the date of re-allocation⁵.

Before making the order to re-allocate the claim, the court must decide whether any party is to pay costs to any other party down to the date of the order to re-allocate in accordance with the rules about costs contained in Part 27 of the Civil Procedure Rules relating to the small claims track⁶. If it decides to make such an order about costs, it will make a summary assessment⁷ of those costs in accordance with Part 27⁸.

1 As to the meaning of 'costs' see PARA 1730.

2 CPR 44.11(1). As to allocation of cases to the small claims track, the fast track or the multi-track see CPR Pt 26; and PARA 260 et seq.

3 As to the meaning of 'court' see PARA 22.

4 CPR 44.11(2)(i).

5 CPR 44.11(2)(ii). As to re-allocation of cases see PARA 272.

6 *Practice Direction about Costs* PD 43-48 paras 16.1, 16.2. For the rules about costs contained in CPR Pt 27 see CPR 27.14-27.15; and PARAS 1773-1774.

7 As to the meaning of 'summary assessment' see PARA 1734; and as to summary assessment see PARA 1752.

8 *Practice Direction about Costs* PD 43-48 para 16.3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(iii) Costs in Particular Situations/1754. Cases where costs orders deemed to have been made.

1754. Cases where costs orders deemed to have been made.

Where a right to costs¹ arises under certain specified rules² a costs order will be deemed to have been made on the standard basis³. Where such an order is deemed to be made in favour of a party with pro bono representation⁴, that party may apply for an order⁵ for a payment to the prescribed charity to be made⁶. Interest payable⁷ on the costs so deemed to have been ordered begins to run from the date on which the event which gave rise to the entitlement to costs occurred⁸.

1 As to the meaning of 'costs' see PARA 1730.

2 I.e. under (1) CPR 3.7 (defendant's right to costs where claim struck out for non-payment of fees: see PARA 253); (2) CPR 36.10(1) or (2) (claimant's entitlement to costs where a Part 36 offer is accepted: see PARA 736); or (3) CPR 38.6 (defendant's right to costs where claimant discontinues: see PARA 727): CPR 44.12(1)(a), (b), (d). As to the meaning of 'claimant' and 'defendant' see PARA 18.

3 CPR 44.12(1). As to the meaning of 'standard basis' see PARA 1747.

4 As to the meaning of 'pro bono representation' see PARA 611 note 20.

5 I.e. under the Legal Services Act 2007 s 194(3): see PARA 1824.

6 CPR 44.12(1A). As to the meaning of 'prescribed charity' see PARA 611 note 20.

7 I.e. interest payable pursuant to the Judgments Act 1838 s 17 or the County Courts Act 1984 s 74: see PARAS 1149, 1759.

8 CPR 44.12(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(iii) Costs in Particular Situations/1755. Costs-only proceedings.

1755. Costs-only proceedings.

Where the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs¹) which is made or confirmed in writing, but they have failed to agree the amount of those costs and no proceedings have been started, either party to the agreement may start proceedings by issuing a claim form² in accordance with Part 8 of the Civil Procedure Rules ('CPR')³. The claim will be for an order for costs to be made to enable the costs to be assessed⁴. It must contain or be accompanied by the agreement or confirmation⁵ and must:

- 1336 (1) identify the claim or dispute to which the agreement to pay costs relates;
- 1337 (2) state the date and terms of the agreement on which the claimant⁶ relies;
- 1338 (3) set out or have attached to it a draft of the order which the claimant seeks;
- 1339 (4) state the amount of the costs claimed; and
- 1340 (5) state whether the costs are claimed on the standard or indemnity basis⁷; if no basis is specified the costs will be treated as being claimed on the standard basis⁸.

The evidence to be filed and served with the claim form⁹ must include copies of the documents on which the claimant relies to prove the defendant's¹⁰ agreement to pay costs¹¹.

A claim issued under these provisions may be dealt with without being allocated to a track¹² and a costs judge¹³ or a district judge¹⁴ has jurisdiction to hear and decide any issue which may arise in a claim so issued irrespective of the amount of the costs claimed or of the value of the claim to which the agreement to pay costs relates¹⁵.

When the time for filing the defendant's acknowledgment of service¹⁶ has expired, the claimant may by letter request the court to make an order in the terms of his claim, unless the defendant has filed an acknowledgment of service stating that he intends to contest the claim or to seek a different order¹⁷.

The court¹⁸ may make an order for costs¹⁹, which will be treated as an order for the amount of costs to be determined by a detailed assessment²⁰, or may dismiss the claim²¹. The court must dismiss the claim if it is opposed²².

An order may be made by consent in terms which differ from those set out in the claim form²³.

Nothing in these provisions prevents a person from issuing a claim form under Part 7 or Part 8 of the CPR to sue on an agreement made in settlement of a dispute where that agreement makes provision for costs, nor from claiming in that case an order for costs or a specified sum in respect of costs²⁴.

1 As to the meaning of 'costs' see PARA 1730.

2 The claim form must be issued in the court which would have been the appropriate office in accordance with CPR 47.4 (see PARA 1782) had proceedings been brought in relation to the substantive claim. It should not be issued in the High Court unless the dispute to which the agreement relates was of such a value or type that had proceedings been begun they would have been commenced in the High Court: *Practice Direction about Costs* PD 43-48 para 17.1. A claim form which is to be issued in the High Court at the Royal Courts of Justice will be issued in the Supreme Court Costs Office: para 17.2. As to the commencement of proceedings in the High Court or a county court see PARA 116; and as to the Supreme Court Costs Office see **COURTS** vol 10 (Reissue) PARA 642. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts

of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

3 CPR 44.12A(1), (2). CPR 48.3 (amount of costs where costs are payable pursuant to a contract: see PARA 1806) does not apply to claims started under the procedure in CPR 44.12A: CPR 44.12A(5). As to the alternative procedure for claims under CPR Pt 8 see PARA 127 et seq. For an example of the application of CPR 44.12A see *Callery v Gray* [2001] EWCA Civ 1117, [2001] 3 All ER 833, [2001] 1 WLR 2112; *Callery v Gray (No 2)* [2001] EWCA Civ 1246, [2001] 4 All ER 1, [2001] 1 WLR 2142 (affd [2002] UKHL 28, [2002] All ER (D) 233 (Jun)).

4 See *Practice Direction about Costs* PD 43-48 para 17.8(1); and the text and note 20.

5 CPR 44.12A(3).

6 As to the meaning of 'claimant' see PARA 18.

7 As to the standard basis and the indemnity basis see PARA 1747. Where the substantial dispute between the parties has been resolved but the issue of costs remains outstanding, the court has to take a broad brush approach to the substantive issue, which will be academic; this may be difficult to reconcile with the level of detail which would be required in order to decide whether costs on the indemnity basis are justified: see *Jobserve Ltd v Relational Designers (No 2)* [2002] All ER (D) 210 (May).

8 *Practice Direction about Costs* PD 43-48 para 17.3. See also CPR 8.2 (contents of Part 8 claim form); and PARA 128. In particular, the claim form must state the remedy which the claimant is seeking and the legal basis for the claim to that remedy: see CPR 8.2(b)(ii).

9 Ie under CPR 8.5: see PARA 132. As to the meaning of 'filing' see PARA 1832 note 8. As to the meaning of 'service' see PARA 138 note 2

10 As to the meaning of 'defendant' see PARA 18.

11 *Practice Direction about Costs* PD 43-48 para 17.4.

12 *Practice Direction about Costs* PD 43-48 para 17.10(1). CPR 8.9, which provides that claims issued under CPR Pt 8 are treated as allocated to the multi-track (see PARA 136) does not apply: *Practice Direction about Costs* PD 43-48 para 17.10(1). CPR 8.1(3) (which provides that the court may at any stage order a Part 8 claim to continue as if the claimant had not used the Part 8 procedure and that, if it does so, the court may give any directions it considers appropriate: see PARA 127) and CPR Pt 24 (summary judgment: see PARAS 524-528) do not apply to proceedings brought under CPR 44.12A: *Practice Direction about Costs* PD 43-48 para 17.10(2).

13 As to the meaning of 'costs judge' see PARA 1734 note 17. As to costs judges see **COURTS** vol 10 (Reissue) PARA 656.

14 As to district judges see **COURTS** vol 10 (Reissue) PARAS 661-662, 728.

15 *Practice Direction about Costs* PD 43-48 para 17.5.

16 As to filing acknowledgment of service in a Part 8 claim see PARA 130.

17 *Practice Direction about Costs* PD 43-48 para 17.6.

18 As to the meaning of 'court' see PARA 22.

19 CPR 44.12A(4)(a)(i). The judge is entitled, in principle, to embark in a summary way on an assessment of the incidence of costs; he is not required to adopt the sort of procedure that might perhaps have been appropriate if he had been deciding the substantive issues in the application: *Coyne v DRC Distribution Ltd* [2008] EWCA Civ 488, [2008] All ER (D) 193 (May).

20 *Practice Direction about Costs* PD 43-48 para 17.8(1). As to the meaning of 'detailed assessment' see PARA 1734; and as to such assessment see CPR Pt 47; and PARA 1779 et seq. CPR 44.4(4) (determination of basis of assessment: see PARA 1747) also applies to the order: *Practice Direction about Costs* PD 43-48 para 17.8(1). In cases in which an additional liability under a funding arrangement is claimed (see PARA 1830), the costs judge or district judge should have regard to the time when and the extent to which the claim has been settled and to the fact that the claim has been settled without the need to commence proceedings: *Practice Direction about Costs* PD 43-48 para 17.8(2).

21 CPR 44.12A(4)(a)(ii). In proceedings to which CPR Pt 45 Section II (CPR45.7-45.14: fixed recoverable costs in road accident cases) applies (see PARA 1769), the court must assess the costs in the manner set out in that Section: CPR 44.12A(4A).

22 CPR 44.12A(4)(b). A claim will be treated as opposed for these purposes if the defendant files an acknowledgment of service stating that he intends to contest the proceedings or to seek a different remedy, and a claim will not be treated as opposed if the defendant files an acknowledgment of service stating that he disputes the amount of the claim for costs: *Practice Direction about Costs* PD 43-48 para 17.9(1). An order dismissing the claim will be made as soon as an acknowledgment of service opposing the claim is filed; the dismissal of a claim under CPR 44.12A(4) does not prevent the claimant from issuing another claim form under CPR Pt 7 (see PARA 118 et seq) or Pt 8 based on the agreement or alleged agreement to which the proceedings under CPR 44.12A(4) related: *Practice Direction about Costs* PD 43-48 para 17.9(2). A costs officer may make an order dismissing a claim under para 17.9: para 17.5. As to the meaning of 'costs officer' see PARA 1734 note 17.

23 *Practice Direction about Costs* PD 43-48 para 17.7. CPR 40.6 (consent judgments and orders: see PARA 1141) applies where an order is to be made by consent: *Practice Direction about Costs* PD 43-48 para 17.7. A costs officer may make an order by consent: para 17.5.

24 *Practice Direction about Costs* PD 43-48 para 17.11.

UPDATE

1755 Costs-only proceedings

TEXT AND NOTES--As to provision for costs in respect of the insurance premium in publication cases see CPR 44.12B (added by SI 2009/2092).

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

TEXT AND NOTES 18-22--CPR 44.12A(4) amended: SI 2009/2092.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(iii) Costs in Particular Situations/1756. Special situations.

1756. Special situations.

Where the court¹ makes an order which does not mention costs², the general rule is that no party is entitled to costs or to seek an order for a payment to the prescribed charity to be made³ in relation to that order⁴ but this does not affect any entitlement of a party to recover costs out of a fund held by that party as trustee or personal representative, or pursuant to any lease, mortgage or other security⁵. Where the court makes an order granting permission to appeal, an order granting permission to apply for judicial review or any other order or direction sought by a party on an application without notice, and its order does not mention costs, it will be deemed to include an order for applicant's costs in the case⁶.

The court hearing an appeal⁷ may, unless it dismisses the appeal, make orders about the costs of the proceedings giving rise to the appeal as well as the costs of the appeal⁸. A tribunal making itself a party to an appeal puts itself at risk as to an order for costs⁹.

Where proceedings are transferred from one court to another¹⁰, the court to which they are transferred may, subject to any order of the court which ordered the transfer, deal with all the costs, including the costs before the transfer¹¹.

The Civil Procedure Rules do not make specific provision for situations where a party incurs extra costs as a result of the death or incapacity of the presiding judge¹². Under the Administration of Justice Act 1985, however, where the judge¹³, or (as the case may be) any of the judges, presiding at any civil proceedings in the Civil Division of the Court of Appeal¹⁴, in the High Court¹⁵ or in a county court¹⁶ becomes temporarily or permanently incapacitated from presiding at the proceedings, or dies, at any time prior to the conclusion of the proceedings, and any party represented at the proceedings incurs any additional costs¹⁷ in consequence of the judge's incapacity or death, the Secretary of State may, if he thinks fit, reimburse¹⁸ that party in respect of any such additional costs, or in respect of such part thereof as he may determine, subject to the prescribed limit¹⁹ for such reimbursement²⁰. Additional costs which are incurred by a party where any such proceedings are due to be begun before a judge at a particular time but are not begun at that time by reason of the judge becoming temporarily or permanently incapacitated from presiding at the proceedings or by reason of his death may also be reimbursed, subject to the prescribed limit, under these provisions²¹.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'costs' see PARA 1730.

3 I.e. an order under the Legal Services Act 2007 s 194(3): see PARA 1824. As to the meaning of 'prescribed charity' see PARA 611 note 20.

4 CPR 44.13(1)(a). This would not affect the entitlement of a legal representative to a person receiving services funded by the Legal Services Commission from recovering solicitor and client costs from the Legal Services Commission. As to costs in cases where a party is funded by the Legal Services Commission see PARA 1814 et seq.

5 CPR 44.13(1)(b).

6 CPR 44.13(1A). Any party affected by a deemed order for costs under CPR 44.13(1A) may apply at any time to vary the order: CPR 44.13(1B). As to costs in judicial review claims, see *Practice Note (Administrative Court)* [2004] All ER (D) 212 (May).

7 As to appeals see PARA 1657 et seq.

8 CPR 44.13(2).

9 Costs retrievable from the Pensions Ombudsman in the case of a successful appeal brought against his decision are not limited only to the amount by which they were increased by his appearance but may in principle extend to the whole of the successful party's costs of the appeal: *Moore's (Wallisdown) Ltd v Pensions Ombudsman, Royal and Sun Alliance Life and Pensions Ltd v Pensions Ombudsman* [2002] 1 All ER 737, [2001] All ER (D) 372 (Dec).

10 As to the transfer of proceedings see PARA 66 et seq.

11 CPR 44.13(3), (4); and see the County Courts Act 1984 s 45(1); and PARA 69.

12 As to the death or incapacity of a judge see generally **COURTS** vol 10 (Reissue) PARA 325.

13 For these purposes, 'judge' in relation to any proceedings, includes (1) a master, registrar or other person acting in a judicial capacity in the proceedings; or (2) a person assisting at the proceedings as an assessor (see PARA 1133) or as an adviser appointed by virtue of the Supreme Court Act 1981 s 70(3) (scientific advisers to assist the Patents Court: see **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 638); and, in relation to any such person as is mentioned in head (2), any reference to presiding at any proceedings is to be construed as including a reference to assisting at the proceedings: Administration of Justice Act 1985 s 53(6) (amended by the Access to Justice Act 1999 s 106, Sch 15 Pt III). As from a day to be appointed, the Administration of Justice Act 1985 s 53(6) is amended by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2) to substitute a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981. At the date at which this title states the law, no such day had been appointed. 'Other person' would include a district judge; as to district judges see **COURTS** vol 10 (Reissue) PARAS 661-662, 728.

14 As to the Civil Division of the Court of Appeal see **COURTS** vol 10 (Reissue) PARAS 635, 639.

15 As to the High Court see **COURTS** vol 10 (Reissue) PARA 602 et seq.

16 As to county courts see **COURTS** vol 10 (Reissue) PARA 701 et seq.

17 For these purposes, the amount of any additional costs incurred by any person as mentioned in the text is such amount as may be agreed between the Secretary of State and that person or, in default of agreement, as may be ascertained by 'taxation' (ie detailed assessment: see PARA 1734 et seq): Administration of Justice Act 1985 s 53(4) (amended by SI 2003/1887). The Secretary of State referred to is the Secretary of State for Constitutional Affairs: see the Secretary of State for Constitutional Affairs Order 2003, SI 2003/1887, art 4(1), Sch 1; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

18 Any sums required by the Secretary of State for making such payments must be paid out of money provided by Parliament: Administration of Justice Act 1985 s 53(8) (amended by SI 2003/1887).

19 The sum as the Secretary of State may by order prescribe for these purposes: Administration of Justice Act 1985 s 53(1) (amended by SI 2003/1887). Any order made by the Secretary of State under the Administration of Justice Act 1985 s 53 must be made with the concurrence of the Treasury, and must be so made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 53(7) (amended by SI 2003/1887). The amount so prescribed is £8,000: Reimbursement of Costs (Monetary Limit) Order 1988, SI 1988/1342, art 2.

20 Administration of Justice Act 1985 s 53(1), (2) (s 53(1) as amended: see note 18). In the case of any interlocutory (interim) proceedings to which s 53(1) applies, it applies separately to any such proceedings and to any other proceedings in the cause or matter in question: s 53(2).

21 See the Administration of Justice Act 1985 s 53(5).

UPDATE

1756 Special situations

NOTE 13--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(iii) Costs in Particular Situations/1757. Court's powers in relation to misconduct.

1757. Court's powers in relation to misconduct.

The court¹ may disallow all or part of the costs² which are being assessed³, or may order the party at fault or his legal representative⁴ to pay costs which he has caused any other party to incur⁵, where:

- 1341 (1) a party or his legal representative fails to comply with a rule, practice direction or court order in connection with a summary or detailed assessment⁶; or
- 1342 (2) it appears to the court that the conduct of a party or his legal representative, before or during the proceedings which gave rise to the assessment proceedings, was unreasonable or improper⁷.

Before making an order under these provisions, the court must give the party or legal representative in question a reasonable opportunity to attend a hearing to give reasons why it should not make such an order⁸.

Where the court makes an order under the above provisions against a legally represented party and the party is not present when the order is made, the party's solicitor must notify his client in writing of the order no later than seven days after the solicitor receives notice of the order⁹. Although no sanction is specified for breach of the obligation so imposed, the court may, either in the order made under the above provisions or in a subsequent order, require the solicitor to produce to the court evidence that he took reasonable steps to comply with the obligation¹⁰.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'costs judge' see PARA 1734 note 17. As to costs judges see **COURTS** vol 10 (Reissue) PARA 656.

3 CPR 44.14(2)(a). As to the assessment of costs generally see PARA 1747 et seq.

4 As to the meaning of 'legal representative' see PARA 1833 note 13.

5 CPR 44.14(2)(b).

6 CPR 44.14(1)(a). As to the meaning of 'summary assessment' and 'detailed assessment' see PARA 1734; as to summary assessment see PARA 1752; and as to detailed assessment see CPR Pt 47; and PARA 1779 et seq.

7 CPR 44.14(1)(b). Conduct before or during the proceedings which gave rise to the assessment which is unreasonable or improper includes steps which are calculated to prevent or inhibit the court from furthering the overriding objective: *Practice Direction about Costs* PD 43-48 para 18.2. As to the overriding objective see PARA 33. An application to the court in the course of proceedings that unnecessarily disrupts the proceedings may constitute unreasonable or improper conduct: *A v Times Newspapers Ltd* [2002] EWHC 2444 (Fam), [2003] 1 All ER 587, [2003] 1 FCR 326.

8 *Practice Direction about Costs* PD 43-48 para 18.1.

9 CPR 44.14(3).

10 *Practice Direction about Costs* PD 43-48 para 18.3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(iv) Time for Payment and Interest on Costs/1758. Time for complying with an order for costs.

(iv) Time for Payment and Interest on Costs

1758. Time for complying with an order for costs.

A party must comply with an order for the payment of costs¹ within 14 days of the date of the judgment or order if it states the amount of those costs² or, if the amount of those costs (or part of them) is decided later³, within 14 days of the date of the certificate which states the amount⁴. In either case, the court may specify a later date with which the party must then comply⁵.

1 As to the meaning of 'costs' see PARA 1730.

2 CPR 44.8(a). Where a party is obliged to pay costs within the 14 day period it is open to that party to apply to the court to extend time for payment supported by evidence. In the absence of any alternative order, CPR 44.8 applies: *John Penn v Watts* (4 October 2000, unreported), CA.

3 I.e. in accordance with CPR Pt 47: see PARA 1779 et seq.

4 CPR 44.8(b).

5 See CPR 44.8(c).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(iv) Time for Payment and Interest on Costs/1759. Interest on costs.

1759. Interest on costs.

Interest on costs¹ is payable at the rate of 8 per cent per annum from the date on which judgment was given until the costs are paid, unless a rule or practice direction makes different provision or the court² orders otherwise³.

Interest payable on costs deemed to have been ordered runs from the date on which the event which gave rise to the entitlement to costs occurred⁴.

Provision is made as to the payment of costs and interest on them where a Part 36 offer has been made⁵.

1 As to the meaning of 'costs' see PARA 1730.

2 As to the meaning of 'court' see PARA 22.

3 See CPR 40.8(1); the Judgments Act 1838 s 17; the County Courts Act 1984 s 74; the County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184; and PARA 1149. Where seven years have elapsed between the date of entry of a judgment and the date of assessment of damages, a judge should use his discretion under CPR 44.3(6)(g) to make a fair award of interest: *Powell v Herefordshire Health Authority* [2002] EWCA Civ 1786, [2003] 3 All ER 253.

4 See CPR 44.12(2); and PARA 1754.

5 See PARA 740. As to the meaning of 'Part 36 offer' see PARA 730.

UPDATE

1759 Interest on costs

NOTE 3--It is not a requirement that the circumstances be exceptional for a different date to be chosen; the court should in all cases seek to ensure a just outcome: *Fattal v Walbrook Defendants (Jersey) Ltd* [2009] EWHC 1674 (Ch), [2009] All ER (D) 190 (Jul) (affd on other grounds sub nom *Walbrook Trustees (Jersey) Ltd v Fattal* [2010] EWCA Civ 408, [2010] All ER (D) 122 (Apr): see **TRUSTS** vol 48 (2007 Reissue) PARA 1067).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/ (3) FIXED COSTS/1760. In general.

(3) FIXED COSTS

1760. In general.

Section I of Part 45 of the Civil Procedure Rules ('CPR')¹ sets out the amounts which, unless the court² orders otherwise, are to be allowed in respect of solicitors' charges in the cases to which that Section applies³. Any appropriate court fee⁴ will be allowed in addition to the costs set out in Section I of Part 45⁵. These costs are known as 'fixed costs'⁶.

Section I of Part 45 of the CPR applies where:

- 1343 (1) the only claim is a claim for a specified sum of money where the value exceeds £25 and:
 - 43
 110. (a) judgment in default is obtained⁷;
 111. (b) judgment on admission is obtained⁸;
 112. (c) judgment on admission on part of the claim is obtained⁹;
 113. (d) summary judgment is given¹⁰;
 114. (e) the court has made an order to strike out¹¹ a defence as disclosing no reasonable grounds for defending the claim¹²; or
 115. (f) the defendant¹³ is only liable for fixed commencement costs¹⁴;
- 44
- 1344 (2) the only claim is a claim where the court gave a fixed date for the hearing when it issued the claim¹⁵ and judgment is given for the delivery of goods, and the value of the claim exceeds £25¹⁶; or
- 1345 (3) the claim is for the recovery of land, including a possession claim under Part 55 of the CPR, whether or not the claim includes a claim for a sum of money and the defendant gives up possession, pays the amount claimed, if any, and the fixed commencement costs stated in the claim form¹⁷;
- 1346 (4) the claim is for the recovery of land, including a possession claim under Part 55, where one of the grounds for possession is arrears of rent, for which the court gave a fixed date for the hearing when it issued the claim and judgment is given for the possession of land (whether or not the order for possession is suspended on terms) and the defendant has neither delivered a defence, or counterclaim, nor otherwise denied liability, or has delivered a defence which is limited to specifying his proposals for the payment of arrears of rent¹⁸;
- 1347 (5) the claim is a possession claim under Section II of Part 55 (accelerated possession claims of land let on an assured shorthold tenancy) and a possession order is made where the defendant has neither delivered a defence, or counterclaim, nor otherwise denied liability¹⁹;
- 1348 (6) the claim is a demotion claim under Section III of Part 65 of the CPR or a demotion claim is made in the same claim form in which a claim for possession is made under Part 55 and that demotion claim is successful²⁰; or
- 1349 (7) a judgment creditor has taken steps under Parts 70 to 73 of the CPR²¹ to enforce a judgment or order²².

The claim form may include a claim for fixed commencement costs²³.

Section II of Part 45²⁴ deals with fixed recoverable costs in road traffic accident cases²⁵. Section III²⁶ deals with the fixed percentage increase in fees in relation to road traffic accident claims where the claimant has entered into a funding arrangement of a specified²⁷ type²⁸. Section IV of Part 45²⁹ deals with the fixed percentage increase in fees in relation to personal injury claims against an employer where the claimant has entered into a conditional fee agreement or a collective conditional fee agreement which provides for a success fee³⁰, and Section V³¹ deals with the fixed percentage increase in fees in relation to disease claims against an employer where the claimant has entered into a funding arrangement of a specified³² type³³.

1 le CPR Pt 45.1-45.14: see the text and notes 2-23; and PARA 1760 et seq.

2 As to the meaning of 'court' see PARA 22.

3 CPR 45.1(1).

4 As to court fees see PARA 87. For the current levels of fees see *The Civil Court Practice*.

5 CPR 45.1(3).

6 See PARA 1730 text and notes 6-7.

7 le under CPR 12.4(1): see PARA 508.

8 le under CPR 14.4(3): see PARA 191.

9 le under CPR 14.5(6): see PARA 192.

10 le under CPR Pt 24: see PARAS 524-528.

11 As to the meaning of 'striking out' see PARA 218 note 2.

12 le under CPR 3.4(2)(a): see PARA 520 text and note 4.

13 As to the meaning of 'defendant' see PARA 18.

14 CPR 45.1(2)(a). The situation referred to in head (f) in the text is the situation where CPR 45.3 applies: see PARA 1764.

15 As to the types of case where a court may give a fixed date for a hearing when it issues a claim see PARA 125.

16 CPR 45.1(2)(b).

17 CPR 45.1(2)(c). As to possession claims under CPR Pt 55 see PARA 593.

18 CPR 45.1(2)(d).

19 CPR 45.1(2)(e).

20 CPR 45.1(2)(f).

21 As to CPR Pts 70-73 see PARA 1225 et seq.

22 CPR 45.1(2)(g).

23 CPR 45.1(4).

24 le CPR Pt 45.15-45.14.

25 See PARA 1769.

26 le CPR 45.15-45.19.

27 le specified in CPR 43.2(1)(k)(i): see PARA 1830 note 4.

- 28 See PARA 1770.
- 29 le CPR 45.20-45.22.
- 30 See PARA 1771.
- 31 le CPR 45.23-45.26.
- 32 le specified in CPR 43.2(1)(k)(i): see PARA 1830 note 4.
- 33 See PARA 1772.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/ (3) FIXED COSTS/1761. Fixed costs in small claims.

1761. Fixed costs in small claims.

The costs¹ which may be awarded² to a claimant³ in a small claims track case⁴ include the fixed costs⁵ payable which are attributable to issuing the claim⁶. Those fixed costs are the sum of the fixed commencement costs⁷ and the appropriate court fee or fees⁸ paid by the claimant⁹.

1 As to the meaning of 'costs' see PARA 1730.

2 Ie under CPR 27.14: see PARAS 1773-1774.

3 As to the meaning of 'claimant' see PARA 18.

4 As to the small claims track see PARAS 267, 274 et seq.

5 As to the meaning of 'fixed costs' see PARA 1730 text and notes 6-7.

6 *Practice Direction about Costs* PD 43-48 para 24.1.

7 Ie calculated in accordance with CPR 45.2, Table 1: see PARA 1762.

8 As to county court fees see PARA 87. For the current levels of fees see *The Civil Court Practice*.

9 *Practice Direction about Costs* PD 43-48 para 24.2.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/ (3) FIXED COSTS/1762. Amount of fixed commencement costs.

1762. Amount of fixed commencement costs.

The amount of fixed commencement costs in a claim for the recovery of money or goods, where the value of the claim exceeds £25 and the other conditions are met¹ must be calculated by reference to Table 1 in Section I of Part 45 of the Civil Procedure Rules ('CPR')²; additional costs may also be claimed in specified circumstances³. The amount claimed, or the value of the goods claimed if specified, in the claim form is to be used for determining the band in the Table that applies to the claim⁴. Those bands are:

- 1350 (1) where the value of the claim exceeds £25 but does not exceed £500;
- 1351 (2) where the value of the claim exceeds £500 but does not exceed £1,000;
- 1352 (3) where the value of the claim exceeds £1,000 but does not exceed £5,000, or where the only claim is for delivery of goods and no value is specified or stated on the claim form; and
- 1353 (4) where the value of the claim exceeds £5,000⁵.

Where the claim form is served⁶ by the court⁷ or by any method other than personal service by the claimant⁸, the fixed commencement costs are £50 for band (1), £70 for band (2), £80 for band (3) and £100 for band (4) above⁹. Where it is served personally by the claimant and there is only one defendant¹⁰, the fixed commencement costs are £60 for band (1), £80 for band (2), £90 for band (3) and £110 for band (4) above¹¹. Finally, where there is more than one defendant, for each additional defendant personally served at separate addresses by the claimant the fixed commencement costs are £15, regardless of the band¹².

The amount of fixed commencement costs in a claim for the recovery of land or a demotion claim¹³ must be calculated by reference to Table 2 in Section I of Part 45 of the CPR¹⁴. Additional costs may also be claimed in specified circumstances¹⁵.

Where the claim form is served by the court or by any method other than personal service by the claimant, the fixed commencement costs are £69.50¹⁶. Where the claim form is served personally by the claimant and there is only one defendant, the fixed commencement costs are £77¹⁷; and where there is more than one defendant, for each additional defendant personally served at separate addresses by the claimant the fixed commencement costs are £15¹⁸.

1 Ie in a claim to which CPR 45.1(2)(a) or (b) applies: see PARA 1760.

2 CPR 45.2(1). As to the meaning of 'costs' see PARA 1730; and as to the meaning of 'fixed costs' see PARA 1730 text and notes 6-7.

3 Ie in the circumstances specified in CPR 45.5, Table 4 (see PARA 1767): CPR 45.2(2).

4 CPR 45.2(1).

5 CPR 45.2, Table 1 col 1.

6 As to the meaning of 'service' see PARA 138 note 2.

7 As to the meaning of 'court' see PARA 22.

8 As to the meaning of 'claimant' see PARA 18. As to methods of service of the claim form see PARA 139.

- 9 CPR 45.2, Table 1 col 2.
- 10 As to the meaning of 'defendant' see PARA 18.
- 11 CPR 45.2, Table 1 col 3.
- 12 CPR 45.2, Table 1 col 4.
- 13 Ie a claim to which CPR 45.1(2)(c), (d) or (f) applies: see PARA 1760 heads (3), (4), (6) in the text.
- 14 CPR 45.2A(1).
- 15 Ie in the circumstances specified in CPR 45.5, Table 4 (see PARA 1767): CPR 45.2A(2).
- 16 CPR 45.2A, Table 2 col 1.
- 17 CPR 45.2A, Table 2 col 2.
- 18 CPR 45.2A, Table 2 col 3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/ (3) FIXED COSTS/1763. Fixed costs on issue of default costs certificate.

1763. Fixed costs on issue of default costs certificate.

Where a default costs certificate is issued¹, the fixed costs² included in the certificate must not exceed the maximum sum specified for costs³ and court fee⁴ in the notice of commencement⁵. Unless the case is a small claims track case⁶ or unless the court⁷ orders otherwise, the fixed costs to be included in a default costs certificate are £80 plus a sum equal to any appropriate court fee payable on the issue of the certificate⁸.

1 As to default costs certificates see PARA 1789.

2 As to the meaning of 'fixed costs' see PARA 1730 text and notes 6-7.

3 As to the meaning of 'costs' see PARA 1730.

4 As to court fees see PARA 87. For the current levels of fees see *The Civil Court Practice*.

5 *Practice Direction about Costs* PD 43-48 para 25.2.

6 Ie unless *Practice Direction about Costs* PD 43-48 para 24.2 (see PARA 1761) applies: *Practice Direction about Costs* PD 43-48 para 25.1.

7 As to the meaning of 'court' see PARA 22.

8 *Practice Direction about Costs* PD 43-48 para 25.1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/ (3) FIXED COSTS/1764. When defendant only liable for fixed commencement costs.

1764. When defendant only liable for fixed commencement costs.

Where the only claim is for a specified sum of money and the defendant¹ pays the money claimed within 14 days after service² of particulars of claim³ on him, together with the fixed commencement costs⁴ stated in the claim form, the defendant is not liable for any further costs⁵ unless the court⁶ orders otherwise⁷.

1 As to the meaning of 'defendant' see PARA 18.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to service of particulars of claim see PARA 123.

4 As to fixed commencement costs see PARA 1762. As to the meaning of 'fixed costs' see PARA 1730 text and notes 6-7.

5 As to the meaning of 'costs' see PARA 1730.

6 As to the meaning of 'court' see PARA 22.

7 CPR 45.3(1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/ (3) FIXED COSTS/1765. Costs on entry of judgment in a claim for the recovery of money or goods.

1765. Costs on entry of judgment in a claim for the recovery of money or goods.

Where the claimant¹ has claimed fixed commencement costs² in a claim for the recovery of money or goods and judgment is entered in the specified circumstances³, the amount to be included in the judgment in respect of the claimant's solicitor's charges is the total of the fixed commencement costs and the relevant amount set out below⁴. The specified circumstances are:

- 1354 (1) where judgment in default of an acknowledgment of service is entered on a claim for money only⁵;
- 1355 (2) where judgment in default of a defence is entered on a claim for money only⁶;
- 1356 (3) where judgment is entered on admission⁷ or on admission of part of the claim⁸ and the claimant accepts the defendant's⁹ proposal as to the manner of payment;
- 1357 (4) where judgment is entered as mentioned in head (3) above and the court¹⁰ decides the date or time of payment;
- 1358 (5) where summary judgment is given¹¹ or the court strikes out¹² a defence¹³, in either case on application by a party; and
- 1359 (6) where judgment is given on a claim for delivery of goods under a regulated agreement within the meaning of the Consumer Credit Act 1974¹⁴ and none of heads (1) to (5) above applies¹⁵.

The relevant amounts are as follows:

- 1360 (a) where the amount of the judgment exceeds £25 but does not exceed £5,000, the sum of £22 under head (1) above, £25 under head (2) above, £40 under head (3) above, £55 under head (4) above, £175 under head (5) above and £60 under head (6) above¹⁶; and
- 1361 (b) where the amount of the judgment exceeds £5,000, the sum of £30 under head (1) above, £35 under head (2) above, £55 under head (3) above, £70 under head (4) above, £210 under head (5) above and £85 under head (6) above¹⁷.

1 As to the meaning of 'claimant' see PARA 18.

2 Ie under CPR 45.2: see PARA 1762. As to the meaning of 'costs' see PARA 1730; and as to the meaning of 'fixed costs' see PARA 1730 text and notes 6-7.

3 Ie the circumstances specified in CPR 45.4, Table 3: see heads (1)-(6) in the text.

4 CPR 45.4.

5 Ie under CPR 12.4(1): see PARA 508.

6 See note 5.

7 Ie under CPR 14.4: see PARA 191.

8 Ie under CPR 14.5: see PARA 192.

- 9 As to the meaning of 'defendant' see PARA 18.
- 10 As to the meaning of 'court' see PARA 22.
- 11 le under CPR Pt 24: see PARAS 524-528.
- 12 As to the meaning of 'striking out' see PARA 218 note 2.
- 13 le under CPR 3.4(2)(a): see PARA 520 text and note 4.
- 14 See **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 79.
- 15 CPR 45.4, Table 3 col 1.
- 16 CPR 45.4, Table 3 col 2.
- 17 CPR 45.4, Table 3 col 3.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/ (3) FIXED COSTS/1766. Costs on entry of judgment in a claim for the recovery of land or a demotion claim.

1766. Costs on entry of judgment in a claim for the recovery of land or a demotion claim.

Where the claimant¹ has claimed fixed commencement costs² in a claim for the recovery of land or a demotion claim and judgment is entered³, the amount to be included in the judgment in respect of the claimant's solicitor's charges is the total of the fixed commencement costs and the sum of £57.25⁴. Where an order for possession is made in a claim for accelerated possession⁵, the amount allowed for the claimant's solicitor's charges for preparing and filing the claim form⁶, the documents that accompany the claim form and the request for possession is £79.50⁷.

1 As to the meaning of 'claimant' see PARA 18.

2 Ie under CPR 45.2A: see PARA 1762. As to the meaning of 'costs' see PARA 1730; and as to the meaning of 'fixed costs' see PARA 1730 text and notes 6-7.

3 Ie in a claim to which CPR 45.1(2)(d) or (f) applies: see PARA 1760 heads (4), (6) in the text.

4 CPR 45.4A(1).

5 Ie a claim to which CPR 45.1(2)(e) applies: see PARA 1760 head (5) in the text.

6 As to the claim form see PARA 117.

7 CPR 45.4A(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/ (3) FIXED COSTS/1767. Miscellaneous fixed costs.

1767. Miscellaneous fixed costs.

The amount to be allowed as fixed costs¹ in respect of solicitor's charges in the circumstances set out below is as follows²:

- 1362 (1) for service³ by a party of any document required to be served personally including preparing and copying a certificate of service for each individual served, £15;
- 1363 (2) where service by an alternative method or at an alternative place is permitted⁴, for each individual served, £53.25;
- 1364 (3) where a document is served out of the jurisdiction⁵, £68.25 for service in Scotland, Northern Ireland, the Isle of Man or the Channel Islands and £77 for service in any other place⁶.

1 As to the meaning of 'fixed costs' see PARA 1730 text and notes 6-7.

2 CPR 45.5.

3 As to the meaning of 'service' see PARA 138 note 2.

4 ie by an order under CPR 6.15: see PARA 152.

5 As to the meaning of 'jurisdiction' see PARA 117 note 6. As to service out of the jurisdiction see PARA 156 et seq.

6 CPR 45.5, Table 4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/ (3) FIXED COSTS/1768. Fixed enforcement costs.

1768. Fixed enforcement costs.

The amount to be allowed as fixed costs¹ in respect of solicitors' costs in the circumstances set out below is as follows²:

- 1365 (1) for an application³ that an award may be enforced as if payable under a court order, where the amount outstanding under the award:
- 45
- 116. (a) exceeds £25 but does not exceed £250, the sum of £30.75;
 - 117. (b) exceeds £250 but does not exceed £600, the sum of £41;
 - 118. (c) exceeds £600 but does not exceed £2,000, the sum of £69.50; and
 - 119. (d) exceeds £2,000, the sum of £75.50;
- 46
- 1366 (2) on attendance to question a judgment debtor, or officer of a company or other corporation, who has been ordered to attend court⁴ where the questioning takes place before a court officer⁵, including attendance by a responsible representative of the solicitor, the sum of £15 for each half-hour or part⁶;
- 1367 (3) on the making of a final third party debt order⁷ or an order for the payment to the judgment creditor of money in court⁸, one-half of the amount recovered if that amount is less than £150, or otherwise the sum of £98.50;
- 1368 (4) on the making of a final charging order⁹, the sum of £110; and the court may also allow reasonable disbursements in respect of search fees and registration of the order;
- 1369 (5) where a certificate is issued and registered under the Civil Jurisdiction and Judgments Act 1982¹⁰, the costs of registration, namely £39;
- 1370 (6) where permission is given¹¹ to enforce a judgment or order giving possession of land and costs are allowed on the judgment or order, the amount to be added to the judgment or order for costs in the sum of £42.50 for basic costs and, where notice of the proceedings is to be to more than one person, for each additional person the sum of £2.75;
- 1371 (7) where a writ of execution¹² is issued against any party, the sum of £51.75;
- 1372 (8) where a request is filed for the issue of a warrant of execution¹³ for a sum exceeding £25, an amount of £2.25; and
- 1373 (9) where an application for an attachment of earnings order is made and costs are allowed¹⁴, the sum of £8.50 for each attendance on the hearing of the application¹⁵.

The amounts set out in the previous paragraph¹⁶ are to be allowed in addition, if applicable¹⁷.

1 As to the meaning of 'fixed costs' see PARA 1730 text and notes 6-7.

2 CPR 45.6.

3 I.e. under CPR 70.5(4): see PARA 1231.

4 I.e. under CPR 71.2: see PARA 1252. As to the meaning of 'court' see PARA 22.

5 As to the meaning of 'court officer' see PARA 49 note 3.

6 When the questioning takes place before a judge, he may summarily assess any costs allowed: see CPR 45.6, Table 5. As to the meaning of 'summary assessment' see PARA 1734; and as to such assessment see PARA 1752. As to the meaning of 'judge' see PARA 49.

7 le under CPR 72.8(6)(a): see PARA 1424.

8 le under CPR 72.10(1)(b): see PARA 1427.

9 le under CPR 73.8(2)(a): see PARA 1479.

10 le under the Civil Jurisdiction and Judgments Act 1982 s 18, Sch 6: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 201 et seq.

11 le under CPR Sch 1 RSC Ord 45 r 3: see PARA 1274; and **MORTGAGE**.

12 le as defined in CPR Sch 1 RSC Ord 46 r 1: see PARA 1265.

13 le under CPR Sch 2 CCR Ord 26 r 1: see PARA 1283.

14 le under CPR Sch 2 CCR Ord 27 r 9 or CCR Ord 28 r 10: see PARAS 1440, 1521.

15 CPR 45.6, Table 5.

16 le the amounts shown in CPR 45.5, Table 4: see PARA 1767.

17 CPR 45.6.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/ (3) FIXED COSTS/1769. Road traffic accidents; fixed recoverable costs.

1769. Road traffic accidents; fixed recoverable costs.

Where costs-only proceedings or proceedings for approval of a settlement or compromise are issued¹ in relation to a dispute arising out of a road traffic accident² and the following conditions apply, only specified fixed costs are recoverable³, except in exceptional circumstances⁴. The fixed costs provisions apply if:

- 1374 (1) the claimant is not a litigant in person⁵;
- 1375 (2) the dispute arises from a road traffic accident⁶;
- 1376 (3) the agreed damages include damages in respect of personal injury⁷, damage to property, or both⁸;
- 1377 (4) the total value of the agreed damages does not exceed £10,000⁹; and
- 1378 (5) if a claim had been issued for the amount of the agreed damages, the small claims track would not have been the normal track for that claim¹⁰.

Where these conditions are satisfied, the only costs which are to be allowed are fixed costs calculated by reference to the amount of the agreed damages¹¹, certain disbursements¹² and, in specified circumstances, a success fee¹³. The amount of fixed recoverable costs is generally the total of:

- 1379 (a) £800;
- 1380 (b) 20 per cent of the damages agreed up to £5,000; and
- 1381 (c) 15 per cent of the damages agreed between £5,000 and £10,000¹⁴.

Where, however, the claimant lives or works in an area set out in the relevant practice direction¹⁵, and instructs a solicitor or firm of solicitors who practise in that area, the fixed recoverable costs will include, in addition to the costs specified in heads (a)-(c) above, an amount equal to 12.5 per cent of the costs allowable under that paragraph¹⁶.

The court may allow a claim for the following type of disbursement, but must not allow a claim for any other type of disbursement¹⁷:

- 1382 (i) the cost of obtaining medical records, a medical report, a police report, an engineer's report, or a search of the records of the Driver Vehicle Licensing Authority;
- 1383 (ii) the amount of an insurance premium or, where a membership organisation undertakes to meet liabilities incurred to pay the costs of other parties to proceedings, a sum not exceeding such additional amount of costs as would be allowed¹⁸ in respect of provision made against the risk of having to meet such liabilities¹⁹;
- 1384 (iii) where they are necessarily incurred by reason of one or more of the claimants being a child or protected party²⁰, fees payable for instructing counsel, or court fees payable on an application to the court;
- 1385 (iv) any other disbursement that has arisen due to a particular feature of the dispute²¹.

The claimant may recover a success fee if he has entered into a specified type of funding arrangement²². The amount of the success fee is 12.5 per cent of the fixed recoverable costs²³, disregarding any additional amount which may be included in the fixed recoverable costs²⁴.

The court will entertain a claim for an amount of costs (excluding any success fee or disbursements) greater than the fixed recoverable costs but only if it considers that there are exceptional circumstances making it appropriate to do so²⁵. If the court considers such a claim appropriate, it may assess the costs, or make an order for the costs to be assessed²⁶. If the court does not consider the claim appropriate, it must make an order for fixed recoverable costs only²⁷.

1 le under CPR 44.12A (see PARA 1755) in the case of costs-only proceedings, and under CPR 21.10(2) (see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1422) in the case of proceedings for approval of a settlement or compromise: CPR 45.7(1).

2 'Road traffic accident' means an accident resulting in bodily injury to any person or damage to property caused by, or arising out of the use of a motor vehicle on a road or other public place in England and Wales: CPR 45.7(4)(a). 'Motor vehicle' means a mechanically propelled vehicle intended for use on roads; and 'road' means any highway and any other road to which the public has access and includes bridges over which a road passes: CPR 45.7(4)(b), (c).

3 See CPR Pt 45 Section II (CPR 45.7-45.14); *Practice Direction about Costs* PD 43-48 para 25A. Note that CPR Pt 45 Section II does not apply to any costs-only proceedings arising out of a dispute, where the road traffic accident which gave rise to the dispute occurred before 6 October 2003: Civil Procedure (Amendment No 4) Rules 2003, SI 2003/2113, r 18. See also *Lamont v Burton* [2007] EWCA Civ 429, [2007] 3 All ER 173.

4 See CPR 45.12; and text and notes 23-25.

5 CPR 45.7(3), which disapplies CPR Pt 45 Section II to litigants in person.

6 CPR 45.7(2)(a).

7 As to the meaning of 'personal injuries' see PARA 19.

8 CPR 45.7(2)(b).

9 CPR 45.7(2)(c).

10 CPR 45.7(2)(d). As to when the small claims track is the normal track see CPR 26.6; PARA 37.

11 CPR 45.8(a), CPR 45.9.

12 CPR 45.8(b), CPR 45.10.

13 CPR 45.8(c), CPR 45.11. See also *Atack v Lee*, *Ellerton v Harris* [2004] EWCA Civ 1712, [2005] 1 WLR 2643 (reasonableness of a success fee had to be judged at time it was agreed).

14 CPR 45.9(1). Where appropriate, value added tax may be recovered in addition to the amount of fixed recoverable costs and any reference in CPR 45.9 to fixed recoverable costs is a reference to those costs net of any such VAT: CPR 45.9(3).

15 The areas referred to in CPR 45.9(2) are (within London) the county court districts of Barnet, Bow, Brentford, Central London, Clerkenwell, Edmonton, Ilford, Lambeth, Mayors and City of London, Romford, Shoreditch, Wandsworth, West London, Willesden and Woolwich and (outside London) the county court districts of Bromley, Croydon, Dartford, Gravesend and Uxbridge: *Practice Direction about Costs* PD 43-48 para 25A.6.

16 CPR 45.9(2).

17 CPR 45.10(1).

18 le under the Access to Justice Act 1999 s 30: see PARA 1830 note 19.

19 As to the meaning of 'insurance premium' see PARA 1830 note 20; and as to the meaning of 'membership organisation' see PARA 1830 note 6.

20 le as defined in CPR Pt 21: see PARA 222.

21 CPR 45.10(2).

22 CPR 45.11(1). The funding arrangement must be of a type specified in CPR 43.2(1)(k)(i), which is defined as including a conditional fee agreement or collective conditional fee agreement which provides for a success fee; see also PARA 1830. See *Kilby v Gawith* [2008] EWCA Civ 812, [2008] All ER (D) 248 (May), CA (court had no discretion to disallow a success fee provided for in the conditional fee agreement).

23 le calculated in accordance with CPR 45.9(1).

24 CPR 45.11(2).

25 CPR 45.12(1).

26 CPR 45.12(2). Where costs are assessed in accordance with CPR 45.12(2), and the court assesses the costs (excluding any VAT) as being an amount which is less than 20% greater than the amount of the fixed recoverable costs, the court must order the defendant to pay to the claimant the lesser of the fixed recoverable costs, and the assessed costs: CPR 45.13(1), (2). Where CPR 45.13 applies, the court must (1) make no award for the payment of the claimant's costs in bringing the proceedings under CPR 44.12A (see PARA 1755); and (2) order that the claimant pay the defendant's costs of defending those proceedings: CPR 45.14.

27 CPR 45.12(3). Where the court makes an order for fixed recoverable costs in accordance with CPR 45.12(3), it must (1) make no award for the payment of the claimant's costs in bringing the proceedings under CPR 44.12A (see PARA 1755); and (2) order that the claimant pay the defendant's costs of defending those proceedings: CPR 45.14.

UPDATE

1769 Road traffic accidents; fixed recoverable costs

NOTE 22--*Kilby*, cited, reported at [2009] 1 WLR 853.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/ (3) FIXED COSTS/1770. Fixed percentage increase in road traffic accident claims.

1770. Fixed percentage increase in road traffic accident claims.

Where the dispute arises from a road traffic accident¹ and the claimant² has entered into a funding arrangement of a specified³ type, a percentage increase⁴ is to be allowed in the following cases⁵. Subject to the procedure for an application for an alternative percentage increase where the fixed increase is 12.5 per cent⁶, the percentage increase which is to be allowed in relation to solicitors' fees⁷ is (1) 100 per cent where the claim concludes at trial⁸; or (2) 12.5 per cent where either the claim concludes before a trial has commenced or the dispute is settled before a claim is issued⁹; and the percentage increase which is to be allowed in relation to counsel's fees is:

- 1386 (a) 100 per cent where the claim concludes at trial¹⁰;
- 1387 (b) if the claim has been allocated to the fast track¹¹, 50 per cent if the claim concludes 14 days or less before the date fixed for the commencement of the trial¹², or 12.5 per cent if the claim concludes more than 14 days before the date fixed for the commencement of the trial or before any such date has been fixed¹³;
- 1388 (c) if the claim has been allocated to the multi-track¹⁴, 75 per cent if the claim concludes 21 days or less before the date fixed for the commencement of the trial¹⁵, or 12.5 per cent if the claim concludes more than 21 days before the date fixed for the commencement of the trial or before any such date has been fixed¹⁶;
- 1389 (d) 12.5 per cent where the claim has been issued but concludes before it has been allocated to a track or, in relation to costs-only proceedings, the dispute is settled before a claim is issued¹⁷.

Where the percentage increase to be allowed in relation to solicitors' fees¹⁸ or in relation to counsel's fees¹⁹ is 12.5 per cent, a party may apply for a percentage increase greater or less than that amount if:

- 1390 (i) the parties agree damages of an amount²⁰ greater than £500,000 or the court awards damages of an amount greater than £500,000; or
- 1391 (ii) the court awards damages of £500,000 or less but would have awarded damages greater than £500,000 if it had not made a finding of contributory negligence; or
- 1392 (iii) the parties agree damages of £500,000 or less and it is reasonable to expect that if the court had made an award of damages, it would have awarded damages greater than £500,000, disregarding any reduction the court may have made in respect of contributory negligence²¹.

If the court²² is satisfied that the circumstances set out in heads (i) to (iii) apply it must either assess the percentage increase or make an order for the percentage increase to be assessed²³. Where the percentage increase of fees is so assessed, if the percentage increase is assessed as greater than 20 per cent or less than 7.5 per cent, the percentage increase to be allowed is that assessed by the court²⁴; if the percentage increase is assessed as no greater than 20 per cent and no less than 7.5 per cent, the percentage increase to be allowed is 12.5 per cent and the costs of the application and assessment are to be paid by the applicant²⁵.

- 1 As to the meaning of 'road traffic accident' see PARA 1769 note 2; definition applied by CPR 45.15(5).
- 2 As to the meaning of 'claimant' see PARA 18.
- 3 Ie of a type specified in CPR 43.2(1)(k)(i), which is defined as including a conditional fee agreement or collective conditional fee agreement which provides for a success fee: see PARA 1830 note 4.
- 4 As to the meaning of 'percentage increase' see PARA 1830 note 20.
- 5 CPR 45.15(1), (2). CPR Pt 45 Section III (CPR 45.15-45.19) does not apply if the proceedings are costs only proceedings to which CPR Pt 45 Section II (CPR 45.7-45.14) applies (see PARA 1769): CPR 45.15(3). Nor does CPR Pt 45 Section III apply to a claim which has been allocated to the small claims track (see PARAS 267, 274 et seq), to a claim not allocated to a track, but for which the small claims track is the normal track (see PARA 37), or where the road traffic accident which gave rise to the dispute occurred before 6 October 2003: CPR 45.13(4).
- 6 Ie CPR 45.18: see the text and notes 18-23.
- 7 A reference to 'fees' is a reference to fees for work done under a conditional fee agreement or collective conditional fee agreement (see PARA 1830): CPR 45.15(6)(a).
- 8 A reference to a claim concluding at trial is a reference to a claim concluding by settlement after the trial has commenced or by judgment (CPR 45.15(6)(c)) and a reference to 'trial' is a reference to the final contested hearing or to the contested hearing of any issue ordered to be tried separately (CPR 45.15(6)(b)).
- 9 CPR 45.16.
- 10 CPR 45.17(1)(a).
- 11 As to the fast track see PARA 286 et seq.
- 12 Where a trial period has been fixed, then if the claim concludes before the first day of that period and no trial date has been fixed within that period before the claim concludes, the first day of that period is treated as the date fixed for the commencement of the trial for the purposes of CPR 45.15(1): CPR 45.17(2). 'Trial period' means a period of time fixed by the court within which the trial is to take place and where the court fixes more than one such period in relation to a claim, means the most recent period to be fixed: CPR 45.15(6)(d). Where a trial period has been fixed, if the claim concludes before the first day of that period but before the claim concludes, a trial date had been fixed within that period, the trial date is the date fixed for the commencement of the trial for the purposes of CPR 45.15(1): CPR 45.17(3). Where a trial period has been fixed and the claim concludes on or after the first day of that period but before commencement of the trial, the percentage increase of 50% applies, whether or not a trial date has been fixed within that period: CPR 45.17(4). For the purposes of CPR 45.17, in calculating the periods of time, the day fixed for the commencement of the trial (or the first day of the trial period, where appropriate) is not included: CPR 45.17(5).
- 13 CPR 45.17(1)(b).
- 14 As to the multi-track see PARA 293 et seq.
- 15 Where a trial period has been fixed and the claim concludes on or after the first day of that period but before commencement of the trial, the percentage increase of 75% applies, whether or not a trial date has been fixed within that period: CPR 45.15(4).
- 16 CPR 45.17(1)(c).
- 17 CPR 45.17(1)(d).
- 18 Ie under CPR 45.16.
- 19 Ie under CPR 45.17.
- 20 A reference to a lump sum of damages includes a reference to periodical payments of equivalent value: CPR 45.18(3).
- 21 CPR 45.18(1), (2).
- 22 As to the meaning of 'court' see PARA 22.
- 23 CPR 45.18(4).

24 CPR 45.19(1), (2).

25 CPR 45.19(1), (3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/ (3) FIXED COSTS/1771. Fixed percentage increase in employers' liability claims.

1771. Fixed percentage increase in employers' liability claims.

Where the dispute is between an employee¹ and his employer arising from a bodily injury sustained by the employee in the course of his employment and the claimant² has entered into a funding arrangement of a specified³ type, a percentage increase⁴ is to be allowed in the following cases⁵. Subject to the procedure for an application for an alternative percentage increase⁶, the percentage increase which is to be allowed in relation to solicitors' and counsel's fees⁷ is to be determined in accordance with the rules for the percentage increase in road traffic accident claims⁸, subject to the modifications that (1) the percentage increase which is to be allowed in relation to solicitors' fees where the claim concludes before a trial has commenced or the dispute is settled before a claim is issued⁹ is (a) 27.5 per cent if a membership organisation¹⁰ has undertaken to meet the claimant's liabilities for legal costs¹¹; and (b) 25 per cent in any other case; and (2) the percentage increase which is to be allowed in relation to counsel's fees in all cases where the percentage for traffic accident claims is fixed at 12.5 per cent¹² is 25 per cent¹³.

Where the percentage increase of solicitors' fees to be allowed¹⁴ is 25 per cent or 27.5 per cent or the percentage increase of counsel's fees to be allowed is 25 per cent, a party may apply for a percentage increase greater or less than that amount if:

- 1393 (a) the parties agree damages of an amount¹⁵ greater than £500,000 or the court awards damages of an amount greater than £500,000; or
- 1394 (b) the court awards damages of £500,000 or less but would have awarded damages greater than £500,000 if it had not made a finding of contributory negligence; or
- 1395 (c) the parties agree damages of £500,000 or less and it is reasonable to expect that if the court had made an award of damages, it would have awarded damages greater than £500,000, disregarding any reduction the court may have made in respect of contributory negligence¹⁶.

If the court¹⁷ is satisfied that the circumstances set out in heads (a) to (c) apply it must either assess the percentage increase or make an order for the percentage increase to be assessed¹⁸. Where the percentage increase of fees is so assessed, if the percentage increase is assessed as greater than 40 per cent or less than 15 per cent, the percentage increase to be allowed is that assessed by the court; if the percentage increase is assessed as no greater than 40 per cent and no less than 15 per cent, the percentage increase to be allowed is 25 per cent or 27.5 per cent as the case may be, and the costs of the application and assessment are to be paid by the applicant¹⁹.

1 For these purposes, 'employee' has the meaning given to it by the Employers' Liability (Compulsory Insurance) Act 1969 s 2(1) (see **EMPLOYMENT** vol 39 (2009) PARA 42): CPR 45.20(3)(a).

2 As to the meaning of 'claimant' see PARA 18.

3 I.e. of a type specified in CPR 43.2(1)(k)(i), which is defined as including a conditional fee agreement or collective conditional fee agreement which provides for a success fee: see PARA 1830 note 4.

4 As to the meaning of 'percentage increase' see PARA 1830 note 20.

5 CPR 45.20(1), 45.21. CPR Pt 45 Section IV (CPR 45.20-45.22) does not apply (1) where the dispute (a) relates to a disease; (b) relates to an injury sustained before 1 October 2004; (c) arises from a road traffic accident (as defined in CPR 45.7(4)(a): see PARA 1769 note 2); or (d) relates to an injury to which CPR Pt 45 Section V (CPR 45.23-45.26) applies (see PARA 1772); or (2) to a claim (a) which has been allocated to the small claims track (see PARAS 267, 274 et seq); or (b) not allocated to a track, but for which the small claims track is the normal track (see PARA 37): CPR 45.20(2).

6 Ie CPR 45.22: see the text and notes 14-19.

7 A reference to 'fees' is a reference to fees for work done under a conditional fee agreement or collective conditional fee agreement (see PARA 1830): CPR 45.20(3)(b).

8 Ie CPR 45.16 and 45.17: see PARA 1770.

9 Ie under CPR 45.16(b): see PARA 1770 head (b) in the text.

10 As to the meaning of 'membership organisation' see PARA 1830 note 6.

11 Ie in accordance with the Access to Justice Act 1999 s 30: see PARA 1830 note 19.

12 Ie under CPR 45.17(1)(b)(ii), (1)(c)(ii) or (1)(d): see PARA 1770 heads (b)-(d) in the text.

13 CPR 45.21.

14 Ie in accordance with CPR 45.21.

15 See PARA 1770 note 20.

16 CPR 45.18(2), applied by CPR 45.22(1).

17 As to the meaning of 'court' see PARA 22.

18 CPR 45.18(4), applied by CPR 45.22(1).

19 CPR 45.22(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/ (3) FIXED COSTS/1772. Fixed recoverable success fees in employer's liability disease claims.

1772. Fixed recoverable success fees in employer's liability disease claims.

Where the dispute is between an employee¹ (or, if the employee is deceased, the employee's estate or dependants) and his employer (or a person alleged to be liable for the employer's alleged breach of statutory or common law duties of care); and the dispute relates to a disease with which the employee is diagnosed that is alleged to have been contracted as a consequence of the employer's alleged breach of statutory or common law duties of care in the course of the employee's employment; and the claimant² has entered into a funding arrangement of a specified³ type, a percentage increase⁴ is to be allowed in the following cases⁵. Subject to the procedure for an application for an alternative percentage increase⁶, the percentage increase which is to be allowed in relation to solicitors' fees⁷ is (1) 100 per cent if the claim concludes at trial⁸; or (2) where either the claim concludes before a trial has commenced or the dispute is settled before a claim is issued, to be determined as follows⁹. Where head (2) applies, the percentage increase which is to be allowed in relation to solicitors' fees is (a) in type A claims¹⁰, 30 per cent if a membership organisation¹¹ has undertaken to meet the claimant's liabilities for legal costs¹² and 27.5 per cent in any other case; (b) in type B claims¹³, 100 per cent; and (c) in type C claims¹⁴, 70 per cent if a membership organisation has undertaken to meet the claimant's liabilities for legal costs and 62.5 per cent in any other case¹⁵.

The percentage increase which is to be allowed in relation to counsel's fees is (i) 100 per cent if the claim concludes at trial; or (ii) where either the claim concludes before a trial has commenced or the dispute is settled before a claim is issued, to be determined as follows¹⁶. Where head (ii) applies, the percentage increase which is to be allowed in relation to counsel's fees is as follows¹⁷. If the claim has been allocated to the fast track¹⁸, then if the claim concludes 14 days or less before the date fixed for commencement of the trial, the percentage increase is 50 per cent for a type A claim, 100 per cent for a type B claim and 62.5 per cent for a type C claim; and if the claim concludes more than 14 days before the date fixed for commencement of the trial or before any such date has been fixed, the percentage increase is 27.5 per cent for a type A claim, 100 per cent for a type B claim and 62.5 per cent for a type C claim¹⁹. If the claim has been allocated to the multi-track²⁰, then if the claim concludes 21 days or less before the date fixed for commencement of the trial, the percentage increase is 75 per cent for a type A claim, 100 per cent for a type B claim and 75 per cent for a type C claim; and if the claim concludes more than 21 days before the date fixed for commencement of the trial or before any such date has been fixed, the percentage increase is 27.5 per cent for a type A claim, 100 per cent for a type B claim and 62.5 per cent for a type C claim²¹.

Where the percentage increase is the amount allowed above, a party may apply for a percentage increase greater or less than that amount if:

1396 (A) the parties agree damages of an amount²² greater than £250,000 or the court awards damages of an amount greater than £250,000; or

1397 (B) the court awards damages of £250,000 or less but would have awarded damages greater than £250,000 if it had not made a finding of contributory negligence; or

1398 (C) the parties agree damages of £250,000 or less and it is reasonable to expect that if the court had made an award of damages, it would have awarded damages greater than £250,000, disregarding any reduction the court may have made in respect of contributory negligence²³.

If the court²⁴ is satisfied that the circumstances set out in heads (A) to (c) apply it must either assess the percentage increase or make an order for the percentage increase to be assessed²⁵. Where the percentage increase of fees is so assessed by the court, the percentage increase to be allowed is a specified amount varying with the type of claim²⁶. The percentage increase cannot be varied where the case concludes at trial²⁷.

1 For these purposes, 'employee' has the meaning given to it by the Employers' Liability (Compulsory Insurance) Act 1969 s 2(1) (see **EMPLOYMENT** vol 39 (2009) PARA 42): CPR 45.23(3)(b).

2 As to the meaning of 'claimant' see PARA 18.

3 le of a type specified in CPR 43.2(1)(k)(i), which is defined as including a conditional fee agreement or collective conditional fee agreement which provides for a success fee: see PARA 1830 note 4.

4 As to the meaning of 'percentage increase' see PARA 1830 note 20.

5 CPR 45.23(1), 45.24. CPR Pt 45 Section V (CPR 45.23-45.26) does not apply where (1) the claimant sent a letter of claim to the defendant containing a summary of the facts on which the claim is based and main allegations of fault before 1 October 2005; or (2) CPR 45.20(2)(b) (see PARA 1771 note 5 head (2)) applies: CPR 45.23(2).

6 le CPR 45.26: see the text and notes 22-27.

7 As to the meaning of 'fees' see PARA 1770 note 7; definition applied by CPR 45.23(3)(a).

8 As to the reference to the claim concluding at trial see PARA 1770 note 8; definition applied by CPR 45.23(3)(a).

9 CPR 45.24(1).

10 'Type A claim' means a claim relating to a disease or physical injury alleged to have been caused by exposure to asbestos: CPR 45.23(3)(c). A non-exclusive list of the conditions that will fall within type A is given in *Practice Direction about Costs* PD 43-48 para 25B.1.

11 As to the meaning of 'membership organisation' see PARA 1830 note 6.

12 le in accordance with the Access to Justice Act 1999 s 30: see PARA 1830 note 19.

13 'Type B claim' means a claim relating to (1) a psychiatric injury alleged to have been caused by work-related psychological stress; or (2) a work-related upper limb disorder which is alleged to have been caused by physical stress or strain, excluding hand/arm vibration injuries: CPR 45.23(3)(d). A non-exclusive list of the conditions that will fall within type B is given in *Practice Direction about Costs* PD 43-48 para 25B.1.

14 'Type C claim' means a claim relating to a disease not falling within either type A or type B: CPR 45.23(3)(e).

15 CPR 45.24(2).

16 CPR 45.25(1). Where a trial period has been fixed, CPR 45.17(2)-45.17(5) (see PARA 1770 note 12) apply for the purposes of determining the date fixed for the commencement of the trial: CPR 45.25(3).

17 CPR 45.25(2).

18 As to the fast track see PARA 286 et seq.

19 CPR 45.25(2)(a), Table 6.

20 As to the multi-track see PARA 293 et seq.

21 CPR 45.25(2)(b), Table 7.

22 See PARA 1770 note 20.

23 CPR 45.18(2), applied by CPR 45.26(1) and modified by CPR 45.26(2).

24 As to the meaning of 'court' see PARA 22.

25 CPR 45.18(4), applied by CPR 45.26(1).

26 CPR 45.26(3). For a type A claim, if the percentage increase is assessed as greater than 40% or less than 15%, the amount allowed is the percentage increase that is assessed by the court; and if the percentage increase is assessed as no greater than 40% and no less than 15%, the percentage increase is 27.5% and the costs of the application and assessment are to be paid by the applicant: CPR 45.26(3), Table 6. For a type B claim, if the percentage increase is assessed as less than 75%, the amount allowed is the percentage increase that is assessed by the court; and if the percentage increase is assessed as no less than 75%, the percentage increase is 100% and the costs of the application and assessment are to be paid by the applicant: CPR 45.26(3), Table 6. For a type C claim, if the percentage increase is assessed as greater than 75% or less than 50%, the amount allowed is the percentage increase that is assessed by the court; and if the percentage increase is assessed as no greater than 75% and no less than 50%, the percentage increase is 62.5% and the costs of the application and assessment are to be paid by the applicant: CPR 45.26(3), Table 6.

27 CPR 45.26(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(4) SMALL CLAIMS TRACK COSTS AND FAST TRACK TRIAL COSTS/(i) Small Claims Track Costs/1773. Costs where financial value of claim exceeds small claims limit.

(4) SMALL CLAIMS TRACK COSTS AND FAST TRACK TRIAL COSTS

(i) Small Claims Track Costs

1773. Costs where financial value of claim exceeds small claims limit.

Where the financial value of a claim exceeds the limit for the small claims track¹ but the claim has been allocated to that track with the consent of the parties², the small claims track costs provisions³ will apply unless the parties agree that the fast track costs provisions⁴ are to apply⁵. Where the parties agree that the fast track costs provisions are to apply, the claim and any appeal will be treated for the purposes of costs as if it were proceeding on the fast track except that trial costs will be in the discretion of the court⁶ and will not exceed the amount set out⁷ for the value of claim⁸.

Where a claim is allocated to the small claims track and subsequently re-allocated to another track, these provisions cease to apply after the claim has been re-allocated and the fast track or multi-track costs rules⁹ will apply from the date of re-allocation¹⁰.

1 The financial limit for the small claims track is generally £5,000: see PARA 267.

2 Ie in accordance with CPR 26.7(3): see PARA 270.

3 As to the meaning of 'costs' see PARA 1730.

4 As to the fast track see CPR Pt 28; and PARAS 268, 286 et seq. As to fast track trial costs see CPR Pt 46; and PARAS 1775-1778.

5 CPR 27.14(5).

6 As to the meaning of 'court' see PARA 22.

7 Ie the amount set out for the value of the claim in CPR 46.2: see PARA 1776.

8 CPR 27.14(6).

9 As to the multi-track see CPR Pt 29; and PARAS 269, 293 et seq. There are no specific costs rules applying to the multi-track; costs are usually subject to detailed assessment (see CPR Pt 47; and PARA 1779 et seq) but may be summarily assessed in appropriate cases (see PARA 1752 note 5).

10 CPR 27.15. As to costs on re-allocation see also PARA 1753.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(4) SMALL CLAIMS TRACK COSTS AND FAST TRACK TRIAL COSTS/(i) Small Claims Track Costs/1774. Costs in other small claims.

1774. Costs in other small claims.

In any case which has been allocated to the small claims track¹, other than one whose financial value exceeds the limit for that track² but which is allocated to that track with the consent of the parties³, the court⁴ may not order a party to pay a sum to another party in respect of that other party's costs⁵, fees and expenses, including those relating to an appeal, except:

- 1399 (1) the fixed costs⁶ attributable to issuing the claim which are payable under Part 45 of the Civil Procedure Rules⁷ or would be payable⁸ if Part 45 applied to the claim⁹;
- 1400 (2) in proceedings which included a claim for an injunction¹⁰ or an order for specific performance a sum not exceeding the amount specified in the relevant practice direction for legal advice and assistance relating to that claim¹¹;
- 1401 (3) any court fees¹² paid by another party¹³;
- 1402 (4) expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing¹⁴;
- 1403 (5) a sum not exceeding the amount specified in the relevant practice direction for any loss of earnings by a party or witness due to attending a hearing or to staying away from home for the purpose of attending a hearing¹⁵; and
- 1404 (6) a sum not exceeding the amount specified in the relevant practice direction for an expert's fees¹⁶; and
- 1405 (7) such further costs as the court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably¹⁷.

Where a claim is allocated to the small claims track and subsequently re-allocated to another track, these provisions cease to apply after the claim has been re-allocated and the fast track¹⁸ or multi-track¹⁹ costs rules will apply from the date of re-allocation²⁰.

1 As to the small claims track see PARAS 267, 274 et seq.

2 The financial limit for the small claims track is normally £5,000: see PARA 267.

3 Ie in accordance with CPR 26.7(3): see PARA 270. As to costs in such cases see PARA 1773.

4 As to the meaning of 'court' see PARA 22.

5 As to the meaning of 'costs' see PARA 1730.

6 As to the meaning of 'fixed costs' see PARA 1730 text and notes 6-7.

7 See PARA 1760 et seq. As to fixed costs in small claims see PARA 1761.

8 Ie would be payable under CPR Pt 45: see CPR 27.14(2)(a)(ii).

9 CPR 27.14(2)(a).

10 As to the meaning of 'injunction' see PARA 315 note 2.

11 CPR 27.14(2)(b). The amount which a party may be so ordered to pay is a sum not exceeding £260: see *Practice Direction--Small Claims Track* PD 27 para 7.2.

12 As to court fees see PARA 87. For the current levels of fees see *The Civil Court Practice*.

13 CPR 27.14(2)(c).

14 CPR 27.14(2)(d).

15 CPR 27.14(2)(e). The sum so recoverable is limited to £50 per day: see *Practice Direction--Small Claims Track* PD 27 para 7.3(1).

16 CPR 27.14(2)(f). The sum so recoverable is limited to £200 for each expert: see *Practice Direction--Small Claims Track* PD 27 para 7.3(2).

17 CPR 27.14(2)(g). A party's rejection of an offer in settlement will not of itself constitute unreasonable behaviour under CPR 27.14(2)(g) but the court may take it into consideration when it is applying the unreasonableness test: CPR 27.14(3).

The limits on costs imposed by CPR 27.14 also apply to any fee or reward for acting on behalf of a party to the proceedings charged by a person exercising a right of audience by virtue of an order under the Courts and Legal Services Act 1990 s 11 (a lay representative: see **COURTS** vol 10 (Reissue) PARA 706): CPR 27.14(4).

18 As to the fast track see CPR Pt 28; and PARAS 268, 286 et seq. As to fast track trial costs see CPR Pt 46; and PARA 1775 et seq.

19 As to the multi-track see CPR Pt 29; and PARAS 269, 293 et seq. There are no specific costs rules applying to the multi-track; costs are usually subject to detailed assessment (see CPR Pt 47; and PARA 1779 et seq) but may be summarily assessed in appropriate cases (see PARA 1752 note 5).

20 CPR 27.15. As to costs on re-allocation see also PARA 1753.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(4) SMALL CLAIMS TRACK COSTS AND FAST TRACK TRIAL COSTS/(ii) Fast Track Trial Costs/1775. In general.

(ii) Fast Track Trial Costs

1775. In general.

Part 46 of the Civil Procedure Rules ('CPR')¹ deals with the amount of costs² which the court³ may award as the costs of an advocate⁴ for preparing for and appearing at the trial⁵ of a claim in the fast track⁶. This amount is referred to as 'fast track trial costs'⁷. 'Fast track trial costs' means the costs of a party's advocate for preparing for and appearing at the trial, but does not include any other disbursements or any VAT payable on the fees of a party's advocate⁸.

Part 46 of the CPR applies only where, at the date of the trial, the claim is allocated to the fast track⁹. It does not apply in any other case, irrespective of the final value of the claim¹⁰. In particular it does not apply to the hearing of a claim which is allocated to the small claims track¹¹ with the consent of the parties¹² or to a disposal hearing at which the amount to be paid under a judgment or order is decided by the court¹³.

Where a claim allocated to the fast track settles before trial, the amount of costs which the court may award is limited¹⁴. This limitation is discussed elsewhere in this title¹⁵.

1 Ie CPR Pt 46: see the text and notes 1-7; and PARA 1776 et seq.

2 As to the meaning of 'costs' see PARA 1730.

3 As to the meaning of 'court' see PARA 22.

4 As to the meaning of 'advocate' for these purposes, see PARA 292 note 2.

5 For these purposes 'trial' includes a hearing where the court decides an amount of money or the value of goods following a judgment under CPR Pt 12 (default judgment: see PARA 506 et seq) or CPR Pt 14 (admissions: see PARA 187 et seq) but does not include the hearing of an application for summary judgment under CPR Pt 24 (see PARA 524 et seq) or the court's approval of a settlement or other compromise under CPR 21.10 (see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1422): CPR 46.1(2)(c).

6 As to the fast track see CPR Pt 28; and PARAS 268, 286 et seq.

7 CPR 46.1(1).

8 CPR 46.1(2)(b). As to the application of this rule see *Jefferson v National Freight Carriers plc* [2001] EWCA Civ 2082, [2001] All ER (D) 411 (Feb) per Woolf LCJ.

9 *Practice Direction about Costs* PD 43-48 para 26.2. As to allocation to track see generally PARA 260 et seq. As to costs before allocation see PARA 1746.

10 *Practice Direction about Costs* PD 43-48 para 26.2.

11 As to the small claims track see PARAS 267, 274 et seq; and as to small claims costs see PARAS 1773-1774.

12 Ie under CPR 26.7(3): see PARA 270. As to costs in such cases see PARA 1773.

13 *Practice Direction about Costs* PD 43-48 para 26.3. As to the disposal hearings mentioned in the text see *Practice Direction--Case Management--Preliminary Stage: Allocation and Re-allocation* PD 26 para 12.8; and PARA 273.

14 See *Practice Direction about Costs* PD 43-48 para 26.4.

15 See CPR 44.10; and PARA 1746.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(4) SMALL CLAIMS TRACK COSTS AND FAST TRACK TRIAL COSTS/(ii) Fast Track Trial Costs/1776. Amounts of fast track trial costs.

1776. Amounts of fast track trial costs.

The amounts of fast track trial costs¹ which the court² may award, whether by summary or detailed assessment³, are as follows:

- 1406 (1) where the value of the claim is no more than £3,000, fast track trial costs of £485;
- 1407 (2) where the value of the claim is more than £3,000 but not more than £10,000, fast track trial costs of £690; and
- 1408 (3) where the value of the claim is more than £10,000 but not more than £15,000, fast track trial costs of £1,035;
- 1409 (4) for proceedings issued on or after 6 April 2009, where the value of the claim is more than £15,000, fast track trial costs of £1,650⁴.

The court may not award more or less than the above amounts except where it decides not to award any fast track trial costs or in specified circumstances⁵, but it may apportion the amount awarded between the parties to reflect their respective degrees of success on the issues at trial⁶.

Where the only claim is for the payment of money, then for the purpose of quantifying fast track trial costs to be awarded to a claimant⁷, the value of the claim is the total amount of the judgment excluding interest and costs⁸ and excluding any reduction made for contributory negligence⁹, while for the purpose of quantifying fast track trial costs awarded to a defendant¹⁰, the value of the claim is:

- 1410 (a) the amount specified in the claim form (excluding interest and costs)¹¹;
- 1411 (b) if no amount is specified, the maximum amount which the claimant reasonably expected to recover according to the statement of value¹² included in the claim form¹³; or
- 1412 (c) more than £15,000, if the claim form states that the claimant cannot reasonably say how much is likely to be recovered¹⁴.

Where the claim is only for a remedy other than the payment of money the value of the claim is deemed to be more than £3,000 but not more than £10,000, unless the court orders otherwise¹⁵; while where the claim includes both a claim for the payment of money and for a remedy other than the payment of money, the value of the claim is deemed to be the higher of the value of the money claim decided in accordance with the provisions set out above, and the deemed value of the other remedy as so decided, unless the court orders otherwise¹⁶.

Where a defendant has made a counterclaim¹⁷ against the claimant, the counterclaim has a higher value than the claim and the claimant succeeds at trial both on the claim and on the counterclaim, then for the purpose of quantifying fast track trial costs awarded to the claimant, the value of the claim is the value of the defendant's counterclaim calculated in accordance with the rules set out above¹⁸.

1 As to the meaning of 'fast track trial costs' see PARA 1775.

- 2 As to the meaning of 'court' see PARA 22.
- 3 As to the meaning of 'summary assessment' and 'detailed assessment' see PARA 1734; as to summary assessment see PARA 1752; and as to detailed assessment see CPR Pt 47; and PARA 1779 et seq.
- 4 CPR 46.2(1).
- 5 Ie where CPR 46.3 applies: see PARA 1777.
- 6 CPR 46.2(2).
- 7 As to the meaning of 'claimant' see PARA 18.
- 8 CPR 46.2(3)(a)(i). As to the meaning of 'costs' see PARA 1730. As to interest on judgments see PARA 1149; and as to interest on costs see PARA 1759.
- 9 CPR 46.2(3)(a)(ii).
- 10 As to the meaning of 'defendant' see PARA 18.
- 11 CPR 46.2(3)(b)(i). As to the claim form see PARA 117 et seq.
- 12 As to the meaning of 'statement of value' see PARA 292 note 15.
- 13 Ie under CPR 16.3 (see PARA 586): see CPR 46.2(3)(b)(ii).
- 14 CPR 46.2(3)(b)(iii).
- 15 CPR 46.2(4).
- 16 CPR 46.2(5).
- 17 As to the meaning of 'counterclaim' see PARA 618 note 3. As to counterclaims see PARA 618 et seq.
- 18 CPR 46.2(6).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(4) SMALL CLAIMS TRACK COSTS AND FAST TRACK TRIAL COSTS/(ii) Fast Track Trial Costs/1777. Power to award more or less than the prescribed amount of fast track trial costs.

1777. Power to award more or less than the prescribed amount of fast track trial costs.

A court¹ may award an additional amount to the amounts of fast track trial costs² set out in the previous paragraph³, and less than those amounts, in the following circumstances⁴.

If, in addition to the advocate⁵, a party's legal representative⁶ attends the trial⁷, then if the court considers that it was necessary for a legal representative to attend to assist the advocate and the court awards fast track trial costs to that party, the court may award an additional £345 in respect of the legal representative's attendance at the trial⁸.

The court may in addition award a sum representing an additional liability⁹ under a funding arrangement¹⁰.

If the court considers that it is necessary to direct a separate trial of an issue then the court may award an additional amount in respect of the separate trial¹¹; but that amount must not exceed two-thirds of the amount payable for that claim, subject to a minimum award of £485¹².

Where the party to whom fast track trial costs are to be awarded is a litigant in person, the court will award two-thirds of the amount that would otherwise be awarded, if the litigant in person can prove financial loss¹³. If the litigant in person fails to prove financial loss, the court will award an amount in respect of the time spent reasonably doing the work at the rate specified in the costs practice direction¹⁴.

Where a defendant¹⁵ has made a counterclaim¹⁶ against the claimant¹⁷ and the claimant has succeeded on his claim and the defendant has succeeded on his counterclaim, the court will quantify the amount of the award of fast track trial costs to which (1) but for the counterclaim, the claimant would be entitled for succeeding on his claim; and (2) but for the claim, the defendant would be entitled for succeeding on his counterclaim, and make one award of the difference, if any, to the party entitled to the higher award of costs¹⁸.

Where the court considers that the party to whom fast track trial costs are to be awarded has behaved unreasonably or improperly during the trial, it may award that party an amount less than would otherwise be payable for that claim, as it considers appropriate¹⁹. Where the court considers that the party who is to pay the fast track trial costs has behaved improperly during the trial the court may award such additional amount to the other party as it considers appropriate²⁰.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'fast track trial costs' see PARA 1775.

3 I.e. the amount shown in the table in CPR 46.2(1); see PARA 1776.

4 CPR 46.3(1).

5 As to the meaning of 'advocate' for these purposes see PARA 292 note 2.

6 As to the meaning of 'legal representative' see PARA 1833 note 13.

7 As to the meaning of 'trial' for these purposes see PARA 1775 note 5.

8 CPR 46.3(2).

9 As to the meaning of 'additional liability' see PARA 1830 note 20.

10 See CPR 46.3(2A). As to the requirement to provide information about funding arrangements to the court and other parties see PARA 1832; as to the meaning of 'funding arrangement' see PARA 1830; and as to how the court will approach the question of what sum to allow in respect of additional liability see *Practice Direction about Costs* PD 43-48 Section 11; and PARA 1834. The court has power, when considering whether a percentage increase is reasonable, to allow different percentages for different items of costs or for different periods during which costs were incurred: *Practice Direction about Costs* PD 43-48 para 27.3. As to the meaning of 'percentage increase' see PARA 1830 note 20.

11 CPR 46.3(3).

12 CPR 46.3(3), (4).

13 CPR 46.3(5)(a).

14 CPR 46.3(5)(b). The hourly rate specified is currently £9.25: see *Practice Direction about Costs* PD 43-48 para 52.4. As to costs for litigants in person see further PARA 1809.

15 As to the meaning of 'defendant' see PARA 18.

16 As to the meaning of 'counterclaim' see PARA 618 note 3.

17 As to the meaning of 'claimant' see PARA 18.

18 CPR 46.3(6).

19 CPR 46.3(7).

20 CPR 46.3(8). As to sanctions and relief against sanctions see generally CPR 3.9-CPR 3.10; and PARAS 256-257.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(4) SMALL CLAIMS TRACK COSTS AND FAST TRACK TRIAL COSTS/(ii) Fast Track Trial Costs/1778. Fast track trial costs where there is more than one claimant or defendant.

1778. Fast track trial costs where there is more than one claimant or defendant.

Where the same advocate¹ is acting for more than one party the court² may make only one award in respect of fast track trial costs³ payable to that advocate⁴ and the parties for whom the advocate is acting are jointly entitled to any fast track trial costs awarded by the court⁵. Where the same advocate is acting for more than one claimant⁶ and each claimant has a separate claim against the defendant⁷, the value of the claim, for the purpose of quantifying the award in respect of fast track trial costs, is to be ascertained as follows⁸:

- 1413 (1) where the only claim of each claimant is for the payment of money, then the value of the claim is:
- 47
- 120. (a) if the award of fast track trial costs is in favour of the claimants, the total amount of the judgment made in favour of all the claimants jointly represented; or
- 121. (b) if the award is in favour of the defendant, the total amount claimed by the claimants,
- 48
- 1414 and in either case, quantified⁹ according to the normal rules¹⁰;
- 1415 (2) where the only claim of each claimant is for a remedy other than the payment of money, then the value of the claim is deemed to be more than £3,000 but not more than £10,000¹¹; and
- 1416 (3) where claims of the claimants include both a claim for the payment of money and for a remedy other than the payment of money, then the value of the claim is deemed to be more than £3,000 but not more than £10,000 or, if greater, the value of the money claims calculated in accordance with head (1) above¹².

Where there is more than one defendant and any or all of the defendants are separately represented, the court may award fast track trial costs to each party who is separately represented¹³. Where there is more than one claimant and a single defendant, the court may make only one award to the defendant of fast track trial costs, for which the claimants are jointly and severally liable¹⁴.

1 As to the meaning of 'advocate' for these purposes see PARA 1775 note 4.

2 As to the meaning of 'court' see PARA 22.

3 As to the meaning of 'fast track trial costs' see PARA 1775.

4 CPR 46.4(1)(a).

5 CPR 46.4(1)(b).

6 As to the meaning of 'claimant' see PARA 18.

7 As to the meaning of 'defendant' see PARA 18.

8 CPR 46.4(2).

9 ie quantified in accordance with CPR 46.2(3): see PARA 1776.

10 CPR 46.4(3)(a).

11 CPR 46.4(3)(b).

12 CPR 46.4(3)(c).

13 CPR 46.4(4).

14 CPR 46.4(5). For the purpose of quantifying the fast track trial costs awarded to the single defendant under CPR 46.4(5), the value of the claim is to be calculated in accordance with CPR 46.4(3): CPR 46.4(6). As to the meaning of 'joint liability' and 'several liability' see PARA 847 note 13.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(i) General Rules about Detailed Assessment/A. TIME AND VENUE FOR DETAILED ASSESSMENT/1779. Time when detailed assessment may be carried out.

(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS

(i) General Rules about Detailed Assessment

A. TIME AND VENUE FOR DETAILED ASSESSMENT

1779. Time when detailed assessment may be carried out.

The general rule is that the costs¹ of any proceedings or any part of the proceedings are not to be assessed by the detailed procedure² until the conclusion of the proceedings but the court³ may order them to be assessed immediately⁴. For these purposes, proceedings are concluded when the court has finally determined the matters in issue in the claim, whether or not there is an appeal⁵, and the making of an award of provisional damages⁶ will be treated as a final determination of the matters in issue⁷.

The court may order or the parties may agree in writing that, although the proceedings are continuing, they will nevertheless be treated as concluded⁸.

A costs judge⁹ or a district judge¹⁰ may make an order allowing detailed assessment proceedings to be commenced where there is no realistic prospect of the claim continuing¹¹.

1 As to the meaning of 'costs' see PARA 1730.

2 As to the meaning of 'detailed assessment' see PARA 1734.

3 As to the meaning of 'court' see PARA 22.

4 CPR 47.1. The usual order of ordering assessment in due course under CPR 47.1 was made in *Hicks v Russell Jones and Walker* [2001] CP Rep 25, CA.

5 *Practice Direction about Costs* PD 43-48 para 28.1(1); and see PARA 1780.

6 *Ie* under CPR Pt 41: see PARAS 1217-1221.

7 *Practice Direction about Costs* PD 43-48 para 28.1(2).

8 *Practice Direction about Costs* PD 43-48 para 28.1(3).

9 As to the meaning of 'costs judge' see PARA 1734 note 17.

10 As to district judges see **COURTS** vol 10 (Reissue) PARAS 661-662, 728.

11 *Practice Direction about Costs* PD 43-48 para 28.1(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(i) General Rules about Detailed Assessment/A. TIME AND VENUE FOR DETAILED ASSESSMENT/1780. No stay of detailed assessment where there is an appeal.

1780. No stay of detailed assessment where there is an appeal.

Detailed assessment¹ is not stayed² pending an appeal unless the court³ so orders⁴. An application to stay the detailed assessment of costs⁵ pending an appeal may be made to the court whose order is being appealed or to the court which will hear the appeal⁶.

1 As to the meaning of 'detailed assessment' see PARA 1734.

2 As to the meaning of 'stay' see PARA 233 note 11.

3 As to the meaning of 'court' see PARA 22.

4 CPR 47.2.

5 As to the meaning of 'costs' see PARA 1730.

6 *Practice Direction about Costs* PD 43-48 para 29.1(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(i) General Rules about Detailed Assessment/A. TIME AND VENUE FOR DETAILED ASSESSMENT/1781. Powers of an authorised court officer.

1781. Powers of an authorised court officer.

An authorised court officer¹ has all the powers of the court² when making a detailed assessment³, except:

- 1417 (1) power to make a wasted costs order⁴;
- 1418 (2) power to make an order under the rules allowing costs sanctions to be imposed for misconduct⁵ or for delay in commencing detailed assessment proceedings⁶;
- 1419 (3) power to make an order⁷ that detailed assessment is to be made by a costs judge⁸ or district judge⁹;
- 1420 (4) power to make a detailed assessment of costs¹⁰ payable to a solicitor by his client, unless the costs are being assessed where money is payable to a child¹¹ or protected party¹².

Where a party objects to the detailed assessment of costs being made by an authorised court officer, the court may order it to be made by a costs judge or a district judge¹³. Where the receiving party¹⁴, paying party¹⁵ and any other party to the detailed assessment proceedings who has served¹⁶ points of dispute¹⁷ are agreed that the assessment should not be made by an authorised court officer, the receiving party must so inform the court when requesting a hearing date. The court will then list the hearing before a costs judge or a district judge¹⁸. In any other case a party who objects to the assessment being made by an authorised court officer must make an application to the costs judge or district judge¹⁹ setting out the reasons for the objection, and if sufficient reason is shown the court will direct that the bill be assessed by a costs judge or district judge²⁰.

1 As to the meaning of 'authorised court officer' see PARA 1734 note 17. The court officers authorised by the Lord Chancellor to assess costs in the Supreme Court Costs Office and the Principal Registry of the Family Division are authorised to deal with claims for costs not exceeding £30,000 (excluding VAT) in the case of senior executive officers or their equivalent and £75,000 (excluding VAT) in the case of principal officers: *Practice Direction about Costs* PD 43-48 para 30.1(1). In calculating whether or not a bill of costs is within the authorised amounts, the figure to be taken into account is the total claim for costs including any additional liability: para 30.1(2). As to the meaning of 'additional liability' see PARA 1830 note 20. As to the Supreme Court Costs Office see **COURTS** vol 10 (Reissue) PARA 642; and as to the Principal Registry of the Family Division see **COURTS** vol 10 (Reissue) PARA 644. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

2 As to the meaning of 'court' see PARA 22.

3 As to the meaning of 'detailed assessment' see PARA 1734.

4 I.e a wasted costs order as defined in CPR 48.7: see PARA 1811.

5 I.e under CPR 44.14: see PARA 1757.

6 I.e under CPR 47.8: see PARA 1786.

7 I.e under CPR 47.3(2): see the text and note 13.

- 8 As to the meaning of 'costs judge' see PARA 1734 note 17.
- 9 As to district judges see **COURTS** vol 10 (Reissue) PARAS 661-662, 728.
- 10 As to the meaning of 'costs' see PARA 1730.
- 11 le assessed under CPR 48.5: see PARA 1808. As to the meaning of 'child' see PARA 222 note 3.
- 12 CPR 47.3(1). As to the meaning of 'protected party' see PARA 222 note 1.
- 13 CPR 47.3(2).
- 14 As to the meaning of 'receiving party' see PARA 1833 note 14.
- 15 As to the meaning of 'paying party' see PARA 1836 note 14.
- 16 As to the meaning of 'service' see PARA 138 note 2.
- 17 As to points of dispute see PARA 1787.
- 18 *Practice Direction about Costs* PD 43-48 para 30.1(3).
- 19 le an application under CPR Pt 23: see PARA 303 et seq.
- 20 *Practice Direction about Costs* PD 43-48 para 30.1(4).

UPDATE

1781 Powers of an authorised court officer

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(i) General Rules about Detailed Assessment/A. TIME AND VENUE FOR DETAILED ASSESSMENT/1782. Venue for detailed assessment proceedings.

1782. Venue for detailed assessment proceedings.

All applications and requests in detailed assessment¹ proceedings must be made to or filed² at the appropriate office³. The appropriate office means the district registry⁴ or county court⁵ in which the case was being dealt with when the judgment or order was made or the event occurred which gave rise to the right to assessment, or to which it has subsequently been transferred⁶ or, where a tribunal, person or other body makes an order for the detailed assessment of costs, a county court, or, in all other cases, including Court of Appeal cases, the Supreme Court Costs Office⁷. The court⁸ may, however, direct that the appropriate office is to be the Supreme Court Costs Office⁹ and a county court may direct that another county court is to be the appropriate office¹⁰. Such a direction may be made without proceedings being transferred to that court¹¹ and may be given on application or on the court's own initiative¹². Before making such a direction on its own initiative the court will give the parties the opportunity to make representations¹³. Unless the Supreme Court Costs Office is the appropriate office for these purposes, an order directing that an assessment is to take place at the Supreme Court Costs Office will be made only if it is appropriate to do so having regard to the size of the bill of costs¹⁴, the difficulty of the issues involved, the likely length of the hearing, the cost to the parties and any other relevant matter¹⁵.

1 As to the meaning of 'detailed assessment' see PARA 1734.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 CPR 47.4(1).

4 As to district registries see **COURTS** vol 10 (Reissue) PARA 646.

5 As to county courts see **COURTS** vol 10 (Reissue) PARA 701 et seq.

6 As to the transfer of proceedings see generally PARA 66 et seq.

7 *Practice Direction about Costs* PD 43-48 para 31.1. As to the Supreme Court Costs Office see **COURTS** vol 10 (Reissue) PARA 642. Special provisions apply where the appropriate office is any of the following county courts: Barnet, Bow, Brentford, Bromley, Central London, Clerkenwell, Croydon, Edmonton, Ilford, Kingston, Lambeth, Mayors and City of London, Romford, Shoreditch, Uxbridge, Wandsworth, West London, Willesden and Woolwich: *Practice Direction about Costs* PD 43-48 para 31.1A(1). In such a case, the receiving party must file any request for a detailed assessment hearing in the Supreme Court Costs Office and, for all purposes relating to that detailed assessment, the Supreme Court Costs Office will be treated as the appropriate office in that case; and, unless an order is made under CPR 47.4(2) directing that the Supreme Court Costs Office as part of the High Court is to be the appropriate office, an appeal from any decision made by a costs judge will lie to the Designated Civil Judge for the London Group of County Courts or such judge as he shall nominate. The appeal notice and any other relevant papers should be lodged at the Central London Civil Justice Centre: para 31.1A(2). As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

8 As to the meaning of 'court' see PARA 22.

9 CPR 47.4(2).

10 CPR 47.4(3). As to the transfer of proceedings to another county court for the detailed assessment of costs see CPR 30.2(1); and PARA 68.

- 11 CPR 47.4(4).
- 12 *Practice Direction about Costs* PD 43-48 para 31.2(1).
- 13 *Practice Direction about Costs* PD 43-48 para 31.2(2).
- 14 As to bills of costs see PARA 1783.
- 15 *Practice Direction about Costs* PD 43-48 para 31.2(3).

UPDATE

1782 Venue for detailed assessment proceedings

NOTE 7--Appointed day is 1 October 2009: SI 2009/1604.

TEXT AND NOTES 8, 9--CPR 47.4(2) amended: SI 2009/2092.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(i) General Rules about Detailed Assessment/B. BILLS OF COSTS/1783. Form and contents of bills of costs.

B. BILLS OF COSTS

1783. Form and contents of bills of costs.

Model forms of bills of costs to be used for detailed assessments¹ are scheduled to the costs practice direction². The use of a model form is not compulsory, but is encouraged. A party wishing to rely upon a bill which departs from the model forms must include in the background information of the bill an explanation for that departure³.

A bill of costs may consist of such of the following sections as may be appropriate:

- 1421 (1) title page⁴;
- 1422 (2) background information⁵;
- 1423 (3) items of costs claimed under the specified headings⁶;
- 1424 (4) summary showing the total costs claimed on each page of the bill⁷;
- 1425 (5) schedules of time spent on non-routine attendances; and
- 1426 (6) the appropriate certificates⁸.

Where it is necessary or convenient to do so, a bill of costs may be divided into two or more parts, each part containing sections (2), (3) and (4) above. Circumstances in which it will be necessary or convenient to divide a bill into parts include:

- 1427 (a) where the receiving party⁹ acted in person during the course of the proceedings (whether or not that party also had a legal representative¹⁰ at that time) the bill must be divided into different parts so as to distinguish between the costs claimed for work done by the legal representative and the costs claimed for work done by the receiving party in person¹¹;
- 1428 (b) where the receiving party had pro bono representation¹² for part of the proceedings and an order for a payment to the prescribed charity¹³ has been made, the bill must be divided into different parts so as to distinguish between the sum equivalent to the costs claimed for work done by the legal representative acting free of charge and the costs claimed for work done by the legal representative not acting free of charge¹⁴;
- 1429 (c) where the receiving party was represented by different solicitors during the course of the proceedings, the bill must be divided into different parts so as to distinguish between the costs payable in respect of each solicitor¹⁵;
- 1430 (d) where the receiving party obtained legal aid or Legal Services Commission ('LSC') funding¹⁶ in respect of all or part of the proceedings the bill must be divided into separate parts so as to distinguish between costs claimed before legal aid or LSC funding was granted, costs claimed after legal aid or LSC funding was granted and any costs claimed after legal aid or LSC funding ceased¹⁷;
- 1431 (e) where VAT is claimed and there was a change in the rate of VAT during the course of the proceedings, the bill must be divided into separate parts so as to distinguish between costs claimed at the old rate of VAT and costs claimed at the new rate of VAT¹⁸;

- 1432 (f) where the bill covers costs payable under an order or orders under which there are different paying parties¹⁹ the bill must be divided into parts so as to deal separately with the costs payable by each paying party²⁰;
- 1433 (g) where the bill covers costs payable under an order or orders, in respect of which the receiving party wishes to claim interest²¹ from different dates, the bill must be divided to enable such interest to be calculated²².

Where a party claims costs against another party and also claims costs against the LSC only for work done in the same period, the costs claimed against the LSC only can be claimed either in a separate part of the bill or in additional columns in the same part of the bill²³.

Detailed provision is made relating to work done by solicitors²⁴. Where a claim is made for a percentage increase²⁵ in addition to an hourly rate or base fee, the amount of the increase must be shown separately, either in the appropriate arithmetic column or in the narrative column²⁶. Where a claim is made against the LSC only and includes enhancement²⁷ and where a claim is made in family proceedings and includes a claim for uplift or general care and conduct, the amount of enhancement, uplift and general care and conduct must be shown, in respect of each item upon which it is claimed, as a separate amount either in the appropriate arithmetic column or in the narrative column²⁸.

A claim may be made for the reasonable costs of preparing and checking the bill of costs²⁹.

A bill of costs filed for detailed assessment is always retained by the court³⁰.

1 As to the meaning of 'detailed assessment' see PARA 1734; and as to the meaning of 'costs' see PARA 1730.

2 See *Practice Direction about Costs* PD 43-48 para 3.5; and Precedents A-D in the Schedule of Costs Precedents annexed to the costs practice direction.

3 *Practice Direction about Costs* PD 43-48 para 3.7.

4 The title page of the bill of costs must set out (1) the full title of the proceedings; (2) the name of the party whose bill it is and a description of the document showing the right to assessment (see *Practice Direction about Costs* PD 43-48 para 40.4; and PARA 1792); (3) if VAT is included as part of the claim for costs, the VAT number of the legal representative or other person in respect of whom VAT is claimed; (4) details of all legal aid certificates, Legal Services Commission certificates and relevant amendment certificates in respect of which claims for costs are included in the bill: *Practice Direction about Costs* PD 43-48 para 4.4. As to VAT on costs see PARA 1749.

5 The background information included in the bill of costs should set out (1) a brief description of the proceedings up to the date of the notice of commencement; (2) a statement of the status of the solicitor or solicitor's employee in respect of whom costs are claimed and (if those costs are calculated on the basis of hourly rates) the hourly rates claimed for each such person; (3) a brief explanation of any agreement or arrangement between the receiving party and his solicitors, which affects the costs claimed in the bill: *Practice Direction about Costs* PD 43-48 para 4.5. It should be noted that 'legal executive' means a Fellow of the Institute of Legal Executives. Other clerks, who are fee earners of equivalent experience, may be entitled to similar rates. It should be borne in mind that Fellows of the Institute of Legal Executives will have spent approximately six years in practice, and taken both general and specialist examinations. The Fellows have therefore acquired considerable practical and academic experience. Clerks without the equivalent experience of legal executives will normally be treated as being the equivalent of trainee solicitors and para-legals: *Practice Direction about Costs* PD 43-48 para 4.5(2). As to legal executives see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1463 et seq.

6 The bill of costs may consist of items under such of the following heads as may be appropriate: (1) attendances on the court and counsel up to the date of the notice of commencement; (2) attendances on and communications with the receiving party; (3) attendances on and communications with witnesses including any expert witness; (4) attendances to inspect any property or place for the purposes of the proceedings; (5) attendances on and communications with other persons, including offices of public records; (6) communications with the court and with counsel; (7) work done on documents: preparing and considering documentation, including documentation relating to pre-action protocols where appropriate, work done in connection with arithmetical calculations of compensation and/or interest and time spent collating documents; (8) work done in connection with negotiations with a view to settlement if not already covered in the heads listed above; (9) attendances on and communications with London and other agents and work done by them; (10) other work

done which was of or incidental to the proceedings and which is not already covered in the heads listed above: *Practice Direction about Costs* PD 43-48 para 4.6. In respect of each of the heads of costs: (a) 'communications' means letters out and telephone calls; (b) communications which are not routine communications must be set out in chronological order; (c) routine communications should be set out as a single item at the end of each head: para 4.7. Routine communications are letters out, e-mails out and telephone calls which because of their simplicity should not be regarded as letters or e-mails of substance or telephone calls which properly amount to an attendance: para 4.8. Each item claimed in the bill of costs must be consecutively numbered: para 4.9. In each part of the bill of costs which claims items under head (1) (attendances on court and counsel) a note should be made of all relevant events, including events which do not constitute chargeable items, and any orders for costs which the court made (whether or not a claim is made in respect of those costs in that bill of costs): para 4.10. The numbered items of costs may be set out on paper divided into columns. Precedents A, B, C and D in the Schedule of Costs Precedents annexed to the costs practice direction illustrate various model forms of bills of costs: *Practice Direction about Costs* PD 43-48 para 4.11. In respect of heads (2)-(10) above, if the number of attendances and communications other than routine communications is 20 or more, the claim for the costs of those items in that section of the bill of costs should be for the total only and should refer to a schedule in which the full record of dates and details is set out. If the bill of costs contains more than one schedule each schedule should be numbered consecutively: para 4.12. The bill of costs must not contain any claims in respect of costs or court fees which relate solely to the detailed assessment proceedings other than costs claimed for preparing and checking the bill: para 4.13.

7 The summary must show the total profit costs and disbursements claimed separately from the total VAT claimed. Where the bill of costs is divided into parts the summary must also give totals for each part. If each page of the bill gives a page total the summary must also set out the page totals for each page: *Practice Direction about Costs* PD 43-48 para 4.14.

8 *Practice Direction about Costs* PD 43-48 para 4.1. The bill of costs must contain such of the certificates, the texts of which are set out in Precedent F of the Schedule of Costs Precedents annexed to the costs practice direction, as are appropriate: *Practice Direction about Costs* PD 43-48 para 4.15.

9 As to the meaning of 'receiving party' see PARA 1833 note 14.

10 As to the meaning of 'legal representative' see PARA 1833 note 13.

11 *Practice Direction about Costs* PD 43-48 para 4.2(1). A litigant in person is not treated for the purposes of VAT as having supplied services: see para 5.18; and PARA 1749. Consequently a bill of costs presented for agreement or assessment should not claim any VAT which will not be allowed on assessment: para 5.19.

12 As to the meaning of 'pro bono representation' see PARA 611 note 20.

13 Ie under the Legal Services Act 2007 s 194(3): see PARA 1824. As to the meaning of 'prescribed charity' see PARA 611 note 20.

14 *Practice Direction about Costs* PD 43-48 para 4.2(1A).

15 *Practice Direction about Costs* PD 43-48 para 4.2(2).

16 As to costs when parties are in receipt of legal aid or LSC funding see further PARA 1814 et seq.

17 *Practice Direction about Costs* PD 43-48 para 4.2(3).

18 *Practice Direction about Costs* PD 43-48 para 4.2(4). Where there is a change in the rate of VAT, suppliers of goods and services are entitled by the Value Added Tax Act 1994 s 88(1), (2) (see **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 36) in most circumstances to elect whether the new or the old rate of VAT should apply to a supply where the basic and actual tax points span a period during which there has been a change in VAT rates: *Practice Direction about Costs* PD 43-48 para 5.7. It will be assumed, unless a contrary indication is given in writing, that an election to take advantage of these provisions and to charge VAT at the lower rate has been made. In any case in which an election to charge at the lower rate is not made, such a decision must be justified to the court assessing the costs: para 5.8. As to apportionment see para 5.9. As to changes in the rate between the conclusion of detailed assessment and the issue of the final costs certificate see para 5.10; and PARA 1749.

19 As to the meaning of 'paying party' see PARA 1836 note 14.

20 *Practice Direction about Costs* PD 43-48 para 4.2(5).

21 As to interest on costs see PARA 1759.

22 *Practice Direction about Costs* PD 43-48 para 4.2(6).

23 *Practice Direction about Costs* PD 43-48 para 4.3. Precedents C and D in the Schedule of Costs Precedents annexed to the costs practice direction show how bills should be drafted when costs are claimed against the LSC only: *Practice Direction about Costs* PD 43-48 para 4.3.

24 See *Practice Direction about Costs* PD 43-48 para 4.16, which provides as follows:

- 109 (1) routine letters out and routine telephone calls will in general be allowed on a unit basis of six minutes each, the charge being calculated by reference to the appropriate hourly rate. The unit charge for letters out will include perusing and considering the relevant letters in and no separate charge should be made for in-coming letters;
- 110 (2) e-mails received by solicitors will not normally be allowed. The court may, in its discretion, allow an actual time charge for preparation of emails sent by solicitors, which properly amount to attendances provided that the time taken has been recorded. The court may also, in its discretion, allow a sum in respect of routine emails sent to the client or others on a unit basis of six minutes each, the charge being calculated by reference to the appropriate hourly rate;
- 111 (3) local travelling expenses incurred by solicitors will not be allowed. The definition of 'local' is a matter for the discretion of the court. While no absolute rule can be laid down, as a matter of guidance, 'local' will, in general, be taken to mean within a radius of 10 miles from the court dealing with the case at the relevant time. Where travelling and waiting time is claimed, this should be allowed at the rate agreed with the client unless this is more than the hourly rate on the assessment;
- 112 (4) the cost of postage, couriers, out-going telephone calls, fax and telex messages will in general not be allowed but the court may exceptionally in its discretion allow such expenses in unusual circumstances or where the cost is unusually heavy;
- 113 (5) the cost of making copies of documents will not in general be allowed but the court may exceptionally in its discretion make an allowance for copying in unusual circumstances or where the documents copied are unusually numerous in relation to the nature of the case. Where this discretion is invoked the number of copies made, their purpose and the costs claimed for them must be set out in the bill;
- 114 (6) agency charges as between a principal solicitor and his agent will be dealt with on the principle that such charges, where appropriate, form part of the principal solicitor's charges. Where these charges relate to para 4.6(1) (attendances at court and on counsel: see note 6) they should be included in their chronological order in that head. In other cases they should be included in para 4.6(9) (attendances on London and other agents: see note 6).

Petty (or general) disbursements such as postage, fares etc which are normally treated as part of a solicitor's overheads and included in his profit costs should be charged with VAT even though they bear no tax when the solicitor incurs them. The cost of travel by public transport on a specific journey for a particular client where it forms part of the service rendered by a solicitor to his client and is charged in his bill of costs, attracts VAT: para 5.11. As to expenses not subject to VAT see para 5.12. As to VAT on costs see generally PARA 1749.

25 As to the meaning of 'percentage increase' see PARA 1830 note 20.

26 *Practice Direction about Costs* PD 43-48 para 4.17(1). For examples see Precedents A, B in the Schedule of Costs Precedents annexed to the costs practice direction.

27 'Enhancement' means the increase in prescribed rates which may be allowed by a costs officer in accordance with the Legal Aid in Civil Proceedings (Remuneration) Regulations 1994, SI 1994/228, or the Legal Aid in Family Proceedings Regulations 1991, SI 1991/2038: see **LEGAL AID**. As to the meaning of 'costs officer' see PARA 1734 note 17.

28 *Practice Direction about Costs* PD 43-48 para 4.17(2). For an example see Precedent C in the Schedule of Costs Precedents annexed to the costs practice direction.

29 *Practice Direction about Costs* PD 43-48 para 4.18.

30 *Practice Direction about Costs* PD 43-48 para 5.15. Accordingly if a solicitor waives his solicitor and client costs and accepts the costs certified by the court as payable by the unsuccessful party in settlement, it will be necessary for a short statement as to the amount of the certified costs and the VAT thereon to be prepared for use as the tax invoice: para 5.15.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(ii) Costs Payable by One Party to Another/A. COMMENCEMENT OF DETAILED ASSESSMENT PROCEEDINGS/1784.
Commencement of detailed assessment proceedings.

(ii) Costs Payable by One Party to Another

A. COMMENCEMENT OF DETAILED ASSESSMENT PROCEEDINGS

1784. Commencement of detailed assessment proceedings.

A detailed assessment¹ may be in respect of (1) base costs², where a claim for additional liability³ has not been made or has been agreed; (2) a claim for additional liability only, base costs having been summarily assessed⁴ or agreed; or (3) both base costs and additional liability⁵. Where a costs officer⁶ is to make a detailed assessment of costs which are payable by one party to another or of the sum which is payable by one party to the prescribed charity⁷, the following provisions apply⁸. Detailed assessment proceedings are commenced by the receiving party⁹ serving¹⁰ on the paying party¹¹ notice of commencement in the relevant practice form¹² and a copy of the bill of costs¹³. The receiving party must also serve a copy of the notice of commencement and the bill on any other relevant persons¹⁴ specified in the costs practice direction¹⁵. A person on whom a copy of the notice of commencement is so served is a party to the detailed assessment proceedings in addition to the paying party and the receiving party¹⁶.

As well as the notice of commencement and copy of the bill of costs, the receiving party must also serve on the paying party and all other relevant persons the following documents:

- 1434 (a) if the detailed assessment is in respect of costs without any additional liability, copies of the fee notes of counsel and of any expert in respect of fees claimed in the bill, written evidence as to any other disbursement which is claimed and which exceeds £250 and a statement giving the name and address for service of any person upon whom the receiving party intends to serve the notice of commencement¹⁷;
- 1435 (b) if the detailed assessment is in respect of an additional liability only, the relevant details of the additional liability¹⁸ and a statement giving the name and address of any person upon whom the receiving party intends to serve the notice of commencement¹⁹; and
- 1436 (c) if the detailed assessment is in respect of both base costs and an additional liability, all the documents listed in head (a) above and the specified documents²⁰ giving details of an additional liability²¹.

A party who is served with a notice of commencement may apply to a costs judge²² or a district judge²³ to determine whether the party who served it is entitled to commence detailed assessment proceedings²⁴. On hearing such an application the orders which the court may make include an order allowing the detailed assessment proceedings to continue or an order setting aside²⁵ the notice of commencement²⁶.

1 As to the meaning of 'detailed assessment' see PARA 1734.

2 As to the meaning of 'base costs' see PARA 1740 note 3; and as to the meaning of 'costs' see PARA 1730.

3 As to the meaning of 'additional liability' see PARA 1830 note 20.

4 As to the meaning of 'summary assessment' see PARA 1734; and as to summary assessment see PARA 1752.

5 *Practice Direction about Costs* PD 43-48 para 32.2.

6 As to the meaning of 'costs officer' see PARA 1734 note 17.

7 le pursuant to an order under the Legal Services Act 2007 s 194(3): see PARA 1824. As to the meaning of 'prescribed charity' see PARA 611 note 20.

8 CPR 47.5.

9 As to the meaning of 'receiving party' see PARA 1833 note 14.

10 As to the meaning of 'service' see PARA 138 note 2.

11 As to the meaning of 'paying party' see PARA 1836 note 14.

12 The notice of commencement must be in Form N252 (see *The Civil Court Practice*): *Practice Direction about Costs* PD 43-48 para 32.8(1). Before it is served, it must be completed to show as separate items (1) the total amount of the costs claimed in the bill; (2) the extra sum which will be payable by way of fixed costs and court fees if a default costs certificate is obtained: para 32.8(2). As to bills of costs see further note 12; and as to default costs certificates see PARA 1789. Where the notice of commencement is to be served outside England and Wales, the date to be inserted in the notice of commencement for the paying party to send points of dispute (see PARA 1787) is a date (not less than 21 days from the date of service of the notice) which must be calculated by reference to CPR Pt 6 Section IV (CPR 6.30-6.47: see PARA 168 et seq) as if the notice were a claim form and as if the date to be inserted was the date for the filing of a defence: *Practice Direction about Costs* PD 43-48 para 32.9(1), (2).

13 CPR 47.6(1). In a case in which the bill of costs is capable of being copied onto a computer disk, if, before the detailed assessment hearing, a paying party requests a disk copy of the bill, the receiving party must supply him with a copy free of charge not more than seven days after the date on which he received the request: *Practice Direction about Costs* PD 43-48 para 32.11(1), (2). As to bills of costs see PARA 1783.

14 For these purposes, 'relevant person' means (1) any person who has taken part in the proceedings which gave rise to the assessment and who is directly liable under an order for costs made against him; (2) any person who has given to the receiving party notice in writing that he has a financial interest in the outcome of the assessment and wishes to be a party accordingly; (3) any other person whom the court orders to be treated as such: *Practice Direction about Costs* PD 43-48 para 32.10(1). Where a party is unsure whether a person is or is not a relevant person, that party may apply to the appropriate office (see PARA 1782) for directions: para 32.10(2). The court will generally not make an order that the person in respect of whom the application is made will be treated as a relevant person, unless within a specified time he applies to the court to be joined as a party to the assessment proceedings in accordance with CPR Pt 19 (parties and group litigation: see PARA 210 et seq): *Practice Direction about Costs* PD 43-48 para 32.10(3).

15 CPR 47.6(2).

16 CPR 47.6(3).

17 *Practice Direction about Costs* PD 43-48 para 32.3.

18 The relevant details of an additional liability are as follows: (1) in the case of a conditional fee agreement with a success fee (see PARA 1830), a statement showing the amount of costs which have been summarily assessed or agreed, and the percentage increase which has been claimed in respect of those costs and a statement of the reasons for the percentage increase given in accordance with the Conditional Fee Agreement Regulations 2000, SI 2000/692, reg 3(1)(a) (see PARA 1830 note 3) or the Collective Conditional Fee Agreements Regulations 2000, SI 2000/2988, reg 5(1)(c); (2) if the additional liability is an insurance premium, a copy of the insurance certificate showing whether the policy covers the receiving party's own costs, his opponent's costs; or his own costs and his opponent's costs, and the maximum extent of that cover, and the amount of the premium paid or payable; and (3) if the receiving party claims an additional amount under the Access to Justice Act 1999 s 30 (see PARA 1830) a statement setting out the basis upon which the receiving party's liability for the additional amount is calculated: *Practice Direction about Costs* PD 43-48 para 32.5. Both sets of regulations were revoked by the Conditional Fee Agreements (Revocation) Regulations 2005, SI 2005/2305, but continue to have effect in relation to conditional fee agreements and collective conditional fee agreements entered into before 1 November 2005.

Attention is drawn to the fact that the additional amount recoverable pursuant to the Access to Justice Act 1999 s 30 in respect of a membership organisation must not exceed the likely cost of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings as provided by

the Access to Justice (Membership Organisation) Regulations 2000, SI 2000/693, reg 4 (for the purposes of arrangements entered into before 1 November 2005) and the Access to Justice (Membership Organisation) Regulations 2005, SI 2005/2306, reg 5 (for the purposes of arrangements entered into on or after 1 November 2005) (see PARA 1830): *Practice Direction about Costs* PD 43-48 para 32.6. As to the meaning of 'percentage increase' and 'insurance premium' see PARA 1830 note 20; and as to the meaning of 'membership organisation' see PARA 1830 note 6.

Where the receiving party has left out of the bill of costs, part of what he should have claimed, and there has been a settlement of the bill without reference to costs of previous solicitors, the receiving party cannot recover more than the amount agreed: *Moat Housing Group-South Ltd v Harris*[2007] EWHC 3092 (QB), [2008] 1 WLR 1578, [2007] All ER (D) 323 (Dec).

19 *Practice Direction about Costs* PD 43-48 para 32.4.

20 In the documents listed in *Practice Direction about Costs* PD 43-48 para 32.5: see note 18.

21 *Practice Direction about Costs* PD 43-48 para 32.7.

22 As to the meaning of 'costs judge' see PARA 1734 note 17.

23 As to district judges see **COURTS** vol 10 (Reissue) PARAS 661-662, 728.

24 *Practice Direction about Costs* PD 43-48 para 28.1(4)(a).

25 As to the meaning of 'set aside' see PARA 197 note 2.

26 *Practice Direction about Costs* PD 43-48 para 28.1(4)(b).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(ii) Costs Payable by One Party to Another/A. COMMENCEMENT OF DETAILED ASSESSMENT PROCEEDINGS/1785. Period for commencing detailed assessment proceedings.

1785. Period for commencing detailed assessment proceedings.

Where a costs officer¹ is to make a detailed assessment² of costs³ which are payable by one party to another or of the sum which is payable by one party to the prescribed charity⁴, the period for commencing detailed assessment proceedings is as follows⁵. Where the source of the right to detailed assessment is:

- 1437 (1) a judgment, direction, order, award or other determination, the time by which detailed assessment proceedings must be commenced is three months after the date of that judgment, direction, order, award or other determination or, where detailed assessment is stayed⁶ pending an appeal⁷, three months after the date of the order lifting the stay;
- 1438 (2) discontinuance⁸, the time by which detailed assessment proceedings must be commenced is three months after the date of service⁹ of notice of discontinuance¹⁰ or three months after the date of the dismissal of application to set the notice of discontinuance aside¹¹;
- 1439 (3) acceptance of an offer to settle¹², the time by which detailed assessment proceedings must be commenced is three months after the date when the right to costs arose¹³.

The parties may agree¹⁴ to extend or shorten the time so specified for commencing the detailed assessment proceedings¹⁵ and a party may apply to the appropriate office¹⁶ for an order¹⁷ to extend or shorten that time¹⁸. Permission to commence assessment proceedings out of time is not required¹⁹ but sanctions may be imposed for delay in commencing the proceedings²⁰.

1 As to the meaning of 'costs officer' see PARA 1734 note 17.

2 As to the meaning of 'detailed assessment' see PARA 1734.

3 As to the meaning of 'costs' see PARA 1730.

4 I.e. pursuant to an order under the Legal Services Act 2007 s 194(3): see PARA 1824. As to the meaning of 'prescribed charity' see PARA 611 note 20.

5 CPR 47.5, 47.7. The proceedings are commenced by service of the documents referred to in CPR 47.6(1) (see PARA 1784): *Practice Direction about Costs* PD 43-48 para 33.3.

6 As to the meaning of 'stay' see PARA 233 note 11.

7 Detailed assessment proceedings are not normally stayed pending an appeal: see PARA 1780.

8 I.e. under CPR Pt 38: see PARAS 723-728.

9 As to the meaning of 'service' see PARA 138 note 2.

10 I.e. under CPR 38.3: see PARA 725.

11 I.e. under CPR 38.4: see PARA 726. As to the meaning of 'set aside' see PARA 197 note 6.

12 I.e. under CPR Pt 36: see PARA 729 et seq.

- 13 CPR 47.7, Table.
- 14 le under CPR 2.11: see PARA 248.
- 15 *Practice Direction about Costs* PD 43-48 para 33.1.
- 16 As to the appropriate office see PARA 1782.
- 17 le under CPR 3.1(2)(a): see PARA 247.
- 18 *Practice Direction about Costs* PD 43-48 para 33.2.
- 19 *Practice Direction about Costs* PD 43-48 para 33.4.
- 20 See PARA 1786.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(ii) Costs Payable by One Party to Another/A. COMMENCEMENT OF DETAILED ASSESSMENT PROCEEDINGS/1786. Sanction for delay in commencing detailed assessment proceedings.

1786. Sanction for delay in commencing detailed assessment proceedings.

Where a costs officer¹ is to make a detailed assessment² of costs³ which are payable by one party to another or of the sum which is payable by one party to the prescribed charity⁴, the following provisions apply⁵. Where the receiving party⁶ fails to commence detailed assessment proceedings within the period specified by the Civil Procedure Rules ('CPR')⁷ or by any direction of the court⁸, the paying party⁹ may apply for an order requiring the receiving party to commence detailed assessment proceedings within such time as the court may specify¹⁰.

On such an application, the court may direct that, unless the receiving party commences detailed assessment proceedings within the time specified by the court, all or part of the costs to which the receiving party would otherwise be entitled will be disallowed¹¹. If the paying party has not made such an application and the receiving party commences the proceedings later than the period specified in the CPR¹², the court may disallow all or part of the interest otherwise payable¹³ but must not impose any other sanction except in accordance with its powers¹⁴ in relation to misconduct¹⁵.

Where the costs to be assessed in a detailed assessment are payable out of the Community Legal Service Fund¹⁶, these provisions apply as if the receiving party were the solicitor to whom the costs are payable and the paying party were the Legal Services Commission¹⁷.

1 As to the meaning of 'costs officer' see PARA 1734 note 17.

2 As to the meaning of 'detailed assessment' see PARA 1734.

3 As to the meaning of 'costs' see PARA 1730.

4 I.e. pursuant to an order under the Legal Services Act 2007 s 194(3): see PARA 1824. As to the meaning of 'prescribed charity' see PARA 611 note 20.

5 CPR 47.5.

6 As to the meaning of 'receiving party' see PARA 1833 note 14.

7 I.e. specified in CPR 47.7: see PARA 1785. As to the method of commencing proceedings see PARA 1784.

8 As to the meaning of 'court' see PARA 22.

9 As to the meaning of 'paying party' see PARA 1836 note 14.

10 CPR 47.8(1). An application for such an order must be made in writing and be issued in the appropriate office: *Practice Direction about Costs* PD 43-48 para 34.1(1). The application notice must be served at least seven days before the hearing: para 34.1(2). As to the appropriate office see PARA 1782; and as to the meaning of 'service' see PARA 138 note 2.

11 CPR 47.8(2). As to the relevance of pre-CPR case law on delay in commencing taxation proceedings under the former regime of RSC Order 62 r 28(4) (revoked subject to transitional provisions) see PARA 1736.

12 I.e. the period specified in CPR 47.7: see PARA 1785.

13 I.e. under the Judgments Act 1838 s 17 or the County Courts Act 1984 s 74: see PARA 1759.

14 I.e. in accordance with its powers under CPR 44.14: see PARA 1757.

- 15 CPR 47.8(3). See *Haji-Ioannou v Frangos* [2006] EWCA Civ 1663, [2007] 3 All ER 938.
- 16 As to the Community Legal Service Fund see generally **LEGAL AID** vol 65 (2008) PARA 38.
- 17 CPR 47.8(4). As to costs where a party is in receipt of funding by the LSC see further PARA 1814 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(ii) Costs Payable by One Party to Another/A. COMMENCEMENT OF DETAILED ASSESSMENT PROCEEDINGS/1787. Points of dispute and consequence of not serving.

1787. Points of dispute and consequence of not serving.

Where a costs officer¹ is to make a detailed assessment² of costs³ which are payable by one party to another or of the sum which is payable by one party to the prescribed charity⁴, the following provisions apply⁵. The paying party⁶ and any other party to the detailed assessment proceedings may dispute any item in the bill of costs⁷ by serving⁸ points of dispute on the receiving party⁹ and every other party to the detailed assessment proceedings¹⁰.

Points of dispute should be short and to the point¹¹. They must:

- 1440 (1) identify each item in the bill of costs which is disputed;
- 1441 (2) in each case, state concisely the nature and grounds of dispute;
- 1442 (3) where practicable suggest a figure to be allowed for each item in respect of which a reduction is sought; and
- 1443 (4) be signed¹² by the party serving them or his solicitor¹³.

Where the receiving party claims an additional liability¹⁴, a party who serves points of dispute on the receiving party may include a request for information about other methods of financing costs which were available to the receiving party¹⁵.

The normal period for serving points of dispute is 21 days after the date of service of the notice of commencement¹⁶. If a party serves points of dispute after this period, he may not be heard further in the detailed assessment proceedings unless the court¹⁷ gives permission¹⁸. However, the parties may agree¹⁹ to extend or shorten the time so specified for service of points of dispute and a party may apply to the appropriate office²⁰ for an order²¹ to extend or shorten that time²².

The receiving party may file²³ a request for a default costs certificate²⁴ if the specified period²⁵ for serving points of dispute has expired and he has not been served with any points of dispute²⁶. If, however, any party (including the paying party) serves points of dispute before the issue of a default costs certificate the court may not issue the default costs certificate²⁷.

1 As to the meaning of 'costs officer' see PARA 1734 note 17.

2 As to the meaning of 'detailed assessment' see PARA 1734.

3 As to the meaning of 'costs' see PARA 1730.

4 Ie pursuant to an order under the Legal Services Act 2007 s 194(3): see PARA 1824. As to the meaning of 'prescribed charity' see PARA 611 note 20.

5 CPR 47.5.

6 As to the meaning of 'paying party' see PARA 1836 note 14.

7 As to the bill of costs see PARA 1783.

8 As to the meaning of 'service' see PARA 138 note 2.

9 As to the meaning of 'receiving party' see PARA 1833 note 14. In cases in which points of dispute are capable of being copied onto a computer disk, if, within 14 days of receipt of the points of dispute, the receiving party requests a disk copy of them, the paying party must supply him with a copy free of charge not more than seven days after the date on which he received the request: *Practice Direction about Costs* PD 43-48 para 35.6(1), (2).

10 CPR 47.9(1). The other parties who must be served are the parties whose names and addresses for service appear on the statement served by the receiving party in accordance with *Practice Direction about Costs* PD 43-48 para 32.3 or para 32.4 (see PARA 1784): para 35.5.

11 *Practice Direction about Costs* PD 43-48 para 35.2. They must follow as closely as possible Precedent G in the Schedule of Costs Precedents annexed to the costs practice direction: para 35.2.

12 As to the signature of documents see PARA 1752 note 23.

13 *Practice Direction about Costs* PD 43-48 para 35.3.

14 As to the meaning of 'additional liability' see PARA 1830 note 20.

15 *Practice Direction about Costs* PD 43-48 para 35.7(1). CPR Pt 18 (further information) and its supplementary practice direction (see PARAS 611-612) apply to such a request: *Practice Direction about Costs* PD 43-48 para 35.7(2).

16 CPR 47.9(2); *Practice Direction about Costs* PD 43-48 para 35.4(1). Where, however, a notice of commencement is served on a party outside England and Wales, the period within which that party should serve points of dispute is to be calculated by reference to CPR Pt 6 Section IV (CPR 6.30-6.47) (see PARA 168 et seq) as if the notice of commencement were a claim form and as if the period for serving points of dispute were the period for filing a defence: *Practice Direction about Costs* PD 43-48 para 35.4(2). As to service of the notice of commencement see PARA 1784.

17 As to the meaning of 'court' see PARA 22.

18 CPR 47.9(3).

19 Ie under CPR 2.11: see PARA 248.

20 As to the appropriate office see PARA 1782.

21 Ie an order under CPR 3.1(2)(a): see PARA 247.

22 *Practice Direction about Costs* PD 43-48 para 35.1.

23 As to the meaning of 'filing' see PARA 1832 note 8.

24 As to default costs certificates see PARA 1789.

25 Ie the period specified in CPR 47.9(2): see the text and note 15.

26 CPR 47.9(4).

27 CPR 47.9(5). As to the procedure to be followed after points of dispute have been served see PARAS 1791-1793.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(ii) Costs Payable by One Party to Another/A. COMMENCEMENT OF DETAILED ASSESSMENT PROCEEDINGS/1788. Procedure where costs are agreed.

1788. Procedure where costs are agreed.

Where a costs officer¹ is to make a detailed assessment² of costs³ which are payable by one party to another or of the sum which is payable by one party to the prescribed charity⁴, the following provisions apply⁵. If the paying party⁶ and the receiving party⁷ agree the amount of costs, either party may apply for a costs certificate, either interim or final, in the amount agreed⁸. An application for such a certificate must be made to the court⁹ which would be the venue¹⁰ for detailed assessment proceedings¹¹. Nothing in these provisions prevents parties who seek a judgment or order by consent¹² from including in the draft a term that a party shall pay to another party a specified sum in respect of costs¹³.

Where the parties have agreed terms as to the issue of a costs certificate, either interim or final, they must apply under the normal procedure for consent judgments and orders¹⁴ for an order that a certificate be issued in terms set out in the application. Such an application may be dealt with by a court officer¹⁵, who may issue the certificate¹⁶. Where, however, in the course of proceedings the receiving party claims that the paying party has agreed to pay costs but that he will neither pay those costs nor join in a consent application, the receiving party may apply¹⁷ for a certificate either interim or final to be issued¹⁸.

The receiving party may discontinue¹⁹ the detailed assessment proceedings²⁰. Where he does so before a detailed assessment hearing has been requested, the paying party may apply to the appropriate office²¹ for an order about the costs of the detailed assessment proceedings²². Where a detailed assessment hearing has been requested, however, the receiving party may not discontinue unless the court gives permission²³.

A bill of costs²⁴ may be withdrawn by consent whether or not a detailed assessment hearing has been requested²⁵.

1 As to the meaning of 'costs officer' see PARA 1734 note 17.

2 As to the meaning of 'detailed assessment' see PARA 1734.

3 As to the meaning of 'costs' see PARA 1730.

4 I.e. pursuant to an order under the Legal Services Act 2007 s 194(3): see PARA 1824. As to the meaning of 'prescribed charity' see PARA 611 note 20.

5 CPR 47.5.

6 As to the meaning of 'paying party' see PARA 1836 note 14.

7 As to the meaning of 'receiving party' see PARA 1833 note 14.

8 CPR 47.10(1). As to costs certificates see further PARAS 1796-1797.

9 As to the meaning of 'court' see PARA 22.

10 I.e. under CPR 47.4: see PARA 1782.

11 CPR 47.10(2).

- 12 As to consent judgments and orders see PARA 1141.
- 13 *Practice Direction about Costs* PD 43-48 para 36.4.
- 14 le under CPR 40.6: see PARA 1141.
- 15 As to the meaning of 'court officer' see PARA 49 note 3.
- 16 *Practice Direction about Costs* PD 43-48 para 36.1.
- 17 le under CPR Pt 23: see PARA 303 et seq.
- 18 *Practice Direction about Costs* PD 43-48 para 36.2. The application must be supported by evidence and will be heard by a costs judge or a district judge. The respondent must file and serve any evidence he relies on at least two days before the hearing date: para 36.3. As to the meaning of 'costs judge' see PARA 1734 note 17; as to the meaning of 'filing' see PARA 1832 note 8; as to the meaning of 'service' see PARA 138 note 2; and as to district judges see **COURTS** vol 10 (Reissue) PARAS 661-662, 728.
- 19 le in accordance with CPR Pt 38: see PARAS 723-728.
- 20 *Practice Direction about Costs* PD 43-48 para 36.5(1).
- 21 As to the appropriate office see PARA 1782.
- 22 *Practice Direction about Costs* PD 43-48 para 36.5(2).
- 23 *Practice Direction about Costs* PD 43-48 para 36.5(3).
- 24 As to bills of costs see PARA 1783.
- 25 *Practice Direction about Costs* PD 43-48 para 36.5(4).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(ii) Costs Payable by One Party to Another/B. DEFAULT PROVISIONS/1789. Default costs certificate.

B. DEFAULT PROVISIONS

1789. Default costs certificate.

Where the receiving party¹ is permitted² to obtain a default costs certificate³, that party does so by filing⁴ a request in the relevant practice form⁵. The request must be filed at the appropriate office⁶ and the general rules about the drawing up, filing and service of judgments and orders⁷ apply to the preparation and service of the certificate⁸. The receiving party is treated as having permission to draw up a default costs certificate by virtue of the costs practice direction⁹.

A default costs certificate will include an order to pay the costs to which it relates¹⁰. Where a receiving party obtains a default costs certificate, the costs payable to that party for the commencement of detailed assessment¹¹ proceedings will be the sum set out in the costs practice direction¹²; the fixed costs¹³ payable on the issue of the certificate are £80¹⁴. A receiving party who obtains a default costs certificate in detailed assessment proceedings pursuant to an order for payment of a sum to the prescribed charity¹⁵ must send a copy of the default costs certificate to the prescribed charity¹⁶.

The issue of a default costs certificate does not prohibit, govern or affect any detailed assessment of the same costs which are payable out of the Community Legal Service Fund¹⁷.

Proceedings for enforcement of default costs certificates may not be issued in the Supreme Court Costs Office¹⁸. An application for an order staying¹⁹ enforcement of a default costs certificate may be made either to a costs judge²⁰ or district judge²¹ of the court office which issued the certificate or to the court²², if different, which has general jurisdiction to enforce the certificate²³.

1 As to the meaning of 'receiving party' see PARA 1833 note 14.

2 I.e. by CPR 47.9: see PARA 1787.

3 A default costs certificate will be in Form N255 (see *The Civil Court Practice*): *Practice Direction about Costs* PD 43-48 para 37.3. As to the meaning of 'costs' see PARA 1730.

4 As to the meaning of 'filing' see PARA 1832 note 8.

5 CPR 47.11(1). A request for the issue of a default costs certificate must be made in Form N254 (see *The Civil Court Practice*) and must be signed by the receiving party or his solicitor: *Practice Direction about Costs* PD 43-48 para 37.1(1). The request must be accompanied by a copy of the document giving the right to detailed assessment (see para 40.4, which identifies the appropriate documents): para 37.1(2). As to the signature of documents see PARA 1752 note 23.

6 *Practice Direction about Costs* PD 43-48 para 37.2. As to the appropriate office see PARA 1782.

7 I.e. CPR 40.3, 40.4: see PARAS 1139-1140. As to the meaning of 'service' see PARA 138 note 2.

8 See *Practice Direction about Costs* PD 43-48 para 37.4.

9 *Practice Direction about Costs* PD 43-48 para 37.4.

10 CPR 47.11(2).

11 As to the meaning of 'detailed assessment' see PARA 1734.

12 CPR 47.11(3).

13 As to the meaning of 'fixed costs' see PARA 1730 text and notes 6-7.

14 *Practice Direction about Costs* PD 43-48 para 37.8.

15 le pursuant to an order under the Legal Services Act 2007 s 194(3): see PARA 1824. As to the meaning of 'prescribed charity' see PARA 611 note 20.

16 CPR 47.11(4).

17 *Practice Direction about Costs* PD 43-48 para 37.5. As to the Community Legal Service Fund see generally **LEGAL AID** vol 65 (2008) PARA 38; and as to the detailed assessment of costs payable out of that fund see PARA 1794. See also PARA 1814 et seq.

18 *Practice Direction about Costs* PD 43-48 para 37.7. As to the enforcement of judgments and orders see generally PARA 1223 et seq. As to the Supreme Court Costs Office see **COURTS** vol 10 (Reissue) PARA 642. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

19 As to the meaning of 'stay' see PARA 233 note 11.

20 As to the meaning of 'costs judge' see PARA 1734 note 17.

21 As to district judges see **COURTS** vol 10 (Reissue) PARAS 661-662, 728.

22 As to the meaning of 'court' see PARA 22.

23 *Practice Direction about Costs* PD 43-48 para 37.6; and as to enforcement see also note 16.

UPDATE

1789 Default costs certificate

NOTE 18--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(ii) Costs Payable by One Party to Another/B. DEFAULT PROVISIONS/1790. Setting aside default costs certificate.

1790. Setting aside default costs certificate.

The court¹ must set aside² a default costs certificate³ if the receiving party⁴ was not entitled to it⁵. In any other case, the court may set aside or vary a default costs certificate if it appears to the court that there is some good reason why the detailed assessment⁶ proceedings should continue⁷. In deciding whether to set aside or vary a certificate to which the receiving party was entitled, the matters to which the court must have regard include whether the party seeking the order made the application promptly⁸. When making the order the court may make it subject to conditions⁹ and it may order a party whom it has ordered to pay costs to pay an amount on account¹⁰ before the costs are assessed¹¹. If a default costs certificate is set aside the court will give directions for the management of the detailed assessment proceedings¹².

Where the receiving party has purported to serve the notice of commencement¹³ on the paying party, a default costs certificate has been issued and the receiving party subsequently discovers that the notice of commencement did not reach the paying party at least 21 days before the default costs certificate was issued, the receiving party must file a request for the default costs certificate to be set aside or must apply to the court for directions¹⁴. Where this provision applies, the receiving party may take no further step in the detailed assessment proceedings or the enforcement of the default costs certificate until the certificate has been set aside or the court has given directions¹⁵.

Where the court sets aside or varies a default costs certificate in detailed assessment proceedings pursuant to an order for payment of a sum to the prescribed charity¹⁶, the receiving party must send a copy of the order setting aside or varying the default costs certificate to the prescribed charity¹⁷.

1 As to the meaning of 'court' generally see PARA 22. For the purposes of CPR 47.12 (see the text and notes 2-18), a court officer may set aside a default costs certificate at the request of the receiving party under CPR 47.12(3) (see the text and notes 13-14) and a costs judge or district judge will make any other order or give any directions: *Practice Direction about Costs* PD 43-48 para 38.1(1), (2). As to the meaning of 'court officer' see PARA 49 note 3; and as to district judges see **COURTS** vol 10 (Reissue) PARAS 661-662, 728. As to the meaning of 'costs' see PARA 1730.

2 As to the meaning of 'set aside' see PARA 197 note 6.

3 As to default costs certificates see PARA 1789.

4 As to the meaning of 'receiving party' see PARA 1833 note 14.

5 CPR 47.12(1).

6 As to the meaning of 'detailed assessment' see PARA 1734.

7 CPR 47.12(2).

8 *Practice Direction about Costs* PD 43-48 para 38.2(2). The application must be supported by evidence: para 38.2(1). As a general rule a default costs certificate will be set aside under CPR 47.12(2) only if the applicant shows a good reason for the court to do so and if he files with his application a copy of the bill and a copy of the default costs certificate, and a draft of the points of dispute he proposes to serve if his application is granted: *Practice Direction about Costs* PD 43-48 para 38.2(3). As to points of dispute see PARA 1787; and as to the procedure where they are served see PARAS 1791-1792. As to the meaning of 'service' see PARA 138 note 2.

9 See CPR 3.1(3); and PARA 247.

10 See CPR 44.3(8); and PARA 1741. A costs judge or a district judge may exercise the power of the court to make an order under CPR 44.3(8) although he did not make the order about costs which led to the issue of the default costs certificate: *Practice Direction about Costs* PD 43-48 para 38.3(2).

11 See *Practice Direction about Costs* PD 43-48 para 38.3(1).

12 *Practice Direction about Costs* PD 43-48 para 38.4.

13 As to the notice of commencement see PARA 1784.

14 CPR 47.12(3). This jurisdiction to set aside in these circumstances may be exercised by a court officer: see note 1.

15 CPR 47.12(4).

16 Ie pursuant to an order under the Legal Services Act 2007 s 194(3): see PARA 1824. As to the meaning of 'prescribed charity' see PARA 611 note 20.

17 CPR 47.12(5).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(ii) Costs Payable by One Party to Another/C. PROCEDURE WHERE POINTS OF DISPUTE ARE SERVED/1791. Optional reply.

C. PROCEDURE WHERE POINTS OF DISPUTE ARE SERVED

1791. Optional reply.

Where any party to the detailed assessment¹ proceedings serves² points of dispute³, the receiving party⁴ may serve a reply⁵ on the other parties to the assessment proceedings⁶. He may do so within 21 days after service on him of the points of dispute to which his reply relates⁷.

1 As to the meaning of 'detailed assessment' see PARA 1734.

2 As to the meaning of 'service' see PARA 138 note 2.

3 As to points of dispute see PARA 1787.

4 As to the meaning of 'receiving party' see PARA 1833 note 14.

5 A 'reply' means (1) a separate document prepared by the receiving party; or (2) his written comments added to the points of dispute: *Practice Direction about Costs* PD 43-48 para 39.1(2). A reply must be signed by the party serving it or his solicitor: para 39.1(3). As to the signature of documents see PARA 1752 note 23.

6 CPR 47.13(1). The reply must be served on every other party to the detailed assessment proceedings: see *Practice Direction about Costs* PD 43-48 para 39.1(1).

7 CPR 47.13(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(ii) Costs Payable by One Party to Another/C. PROCEDURE WHERE POINTS OF DISPUTE ARE SERVED/1792. Request for detailed assessment hearing.

1792. Request for detailed assessment hearing.

Where points of dispute are served¹, the receiving party² must file³ a request for a detailed assessment⁴ hearing⁵. He must file the request within three months of the expiry of the period for commencing detailed assessment proceedings as specified in the Civil Procedure Rules⁶ or by any direction of the court⁷. The request must be accompanied by:

- 1444 (1) a copy of the notice of commencement⁸ of detailed assessment proceedings;
- 1445 (2) a copy of the bill of costs⁹;
- 1446 (3) the document giving the right to detailed assessment¹⁰;
- 1447 (4) a copy of the points of dispute, annotated as necessary in order to show which items have been agreed and their value and to show which items remain in dispute and their value;
- 1448 (5) as many copies of the points of dispute so annotated as there are persons who have served points of dispute;
- 1449 (6) a copy of any replies served¹¹;
- 1450 (7) a copy of all orders made by the court¹² relating to the costs which are to be assessed;
- 1451 (8) copies of the fee notes and other written evidence as served on the paying party¹³;
- 1452 (9) where there is a dispute as to the receiving party's liability to pay costs to the solicitors who acted for that party, any agreement, letter or other written information provided by the solicitor to his client explaining how the solicitor's charges are to be calculated¹⁴;
- 1453 (10) a statement signed by the receiving party or his solicitor giving the name, address for service, reference and telephone number and fax number, if any, of the specified persons¹⁵ and giving an estimate of the length of time the detailed assessment hearing will take;
- 1454 (11) where the application for a detailed assessment hearing is made by a party other than the receiving party, such of the specified documents¹⁶ as are in the possession of that party;
- 1455 (12) where the court is to assess the costs of an assisted person¹⁷ or LSC funded client¹⁸, the specified documents and information¹⁹.

On receipt of the request for a detailed assessment hearing, the court will fix a date for the hearing or, if the costs officer²⁰ so decides, will give directions or fix a date for a preliminary appointment²¹.

Where the receiving party fails to file a request in accordance with the above provisions, the paying party may apply for an order requiring the receiving party to file the request within such time as the court may specify²². On such an application, the court may direct that, unless the receiving party requests a detailed assessment hearing within the time specified by the court, all or part of the costs to which the receiving party would otherwise be entitled will be disallowed²³. If the paying party has not made such an application and the receiving party files a request for a detailed assessment hearing later than the period specified above²⁴, the court

may disallow all or part of the interest otherwise payable²⁵ to the receiving party but must not impose any other sanction except in accordance with its powers²⁶ in relation to misconduct²⁷.

1 le in accordance with CPR Pt 47: CPR 47.14(1). As to service of points of dispute see PARA 1787; and as to the meaning of 'service' see PARA 138 note 2.

2 As to the meaning of 'receiving party' see PARA 1833 note 14.

3 As to the meaning of 'filing' see PARA 1832 note 8.

4 As to the meaning of 'detailed assessment' see PARA 1734.

5 CPR 47.14(1). The request must be in Form N258 (see *The Civil Court Practice*): *Practice Direction about Costs* PD 43-48 para 40.2.

6 le as specified in CPR 47.7: see PARA 1785.

7 CPR 47.14(2). As to the meaning of 'court' see PARA 22. If the receiving party does not file a request for a detailed assessment hearing within the prescribed time, the paying party may apply to the court to fix a time within which the receiving party must do so. The sanction, for failure to commence detailed assessment proceedings within the time specified by the court, is that all or part of the costs may be disallowed (see CPR 47.8(2); and PARA 1786): *Practice Direction about Costs* PD 43-48 para 40.7(1). Where the receiving party commences detailed assessment proceedings after the time specified in the rules but before the paying party has made an application to the court to specify a time, the only sanction which the court may impose is to disallow all or part of the interest which would otherwise be payable for the period of delay, unless the court exercises its powers under CPR 44.14 (court's powers in relation to misconduct: see PARA 1757): *Practice Direction about Costs* PD 43-48 para 40.7(2).

8 As to the notice of commencement see PARA 1784.

9 As to the bill of costs see PARA 1783; and as to the meaning of 'costs' see PARA 1730.

10 'The document giving the right to detailed assessment' means such one or more of the following documents as are appropriate to the detailed assessment proceedings: (1) a copy of the judgment or order of the court giving the right to detailed assessment; (2) a copy of the notice served under CPR 3.7 (sanctions for non-payment of certain fees: see PARA 253) where a claim is struck out under that rule; (3) a copy of the notice of acceptance where an offer to settle is accepted under CPR Pt 36 (offers to settle: see PARA 729 et seq); (4) a copy of the notice of discontinuance in a case which is discontinued under CPR Pt 38 (discontinuance: see PARAS 723-728); (5) a copy of the award made on an arbitration under any Act or pursuant to an agreement, where no court has made an order for the enforcement of the award; (6) a copy of the order, award or determination of a statutorily constituted tribunal or body; (7) in a case under the Sheriffs Act 1887, the sheriff's bill of fees and charges, unless a court order giving the right to detailed assessment has been made; (8) a notice of revocation or discharge under the Civil Legal Aid (General) Regulations 1989, SI 1989/339, reg 82 (lapsed subject to transitional provisions: see **LEGAL AID**); (9) a copy of the relevant county court order where application has been made under certain Acts and regulations which provide for costs incurred in proceedings under those Acts and regulations to be assessed in the county court if so ordered on application: *Practice Direction about Costs* PD 43-48 para 40.4.

11 As to service of replies see PARA 1791.

12 As to the meaning of 'court' see PARA 22.

13 le in accordance with *Practice Direction about Costs* PD 43-48 para 32.3: see PARA 1784. As to the meaning of 'paying party' see PARA 1836 note 14.

14 Any such document which the receiving party has filed in the appropriate office must be the latest relevant version and in any event have been filed not more than two years before filing the request for a detailed assessment hearing: *Practice Direction about Costs* PD 43-48 para 40.3(1). In respect of any such documents the receiving party may, instead of filing a copy of the document, specify in the request for a detailed assessment hearing the case number under which a copy of the document was previously filed: para 40.3(2).

15 le of the receiving party, the paying party, and any other person who has served points of dispute or who has given notice to the receiving party under *Practice Direction about Costs* PD 43-48 para 31.10(1)(b): *Practice Direction about Costs* PD 43-48 para 40.2(j).

16 le the documents set out in *Practice Direction about Costs* PD 43-48 para 40.2: see heads (1)-(12) in the text.

17 As to the meaning of 'assisted person' see PARA 241 note 12.

18 As to the meaning of 'LSC funded client' see PARA 241 note 12.

19 *Practice Direction about Costs* PD 43-48 para 40(2). The documents and information referred to in head (12) in the text are (1) the legal aid certificate, LSC certificate and relevant amendment certificates, any authorities and any certificates of discharge or revocation; (2) a certificate, in Precedent F(3) of the Schedule of Costs Precedents annexed to the costs practice direction; (3) if the assisted person has a financial interest in the detailed assessment hearing and wishes to attend, the postal address of that person to which the court will send notice of any hearing; (4) if the rates payable out of the LSC fund are prescribed rates, a schedule to the bill of costs setting out all the items in the bill which are claimed against other parties calculated at the legal aid prescribed rates with or without any claim for enhancement; and (5) a copy of any default costs certificate in respect of costs claimed in the bill of costs: *Practice Direction about Costs* PD 43-48 para 40.2(l). Where a bill of costs of an assisted person or LSC funded client is payable by another person and the costs which can be claimed against the LSC are restricted to prescribed rates, with or without enhancement, the solicitor of the assisted person or LSC funded client must file a legal aid/LSC schedule in accordance with para 40.2(l), which should follow as closely as possible Precedent E in the Schedule of Costs Precedents annexed to the costs practice direction: *Practice Direction about Costs* PD 43-48 paras 49.1, 49.2. The schedule must set out, by reference to the item numbers in the bill of costs, all the costs claimed as payable by another person, but the arithmetic in the schedule should claim those items at prescribed rates only (with or without any claim for enhancement): para 49.3. Where there has been a change in the prescribed rates during the period covered by the bill of costs, the schedule (as opposed to the bill) should be divided into separate parts, so as to deal separately with each change of rate. The schedule must also be divided so as to correspond with any divisions in the bill of costs: para 49.4. If the bill of costs contains additional columns setting out costs claimed against the LSC only, the schedule may be set out in a separate document or, alternatively, may be included in the additional columns of the bill: para 49.5. As to prescribed rates see generally **LEGAL AID**.

20 As to the meaning of 'costs officer' see PARA 1734 note 17.

21 *Practice Direction about Costs* PD 43-48 para 40.5. The court will give at least 14 days' notice of the time and place of the detailed assessment hearing to every person named in the statement referred to in para 40.2(j) (see note 15) and will, when giving notice, give each person who has served points of dispute a copy of the points of dispute annotated by the receiving party in compliance with para 40.2(d) (see head (4) in the text): para 40.6(1), (2).

22 CPR 47.14(3).

23 CPR 47.14(4). As to the relevance of pre-CPR case law on delay in commencing taxation proceedings under the former regime of RSC Ord 62 r 28(4) (revoked subject to transitional provisions) see PARA 1736.

24 le specified in CPR 47.14(2): see the text and notes 6-7.

25 le under the Judgments Act 1838 s 17 or the County Courts Act 1984 s 74: see PARA 1759.

26 le in accordance with its powers under CPR 44.14: see PARA 1757.

27 CPR 47.14(5). As to the hearing see PARA 1793.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(ii) Costs Payable by One Party to Another/C. PROCEDURE WHERE POINTS OF DISPUTE ARE SERVED/1793. Procedure once hearing date has been given.

1793. Procedure once hearing date has been given.

Where a date has been given by the court¹ for a detailed assessment² hearing and:

- 1456 (1) the detailed assessment proceedings are settled, the receiving party³ must give notice of that fact to the court immediately, preferably by fax⁴;
- 1457 (2) a party wishes to apply to vary that date, he must apply in accordance with the general rules⁵ for making applications⁶;
- 1458 (3) the parties agree about changes they wish to make to any direction given for the management of the detailed assessment proceedings, they must apply to the court for an order by consent and file⁷ a draft of the directions sought and an agreed statement of the reasons why the variation is sought; the court may then make an order in the agreed terms or in other terms without a hearing, but it may direct that a hearing is to be listed⁸.

If a party wishes to vary his bill of costs⁹, points of dispute¹⁰ or a reply¹¹, an amended or supplementary document must be filed with the court and copies of it must be served on all other relevant parties¹². Permission is not required to vary a bill of costs, points of dispute or a reply but the court may disallow the variation or permit it only upon conditions, including conditions as to the payment of any costs caused or wasted by the variation¹³.

Unless the court directs otherwise the receiving party must file with the court the papers in support of the bill¹⁴ not less than seven days before the date for the detailed assessment hearing and not more than 14 days before that date¹⁵.

No party other than the receiving party, the paying party and any party who has served points of dispute¹⁶ may be heard at the detailed assessment hearing unless the court gives permission¹⁷ and only items specified in the points of dispute may be raised at the hearing, unless the court gives permission¹⁸.

The court may direct the receiving party to produce any document which in the opinion of the court is necessary to enable it to reach its decision. These documents will in the first instance be produced to the court, but the court may ask the receiving party to elect whether to disclose the particular document to the paying party in order to rely on the contents of the document, or whether to decline disclosure and instead rely on other evidence¹⁹.

Costs assessed at a detailed assessment at the conclusion of proceedings may include an assessment of any additional liability²⁰ in respect of the costs of a previous application or hearing²¹. Where the court disallows any amount of a legal representative's²² percentage increase²³ and the legal representative applies for an order that the disallowed amount should continue to be payable by the client²⁴, the procedure set out in the costs practice direction applies²⁵. This procedure is discussed elsewhere in this title²⁶.

Where the bill of costs of an assisted person²⁷ or LSC funded client²⁸ is payable by another person and the costs which can be claimed against the Legal Services Commission ('LSC') are restricted to prescribed rates, with or without enhancement²⁹, the detailed assessment of the legal aid or LSC schedule³⁰ will take place immediately after the detailed assessment of the bill of costs³¹. On occasions, the court may decide to conduct the detailed assessment of the legal

aid or LSC schedule separately from any detailed assessment of the bill of costs³². Where costs have been assessed at prescribed rates it is the responsibility of the legal representative to enter the correct figures allowed in respect of each item and to recalculate the summary of the legal aid or LSC schedule³³.

Once the detailed assessment hearing has ended it is the responsibility of the legal representative appearing for the receiving party or, as the case may be, the receiving party in person to remove the papers filed in support of the bill³⁴.

1 See PARA 1792. As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'detailed assessment' see PARA 1734.

3 As to the meaning of 'receiving party' see PARA 1833 note 14.

4 *Practice Direction about Costs* PD 43-48 para 40.9(1)(a), (2).

5 In accordance with CPR Pt 23; see PARA 303 et seq. CPR Pt 23 also applies if either party wishes to make an application in the detailed assessment proceedings themselves: *Practice Direction about Costs* PD 43-48 para 40.8.

6 *Practice Direction about Costs* PD 43-48 para 40.9(1)(b), (3).

7 As to the meaning of 'filing' see PARA 1832 note 8.

8 *Practice Direction about Costs* PD 43-48 para 40.9(1)(c), (4). As to consent orders see PARA 1141.

9 As to the bill of costs see PARA 1783.

10 As to points of dispute see PARA 1787.

11 As to replies see PARA 1791.

12 *Practice Direction about Costs* PD 43-48 para 40.10(1).

13 *Practice Direction about Costs* PD 43-48 para 40.10(2).

14 The following provisions apply in respect of the papers to be filed in support of the bill: (1) if the claim is for costs only without any additional liability the papers to be filed, and the order in which they are to be arranged are as follows: (a) instructions and briefs to counsel arranged in chronological order together with all advices, opinions and drafts received and response to such instructions; (b) reports and opinions of medical and other experts; (c) any other relevant papers; (d) a full set of any relevant pleadings to the extent that they have not already been filed in court; (e) correspondence, files and attendance notes; (2) where the claim is in respect of an additional liability only, such of the papers listed in head (1) as are relevant to the issues raised by the claim for additional liability; and (3) where the claim is for both base costs and an additional liability, the papers listed in head (1), together with any papers relevant to the issues raised by the claim for additional liability: *Practice Direction about Costs* PD 43-48 para 40.12. As to the meaning of 'additional liability' see PARA 1830 note 20; and as to the meaning of 'base costs' see PARA 1740 note 3.

15 *Practice Direction about Costs* PD 43-48 para 40.11.

16 In under CPR 47.9: see PARA 1787.

17 CPR 47.14(6). A solicitor cannot avoid responsibility for the conduct of a detailed assessment merely by instructing a costs draftsman: *Waterson Hicks v Elipoulos* (14 November 1995) reported in Costs LR (Core Vol) 363. As to the use of 'McKenzie friends' see PARA 1126.

18 CPR 47.14(7).

19 *Practice Direction about Costs* PD 43-48 para 40.14. As to the disclosure in detailed assessment proceedings see eg *Skuse v Granada Television Ltd* [1994] 1 WLR 1156. The paying party may in exceptional circumstances be entitled to inspect privileged documents on the grounds of natural justice: *Goldman v Hesper* [1988] 3 All ER 97, [1988] 1 WLR 1238, CA; *Pamplin v Express Newspapers Ltd* [1985] 2 All ER 185, [1985] 1 WLR 689. As to the redaction of relevant documents see *Derby & Co v Weldon (No 7)* [1990] 3 All ER 161, [1990] 1 WLR 1156; *GE Capital Corporate Finance Group Ltd v Bankers Trust Co* [1995] 2 All ER 993, [1995] 1

WLR 172, CA. As to the caution to be exercised in applying pre-CPR authorities see PARAS 33 text and note 2, 1736.

Where a possible breach of the indemnity principle arose the receiving party was put to his election of either waiving privilege or of adducing secondary evidence about the contents of the documents he wished to rely upon: *South Coast Shipping Co Ltd v Havant Borough Council* [2002] 3 All ER 779. Where an issue on a possible breach of the indemnity principle had arisen the costs judge had been wrong to hold that a client care letter and a document containing payment calculations were privileged: *Dickinson (t/a Dickinson Equipment Finance) v Rushmer (t/a FJ Associates)* [2001] All ER (D) 369 (Dec), [2002] NLJR 58. See also *Sharratt v London Central Bus Co Ltd (The Accident Group Test Cases)*, *Hollins v Russell* [2003] EWCA Civ 718, [2003] 4 All ER 590 (disclosure of conditional fee agreement in detailed assessment proceedings); and *Reed Executive plc v Reed Business Information Ltd (No 2)* [2004] EWCA Civ 887, [2004] 4 All ER 942 (disclosure of without prejudice negotiations)

20 Ie under a funding arrangement: see PARA 1830.

21 *Practice Direction about Costs* PD 43-48 para 40.15.

22 As to the meaning of 'legal representative' see PARA 1833 note 13.

23 As to the meaning of 'percentage increase' see PARA 1830 note 20.

24 Ie in accordance with CPR 44.16: see PARA 1836.

25 Ie the provisions of *Practice Direction about Costs* PD 43-48 Section 20 (see PARA 1836): *Practice Direction about Costs* PD 43-48 para 40.13.

26 See PARA 1836.

27 As to the meaning of 'assisted person' see PARA 241 note 12.

28 As to the meaning of 'LSC funded client' see PARA 241 note 12.

29 As to 'enhancement' see generally **LEGAL AID** vol 65 (2008) PARA 73. See also PARA 1783 note 24.

30 As to the legal aid/LSC schedule see PARA 1792 note 19.

31 *Practice Direction about Costs* PD 43-48 para 49.6.

32 *Practice Direction about Costs* PD 43-48 para 49.7. This will occur, eg, where a default costs certificate is obtained as between the parties (see PARA 1789) but that certificate is not set aside at the time of the detailed assessment pursuant to the Legal Aid Act 1988 or regulations thereunder: *Practice Direction about Costs* PD 43-48 para 49.7. As to the meaning of 'set aside' see PARA 197 note 6.

33 *Practice Direction about Costs* PD 43-48 para 49.8.

34 *Practice Direction about Costs* PD 43-48 para 40.16.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(iii) Detailed Assessment Procedure where Costs Payable out of the Community Legal Service Fund or Other Fund/1794. Detailed assessment procedure for costs of LSC funded client or assisted person where costs payable out of the Community Legal Service Fund.

(iii) Detailed Assessment Procedure where Costs Payable out of the Community Legal Service Fund or Other Fund

1794. Detailed assessment procedure for costs of LSC funded client or assisted person where costs payable out of the Community Legal Service Fund.

Where the court¹ is to assess costs² of an LSC funded client³ or an assisted person⁴ which are payable out of the Community Legal Service fund⁵, that person's solicitor may commence detailed assessment⁶ proceedings by filing⁷ a request in the relevant practice form⁸. Such a request must be filed within three months after the date when the right to detailed assessment arose⁹. The request must be accompanied by:

- 1459 (1) a copy of the bill of costs¹⁰;
- 1460 (2) the document giving the right to detailed assessment¹¹;
- 1461 (3) a copy of all orders made by the court relating to the costs which are to be assessed;
- 1462 (4) copies of any fee notes of counsel and any expert in respect of fees claimed in the bill;
- 1463 (5) written evidence as to any other disbursement which is claimed and which exceeds £250;
- 1464 (6) the legal aid certificates, LSC certificates, any relevant amendment certificates, any authorities and any certificates of discharge or revocation¹²;
- 1465 (7) in the Supreme Court Costs Office¹³, the relevant papers in support of the bill¹⁴; but in cases proceeding in district registries¹⁵ and county courts¹⁶ this provision does not apply and the papers should only be lodged if requested by the costs officer¹⁷;
- 1466 (8) a statement signed by the solicitor giving his name, address for service, reference, telephone number, fax number and, if the assisted person has a financial interest in the detailed assessment and wishes to attend, giving the postal address of that person, to which the court will send notice of any hearing¹⁸.

The solicitor must also serve¹⁹ a copy of the request for detailed assessment on the LSC funded client or the assisted person, if notice of that person's interest has been given²⁰ to the court²¹. Where the solicitor has certified that the LSC funded client or assisted person wishes to attend an assessment hearing, the court will, on receipt of the request for assessment, fix a date for the assessment hearing²². Where the solicitor has not so certified, the court will, on receipt of the request for assessment, provisionally assess the costs without the attendance of the solicitor, unless it considers that a hearing is necessary²³. Before deciding whether a hearing is necessary the court may require the solicitor whose bill it is to provide further information relating to the bill²⁴.

After the court has provisionally assessed the bill, it will return the bill to the solicitor²⁵ together with a notice of the amount of costs which the court proposes to allow²⁶. The legal representative²⁷ must, if the provisional assessment is to be accepted, then complete the bill²⁸.

The court will fix a date for an assessment hearing if the solicitor informs the court, within 14 days after he receives the provisionally assessed bill, that he wants the court to hold such a hearing²⁹. The court will give at least 14 days' notice of the time and place of the detailed assessment hearing to the solicitor and, if the assisted person has a financial interest in the detailed assessment and wishes to attend, to the assisted person³⁰.

Where the court is to assess costs payable by another person as well as costs payable only out of the Community Legal Service fund, the procedure which has already been discussed³¹ applies³².

- 1 As to the meaning of 'court' see PARA 22.
- 2 As to the meaning of 'costs' see PARA 1730.
- 3 As to the meaning of 'LSC funded client' see PARA 241 note 12.
- 4 As to the meaning of 'assisted person' see PARA 241 note 12.
- 5 As to the Community Legal Service Fund see generally **LEGAL AID** vol 65 (2008) PARA 38. See also PARA 1814 et seq.
- 6 As to the meaning of 'detailed assessment' see PARA 1734.
- 7 As to the meaning of 'filing' see PARA 1832 note 8.
- 8 CPR 47.17(1). The request must be in Form N258A (see *The Civil Court Practice*): *Practice Direction about Costs* PD 43-48 para 43.3.
- 9 CPR 47.17(2).
- 10 As to the bill of costs see PARA 1783.
- 11 As to the document giving the right to detailed assessment see *Practice Direction about Costs* PD 43-48 para 40.4; and PARA 1792 note 10.
- 12 As to the documents mentioned in head (6) in the text see generally **LEGAL AID**.
- 13 As to the Supreme Court Costs Office see **COURTS** vol 10 (Reissue) PARA 642. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.
- 14 I.e. the papers as described in *Practice Direction about Costs* PD 43-48 para 40.12: see PARA 1793 note 14.
- 15 As to district registries see **COURTS** vol 10 (Reissue) PARA 646.
- 16 As to county courts see **COURTS** vol 10 (Reissue) PARA 701 et seq.
- 17 As to the meaning of 'costs officer' see PARA 1734 note 17.
- 18 *Practice Direction about Costs* PD 43-48 para 43.3(a)-(h).
- 19 As to the meaning of 'service' see PARA 138 note 2.
- 20 I.e. in accordance with Community Legal Service or legal aid regulations: CPR 47.17(3). See generally **LEGAL AID** vol 65 (2008) PARA 31.
- 21 CPR 47.17(3).
- 22 CPR 47.17(4).
- 23 CPR 47.17(5).
- 24 *Practice Direction about Costs* PD 43-48 para 43.4.

25 CPR 47.17(6).

26 *Practice Direction about Costs* PD 43-48 para 43.5. The notice must be in Form N253 (see *The Civil Court Practice*); *Practice Direction about Costs* PD 43-48 para 43.5.

27 As to the meaning of 'legal representative' see PARA 1833 note 13.

28 *Practice Direction about Costs* PD 43-48 para 43.5. It is the responsibility of the legal representative to complete the bill by entering in the bill the correct figures allowed in respect of each item, recalculating the summary of the bill appropriately and completing the Community Legal Service assessment certificate (Form EX80A); *Practice Direction about Costs* PD 43-48 para 43.9.

29 CPR 47.17(7).

30 *Practice Direction about Costs* PD 43-48 para 43.7. If the solicitor whose bill it is, or any other party, wishes to make an application in the detailed assessment proceedings, the provisions of CPR Pt 23 (general rules about applications for court orders: see PARA 303 et seq) apply; *Practice Direction about Costs* PD 43-48 para 43.8.

31 See *Practice Direction about Costs* PD 43-48 paras 39.1-40.16, 49.1-49.8; and PARAS 1791-1793.

32 *Practice Direction about Costs* PD 43-48 para 43.1.

UPDATE

1794 Detailed assessment procedure for costs of LSC funded client or assisted person where costs payable out of the Community Legal Service Fund

NOTE 13--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(iii) Detailed Assessment Procedure where Costs Payable out of the Community Legal Service Fund or Other Fund/1795. Detailed assessment procedure where costs are payable out of a fund other than the Community Legal Service fund.

1795. Detailed assessment procedure where costs are payable out of a fund other than the Community Legal Service fund.

Where the court¹ is to assess costs² which are payable out of a fund³ other than the Community Legal Service Fund, the receiving party⁴ may commence detailed assessment proceedings⁵ by filing⁶ a request in the relevant practice form⁷. The request must be filed within three months after the date when the right to detailed assessment arose⁸ and must be accompanied by:

- 1467 (1) a copy of the bill of costs⁹;
- 1468 (2) the document giving the right to detailed assessment¹⁰;
- 1469 (3) a copy of all orders made by the court relating to the costs which are to be assessed¹¹;
- 1470 (4) copies of any fee notes of counsel and any expert in respect of fees claimed in the bill¹²;
- 1471 (5) written evidence as to any other disbursement which is claimed and which exceeds £250¹³;
- 1472 (6) in the Supreme Court Costs Office¹⁴, the relevant papers in support of the bill¹⁵; but in cases proceeding in district registries¹⁶ and county courts¹⁷ this provision does not apply and the papers should only be lodged if requested by the costs officer¹⁸;
- 1473 (7) a statement signed by the receiving party giving his name, address for service¹⁹, reference, telephone number, and fax number²⁰;
- 1474 (8) a statement of the postal address of any person who has a financial interest in the outcome of the assessment²¹, to which the court may send notice of any hearing²²; and
- 1475 (9) in respect of each person stated to have such an interest, if such person is a child²³ or protected party²⁴, a statement to that effect²⁵.

The court may direct that the party seeking assessment serve a copy of the request on any person who has a financial interest in the outcome of the assessment²⁶.

The court will, on receipt of the request for assessment, provisionally assess the costs without the attendance of the receiving party, unless it considers that a hearing is necessary²⁷. Where it has made an order dispensing with service on all persons having a financial interest it may proceed at once to make a provisional assessment or, if it decides that a hearing is necessary, give appropriate directions²⁸. Before deciding whether a hearing is necessary it may require the receiving party to provide further information relating to the bill²⁹.

After the court has provisionally assessed the bill, it will return the bill to the receiving party³⁰ together with a notice of the amount of costs which the court proposes to allow³¹. If the receiving party is legally represented the legal representative³² must, if the provisional assessment is to be accepted, then complete the bill³³.

The court will fix a date for an assessment hearing if the receiving party informs the court, within 14 days after he receives the provisionally assessed bill, that he wants the court to hold such a hearing³⁴. The court will give at least 14 days' notice of the time and place of the

detailed assessment hearing to the receiving party and to any person who has a financial interest in the outcome of the assessment and has been served with a copy of the request for assessment³⁵.

- 1 As to the meaning of 'court' see PARA 22.
- 2 As to the meaning of 'costs' see PARA 1730.
- 3 'Fund' includes any estate or property held for the benefit of any person or class of person and any fund to which a trustee or personal representative is entitled in his capacity as such: CPR 43.2(1)(e).
- 4 As to the meaning of 'receiving party' see PARA 1833 note 14.
- 5 As to the meaning of 'detailed assessment' see PARA 1734.
- 6 As to the meaning of 'filing' see PARA 1832 note 8.
- 7 CPR 47.17A(1). The request must be in Form N258B (see *The Civil Court Practice*): *Practice Direction about Costs* PD 43-48 para 44.3.
- 8 CPR 44.17A(2).
- 9 *Practice Direction about Costs* PD 43-48 para 43.3(a) (applied by para 44.3). As to the bill of costs see PARA 1783.
- 10 *Practice Direction about Costs* PD 43-48 para 43.3(b) (applied by para 44.3). As to the document giving the right to detailed assessment see *Practice Direction about Costs* PD 43-48 para 40.4; and PARA 1792 note 10.
- 11 *Practice Direction about Costs* PD 43-48 para 43.3(c) (applied by para 44.3).
- 12 *Practice Direction about Costs* PD 43-48 para 43.3(d) (applied by para 44.3).
- 13 *Practice Direction about Costs* PD 43-48 para 43.3(e) (applied by para 44.3).
- 14 As to the Supreme Court Costs Office see **COURTS** vol 10 (Reissue) PARA 642. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.
- 15 Ie the papers as described in *Practice Direction about Costs* PD 43-48 para 40.12: see PARA 1793 note 14.
- 16 As to district registries see **COURTS** vol 10 (Reissue) PARA 646.
- 17 As to county courts see **COURTS** vol 10 (Reissue) PARA 701 et seq.
- 18 *Practice Direction about Costs* PD 43-48 para 43.3(g) (applied by para 44.3). As to the meaning of 'costs officer' see PARA 1734 note 17.
- 19 As to the meaning of 'service' see PARA 138 note 2.
- 20 *Practice Direction about Costs* PD 43-48 para 44.3(a).
- 21 A person has a financial interest in the outcome of the assessment if the assessment will or may affect the amount of money or property to which he is or may become entitled out of the fund: *Practice Direction about Costs* PD 43-48 para 44.2(a). Where an interest in the fund is itself held by a trustee for the benefit of some other person, that trustee will be treated as the person having such a financial interest: para 44.2(b). 'Trustee' includes a personal representative, receiver or any other person acting in a fiduciary capacity: para 44.2(c).
- 22 *Practice Direction about Costs* PD 43-48 para 44.3(b).
- 23 As to the meaning of 'child' see PARA 222 note 3.
- 24 As to the meaning of 'protected party' see PARA 222 note 1.
- 25 *Practice Direction about Costs* PD 43-48 para 44.3(c).

26 CPR 47.17A(3). The court will decide, having regard to the amount of the bill, the size of the fund and the number of persons who have a financial interest, which of those persons should be served. The court may dispense with service on all or some of them: *Practice Direction about Costs* PD 43-48 para 44.4. Where the court makes an order that a person who has a financial interest is to be served with a copy of the request for assessment, it may give directions about service and about the hearing: para 44.7.

27 CPR 47.17A(4).

28 *Practice Direction about Costs* PD 43-48 para 44.5. As to giving directions see also note 26.

29 *Practice Direction about Costs* PD 43-48 para 44.5.

30 CPR 47.17A(5).

31 *Practice Direction about Costs* PD 43-48 para 44.6(1). The notice must be in Form N253 (see *The Civil Court Practice*): *Practice Direction about Costs* PD 43-48 para 44.6(1).

32 As to the meaning of 'legal representative' see PARA 1833 note 13.

33 *Practice Direction about Costs* PD 43-48 para 44.6(1). In order to complete the bill after the assessment, the legal representative must make clear the correct figures allowed in respect of each item and must recalculate the summary of the bill if appropriate: para 44.10.

34 CPR 47.17A(6); *Practice Direction about Costs* PD 43-48 para 44.6(2).

35 *Practice Direction about Costs* PD 43-48 para 44.8. If the receiving party, or any other party or any person who has a financial interest in the outcome of the assessment, wishes to make an application in the detailed assessment proceedings, the provisions of CPR Pt 23 (general rules about applications for court orders: see PARA 303 et seq) apply: *Practice Direction about Costs* PD 43-48 para 44.9.

UPDATE

1795 Detailed assessment procedure where costs are payable out of a fund other than the Community Legal Service fund

NOTE 3--CPR 43.2(1)(e) amended: SI 2009/2092.

NOTE 14--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(iv) Interim and Final Costs Certificates/1796. Power to issue an interim certificate.

(iv) Interim and Final Costs Certificates

1796. Power to issue an interim certificate.

At any time after the receiving party¹ has filed² a request for a detailed assessment³ hearing, the court⁴ may issue an interim costs⁵ certificate for such sum as it considers appropriate⁶ or may amend or cancel an interim certificate⁷. An interim certificate will include an order to pay the costs to which it relates, unless the court orders otherwise⁸. The court may order the costs certified in an interim certificate to be paid into court⁹.

An application for an order staying¹⁰ enforcement of an interim costs certificate may be made either to a costs judge¹¹ or district judge¹² of the court office which issued the certificate or to the court (if different) which has general jurisdiction to enforce the certificate¹³. Proceedings for enforcement of interim costs certificates may not be issued in the Supreme Court Costs Office¹⁴.

Where the court issues an interim costs certificate or amends or cancels an interim certificate in detailed assessment proceedings pursuant to an order for payment of a sum to the prescribed charity¹⁵, the receiving party must send a copy of the interim costs certificate or the order amending or cancelling the interim costs certificate to the prescribed charity¹⁶.

1 As to the meaning of 'receiving party' see PARA 1833 note 14.

2 As to the meaning of 'filing' see PARA 1832 note 8.

3 As to the meaning of 'detailed assessment' see PARA 1734; and as to such assessment see PARA 1783 et seq.

4 As to the meaning of 'court' see PARA 22.

5 As to the meaning of 'costs' see PARA 1730.

6 CPR 47.15(1)(a). The court's power to issue an interim certificate arises only after the receiving party has filed a request for a detailed assessment hearing: *Practice Direction about Costs* PD 43-48 para 41.1(2). A party wishing to apply for an interim certificate may do so by making an application in accordance with CPR Pt 23 (general rules about applications for court orders: see PARA 303 et seq): *Practice Direction about Costs* PD 43-48 para 41.1(1).

7 CPR 47.15(1)(b).

8 CPR 47.15(2). For a model form of interim costs certificate see Form N257 (see *The Civil Court Practice*): *Practice Direction about Costs* PD 43-48 para 42.10.

9 CPR 47.15(3). As to payment into court see generally PARAS 742-742.

10 As to the meaning of 'stay' see PARA 233 note 11.

11 As to the meaning of 'costs judge' see PARA 1734 note 17.

12 As to district judges see **COURTS** vol 10 (Reissue) PARAS 661-662, 728.

13 *Practice Direction about Costs* PD 43-48 para 42.11. As to enforcement of judgments and orders see generally PARA 1223 et seq.

14 *Practice Direction about Costs* PD 43-48 para 42.12. As to the Supreme Court Costs Office see **COURTS** vol 10 (Reissue) PARA 642. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

15 le pursuant to an order under the Legal Services Act 2007 s 194(3): see PARA 1824. As to the meaning of 'prescribed charity' see PARA 611 note 20.

16 CPR 47.15(4).

UPDATE

1796 Power to issue an interim certificate

NOTE 14--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(iv) Interim and Final Costs Certificates/1797. Final costs certificate.

1797. Final costs certificate.

At the detailed assessment¹ hearing the court² will indicate any disallowance or reduction in the sums claimed in the bill of costs³ by making an appropriate note on the bill⁴. The receiving party⁵ must, in order to complete the bill after the detailed assessment hearing, make clear the correct figures agreed or allowed in respect of each item and must recalculate the summary of the bill appropriately⁶. The completed bill⁷ of costs must be filed⁸ with the court no later than 14 days after the end of the detailed assessment hearing⁹. At the same time as filing the completed bill of costs, the party whose bill it is must also produce receipted fee notes and receipted accounts in respect of all disbursements except those covered by an appropriate certificate¹⁰. If the receiving party fails to file a completed bill in accordance with these provisions, the paying party¹¹ may make an application¹² seeking an appropriate order¹³.

When a completed bill is filed, the court will issue a final costs certificate and serve¹⁴ it on the parties to the detailed assessment proceedings¹⁵, subject to any order made by the court that such a certificate is not to be issued until other costs have been paid¹⁶. No final costs certificate will be issued until all relevant court fees¹⁷ payable on the assessment of costs have been paid¹⁸.

A final costs certificate will show the amount of any costs which have been agreed between the parties or which have been allowed on detailed assessment and, where applicable, the amount agreed or allowed in respect of VAT on the costs agreed or allowed¹⁹. It will include disbursements in respect of the fees of counsel only if receipted fee notes or accounts in respect of those disbursements have been produced to the court and only to the extent indicated by those receipts²⁰. Where the certificate relates to costs payable between parties a separate certificate will be issued for each party entitled to costs²¹.

A final costs certificate will include an order to pay the costs to which it relates, unless the court orders otherwise²².

An application for an order staying²³ enforcement of a final costs certificate may be made either to a costs judge²⁴ or district judge²⁵ of the court office which issued the certificate or to the court (if different) which has general jurisdiction to enforce the certificate²⁶. Proceedings for enforcement of final costs certificates may not be issued in the Supreme Court Costs Office²⁷.

Where the court issues a final costs certificate in detailed assessment proceedings pursuant to an order for payment of a sum to the prescribed charity²⁸, the receiving party must send a copy of the final costs certificate to the prescribed charity²⁹.

1 As to the meaning of 'detailed assessment' see PARA 1734.

2 As to the meaning of 'court' see PARA 22.

3 As to the bill of costs see PARA 1783. As to the meaning of 'costs' see PARA 1730.

4 *Practice Direction about Costs* PD 43-48 para 42.1.

5 As to the meaning of 'receiving party' see PARA 1833 note 14.

6 *Practice Direction about Costs* PD 43-48 para 42.2.

- 7 A 'completed bill' means a bill calculated to show the amount due following the detailed assessment of the costs: CPR 47.16(1).
- 8 As to the meaning of 'filing' see PARA 1832 note 8.
- 9 CPR 47.16(2); *Practice Direction about Costs* PD 43-48 para 42.3.
- 10 *Practice Direction about Costs* PD 43-48 para 42.4. The certificate referred to in the text is a certificate in Precedent F(5) in the Schedule of Costs Precedents annexed to the costs practice direction: *Practice Direction about Costs* PD 43-48 para 42.4.
- 11 As to the meaning of 'paying party' see PARA 1836 note 14.
- 12 Ie under CPR Pt 23 (general rules about applications for court orders): see PARA 303 et seq.
- 13 *Practice Direction about Costs* PD 43-48 para 42.6. The order that will be sought is an order under CPR 3.1 (court's general powers of management: see PARA 247): *Practice Direction about Costs* PD 43-48 para 42.6.
- 14 As to the meaning of 'service' see PARA 138 note 2.
- 15 CPR 47.16(3).
- 16 CPR 47.16(4).
- 17 As to court fees see generally PARA 87; and for the current levels of fees see *The Civil Court Practice*.
- 18 *Practice Direction about Costs* PD 43-48 para 42.5.
- 19 *Practice Direction about Costs* PD 43-48 para 42.7. This provision is subject to any contrary provision made by the statutory provisions relating to costs payable out of the Community Legal Service Fund (see generally **LEGAL AID** vol 65 (2008) PARA 38): *Practice Direction about Costs* PD 43-48 para 42.7. For a model form of final costs certificate see Form N256 (see *The Civil Court Practice*): *Practice Direction about Costs* PD 43-48 para 42.10. As to VAT on costs see PARA 1749.
- 20 *Practice Direction about Costs* PD 43-48 para 42.8. As to counsel's fees see PARA 1750.
- 21 *Practice Direction about Costs* PD 43-48 para 42.9.
- 22 CPR 47.16(5).
- 23 As to the meaning of 'stay' see PARA 233 note 11.
- 24 As to the meaning of 'costs judge' see PARA 1734 note 17.
- 25 As to district judges see **COURTS** vol 10 (Reissue) PARAS 661-662, 728.
- 26 *Practice Direction about Costs* PD 43-48 para 42.11. As to enforcement of judgments and orders see generally PARA 1223 et seq.
- 27 *Practice Direction about Costs* PD 43-48 para 42.12. As to the Supreme Court Costs Office see **COURTS** vol 10 (Reissue) PARA 642. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.
- 28 Ie pursuant to an order under the Legal Services Act 2007 s 194(3): see PARA 1824. As to the meaning of 'prescribed charity' see PARA 611 note 20.
- 29 CPR 47.16(6).

UPDATE

1797 Final costs certificate

NOTE 27--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(v) Costs of Detailed Assessment Proceedings/1798. Liability for costs of detailed assessment proceedings.

(v) Costs of Detailed Assessment Proceedings

1798. Liability for costs of detailed assessment proceedings.

The receiving party¹ is entitled to the costs² of the detailed assessment³ proceedings except where the provisions of any Act, any of the Civil Procedure Rules or any relevant practice direction provide otherwise⁴ or the court⁵ makes some other order in relation to all or part of the costs of the detailed assessment proceedings⁶. In deciding whether to make some other order, the court must have regard to all the circumstances, including the conduct of all the parties⁷, the amount, if any, by which the bill of costs⁸ has been reduced⁹ and whether it was reasonable for a party to claim the costs of a particular item or to dispute that item¹⁰.

As a general rule the court will assess the receiving party's costs of the detailed assessment proceedings and add them to the bill of costs¹¹. If the costs of the detailed assessment proceedings are awarded to the paying party¹², the court will either assess those costs by summary assessment¹³ or make an order for them to be decided by detailed assessment¹⁴. No party should file¹⁵ or serve¹⁶ a statement of costs¹⁷ of the detailed assessment proceedings unless the court orders him to do so¹⁸.

1 As to the meaning of 'receiving party' see PARA 1833 note 14.

2 As to the meaning of 'costs' see PARA 1730.

3 As to the meaning of 'detailed assessment' see PARA 1734; and as to such assessment see PARA 1779 et seq.

4 CPR 47.18(1)(a).

5 As to the meaning of 'court' see PARA 22.

6 CPR 47.18(1)(b). The effect of CPR 47.18(1) is that there is a rebuttable presumption that a receiving party is entitled to have his costs of a detailed assessment subject to the right of the costs judge to make some other order: *Buften v Hill* [2002] All ER (D) 76 (May), SCCO. CPR 47.18(1) does not apply where the receiving party has pro bono representation in the detailed assessment proceedings but that party may apply for an order in respect of that representation under the Legal Services Act 2007 s 194(3) (see PARA 1824); CPR 47.18(1A). As to the meaning of 'pro bono representation' see PARA 611 note 20.

7 CPR 47.18(2)(a). As to the conduct of the parties in relation to costs liability generally see PARA 1739.

8 As to the bill of costs see PARA 1783.

9 CPR 47.18(2)(b).

10 CPR 47.18(2)(c); and see *Practice Direction about Costs* PD 43-48 para 45.4. As to reasonableness in relation to costs liability generally see PARA 1748 note 2.

11 *Practice Direction about Costs* PD 43-48 para 45.1.

12 As to the meaning of 'paying party' see PARA 1836 note 14.

13 As to the meaning of 'summary assessment' see PARA 1734; and as to such assessment see PARA 1752.

14 *Practice Direction about Costs* PD 43-48 para 45.2.

15 As to the meaning of 'filing' see PARA 1832 note 8.

16 As to the meaning of 'service' see PARA 138 note 2.

17 As to statements of costs see PARA 1752.

18 *Practice Direction about Costs* PD 43-48 para 45.3. In respect of interest on the costs of detailed assessment proceedings, the interest will begin to run from the date of the default, interim or final costs certificate as the case may be: *Practice Direction about Costs* PD 43-48 para 45.5(1). This provision applies only to the costs of the detailed assessment proceedings themselves; the costs of the substantive proceedings are governed by CPR 40.8(1): *Practice Direction about Costs* PD 43-48 para 45.5(2).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(v) Costs of Detailed Assessment Proceedings/1799. Offers to settle costs without prejudice save as to costs of detailed assessment proceedings.

1799. Offers to settle costs without prejudice save as to costs of detailed assessment proceedings.

Either the paying party¹ or the receiving party² may make a written offer to settle the costs³ of the proceedings which gave rise to the detailed assessment⁴ proceedings without prejudice⁵ save as to the costs of the detailed assessment proceedings⁶. No time is specified within which such an offer must be made, but an offer made by the paying party should usually be made within 14 days after service⁷ of the notice of commencement⁸ on that party. If the offer is made by the receiving party, it should normally be made within 14 days after the service of points of dispute⁹ by the paying party. Offers made after these periods are likely to be given less weight by the court¹⁰ in deciding what order as to costs to make unless there is good reason for the offer not being made until the later time¹¹. Where an offer to settle is made it should specify whether or not it is intended to be inclusive of the cost of preparation of the bill¹², interest¹³ and VAT¹⁴; unless it states otherwise, the offer will be treated as being inclusive of all these items¹⁵.

Where an offer to settle is accepted, an application may be made for a certificate in agreed terms, or the bill of costs may be withdrawn¹⁶.

Where a party (whether the paying or the receiving party) makes a written offer to settle the costs of the proceedings which gave rise to the assessment proceedings and the offer is expressed to be without prejudice save as to the costs of the detailed assessment proceedings, the fact of the offer must not be communicated to the costs officer¹⁷ until the question of costs of the detailed assessment proceedings falls to be decided¹⁸. The court will take the offer into account in deciding who should pay the costs of those proceedings¹⁹. Where, however, the receiving party is an assisted person²⁰ or an LSC funded client²¹, such an offer to settle will not have these consequences unless the court so orders²².

1 As to the meaning of 'paying party' see PARA 1836 note 14.

2 As to the meaning of 'receiving party' see PARA 1833 note 14.

3 As to the meaning of 'costs' see PARA 1730.

4 As to the meaning of 'detailed assessment' see PARA 1734.

5 As to the meaning of 'without prejudice' see PARA 804 note 4.

6 See *Practice Direction about Costs* PD 43-48 para 46.1; CPR 47.19; and the text and notes 16-22. As to offers to settle proceedings generally see PARA 729 et seq. The costs of the proceedings under CPR 47.19 concern only costs leading up to the disposal of the substantive claim: *Crosbie v Munroe* [2003] EWCA Civ 350, [2003] 2 All ER 856.

7 As to the meaning of 'service' see PARA 138 note 2.

8 As to the notice of commencement see PARA 1784.

9 As to points of dispute see PARA 1787.

10 As to the meaning of 'court' see PARA 22.

11 *Practice Direction about Costs* PD 43-48 para 46.1.

12 As to the bill of costs see PARA 1783.

13 As to interest on costs see PARA 1759.

14 As to VAT on costs see PARA 1749.

15 *Practice Direction about Costs* PD 43-48 para 46.2. The offer may include or exclude some or all of these items but the position must be made clear on the face of the offer so that the offeree is clear about the terms of the offer when it is being considered: para 46.2.

16 *Practice Direction about Costs* PD 43-48 para 46.3. As to withdrawal of the bill of costs where costs are agreed see CPR 47.10; and PARA 1788.

17 As to the meaning of 'costs officer' see PARA 1734 note 17.

18 CPR 47.19(1), (2).

19 CPR 47.19(1)(b).

20 As to the meaning of 'assisted person' see PARA 241 note 12.

21 As to the meaning of 'LSC funded client' see PARA 241 note 12.

22 *Practice Direction about Costs* PD 43-48 para 46.4.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(vi) Appeal against Decisions in Detailed Assessment Proceedings/1800. In general.

(vi) Appeal against Decisions in Detailed Assessment Proceedings

1800. In general.

A special procedure applies to appeals from authorised court officers¹ in detailed assessment² proceedings³. All other appeals arising out of detailed assessment proceedings, and appeals arising out of summary assessment⁴, are dealt with in accordance with the general rules⁵ governing appeals and their destination⁶, which are discussed elsewhere in this title⁷.

1 As to the meaning of 'authorised court officer' see PARA 1734 note 17.

2 As to the meaning of 'detailed assessment' see PARA 1734; and as to such assessment see PARA 1779 et seq.

3 *Practice Direction about Costs* PD 43-48 para 47.1. See CPR 47.20-47.20; *Practice Direction about Costs* PD 43-48 Sections 47, 48; and PARAS 1801-1802.

4 As to the meaning of 'summary assessment' see PARA 1734; and as to such assessment see PARA 1752.

5 Ie CPR Pt 52 and the practice direction supplementary thereto: see PARA 1658 et seq. See also *Tanfern Ltd v Cameron-MacDonald*[2000] 2 All ER 801, [2000] 1 WLR 1311, CA.

6 See the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071; and PARA 1658.

7 See PARA 1658 et seq.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(vi) Appeal against Decisions in Detailed Assessment Proceedings/1801. Right to appeal from decision of authorised court officer.

1801. Right to appeal from decision of authorised court officer.

Any party to detailed assessment¹ proceedings may appeal against a decision of an authorised court officer² in those proceedings³. There is no requirement to obtain permission⁴ or to seek written reasons⁵.

For the purposes of this right to appeal, an LSC funded client⁶ or an assisted person⁷ is not a party to detailed assessment proceedings⁸.

An appeal against such a decision of an authorised court officer is to a costs judge⁹ or a district judge¹⁰ of the High Court¹¹ and is a re-hearing¹².

1 As to the meaning of 'detailed assessment' see PARA 1734; and as to such assessment see PARA 1779 et seq.

2 As to the meaning of 'authorised court officer' see PARA 1734 note 17.

3 CPR 47.20(1).

4 As to the requirement to seek permission for other appeals see PARAS 1659-1661.

5 *Practice Direction about Costs* PD 43-48 para 47.2. See, however, *Practice Direction about Costs* PD 43-48 para 48.3; and PARA 1802. As to the requirement for written reasons generally see PARA 1662.

6 As to the meaning of 'LSC funded client' see PARA 241 note 12.

7 As to the meaning of 'assisted person' see PARA 241 note 12.

8 CPR 47.20(2).

9 As to the meaning of 'costs judge' see PARA 1734 note 17.

10 As to High Court district judges see **COURTS** vol 10 (Reissue) PARAS 661-662, 728.

11 CPR 47.21.

12 *Practice Direction about Costs* PD 43-48 para 48.2; and see PARA 1802.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(5) PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS/(vi) Appeal against Decisions in Detailed Assessment Proceedings/1802. Appeal procedure.

1802. Appeal procedure.

The appellant must file¹ an appeal notice² within 21 days after the date of the authorised court officer's decision³ he wishes to appeal against⁴. The appellant's notice should, if possible, be accompanied by a suitable record of the judgment appealed against⁵. If he is unable to obtain a suitable record of the authorised court officer's decision within the time in which the appellant's notice must be filed, that notice must still be completed to the best of the appellant's ability but may be amended subsequently with the permission of the costs judge or district judge hearing the appeal⁶.

On receipt of the appeal notice, the court⁷ will serve⁸ a copy of the notice on the parties⁹ to the detailed assessment¹⁰ proceedings and give notice of the appeal hearing to those parties¹¹.

On an appeal from an authorised court officer the court will re-hear the proceedings which gave rise to the decision appealed against and make any order and give any directions as it considers appropriate¹². The hearing is before a costs judge or a district judge of the High Court¹³.

1 As to the meaning of 'filing' see PARA 1832 note 8.

2 The notice must be in Form N161 (appellant's notice: see *The Civil Court Practice*): *Practice Direction about Costs* PD 43-48 para 48.1.

3 The procedure set out in this paragraph applies only to appeals against decisions of authorised court officers: see PARA 1800. As to the meaning of 'authorised court officer' see PARA 1734 note 17. The 21 days run from the date on which the officer makes his decision in principle on a disputed item even if the exact amount allowed is to be the subject of subsequent negotiation or agreement: *Kasir v Darlington & Simpson Rolling Mills Ltd* [2001] 12 LS Gaz R 39, Popplewell J (a decision on an appeal from a costs judge under CPR Pt 52 (see PARA 1658 et seq)).

4 CPR 47.22(1).

5 *Practice Direction about Costs* PD 43-48 para 48.3. Where reasons given for the decision have been officially recorded by the court an approved transcript of that record must accompany the notice and photocopies will not be accepted for this purpose. Where there is no official record the following documents will be acceptable: (1) the officer's comments written on the bill; (2) advocates' notes of the reasons agreed by the respondent if possible and approved by the authorised court officer. When the appellant was unrepresented before the authorised court officer, it is the duty of any advocate for the respondent to make his own note of the reasons promptly available, free of charge, to the appellant where there is no official record or if the court so directs. Where the appellant was represented before the authorised court officer, it is the duty of his own former advocate to make his notes available. The appellant should submit the note of the reasons to the costs judge or district judge hearing the appeal: para 48.3. As to the meaning of 'costs judge' see PARA 1734 note 17; and as to High Court district judges see **COURTS** vol 10 (Reissue) PARAS 661-662, 728.

6 *Practice Direction about Costs* PD 43-48 para 48.4.

7 As to the meaning of 'court' see PARA 22.

8 As to the meaning of 'service' see PARA 138 note 2.

9 An LSC funded client or assisted person is not a party: see PARA 1801. As to the meanings of 'LSC funded client' and 'assisted person' see PARA 241 note 12.

10 As to the meaning of 'detailed assessment' see PARA 1734; and as to such assessment see PARA 1779 et seq.

- 11 CPR 47.22(2).
- 12 CPR 47.23.
- 13 See CPR 47.21; and PARA 1801.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(i) Costs Payable by or to Particular Persons/1803. Pre-commencement disclosure etc and orders for disclosure etc against a person who is not a party.

(6) COSTS IN SPECIAL CASES

(i) Costs Payable by or to Particular Persons

1803. Pre-commencement disclosure etc and orders for disclosure etc against a person who is not a party.

Where a person applies for an order for the High Court¹ or a county court² to exercise its powers:

- 1476 (1) to make an order before the commencement of proceedings for the inspection, photographing, preservation, custody and detention of property, the taking of samples of property and the carrying out of any experiment on or with any such property³;
- 1477 (2) to make an order for pre-action disclosure⁴; or
- 1478 (3) to make an order for disclosure or for the inspection, photographing etc of property against a non-party⁵,

the general rule is that the court⁶ will award the person against whom the order is sought his costs⁷ of the application and of complying with any order made on the application⁸. The court may, however, make a different order, having regard to all the circumstances, including the extent to which it was reasonable for the person against whom the order was sought to oppose the application⁹ and whether the parties to the application have complied with any relevant pre-action protocol¹⁰.

1 As to the High Court see **COURTS** vol 10 (Reissue) PARA 602 et seq.

2 As to county courts see **COURTS** vol 10 (Reissue) PARA 701 et seq.

3 Ie an order under the Supreme Court Act 1981 s 33(1) or under the County Courts Act 1984 s 52(1): see PARA 114. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

4 Ie an order under the Supreme Court Act 1981 s 33(2) or under the County Courts Act 1984 s 52(2): see PARA 111.

5 Ie an order under the Supreme Court Act 1981 s 34 or the County Courts Act 1984 s 53: see PARAS 317, 550.

6 As to the meaning of 'court' see PARA 22.

7 As to the meaning of 'costs' see PARA 1730.

8 CPR 48.1(1), (2). As from a day to be appointed, CPR 48.1(1) is amended by virtue of the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2) to substitute references to the Senior Courts Act 1981 for the references to the Supreme Court Act 1981. At the date at which this title states the law, no such day had been appointed.

9 CPR 48.1(3)(a). See eg *Bermuda International Securities Ltd v KPMG (a firm)*[2001] EWCA Civ 269, [2001] All ER (D) 337 (Feb), [2001] 3 CPLR 252, where an application was unreasonably and unsuccessfully resisted

and the court departed from the general rule; and *SES Contracting Ltd v UK Coal plc*[2007] EWCA Civ 791, [2007] All ER (D) 410 (Jul).

10 CPR 48.1(3)(b). As to pre-action protocols see PARA 107 et seq.

UPDATE

1803 Pre-commencement disclosure etc and orders for disclosure etc against a person who is not a party

NOTE 8--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(i) Costs Payable by or to Particular Persons/1804. Power to make costs orders in favour of or against non-parties.

1804. Power to make costs orders in favour of or against non-parties.

The court¹ has power to make a costs² order in favour of or against a person who is not a party to proceedings³, and the court's jurisdiction extends to making an order that the unsuccessful party in one set of proceedings is to pay the opponent's costs in bringing separate proceedings against a third party⁴. It has been held that where a third party professional funder is funding part of the costs of litigation in a manner which facilitates access to justice, the professional funder should be potentially liable for the costs of the opposing party to the extent of the funding provided⁵.

The general rule is that an order for costs against a non-party may only be made in exceptional circumstances⁶, but nevertheless such an order may be made if in all the circumstances it is just to do so⁷ although generally the non-party must have some connection with the proceedings⁸.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'costs' see PARA 1730.

3 See the Supreme Court Act 1981 s 51; and PARA 1732. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

4 *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira* [1986] AC 965, [1986] 2 All ER 409, HL (overruling *John Fairfax & Sons Pty Ltd v EC de Witt & Co (Australia) Pty Ltd* [1958] 1 QB 323, [1957] 3 All ER 410, CA); and see *Symphony Group plc v Hodgson* [1994] QB 179, [1993] 4 All ER 143, CA (costs against non-party refused where claimant at all times had cause of action against non-party and could have joined him as a party); *Wiggins v Richard Read (Transport) Ltd* (1999) Times, 14 January, CA (in determining whether to order costs against a non-party, the court ought to refer to the full guidelines as set out in *Symphony Group plc v Hodgson* [1994] QB 179, [1993] 4 All ER 143, CA). See also *Globe Equities Ltd v Globe Legal Services Ltd* [1999] BLR 232, [1999] All ER (D) 226, CA; *Davies v Eli Lilly & Co* [1987] 3 All ER 94, [1987] 1 WLR 1136, CA (costs of lead actions against drug manufacturer to be apportioned between all claimants in dispute); *Carr v Allen-Bradley Electronics Ltd* [1980] ICR 603, [1980] IRLR 263, EAT; *Singh v Observer Ltd* [1989] 2 All ER 751, 133 Sol Jo 485 (revsd on other grounds [1989] 3 All ER 777n, CA) (court has power to order maintainer to pay costs and that his identity be disclosed: but see PARA 1732 note 11); *Nordstern Allgemeine Versicherungs AG v Internav Ltd, Nordstern Allgemeine Versicherungs AG v Katsamas* [1999] 2 Lloyd's Rep 139, [1999] All ER (D) 530, CA (non-party liable for costs incurred as result of his wanton intermeddling in a claim). As to the caution to be exercised in applying pre-CPR authorities see PARAS 33 text and note 2, 1736.

5 *Arkin v Borchard Lines* [2005] EWCA Civ 655 at [38]-[42], [2005] 3 All ER 613 at [38]-[42] per Lord Phillips of Worth Matravers MR. See also eg *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2005] 4 All ER 195; *Koninklijke Philips Electronics NV v Aventi Ltd* [2003] EWHC 2589 (Pat), [2004] FSR 663; *Latimer Management Consultants Ltd v Ellingham Investments Ltd* [2006] EWHC 3662 (Ch) [2007] 3 All ER 485, DC.

6 *Locabail (UK) Ltd v Bayfield Properties Ltd (No 3)* (2000) Times, 29 February; *Gardiner v FX Music Ltd* [2000] All ER (D) 144; *Cormack v Washbourne (formerly t/a Washbourne & Co (a firm))* [2000] All ER (D) 353, (2000) Times, 30 March, CA. As to the caution to be exercised in applying pre-CPR authorities see PARAS 33 text and note 2, 1736.

7 *Globe Equities Ltd v Globe Legal Services Ltd* [1999] BLR 232, [1999] All ER (D) 226, CA; *Re Aurum Marketing Ltd (in liquidation)* [2000] 2 BCLC 645, sub nom *Secretary of State for Trade and Industry v Aurum Marketing Ltd* [2000] All ER (D) 1009, CA. As to the caution to be exercised in applying pre-CPR authorities see PARAS 33 text and note 2, 1736.

8 *Murphy v Young & Co's Brewery plc and Sun Alliance and London Insurance plc* [1997] 1 All ER 518, [1997] 1 WLR 1591, CA. Where the third party has a direct interest in the result of the litigation as, for instance, an

insurer, an order may be made: *TGA Chapman Ltd v Christopher* [1998] 2 All ER 873, [1998 1 WLR 12, CA. A non-party who plays a role in the management of litigation is at greater risk but it is usually necessary to show that the third party who brought the proceedings did so in bad faith or with an ulterior motive: *Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd* [1997] 1 All ER 418, [1997] 1 WLR 1613, CA. Where legal expenses insurers took over the defence of the claim and conducted it for the insurers' own benefit costs were awarded against the insurers: *Pendennis Shipyard Ltd v Margrathia (Pendennis) Ltd (in liquidation)* [1998] 1 Lloyd's Rep 315, (1997) Times, 27 August, DC.

The power to make an order against a director will not normally be exercised (*Taylor v Pace Developments Co Ltd* [1991] BCC 406, CA) but where a director has substantially financed the litigation and improperly caused the company to defend the claim and to prosecute a concocted counterclaim an order may be made (*H Leverton Ltd v Crawford Offshore (Exploration) Services Ltd (in liquidation)* (1996) Times, 22 November).

A conditional fee agreement is not by itself enough to expose the solicitors for one party for the other's costs: *Hodgson v Imperial Tobacco Ltd* [1998] 2 All ER 673, [1998] 1 WLR 1056, CA. As to the liability of solicitors see *Tolstoy-Miloslavsky v Lord Aldington* [1996] 2 All ER 556, [1996] 1 WLR 736, CA.

It is only in a rare case that it will be just and reasonable to make an order under the Supreme Court Act 1981 s 51 against a pure funder: *Hamilton v Al Fayed (No 3)* (2001) Times, 25 July; affd [2002] EWCA Civ 665, [2003] QB 1175, [2002] 3 All ER 641.

A non-existent person cannot receive or be ordered to pay costs: *Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse* [1923] 2 KB 630, CA; revsd on the ground that the plaintiff bank still existed [1925] AC 112, HL.

A costs order can be made to enable a witness to recover the costs of complying with a witness summons: *Individual Homes Ltd v Macbreams Investments Ltd* [2002] All ER (D) 345 (Oct).

See also *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2005] 4 All ER 195 (a non-party who promoted and funded proceedings by an insolvent company solely or substantially for his own financial benefit should be liable for costs; order made against non-party as appeals would not have been made without its assistance); *Ewing v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583, [2006] 1 WLR 1260 (vexatious litigant instigated proceedings; though technically litigant could not be a party without court's permission, he was a party for costs purposes); *Koninklijke Philips Electronics NV v Aventi Ltd* [2003] EWHC 2589 (Pat), [2004] FSR 663 (costs ordered against third party funder who stood to gain from outcome of litigation); *Phillips v Symes (No 2)* [2004] EWHC 2330 (Ch), [2005] 4 All ER 519, [2005] 1 WLR 2043 (order against expert medical witness guilty of flagrant disregard of duty to court); *BE Studios Ltd v Smith & Williamson Ltd* [2005] EWHC 2730 (Ch), [2006] 2 All ER 811 (cited in PARA 1732 note 11); *Goodwood Recoveries Ltd v Breen* [2005] EWCA Civ 414, [2006] 2 All ER 533 (costs ordered against the claimant company's director who had acted with dishonesty, impropriety and exceptional conduct); *Latimer Management Consultants Ltd v Ellingham Investments Ltd* [2006] EWHC 3662 (Ch) [2007] 3 All ER 485, DC (costs ordered against funder of litigation who had no financial interest in outcome, but was in de facto control of defendant); *Myatt v National Coal Board* [2007] EWCA Civ 307, [2007] 4 All ER 1094, [2007] 1 WLR 1559 (costs ordered against solicitors seeking to gain financially from proceedings); *Dolphin Quays Developments Ltd v Mills* [2008] EWCA Civ 385, [2008] 1 WLR 1829, [2008] All ER (D) 257 (Apr) (no order against receiver seeking to enforce contractual right forming part of the security); *Apex Frozen Foods Ltd v Ali* [2007] EWHC 469 (Ch), [2007] BPIR 1437 (costs ordered against provisional liquidator on a standard basis).

As to the caution to be exercised in applying pre-CPR authorities see PARAS 33 text and note 2, 1736.

UPDATE

1804 Power to make costs orders in favour of or against non-parties

NOTE 8--See *Thomson v Berkhamsted Collegiate School* [2009] EWHC 2374 (QB), [2009] All ER (D) 39 (Oct) (application for costs order against parents of claimant pupil).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(i) Costs Payable by or to Particular Persons/1805. Procedure where a costs order in favour of or against non-parties is considered.

1805. Procedure where a costs order in favour of or against non-parties is considered.

Where the court¹ is considering whether to exercise its power² to make a costs³ order in favour of or against a person who is not a party to proceedings⁴, the general rule is that that person must be added as a party to the proceedings for the purposes of costs only⁵ and he must be given a reasonable opportunity to attend a hearing at which the court will consider the matter further⁶. This rule does not, however, apply where the court is considering whether to make an order against the Legal Services Commission⁷ or make a wasted costs order⁸. Nor does it apply in proceedings⁹ for pre-commencement disclosure and orders for disclosure against a person who is not a party¹⁰.

Where an innocent party is involved in the wrongdoing of others and becomes under a duty to assist the court by disclosing information, in most such cases the costs ought to be recovered from the wrongdoer rather than from the innocent party¹¹.

1 As to the meaning of 'court' see PARA 22.

2 I.e. under the Supreme Court Act 1981 s 51 (costs are in the discretion of the court): see PARA 1732. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

3 As to the meaning of 'costs' see PARA 1730.

4 As to the power to make costs orders in favour of or against non-parties see PARA 1804.

5 CPR 48.2(1)(a). As from a day to be appointed, CPR 48.2(1) is amended by virtue of the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2) to substitute a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981. At the date at which this title states the law, no such day had been appointed.

6 CPR 48.2(1)(b).

7 CPR 48.2(2)(a)(i). As to the Legal Services Commission see generally **LEGAL AID** vol 65 (2008) PARA 38. See also PARA 1815.

8 CPR 48.2(2)(a)(ii). As to the meaning of 'wasted costs' order for these purposes see CPR 48.7; and PARA 1811.

9 I.e. proceedings to which CPR 48.1 applies: see PARA 1803.

10 CPR 48.2(2)(b).

11 *Totalise plc v Motley Fool Ltd* [2001] EWCA Civ 1897, [2003] 2 All ER 872, [2002] 1 WLR 1233; and see *Australia and New Zealand Banking Group Ltd v National Westminster Bank plc* [2002] All ER (D) 72 (Feb).

UPDATE

1805 Procedure where a costs order in favour of or against non-parties is considered

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(i) Costs Payable by or to Particular Persons/1806. Amount of costs where costs are payable pursuant to a contract.

1806. Amount of costs where costs are payable pursuant to a contract.

Where the court¹ assesses (whether by the summary² or detailed assessment³ procedure) costs⁴ which are payable by the paying party⁵ to the receiving party⁶ under the terms of a contract, the costs payable under those terms are, unless the contract expressly provides otherwise, to be presumed to be costs which have been reasonably incurred and are reasonable in amount, and the court will assess them accordingly⁷. The court may, however, make an order that all or part of the costs payable under the contract are to be disallowed if it is satisfied by the paying party that costs have been unreasonably incurred or are unreasonable in amount⁸.

These provisions do not apply where the contract is between a solicitor and his client⁹. They do not require the court to make an assessment of costs payable under a contract¹⁰ or require a mortgagee to apply for an order for those costs that he has a contractual right to recover out of the mortgage funds¹¹.

The following principles apply to costs relating to a mortgage:

- 1479 (1) an order for the payment of costs of proceedings by one party to another is always a discretionary order¹²;
- 1480 (2) where there is a contractual right to the costs the discretion should ordinarily be exercised so as to reflect that contractual right;
- 1481 (3) the power of the court to disallow a mortgagee's costs sought to be added to the mortgage security is a power that does not derive from the court's discretion to award costs¹³, but from the power of the courts of equity to fix the terms on which redemption will be allowed¹⁴;
- 1482 (4) a decision by a court to refuse costs in whole or in part to a mortgagee litigant may be a decision in the exercise of its discretion to award costs, a decision in the exercise of the power to fix the terms on which redemption will be allowed, a decision as to the extent of a mortgagee's contractual right to add his costs to the security or a combination of two or more of these things¹⁵;
- 1483 (5) a mortgagee is not to be deprived of a contractual or equitable right to add costs to the security merely by reason of an order for payment of costs made without reference to the mortgagee's contractual or equitable rights, and without any adjudication as to whether or not the mortgagee should be deprived of those costs¹⁶.

Where the contract entitles a mortgagee to (a) add the costs of litigation relating to the mortgage to the sum secured by it; (b) require a mortgagor to pay those costs; or (c) both, the mortgagor may make an application for the court to direct that an account of the mortgagee's costs be taken¹⁷. The mortgagor may then dispute an amount in the mortgagee's account on the basis that it has been unreasonably incurred or is unreasonable in amount¹⁸. Where a mortgagor disputes an amount, the court may make an order that the disputed costs are assessed under the normal rules¹⁹ relating to assessment of costs payable under a contract²⁰.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'summary assessment' see PARA 1734; and as to such assessment see PARA 1752.

3 As to the meaning of 'detailed assessment' see PARA 1734; and as to such assessment see PARA 1779 et seq.

4 As to the meaning of 'costs' see PARA 1730.

5 As to the meaning of 'paying party' see PARA 1836 note 14.

6 As to the meaning of 'receiving party' see PARA 1833 note 14.

7 CPR 48.3(1).

8 *Practice Direction about Costs* PD 43-48 para 50.1.

9 CPR 48.3(2). These costs are governed by the Solicitors Act 1974 ss 56-75: see PARA 1813; and **LEGAL PROFESSIONS**.

10 *Practice Direction about Costs* PD 43-48 para 50.2(1).

11 *Practice Direction about Costs* PD 43-48 para 50.2(2).

12 Ie by virtue of the Supreme Court Act 1981 s 51: see PARA 1732. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

13 See note 12.

14 As to the terms on which a mortgage may be redeemed see generally **MORTGAGE**.

15 The statements of case in the proceedings or the submissions made to the court may indicate which of the decisions has been made: *Practice Direction about Costs* PD 43-48 para 50.3(4). As to statements of case see PARA 584 et seq.

16 *Practice Direction about Costs* PD 43-48 para 50.3(1)-(5). As to costs relating to a mortgage see also *Gomba Holdings (UK) Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA; *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588, CA. As to the caution to be exercised in applying pre-CPR authorities see PARAS 33 text and note 2, 1736.

17 *Practice Direction about Costs* PD 43-48 para 50.4(1). The court may direct that a party file an account under CPR 25.1(1)(n): see PARA 315.

18 *Practice Direction about Costs* PD 43-48 para 50.4(2).

19 Ie under CPR 48.3: see the text and notes 1-9.

20 *Practice Direction about Costs* PD 43-48 para 50.4(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(i) Costs Payable by or to Particular Persons/1807. Limitations on court's power to award costs in favour of trustee or personal representative.

1807. Limitations on court's power to award costs in favour of trustee or personal representative.

Where a person is or has been a party to any proceedings in the capacity of trustee or personal representative¹ and the rule as to costs² payable pursuant to a contract³ does not apply, then the general rule is that he is entitled to be paid his costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the relevant trust fund⁴ or estate⁵. Where he is entitled to be paid any of those costs out of the fund or estate, those costs will be assessed on the indemnity basis⁶ and he is entitled to an indemnity out of the relevant trust fund or estate even if costs were awarded against him in favour of another party, provided that those costs were properly incurred⁷. Whether costs were properly incurred depends on all the circumstances of the case, and may, for example, depend on (1) whether the trustee or personal representative obtained directions from the court before bringing or defending the proceedings; (2) whether he acted in the interests of the fund or estate or in substance for a benefit other than that of the estate, including his own⁸; and (3) whether he acted in some way unreasonably in bringing or defending, or in the conduct of, the proceedings⁹.

1 As to personal representatives and trustees as parties to proceedings see generally PARA 225.

2 As to the meaning of 'costs' see PARA 1730.

3 I.e. CPR 48.3: see PARA 1806.

4 As to the meaning of 'fund' see PARA 1795 note 3.

5 CPR 48.4(1), (2). Trustees and personal representatives may seek directions before the issue of proceedings by way of a 'Beddoe' application: *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547, CA. Where trustees or personal representatives are parties the court may make an order deciding the incidence of costs in advance of the trial: *Re Westdock Realisations Ltd* [1988] BCLC 354, (1988) 4 BCC 192. As to the caution to be exercised in applying pre-CPR authorities see PARAS 33 text and note 2, 1736. See also *Practice Note (trust proceedings: prospective costs orders)* [2001] 3 All ER 574.

6 CPR 48.4(3). As to the meaning of 'indemnity basis' see PARA 1747.

7 *Practice Direction about Costs* PD 43-48 para 50A.1.

8 The trustee or personal representative is not to be taken to have acted in substance for a benefit other than that of the fund by reason only that he has defended a claim in which relief is sought against him personally: *Practice Direction about Costs* PD 43-48 para 50A.3.

9 *Practice Direction about Costs* PD 43-48 para 50A.2(1)-(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(i) Costs Payable by or to Particular Persons/1808. Costs where money is payable by or to a child or protected party.

1808. Costs where money is payable by or to a child or protected party.

In any proceedings where a party is a child¹ or protected party² and money is ordered or agreed to be paid to, or for the benefit of, that party or money is ordered to be paid by him or on his behalf, the general rule is that the court³ must order a detailed assessment⁴ of the costs⁵ payable by, or out of money belonging to, any party who is a child or protected party and, on such an assessment, the court must also assess any costs payable to that party in the proceedings, unless the court has issued a default costs certificate⁶ in relation to those costs or the costs are payable in proceedings⁷ relating to a road traffic accident⁸. Where a claimant⁹ is a child or protected party and such a detailed assessment has taken place, the only amount payable by the child or protected party is the amount which the court certifies as payable¹⁰. These provisions also apply to a counterclaim¹¹ by or on behalf of a child or protected party¹².

The court need not, however, order detailed assessment of costs in the following circumstances:

- 1484 (1) where there is no need to do so to protect the interests of the child or protected party or his estate;
- 1485 (2) where another party has agreed to pay a specified sum in respect of the costs of the child or protected party and the solicitor acting for the child or protected party has waived the right to claim further costs;
- 1486 (3) where the court has decided the costs payable to the child or protected party by way of summary assessment¹³ and the solicitor acting for the child or protected party has waived the right to claim further costs;
- 1487 (4) where an insurer or other person is liable to discharge the costs which the child or protected party would otherwise be liable to pay to his solicitor and the court is satisfied that the insurer or other person is financially able to discharge those costs¹⁴.

1 As to the meaning of 'child' see PARA 222 note 3.

2 As to the meaning of 'protected party' see PARA 222 note 1.

3 As to the meaning of 'court' see PARA 22

4 As to the meaning of 'detailed assessment' see PARA 1734; and as to such assessment see PARA 1779 et seq.

5 As to the meaning of 'costs' see PARA 1730.

6 Ie under CPR 47.11: see PARA 1789.

7 Ie to proceedings which CPR Pt 45 Section II (CPR45.7-45.14: fixed recoverable costs in road accident cases) applies (see PARA 1769).

8 CPR 48.5(1), (2).

9 As to the meaning of 'claimant' see PARA 18.

10 CPR 48.5(4).

- 11 le by virtue of CPR 20.3; and PARA 619. As to the meaning of 'counterclaim' see PARA 618 note 3.
- 12 See CPR 48.5(4) note.
- 13 As to the meaning of 'summary assessment' see PARA 1734; and as to such assessment see PARA 1752.
- 14 CPR 48.5(3); *Practice Direction about Costs* PD 43-48 para 51.1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(i) Costs Payable by or to Particular Persons/1809. Litigants in person.

1809. Litigants in person.

Where, in any proceedings in a county court¹, in the Supreme Court² or in the House of Lords³ on appeal from the High Court or the Court of Appeal⁴, before the Lands Tribunal⁵, before the First-tier Tribunal or the Upper Tribunal⁶ or in or before any other specified court or tribunal⁷, any costs of a litigant in person are ordered to be paid by any other party to the proceedings or in any other way, there may, subject to rules of court⁸, be allowed⁹ sums in respect of any work done, and any expenses and losses incurred, by the litigant in or in connection with the proceedings to which the order relates¹⁰.

Under the Civil Procedure Rules, where the court¹¹ orders (whether by summary assessment¹² or detailed assessment¹³) that the costs¹⁴ of a litigant in person¹⁵ are to be paid by any other person¹⁶, the costs allowed must not exceed, except in the case of a disbursement, two-thirds of the amount which would have been allowed if the litigant in person had been represented by a legal representative¹⁷. The litigant in person must be allowed:

- 1488 (1) costs for the same categories of work and disbursements which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant in person's behalf¹⁸;
- 1489 (2) the payments reasonably made by him for legal services relating to the conduct of the proceedings¹⁹; and
- 1490 (3) the costs of obtaining expert assistance in assessing the costs claim²⁰.

Subject to the two-thirds limit set out above, the amount of costs to be allowed to the litigant in person for any item of work claimed is (a) where the litigant can prove financial loss²¹, the amount that he can prove he has lost for time reasonably spent on doing the work; or (b) where the litigant cannot prove financial loss, an amount for the time reasonably spent on doing the work at the rate set out in the costs practice direction²². A litigant who is allowed costs for attending at court to conduct his case is not entitled to a witness allowance in respect of such attendance in addition to those costs²³.

1 As to county courts see **COURTS** vol 10 (Reissue) PARA 701 et seq.

2 As to the Supreme Court of England and Wales (ie the Court of Appeal, the High Court and the Crown Court) see **COURTS** vol 10 (Reissue) PARA 601 et seq. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

3 As to proceedings in the House of Lords see **COURTS** vol 10 (Reissue) PARA 359 et seq. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

4 As to appeals to the House of Lords see **COURTS** vol 10 (Reissue) PARA 360 et seq; PARAS 1717-1719.

5 As to the Lands Tribunal see **COURTS** vol 10 (Reissue) PARA 812; and **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 720 et seq.

6 As to the First-tier Tribunal and the Upper Tribunal see **COURTS**.

7 The tribunal specified under the Litigants in Person (Costs and Expenses) Act 1975 s 1(1) by order made by the Lord Chancellor by statutory instrument, subject to annulment in pursuance of a resolution of either House of Parliament: s 1(1)(c), (3). In the exercise of the power so conferred, the Lord Chancellor has made the Litigants in Person (Costs and Expenses) Order 1980, SI 1980/1159, which came into operation on 1 September 1980 (art 1) and which specifies the Employment Appeal Tribunal) (art 3). As to the Employment Appeal Tribunal see **COURTS** vol 10 (Reissue) PARA 809; and **EMPLOYMENT** vol 41 (2009) PARA 1384 et seq.

8 As to the meaning of 'rules of court' for these purposes see the Litigants in Person (Costs and Expenses) Act 1975 s 1(4) (amended by the Tribunals, Courts and Enforcement Act 2007 s 48(1), Sch 8 para 6(1), (3)) (rules relating to the Lands Tribunal and to the First-tier Tribunal and the Upper Tribunal) and the Litigants in Person (Costs and Expenses) Order 1980, SI 1980/1159, art 4 (rules relating to the Employment Appeal Tribunal).

9 The on the taxation or other determination of those costs: Litigants in Person (Costs and Expenses) Act 1975 s 1(1). Under the Civil Procedure Rules 'taxation' is now known as 'assessment', and normally means 'detailed assessment': see PARA 1734.

10 Litigants in Person (Costs and Expenses) Act 1975 s 1(1) (amended by the Tribunals, Courts and Enforcement Act 2007 Sch 8 para 6(2)). The Litigants in Person (Costs and Expenses) Act 1975 s 1(1) is amended, as from a day to be appointed, by the Constitutional Reform Act 2005 ss 40(4), 59(5), Sch 9 Pt 1 para 26, Sch 11 Pt 4 para 22(a), to substitute for the reference to the Supreme Court a reference to the Senior Courts, and for the reference to the House of Lords a reference to the Supreme Court. At the date at which this title states the law, no day had been appointed for bringing these amendments into force.

11 As to the meaning of 'court' see PARA 22

12 As to the meaning of 'summary assessment' see PARA 1734; and as to such assessment see PARA 1752.

13 As to the meaning of 'detailed assessment' see PARA 1734; and as to such assessment see PARA 1779 et seq.

14 As to the meaning of 'costs' see PARA 1730.

15 For these purposes, a litigant in person includes a company or other corporation which is acting without a legal representative (CPR 48.6(6)(a)); and a barrister, solicitor, solicitor's employee or other authorised litigator (as defined in the Courts and Legal Services Act 1990: see s 119(1); and **LEGAL PROFESSIONS** vol 65 (2008) PARA 497) who is acting for himself (CPR 48.6(6)(b)). A solicitor who, instead of acting for himself, is represented in the proceedings by his firm or by himself in his firm name, is not a litigant in person for the purposes of the CPR: *Practice Direction about Costs* PD 43-48 para 52.5. As to the meaning of 'legal representative' see PARA 1833 note 13. As to the use of a 'McKenzie friend' see PARA 1126. A solicitor, represented by his firm in proceedings against him, is entitled to recover the costs of his firm: *Malkinson v Trim* [2002] EWCA Civ 1273, [2003] 1 WLR 463; considered in *Khan v Lord Chancellor* [2003] EWHC 12 (QB), [2003] 1 WLR 2385 (barrister, in proceedings to which he is party, entitled to recover costs for preparatory work done by himself, not entitled to costs for representing himself in court).

16 CPR 48.6(1). Formerly a litigant in person was unable to recover costs in respect of the time and trouble he expended on the preparation of his case (*Buckland v Watts* [1970] 1 QB 27, [1969] 2 All ER 985, CA), for from ancient times the court would only award costs which it could measure, and whilst it recognised and could measure professional skill and labour it could not measure private expenditure of labour and trouble by a layman (see 2 Co Inst 288; *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872, CA; considered in *Khan v Lord Chancellor* [2003] EWHC 12 (QB), [2003] 1 WLR 2385). The Litigants in Person (Costs and Expenses) Act 1975 (see the text and notes 1-10) extended the ability of a litigant in person to recover costs.

17 CPR 48.6(2). The court (costs judge) must make an assessment of the sum that he would allow to a solicitor and then restrict the litigant's costs to two-thirds of that sum: *Morris v Wiltshire and Woodspring District Council* (16 January 1998, unreported); *Hart v Aga Khan Foundation (UK)* [1984] 2 All ER 439, [1984] 1 WLR 994, CA (where a litigant was not entitled to recover a sum equal to two thirds of a notional counsel's fee for conducting the claim). As to the caution to be exercised in applying pre-CPR authorities see PARAS 33 text and note 2, 1736.

Only actual and not notional disbursements can be recovered. A litigant in person may be allowed more time for a particular task than would be allowed to a solicitor: *Mealing-Mcleod v CPE Board* (SCCO Case No 7 of 2000, unreported) per Buckley J.

18 CPR 48.6(3)(a); and see note 16.

19 CPR 48.6(3)(b); and see *Uhbi (t/a United Building and Plumbing Contractors) v Kajla* [2002] EWCA Civ 628, [2002] All ER (D) 265 (Apr) (litigant in person not entitled to recover costs of assistance in preparing for trial given by director of debt collection company who was not legally qualified). A litigant in person is not

treated for the purposes of VAT as having supplied legal services himself: see *Practice Direction about Costs* PD 43-48 para 5.18; and PARA 1749. Consequently a bill of costs presented for agreement or assessment should not claim any VAT which will not be allowed on assessment: see para 5.19; and PARA 1783.

20 CPR 48.6(3)(c). In order to qualify as an expert for these purposes the person in question must be a barrister, solicitor, Fellow of the Institute of Legal Executives, Fellow of the Association of Law Costs Draftsmen, law costs draftsman who is a member of the Academy of Experts, or law costs draftsman who is a member of the Expert Witness Institute: *Practice Direction about Costs* PD 43-48 para 52.1.

21 Where a litigant in person wishes to prove that he has suffered financial loss he must produce to the court any written evidence he relies on to support that claim, and serve a copy of that evidence on any party against whom he seeks costs at least 24 hours before the hearing at which the question may be decided: *Practice Direction about Costs* PD 43-48 para 52.2. Where a litigant in person commences detailed assessment proceedings under CPR 47.6 (see PARA 1784), he must serve copies of that written evidence with the notice of commencement: *Practice Direction about Costs* PD 43-48 para 52.3. The burden of proving financial loss lies on the litigant in person: *Mainwaring v Goldtech Investments Ltd* [1997] 1 All ER 467. As to the caution to be exercised in applying pre-CPR authorities see PARAS 33 text and note 2, 1736.

22 CPR 48.6(4). The amount which may be allowed under CPR 46.3(5)(b) (fast track trial costs: see PARA 1777) and CPR 48.6(4) is £9.25 per hour: *Practice Direction about Costs* PD 43-48 para 52.4. See eg *R (on the application of Wulfsohn) v Legal Services Commission* [2002] EWCA Civ 250, [2002] All ER (D) 120 (Feb), where the litigant in person was allowed £10,000 for some 1,200 hours of research he had put in. See also *Agassi v Robinson (Inspector of Taxes) (Bar Council intervening)* [2005] EWCA Civ 1507, [2006] 1 All ER 900 (taxation specialist instructing counsel on behalf of litigant in person; litigant in person entitled to recover counsel's fees as a disbursement, but not specialist's fees in respect of work normally done by solicitor).

23 CPR 48.6(5).

UPDATE

1809 Litigants in person

NOTES 2, 3, 10--Appointed day is 1 October 2009: SI 2009/1604.

TEXT AND NOTES 5-8--In both places, omit the 'Lands Tribunal': Litigants in Person (Costs and Expenses) Act 1975 s 1(1), (4) (amended by SI 2009/1307).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(i) Costs Payable by or to Particular Persons/1810. Costs where the court has made a group litigation order.

1810. Costs where the court has made a group litigation order.

Where the court¹ has made a group litigation order ('GLO')², unless the court orders otherwise any order for common costs³ against group litigants⁴ imposes on each group litigant several liability⁵ for an equal proportion of those common costs⁶. The general rule is that where a group litigant is the paying party⁷, he will, in addition to any costs he is liable to pay to the receiving party⁸, be liable for the individual costs of his claim⁹ and an equal proportion, together with all the other group litigants, of the common costs¹⁰. Where the court makes an order about costs in relation to any application or hearing which involved one or more GLO issues and issues relevant only to individual claims, the court will direct the proportion of the costs that is to relate to common costs and the proportion that is to relate to individual costs¹¹.

Where common costs have been incurred before a claim is entered on the group register, the court may order the group litigant to be liable for a proportion of those costs¹²; and where a claim is removed from the group register¹³, the court may make an order for costs in that claim which includes a proportion of the common costs incurred up to the date on which the claim is removed from the group register¹⁴.

1 As to the meaning of 'court' see PARA 22

2 As to the meaning of 'GLO' see PARA 233 note 2. As to group litigation orders see PARAS 233-235.

3 'Common costs' means (1) costs incurred in relation to the GLO issues; (2) individual costs incurred in a claim while it is proceeding as a test claim; and (3) costs incurred by the lead solicitor in administering the group litigation: CPR 48.6A(2)(b). 'Individual costs' means costs incurred in relation to an individual claim on the group register: CPR 48.6A(2)(a). As to the group register see PARA 233 note 8; and as to test claims see PARA 235. As to the meaning of 'costs' see PARA 1730.

4 'Group litigant' means a claimant or defendant, as the case may be, whose claim is entered on the group register: CPR 48.6A(2)(c). As to the meaning of 'claimant' and 'defendant' see PARA 18.

5 As to the meaning of 'several liability' see PARA 847 note 13.

6 CPR 48.6A(1), (3). In *Hodgson v Imperial Tobacco Ltd (No 2)* [1998] 2 Costs LR 27, per Wright J, it was held that liability for and the benefit of costs in relation to issues common to all claimants would be several rather than joint. As to an early approach to costs-sharing orders see *Davies v Eli Lilly & Co* [1987] 3 All ER 94, [1987] 1 WLR 1136, CA. As to group litigation and conditional fee agreements see *Hodgson v Imperial Tobacco Ltd (No 2)* [1998] 2 Costs LR 27. As to the caution to be exercised in applying pre-CPR authorities see PARAS 33 text and note 2, 1736.

As to a group litigation costs order where two out of five lead cases which went to trial were dismissed with the claimants succeeding only on certain issues see *Ochwat v Watson Burton (a firm)* [1999] All ER (D) 1407, CA. The incidence of common costs between claimants and defendants in group claims requires special consideration and may involve inherently different principles than those applicable to single-claimant proceedings: *Afrika v Cape plc* [2001] EWCA Civ 2017, [2003] 3 All ER 631. The liability of discontinuing claimants for costs of common issues should be determined following the trial of common issues: *Afrika v Cape plc* [2001] EWCA Civ 2017, [2003] 3 All ER 631.

7 As to the meaning of 'paying party' see PARA 1836 note 14.

8 As to the meaning of 'receiving party' see PARA 1833 note 14.

9 CPR 48.6A(4)(a).

10 CPR 48.6A(4)(b). Under a conditional fee agreement, there is no requirement for any additional or collateral agreement relating to generic costs: *Brown v Russell Young & Co* [2007] EWCA Civ 43, [2007] 2 All ER 453, [2008] 1 WLR 525.

11 CPR 48.6A(5). Where the court makes an order about costs in relation to any application or hearing involving both one or more of the GLO issues and an issue or issues relevant only to individual claims and the court has not directed the proportion of the costs that is to relate to common costs and the proportion that is to relate to individual costs in accordance with this rule, the costs judge will make a decision as to the relevant proportions at or before the commencement of the detailed assessment of costs.

12 CPR 48.6A(6).

13 As to removal from the group register see PARA 233 note 8.

14 CPR 48.6A(7).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(ii) Costs Relating to Solicitors and Other Legal Representatives/1811. Personal liability of legal representative for costs; wasted costs orders.

(ii) Costs Relating to Solicitors and Other Legal Representatives

1811. Personal liability of legal representative for costs; wasted costs orders.

Where the court¹ is considering whether to make an order² to disallow or, as the case may be, order a legal representative³ to meet, 'wasted costs'⁴, the court must give the legal representative a reasonable opportunity to attend a hearing to give reasons why it should not make such an order⁵. A party may apply⁶ for a wasted costs order⁷ or the court may make a wasted costs order against a legal representative on its own initiative⁸. Such orders can be made at any stage in the proceedings, up to and including the proceedings relating to the detailed assessment⁹ of costs, but in general applications for wasted costs are best left until after the end of the trial¹⁰.

It is appropriate for the court to make a wasted costs order against a legal representative only if (1) the legal representative has acted improperly, unreasonably or negligently; (2) his conduct has caused a party to incur unnecessary costs; and (3) it is just in all the circumstances to order him to compensate that party for the whole or part of those costs¹¹. The court may direct that notice must be given to the legal representative's client, in such manner as the court may direct, of any proceedings under these provisions¹² and it will give directions about the procedure that will be followed in each case in order to ensure that the issues are dealt with in a way which is fair and as simple and summary as the circumstances permit¹³. As a general rule the court will consider whether to make a wasted costs order in two stages. In the first stage, the court must be satisfied that it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made, and that the wasted costs proceedings are justified notwithstanding the likely costs involved¹⁴. At the second stage, even if the court is satisfied as set out above, the court will consider, after giving the legal representative an opportunity to give reasons why the court should not make a wasted costs order, whether it is appropriate to make a wasted costs order¹⁵. Before making a wasted costs order, the court may direct a costs judge¹⁶ or a district judge¹⁷ to inquire into the matter and report to the court¹⁸.

Where a party applies for a wasted costs order against his own legal representative he will be taken to have waived his legal professional privilege as regards relevant communications between them¹⁹; however, where a party applies for a wasted costs order against the opposing party's legal representative the opponent may not be willing to waive his privilege, leaving the legal representative at a disadvantage since he will be hampered in his defence, not being able to reveal privileged communications indicating what advice he gave to his client or what instructions he received²⁰. Thus, where there is room for doubt, the opponent's legal representative will be given the benefit of it, unless his conduct is quite plainly unjustifiable²¹. An application for a wasted costs order against another party's legal representative is therefore unlikely to succeed unless his conduct can be shown to have been improper without recourse to privileged material²².

When the court makes a wasted costs order, it must either specify the amount to be disallowed or paid or direct a costs judge or a district judge to decide the amount of costs to be disallowed or paid²³. The court may direct that notice must be given to the legal representative's client, in such manner as the court may direct, of any wasted costs order made against his legal representative²⁴.

The court may refer the question of wasted costs to a costs judge or a district judge, instead of making a wasted costs order²⁵.

1 As to the meaning of 'court' see PARA 22.

2 Under the Supreme Court Act 1981 s 51(6); see PARA 1732. As to the prospective citation of the Supreme Court Act 1981 as the Senior Courts Act 1981 see PARA 8 note 1.

3 As to the meaning of 'legal representative' see PARA 1833 note 13. A party may apply for a wasted costs order against his own legal representative or an opponent's legal representative (but see the text and notes 20-22); and the liability of the legal representative is not limited to his conduct in exercising the right of audience in a court: see *Medcalf v Mardell*[2002] UKHL 27, [2003] 1 AC 120, [2002] 3 All ER 721.

4 As to the meaning of 'wasted costs' see PARA 1732 note 14. See also *Ridehalgh v Horsefield*, *Allen v Unigate Dairies Ltd*, *Roberts v Coverite (Asphalters) Ltd*, *Philex plc v Golban*, *Watson v Watson*, *Antonelli v Wade Gery Farr (a firm)*[1994] Ch 205, [1994] 3 All ER 848, CA (where the court gave general guidelines for the exercise by courts of their jurisdiction to make a wasted costs order; applied in *B v B (wasted costs order)* [2001] 3 FCR 724); *Tolstoy-Miloslavsky v Lord Aldington*[1996] 2 All ER 556, [1996] 1 WLR 736, CA. As to the caution to be exercised in applying pre-CPR authorities see PARAS 33 text and note 2, 1736. As to the meaning of 'costs' see PARA 1730.

5 CPR 48.7(1), (2). As from a day to be appointed, CPR 48.7(1) is amended by virtue of the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2) to substitute a reference to the Senior Courts Act 1981 for the reference to the Supreme Court Act 1981. At the date at which this title states the law, no such day had been appointed.

6 The application may be made by filing an application notice in accordance with CPR Pt 23 (see PARA 303 et seq) or orally in the course of any hearing: see *Practice Direction about Costs* PD 43-48 para 53.3. On an application for a wasted costs order under CPR Pt 23 the application notice and any evidence in support must identify (1) what the legal representative is alleged to have done or failed to do; and (2) the costs that he may be ordered to pay or which are sought against him: *Practice Direction about Costs* PD 43-48 para 53.8. On such an application, respondent barristers may be asked whether they saw or knew of non-privileged documents provided that the purpose of the question is not to discover what was in their brief or instructions: *Brown v Bennett*[2001] All ER (D) 246 (Dec), (2002) Times, 4 January per Neuberger J.

7 See note 6. A wasted costs order is an order (1) that the legal representative pay a specified sum in respect of costs to a party; or (2) for costs relating to a specified sum or items of work to be disallowed: *Practice Direction about Costs* PD 43-48 para 53.9.

8 *Practice Direction about Costs* PD 43-48 para 53.2. It has been held that a wasted costs order may not be made against a prospective respondent attending on an application for leave to apply for judicial review: *R v Camden London Borough Council, ex p Martin*[1997] 1 All ER 307, [1997] 1 WLR 359. As to the caution to be exercised in applying pre-CPR authorities see PARAS 33 text and note 2, 1736.

9 As to the meaning of 'detailed assessment' see PARA 1734; and as to such assessment see PARA 1779 et seq.

10 *Practice Direction about Costs* PD 43-48 para 53.1; and see *Fimlab Systems International Ltd v Pennington*[1994] 4 All ER 673, [1995] 1 WLR 673. A court can consider an application for wasted costs where a stay of proceedings has been ordered in relation to the proceedings to which the costs relate: *Wagstaff v Collis*[2003] EWCA Civ 469, [2003] All ER (D) 25 (Apr). Wasted costs orders should be dealt with, except in wholly unusual circumstances, at the conclusion of the trial and by the same judge who heard the trial: *Gray v Going Places Leisure Travel Ltd*[2005] EWCA Civ 189, [2005] All ER (D) 94 (Feb). See also CPR 44.3A(1), (2) (court may not assess any additional liability until the conclusion of the proceedings, or the part of the proceedings, to which the funding arrangement relates; and orders which may be made at the conclusion of the proceedings); *Practice Direction about Costs* PD 43-48 para 53.10; and PARA 1833. As to the meaning of 'funding arrangement' see PARA 1830; and as to the meaning of 'additional liability' see PARA 1830 note 20.

11 *Practice Direction about Costs* PD 43-48 para 53.4; and see *Re a Barrister (wasted costs order) (No 1 of 1991)*[1993] QB 293, [1992] 3 All ER 429, CA, as approved in *Ridehalgh v Horsefield*, *Allen v Unigate Dairies Ltd*, *Roberts v Coverite (Asphalters) Ltd*, *Philex plc v Golban*, *Watson v Watson*, *Antonelli v Wade Gery Farr (a firm)*[1994] Ch 205, [1994] 3 All ER 848, CA (applied in *B v B (wasted costs order)* [2001] 3 FCR 724); *Medcalf v Mardell*[2002] UKHL 27, [2003] 1 AC 120, [2002] 3 All ER 721. See also *R v Horsham District Council, ex p Wenman*[1994] 4 All ER 681, [1995] 1 WLR 680; *Persaud v Persaud*[2003] EWCA Civ 394, [2003] All ER (D) 80 (Mar); *Dempsey v Johnstone*[2003] EWCA Civ 1134, [2003] All ER (D) 515 (Jul); *R (on the application of Kamau) v Secretary of State for the Home Department*[2007] All ER (D) 111 (Apr) (order made where solicitor had acted in name of company but without its authority); *D v H*[2008] EWHC 559 (Fam), [2008] Fam Law 624, [2008] All

ER (D) 286 (Mar) (order set aside because of risk of double recovery). As to the caution to be exercised in applying pre-CPR authorities see PARAS 33 text and note 2, 1736.

12 CPR 48.7(5)(a).

13 *Practice Direction about Costs* PD 43-48 para 53.5.

14 *Practice Direction about Costs* PD 43-48 para 53.6(1).

15 *Practice Direction about Costs* PD 43-48 para 53.6(2). On an application for a wasted costs order under CPR Pt 23 the court may proceed to the second stage without first adjourning the hearing if it is satisfied that the legal representative has already had a reasonable opportunity to give reasons why the court should not make a wasted costs order. In other cases the court will adjourn the hearing before proceeding to the second stage: *Practice Direction about Costs* PD 43-48 para 53.7. See also *Re Wiseman Lee (Solicitors) (wasted costs order) (No 5 of 2000)* (2001) 145 Sol Jo LB 119, CA; *Manzanilla Ltd v Corton Property and Investments Ltd* [1997] 3 FCR 389, (1997) Times, 4 August, CA. The summary procedure might be inappropriate in circumstances where a solicitor was alleged to be in breach of his professional duty to his client: *Turner Page Music v Torres Design Associates Ltd* (1998) Times, 3 August CA; *Chief Constable of North Yorkshire v Audley* [2000] Lloyd's Rep PN 675. Satellite litigation over wasted costs is undesirable: *Warren v Warren* [1997] QB 488, [1996] 4 All ER 664, CA; *Wall v Lefever* [1998] 1 FCR 605, CA; and see *White v White* [2002] All ER (D) 454 (Mar); and *Regent Leisuretime Ltd v Skerrett* [2006] EWCA Civ 1032, [2006] All ER (D) 34 (Jul) (judge misapplied test by forming prima facie view that solicitors had acted negligently). As to the caution to be exercised in applying the pre-CPR authorities cited in this note see PARA 1736.

16 As to the meaning of 'costs judge' see PARA 1734 note 17.

17 As to district judges see **COURTS** vol 10 (Reissue) PARAS 661-662, 728.

18 CPR 48.7(6).

19 As to legal professional privilege see PARA 558 et seq.

20 See *Ridehalgh v Horsefield*, *Allen v Unigate Dairies Ltd*, *Roberts v Coverite (Asphaltes) Ltd*, *Philex plc v Golban*, *Watson v Watson*, *Antonelli v Wade Gery Farr (a firm)* [1994] Ch 205, [1994] 3 All ER 848, CA; *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120, [2002] 3 All ER 721.

21 See *Ridehalgh v Horsefield*, *Allen v Unigate Dairies Ltd*, *Roberts v Coverite (Asphaltes) Ltd*, *Philex plc v Golban*, *Watson v Watson*, *Antonelli v Wade Gery Farr (a firm)* [1994] Ch 205, [1994] 3 All ER 848, CA; *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120, [2002] 3 All ER 721.

22 See eg *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120, [2002] 3 All ER 721.

23 CPR 48.7(4).

24 CPR 48.7(5)(b).

25 CPR 48.7(7).

UPDATE

1811 Personal liability of legal representative for costs; wasted costs orders

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 11--See *Equity Solicitors v Javid* [2009] EWCA Civ 535, [2010] 1 FCR 60 (solicitor acting pro bono and arranging new firm to take over proceedings; new firm failing to attend hearing and remove original solicitor from court record; wasted costs order against original solicitor not justified); and *Tradition (UK) Ltd v Ahmed* [2008] EWHC 3448 (Ch), [2009] All ER (D) 55 (Mar) (insolvency practitioner held jointly liable in similar way to a legal professional for costs which should have been avoided). *Ridehalgh*, *Medcalf*, cited, applied: *Harrison v Harrison* [2009] EWHC 428 (QB), [2009] Fam Law 481, [2009] All ER (D) 61 (Feb).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(ii) Costs Relating to Solicitors and Other Legal Representatives/1812. Basis of detailed assessment of solicitor and client costs.

1812. Basis of detailed assessment of solicitor and client costs.

The following provisions apply to every assessment of a solicitor's bill to his client except a bill which is to be paid out of the Community Legal Service Fund under the Legal Aid Act 1988¹ or the Access to Justice Act 1999². The amount which may be allowed on the assessment of any costs³ or bill of costs⁴ in respect of any item relating to proceedings in a county court⁵ must not normally, except in so far as rules of court may otherwise provide, exceed the amount which could have been allowed in respect of that item as between party and party in those proceedings, having regard to the nature of the proceedings and the amount of the claim and of any counterclaim⁶, and this applies unless the solicitor and client have entered into a written agreement which expressly permits payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings⁷. Subject to this, costs are to be assessed on the indemnity⁸ basis but are to be presumed:

- 1491 (1) to have been reasonably incurred if they were incurred with the express or implied approval of the client⁹;
- 1492 (2) to be reasonable in amount if their amount was expressly or impliedly approved by the client¹⁰;
- 1493 (3) to have been unreasonably incurred if they are of an unusual nature or amount and the solicitor did not tell his client that as a result he might not recover all of them from the other party¹¹.

Where the court¹² is considering a percentage increase¹³, whether on the application of the legal representative¹⁴ or on the application of the client, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement¹⁵ was entered into or varied¹⁶.

1 As to payment out of the Community Legal Service Fund under the Legal Aid Act 1988 (repealed subject to transitional provisions) see generally **LEGAL AID**.

2 CPR 48.8(1). As to payment out of the Community Legal Service Fund under the Access to Justice Act 1999 see PARA 1814 et seq; and see generally **LEGAL AID** vol 65 (2008) PARA 38.

3 As to the meaning of 'costs' see PARA 1730.

4 As to bills of costs see PARA 1783.

5 As to county courts see **COURTS** vol 10 (Reissue) PARA 701 et seq.

6 See the Solicitors Act 1974 s 74(3) (prospectively amended by the Legal Services Act 2007 s 177, Sch 16 Pt 1 paras 1, 69(b)); and **LEGAL PROFESSIONS** vol 66 (2009) PARA 970. Section 74(3) does not have the effect of making the assessment of costs between the parties into a cap on the costs recoverable as between solicitor and client under CPR 48.8: *Lynch v Paul Davidson Taylor (a firm)* [2004] EWHC 89 (QB), [2004] 1 WLR 1753.

7 CPR 48.8(1A). A client and his solicitor may agree whatever terms they consider appropriate about the payment of the solicitor's charges for his services. If however, the costs are of an unusual nature (either in amount or in the type of costs incurred) those costs will be presumed to have been unreasonably incurred unless the solicitor satisfies the court that he informed the client that they were unusual and, where the costs relate to litigation, that he informed the client they might not be allowed on an assessment of costs between the parties. That information must have been given to the client before the costs were incurred: *Practice*

Direction about Costs PD 43-48 para 54.1. As to a solicitor's professional obligations in respect of charges to his client and the giving of appropriate information see generally **LEGAL PROFESSIONS**.

8 As to the indemnity basis see PARA 1747.

9 CPR 48.8(2)(a).

10 CPR 48.8(2)(b). The approval must be 'informed' approval: *MacDougall v Boote Edgar Esterkia* (SCCO Case No 15 of 2000, unreported) per Holland J.

11 CPR 48.8(2)(c).

12 As to the meaning of 'court' see PARA 22.

13 As to the meaning of 'percentage increase' see PARA 1830 note 20.

14 Ie under CPR 44.16: see PARA 1836. As to the meaning of 'legal representative' see PARA 1833 note 13.

15 For these purposes, 'conditional fee agreement' means an agreement enforceable under the Courts and Legal Services Act 1990 s 58 (see PARA 1830) at the date on which that agreement was entered into or varied: CPR 48.8(4).

16 CPR 48.8(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(ii) Costs Relating to Solicitors and Other Legal Representatives/1813. Procedure on assessment of costs payable by a client to his solicitor on an order under the Solicitors Act 1974.

1813. Procedure on assessment of costs payable by a client to his solicitor on an order under the Solicitors Act 1974.

Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court must, without requiring any sum to be paid into court, order that the bill be 'taxed' (assessed)¹ and that no action (now known as a 'claim')² be commenced on the bill until the 'taxation' (assessment) is completed³. Where no such application is made before the expiration of that period, then on an application being made by the solicitor or, subject to the statutory conditions⁴, by the party chargeable with the bill, the court may on such terms, if any, as it thinks fit (not being terms as to the costs of the assessment), order that the bill be assessed, and that no claim be commenced on the bill, and that any claim already commenced be stayed, until the assessment is completed⁵.

An order for the assessment of a bill made on an application under these provisions by the party chargeable with the bill must, if he so requests, be an order for the assessment of the profit costs⁶ covered by the bill⁷. Subject to this, the court may order the assessment of all the costs, or of the profit costs, or of the costs other than profit costs and, where part of the costs is not to be assessed, may allow a claim to be commenced or to be continued for that part of the costs⁸. Every order for the assessment of a bill must require the assessing officer to assess not only the bill but also the costs of the assessment and to certify what is due to or by the solicitor in respect of the bill and in respect of the costs of the assessment⁹. If after due notice of any assessment either party to it fails to attend, the officer may proceed with the assessment without notice¹⁰. Unless the order for assessment was made on the application of the solicitor and the party chargeable does not attend the assessment, or the relevant order¹¹ otherwise provides, the costs of an assessment must be paid according to the event of the assessment, that is to say, if one-fifth of the amount of the bill is assessed off, the solicitor must pay the costs, but otherwise the party chargeable must pay the costs¹². The assessing officer may certify to the court any special circumstances relating to a bill or to the assessment of a bill, and the court may make such order as respects the costs of the assessment as it may think fit¹³.

Where the court¹⁴ has made such an order¹⁵ for the assessment of costs¹⁶ payable to a solicitor by his client, the solicitor must serve¹⁷ a breakdown of costs¹⁸ within 28 days of the order for costs to be assessed¹⁹. The client must serve points of dispute²⁰ within 14 days after service on him of the breakdown of costs²¹. If the solicitor wishes to serve a reply²², he must do so within 14 days of service on him of the points of dispute²³. Either party may file²⁴ a request for a hearing date after points of dispute have been served but no later than three months after the date of the order for the costs to be assessed²⁵. On receipt of the request for a detailed assessment²⁶ hearing the court will fix a date for the hearing or, if the costs judge²⁷ or district judge²⁸ so decides, will give directions or fix a date for a preliminary appointment²⁹. There is power to issue an interim certificate³⁰. After the detailed assessment hearing is concluded the court will complete the court copy of the bill so as to show the amount allowed, determine the result of the cash account, award the costs of the detailed assessment hearing³¹ and issue a final costs certificate showing the amount due following the detailed assessment hearing³².

This procedure applies subject to any contrary order made by the court³³.

1 In the Solicitors Act 1974 Pt III (ss 59-75), the pre-CPR terminology of 'taxed', 'taxation' and 'taxing' is used. However, the procedure following an order for taxation of a bill which is prescribed by CPR 48.9 (see the text and notes 14-33) uses the new terminology of 'assessed', 'assessment' and 'assessing' and the practice is now to refer to 'Solicitors Act assessments' not 'Solicitors Act taxations'. Prospective amendments to the Solicitors Act 1974 Pt III are made by the Legal Services Act 2007 s 177, Sch 16 Pt 1 to reflect the new terminology and although, at the date at which this title states the law, no such day had been appointed, the new terminology has been used throughout this paragraph.

2 See PARA 18.

3 Solicitors Act 1974 s 70(1) (amended, as from a day to be appointed, by the Legal Services Act 2007 Sch 16 Pt 1 paras 1, 65(b)). Application is made by the alternative procedure for claims under CPR Pt 8 (see PARA 127 et seq): *Practice Direction about Costs* PD 43-48 para 56.2. See further CPR Pt 67.

4 Where an application under the Solicitors Act 1974 s 70(2) is made by the party chargeable with the bill (1) after the expiration of 12 months from the delivery of the bill; or (2) after a judgment has been obtained for the recovery of the costs covered by the bill; or (3) after the bill has been paid, but before the expiration of 12 months from the payment of the bill, no order must be made except in special circumstances and, if an order is made, it may contain such terms as regards the costs of the assessment as the court may think fit: s 70(3) (amended, as from a day to be appointed, by the Legal Services Act 2007 Sch 16 Pt 1 para 65(d)). The power to order assessment conferred by s 70(2) is not exercisable on an application made by the party chargeable with the bill after the expiration of 12 months from the payment of the bill: Solicitors Act 1984 s 70(4) (amended, as from a day to be appointed, by the Legal Services Act 2007 Sch 16 Pt 1 para 65(d)).

5 Solicitors Act 1974 s 70(2) (amended, as from a day to be appointed, by the Legal Services Act 2007 Sch 16 Pt 1 para 65(c)). The Solicitors Act 1984 s 70 does not oust the court's inherent jurisdiction to order assessment of a solicitor's invoices: see *Connollys (a firm) v Harrington* [2002] All ER (D) 268 (May).

6 'Profit costs' means costs other than counsel's fees or costs paid or payable in the discharge of a liability incurred by the solicitor on behalf of the party chargeable, and the reference in the Solicitors Act 1974 s 70(9) (see the text and note 12) to the fraction of the amount of the bill assessed off is to be taken, where the assessment concerns only part of the costs covered by the bill, as a reference to that fraction of the amount of those costs which is being assessed: s 70(12) (amended, as from a day to be appointed, by the Legal Services Act 2007 Sch 16 Pt 1 para 65(k)).

7 Solicitors Act 1974 s 70(5) (amended, as from a day to be appointed, by the Legal Services Act 2007 Sch 16 Pt 1 para 65(d)).

8 Solicitors Act 1974 s 70(6) (amended, as from a day to be appointed, by the Legal Services Act 2007 Sch 16 Pt 1 para 65(e)).

9 See the Solicitors Act 1974 s 70(7) (amended, as from a day to be appointed, by the Legal Services Act 2007 Sch 16 Pt 1 para 65(f)).

10 Solicitors Act 1974 s 70(8) (amended, as from a day to be appointed, by the Legal Services Act 2007 Sch 16 Pt 1 para 65(g)).

11 In the order for assessment or the order under the Solicitors Act 1974 s 70(10) (see the text and note 13): s 70(9). See *Angel Airlines (a Romanian company in liquidation) v Dean and Dean* [2008] EWHC 1513 (QB).

12 Solicitors Act 1974 s 70(9) (amended, as from a day to be appointed, by the Legal Services Act 2007 Sch 16 Pt 1 para 65(h)).

13 Solicitors Act 1974 s 70(10) (amended, as from a day to be appointed, by the Legal Services Act 2007 Sch 16 Pt 1 para 65(i)).

14 As to the meaning of 'court' see PARA 22.

15 In an order under the Solicitors Act 1973 Pt III: see the text and notes 1-13; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 969 et seq.

16 As to the meaning of 'costs' see PARA 1730.

17 As to the meaning of 'service' see PARA 138 note 2.

18 The breakdown of costs is a document which contains the following information: (1) details of the work done under each of the bills sent for assessment; and (2) in applications under the Solicitors Act 1974 s 70, an account showing money received by the solicitor to the credit of the client and sums paid out of that money on

behalf of the client but not payments out which were made in satisfaction of the bill or of any items which are claimed in the bill: *Practice Direction about Costs* PD 43-48 para 56.5. Precedent P of the Schedule of Costs Precedents annexed to the costs practice direction is a model form of breakdown of costs. A party who is required to serve a breakdown of costs must also serve (a) copies of the fee notes of counsel and of any expert in respect of fees claimed in the breakdown; and (b) written evidence as to any other disbursement which is claimed in the breakdown and which exceeds £250: *Practice Direction about Costs* PD 43-48 para 56.6.

19 CPR 48.10(1), (2).

20 The points of dispute must, as far as practicable, be in the form complying with *Practice Direction about Costs* PD 43-48 paras 35.1-35.7: para 56.8. As to points of dispute see PARA 1787.

21 CPR 48.10(3).

22 As to replies see PARA 1791.

23 CPR 48.10(4).

24 As to the meaning of 'filing' see PARA 1832 note 8.

25 CPR 48.10(5). The form of request must be in Form N258C (see *The Civil Court Practice*) and must be accompanied by copies of (1) the order sending the bill or bills for assessment; (2) the bill or bills sent for assessment; (3) the solicitor's breakdown of costs and any invoices or accounts served with that breakdown; (4) a copy of the points of dispute, annotated as necessary in order to show which items have been agreed and their value and to show which items remain in dispute; (5) as many copies of the points of dispute so annotated as there are other parties to the proceedings to whom the court should give details of the assessment hearing requested; (6) a copy of any replies served; (7) a statement signed by the party filing the request or his legal representative giving the names and addresses for service of all parties to the proceedings: *Practice Direction about Costs* PD 43-48 para 56.10. The request must include an estimate of the length of time the detailed assessment hearing will take: para 56.11.

26 As to the meaning of 'detailed assessment' see PARA 1734; and as to such assessment see PARA 1779 et seq.

27 As to the meaning of 'costs judge' see PARA 1734 note 17.

28 As to district judges see **COURTS** vol 10 (Reissue) PARAS 661-662, 728.

29 *Practice Direction about Costs* PD 43-48 para 56.12. The court will give at least 14 days' notice of the time and place of the detailed assessment hearing to every person named in the statement referred to in para 56.10(g) (see note 25 head (7)): para 56.13(1). The court will, when giving notice, give all parties other than the party who requested the hearing a copy of the points of dispute annotated by the party requesting the hearing in compliance with para 56.10(e) (see note 25 head (5)): para 56.13(2). Apart from the solicitor whose bill it is, only those parties who have served points of dispute may be heard on the detailed assessment unless the court gives permission, and only items specified in the points of dispute may be raised unless the court gives permission: see para 56.13(3); and see CPR 47.14(6), (7); and PARA 1793. If a party wishes to vary his breakdown of costs, points of dispute or reply, an amended or supplementary document must be filed with the court and copies of it must be served on all other relevant parties: *Practice Direction about Costs* PD 43-48 para 56.14(1). Permission is not required to vary a breakdown of costs, points of dispute or a reply but the court may disallow the variation or permit it only upon conditions, including conditions as to the payment of any costs caused or wasted by the variation: para 56.14(2). Unless the court directs otherwise the solicitor must file with the court the papers in support of the bill not less than seven days before the date for the detailed assessment hearing and not more than 14 days before that date: para 56.15.

30 See *Practice Direction about Costs* PD 43-48 para 56.17(1); and see CPR 47.15; and PARA 1796. If, in the course of a detailed assessment hearing of a solicitor's bill to his client, it appears to the costs judge or district judge that in any event the solicitor will be liable in connection with that bill to pay money to the client, he may issue an interim certificate specifying an amount which in his opinion is payable by the solicitor to his client. Such a certificate will include an order to pay the sum it certifies unless the court orders otherwise: *Practice Direction about Costs* PD 43-48 para 56.17(2).

31 In accordance with the Solicitors Act 1974 s 70(8): see the text and note 10.

32 *Practice Direction about Costs* PD 43-48 para 56.18(2). The requirement under CPR 47.16 for the solicitor to file a completed bill within 14 days after the end of the detailed assessment hearing (see PARA 1797) may be dispensed with: see *Practice Direction about Costs* PD 43-48 para 56.18(1). A final costs certificate will include an order to pay the sum it certifies unless the court orders otherwise: para 56.19. Once the detailed assessment

hearing has ended it is the responsibility of the legal representative appearing for the solicitor or, as the case may be, the solicitor in person to remove the papers filed in support of the bill: para 56.16.

33 CPR 48.10(6).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(iii) Costs where Parties Funded by the Legal Services Commission/A. COST PROTECTION; IN GENERAL/1814. Cost protection for litigants receiving Legal Services Commission funding.

(iii) Costs where Parties Funded by the Legal Services Commission

A. COST PROTECTION; IN GENERAL

1814. Cost protection for litigants receiving Legal Services Commission funding.

Except in prescribed circumstances, costs ordered against an individual in relation to any proceedings or part of proceedings funded for him by the Legal Services Commission as part of the Community Legal Service¹ must not exceed the amount, if any, which is a reasonable one for him to pay having regard to all the circumstances including (1) the financial resources² of all the parties to the proceedings; and (2) their conduct in connection with the dispute to which the proceedings relate³. Subject to this, regulations may make provision about costs in relation to proceedings in which services are funded by the Commission for any of the parties as part of the Community Legal Service⁴. The regulations may, in particular, make provision:

- 1494 (a) specifying the principles to be applied in determining the amount of any costs which may be awarded against a party for whom services are funded by the Commission as part of the Community Legal Service⁵;
- 1495 (b) limiting the circumstances in which, or extent to which, an order for costs may be enforced against such a party⁶;
- 1496 (c) as to the cases in which, and extent to which, such a party may be required to give security for costs and the manner in which it is to be given⁷;
- 1497 (d) requiring the payment by the Commission of the whole or part of any costs incurred by a party for whom services are not funded by the Commission as part of the Community Legal Service⁸;
- 1498 (e) specifying the principles to be applied in determining the amount of any costs which may be awarded to a party for whom services are so funded⁹;
- 1499 (f) requiring the payment to the Commission, or the person or body by which the services were provided, of the whole or part of any sum awarded by way of costs to such a party¹⁰; and
- 1500 (g) as to the court, tribunal or other person or body by whom the amount of any costs is to be determined and the extent to which any determination of that amount is to be final¹¹.

Cost protection does not apply in relation to such parts of proceedings, or prospective proceedings, as are funded for the client¹² by way of:

- 1501 (i) Help at Court or Litigation Support¹³;
- 1502 (ii) Legal Help¹⁴, unless the client later receives Legal Representation or General Family Help or Help with Mediation in respect of the same dispute¹⁵;
- 1503 (iii) General Family Help and Help with Mediation in family proceedings¹⁶; or
- 1504 (iv) Legal Representation in family proceedings¹⁷.

Cost protection applies only to costs incurred by the receiving party in relation to proceedings which, as regards the client, are funded proceedings¹⁸. Where funding is withdrawn by revoking

the client's certificate, cost protection does not apply, either in respect of work done before or after the revocation¹⁹.

1 For this purpose proceedings, or a part of proceedings, are funded for an individual if services relating to the proceedings or part are funded for him by the Legal Services Commission as part of the Community Legal Service: Access to Justice Act 1999 s 11(1). As to the Legal Services Commission and the Community Legal Service see generally **LEGAL AID** vol 65 (2008) PARAS 17 et seq; 31 et seq.

2 In assessing for these purposes the financial resources of an individual for whom services are funded by the Commission as part of the Community Legal Service, his clothes and household furniture and the tools and implements of his trade must not be taken into account, except so far as may be prescribed: Access to Justice Act 1999 s 11(2). Where cost protection applies (Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 5): (1) the first £100,000 of the value of the client's interest in the main or only dwelling in which he resides must not be taken into account in having regard to the client's resources for these purposes (reg 7(1)); (2) where, but only to the extent that, the court considers that the circumstances are exceptional, having regard in particular to the quantity or value of the items concerned, the court may take into account the value of the client's clothes and household furniture, or the tools and implements of his trade, in having regard to the client's resources for these purposes (reg 7(2)); (3) in having regard to the resources of a party for these purposes, the resources of his partner must be treated as his resources unless the partner has a contrary interest in the dispute in respect of which the funded services are provided (reg 7(3), (4)); (4) where a party is acting in a representative, fiduciary or official capacity, the court must not take the personal resources of the party into account for these purposes, but must have regard to the value of any property or estate, or the amount of any fund out of which he is entitled to be indemnified, and may also have regard to the resources of the persons, if any, including that party where appropriate, who are beneficially interested in that property, estate or fund (reg 7(5)); and (5) for the purposes of the Access to Justice Act 1999 s 11(1), where a party is acting as a litigation friend to a client who is a child or a patient, the court must not take the personal resources of the litigation friend into account in assessing the resources of the client (Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 7(6) (added by SI 2003/649)). The purpose of the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 7(5) is to ensure that any liability is determined with reference to the value of the property or fund being used to pay for the litigation, and the financial position of those who may benefit from or rely on it: see *Practice Direction about Costs* PD 43-48 para 21.15(3). 'Partner', in relation to a party to proceedings, means a person with whom that party lives as a couple, and includes a person with whom the party is not currently living but from whom he is not living separate and apart: Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 2. 'Cost protection' means the limit on costs awarded against a client set out in the Access to Justice Act 1999 s 11(1) (see the text and notes 1, 3): Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 2.

In a case where costs protection applies, the first £100,000 of the value of the LSC funded client's interest in the main or only home cannot be the subject of any enforcement process by the receiving party. The receiving party cannot apply for an order to sell the LSC funded client's home, but could secure the debt against any value exceeding £100,000 by way of a charging order: see the Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 4 (amended by SI 2005/2006); and *Practice Direction about Costs* PD 43-48 para 21.12. As to the meaning of 'receiving party' see PARA 1833 note 14.

3 Access to Justice Act 1999 s 11(1). When deciding whether to make an order pursuant to s 11(1), the court should consider whether, but for cost protection, it would have made a costs order against the unsuccessful party: *Re Wyatt (A Child) (Medical Treatment: Continuation of Order) (Costs)* [2006] EWCA Civ 529, [2006] All ER (D) 27 (May).

4 Access to Justice Act 1999 s 11(3).

5 Access to Justice Act 1999 s 11(4)(a); and see PARA 1817.

6 Access to Justice Act 1999 s 11(4)(b); and see note 2.

7 Access to Justice Act 1999 s 11(4)(c). Where cost protection applies, in any proceedings where a client is required to give security for costs, the amount of that security must not exceed the amount (if any) which is a reasonable one having regard to all the circumstances, including the client's financial resources and his conduct in relation to the dispute to which the proceedings relate: Community Legal Service (Costs) Regulations 2000, SI 2000/441, regs 5, 6.

8 Access to Justice Act 1999 s 11(4)(d); and see PARA 1815.

9 Access to Justice Act 1999 s 11(4)(e); and see PARA 1822.

10 Access to Justice Act 1999 s 11(4)(f); and see PARA 1823.

11 Access to Justice Act 1999 s 11(4)(g); and see PARAS 1815, 1818, 1820.

12 For these purposes, 'client' means an individual who receives funded services; and 'funded services' means services which are provided directly for a client and funded for that client by the Commission as part of the Community Legal Service under the Access to Justice Act 1999 ss 4-11 (see generally **LEGAL AID**): Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 2(1).

13 Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 3(1)(a); and see *Practice Direction about Costs* PD 43-48 para 21.7(1). As to Help at Court see generally **LEGAL AID**. See also *Practice Direction about Costs* PD 43-48 para 21.8.

14 Ie where the solicitor is advising but not representing a litigant in person: see *Practice Direction about Costs* PD 43-48 para 21.7(2).

15 Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 3(1)(c) (amended by SI 2005/2006). Where the client receives Legal Help, but later receives Legal Representation or General Family Help or Help with Mediation in respect of the same dispute, other than Legal Representation in family proceedings or General Family Help or Help with Mediation in family proceedings, cost protection applies, both in respect of (1) the costs incurred by the receiving party before the commencement of proceedings which, as regards the client, are funded proceedings by virtue of the client's receipt of Legal Help; and (2) the costs incurred by the receiving party in the course of proceedings which, as regards the client, are funded proceedings by virtue of the client's receipt of Legal Representation, General Family Help or Help with Mediation: Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 3(2) (amended by SI 2005/2006). This is subject to reg 3(4) (see note 19): reg 3(2). See also *Practice Direction about Costs* PD 43-48 para 21.7(2). 'Funded proceedings' means proceedings (including prospective proceedings) in relation to which the client receives funded services or, as the case may be, that part of proceedings during which the client receives funded services: Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 2(1). 'Family proceedings' means (a) all proceedings under any one or more of the following: (i) the Matrimonial Causes Act 1973; (ii) the Domestic Proceedings and Magistrates' Courts Act 1978; (iii) the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27); (iv) the Child Abduction and Custody Act 1985; (v) the Children Act 1989 Pts I (ss 1-7), II (ss 8-16), Sch 1; (vi) the Family Law Act 1996 s 53 and Sch 7; and (b) proceedings which arise out of family relationships under either or both of the following: (i) the Inheritance (Provision for Family and Dependents) Act 1975; (ii) the Trusts of Land and Appointment of Trustees Act 1996: Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 2(1). 'Family relationships' has the same meaning as in the Funding Code (see PARA 1818 note 15) and the Funding Code Guidance published on 1 April 2000 by the Commission for the purpose of making decisions under the Code: Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 2(1) (definition added by SI 2005/2006). As to Legal Help, Legal Representation, General Family Help and Help with Mediation see **LEGAL AID** vol 65 (2008) PARAS 46, 111.

16 Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 3(1)(d) (added by SI 2005/2006). See also *Practice Direction about Costs* PD 43-48 para 21.7(3).

17 Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 3(1)(e) (added by SI 2005/2006). See also *Practice Direction about Costs* PD 43-48 para 21.7(4).

18 Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 3(3). Where work is done before the issue of a certificate, cost protection applies, subject to reg 3(2) (see note 15) and reg 3(5), only to costs incurred after the issue of the certificate: reg 3(3)(a). Where funding is withdrawn by discharging the client's certificate, cost protection applies only to costs incurred before the date when funded services under the certificate ceased to be provided: reg 3(3)(b); and see *Practice Direction about Costs* PD 43-48 para 21.11. The date on which funded services ceased to be provided under the certificate may be a date before the date on which the certificate is formally discharged by the Commission: see *Burridge v Stafford, Khan v Ali* [1999] 4 All ER 660, [2000] 1 WLR 927, CA. Cost protection does not apply to an individual whose claim is based on his own serious crime: *Jones v Congregational and General Insurance plc* [2003] EWHC 1027 (QB), [2003] 1 WLR 3001, [2003] All ER (D) 322 (Jun). Cost protection is, however, to apply to work done immediately before the grant of an emergency certificate, other than an emergency certificate granted in relation to family proceedings, if (1) no application for such a certificate could be made because the Commission's office was closed; and (2) the client's solicitor applies for an emergency certificate at the first available opportunity, and the certificate is granted: Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824 reg 3(5) (amended by SI 2005/2006). See also *Practice Direction about Costs* PD 43-48 para 21.9.

19 Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 3(4); and see *Practice Direction about Costs* PD 43-48 para 21.10.

UPDATE

1814 Cost protection for litigants receiving Legal Services Commission funding

NOTE 1--Where the Legal Services Commission decides to fund a litigant who is successful in his cause, that decision has to be seen to carry something close to an assurance that it will continue to support him in any appeal by the unsuccessful party: *R (on the application of E) v Governing Body of JFS (No 2)*; *R (on the application of E) v Office of the Schools Adjudicator (No 2)* [2009] UKSC 1, [2010] 1 All ER 1.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(iii) Costs where Parties Funded by the Legal Services Commission/A. COST PROTECTION; IN GENERAL/1815. Costs orders against the Legal Services Commission in favour of non-funded parties.

1815. Costs orders against the Legal Services Commission in favour of non-funded parties.

No order to pay costs in favour of a non-funded party¹ must be made against the Legal Services Commission² in respect of funded proceedings³ except in accordance with the relevant regulations⁴ and any costs to be paid under such an order must be paid out of the Community Legal Service Fund⁵. Nothing in those regulations, however, is to be construed, in relation to proceedings where one or more parties are receiving, or have received, funded services⁶, as requiring a court to make a costs order⁷ where it would not otherwise have made a costs order or as affecting the court's⁸ power to make a wasted costs order⁹ against a legal representative¹⁰.

Where funded services are provided to a client¹¹ in relation to proceedings, those proceedings are finally decided in favour of a non-funded party and cost protection¹² applies, the court may make an order for the payment by the Commission to the non-funded party of the whole or any part of the costs incurred by him in the proceedings¹³, other than any costs that the client is required¹⁴ to pay¹⁵. Such an order may only be made if all the conditions set out below are satisfied:

- 1505 (1) a costs order¹⁶ is made against the client in the proceedings, and the amount (if any) which the client is required to pay under that costs order is less than the amount of the full costs¹⁷;
- 1506 (2) unless there is a good reason for the delay, the non-funded party makes a request¹⁸ within three months of the making of the costs order against the client¹⁹;
- 1507 (3) as regards costs incurred in a court of first instance, the proceedings were instituted by the client, the non-funded party is an individual, and the court is satisfied that the non-funded party will suffer financial hardship unless the order is made²⁰; and
- 1508 (4) in any case, the court is satisfied that it is just and equitable in the circumstances that provision for the costs should be made out of public funds²¹.

Where a court decides any proceedings in favour of the non-funded party and an appeal lies (with or without permission) against that decision, any order made under these provisions is not to take effect (a) where permission to appeal is required, unless the time limit for applications for permission to appeal expires without permission being granted; and (b) where permission to appeal is granted or is not required, unless the time limit for appeal expires without an appeal being brought²².

1 'Non-funded party' means a party to proceedings who has not received funded services in relation to those proceedings under a certificate, other than a certificate which has been revoked; 'certificate' means a certificate issued under the Funding Code certifying a decision to fund services for the client and 'emergency certificate' means a certificate certifying a decision to fund Legal Representation for the client in a case of emergency; and 'Funding Code' means the code approved under the Access to Justice Act 1999 s 9 (see **LEGAL AID** vol 65 (2008) PARA 40): Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 2(1).

2 As to the Legal Services Commission see generally **LEGAL AID** vol 65 (2008) PARA 17 et seq.

- 3 As to the meaning of 'funded proceedings' PARA 1814 note 15.
- 4 Ie in accordance with the Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824: see PARA 1814; and the text and notes 5-22.
- 5 Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 7(1).
- 6 As to the meaning of 'funded services' see PARA 1814 note 12.
- 7 'Costs order' means an order that a party pay all or part of the costs of proceedings: Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 2(1).
- 8 For these purposes, 'court' includes any tribunal having the power to award costs in favour of, or against, a party: Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 2(1).
- 9 As to wasted costs orders see PARA 1811.
- 10 Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 7(2).
- 11 As to the meaning of 'client' see PARA 1814 note 12.
- 12 'Cost protection' means the limit on costs awarded against a client set out in the Access to Justice Act 1999 s 11(1) (see PARA 1814): Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 2(1).
- 13 Where the client receives funded services in connection with part only of the proceedings, the reference in the text to the costs incurred by the non-funded party in the relevant proceedings is to be construed as a reference to so much of those costs as is attributable to the part of the proceedings which are funded proceedings: Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 5(4).
- 14 Ie under a 'section 11(1) costs order': Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 5(2). 'Section 11(1) costs order' means a costs order against a client where cost protection applies: reg 2(1). The statutory provision referred to is the Access to Justice Act 1999 s 11(1): see PARA 1814.
- 15 Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 5(1), (2). See also *Practice Direction about Costs* PD 43-48 para 21.18. An order under the Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 5(2) may be made (1) in relation to proceedings in the House of Lords, by the Clerk to the Parliaments (see **COURTS** vol 10 (Reissue) PARA 371); (2) in relation to proceedings in the Court of Appeal, High Court or a county court, by a costs judge or a district judge; (3) in relation to proceedings in a magistrates' court, by a single justice or by the justices' clerk (see **MAGISTRATES**); and (4) in relation to proceedings in the Employment Appeal Tribunal, by the registrar of that tribunal (see **EMPLOYMENT**): reg 5(3A) (added by SI 2001/823). As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.
- 16 Ie a 'section 11(1) costs order': see note 14.
- 17 Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 5(3)(a). 'Full costs' means, where a section 11(1) costs order is made against a client, the amount of costs which that client would, but for the access to Justice Act 1999 s 11(1) of the Act, have been ordered to pay: Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 2(1).
- 18 Ie under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10(2): see PARA 1818.
- 19 Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 5(3)(b) (reg 5(3) amended by SI 2001/3812).
- 20 Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 5(3)(c) (as amended: see note 19). In determining whether the conditions in reg 5(3)(c) and reg 5(3)(d) (see head (4) in the text) are satisfied, the court must have regard to the resources of the non-funded party and of his partner, unless the partner has a contrary interest in the funded proceedings: reg 5(6), (7). Where the non-funded party is acting in a representative, fiduciary or official capacity and is entitled to be indemnified in respect of his costs from any property, estate or fund, the court must, for the purposes of reg 5(3) (as so amended), have regard to the value of the property, estate or fund and the resources of the persons, if any, including that party where appropriate, who are beneficially interested in that property, estate or fund: reg 5(8). 'Partner' means a person with whom the person concerned lives as a couple, and includes a person with whom the person concerned is not currently living but from whom he is not living separate and apart: reg 2(1).

21 Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 5(3)(d); and see note 20. See also *Practice Direction about Costs* PD 43-48 para 21.19.

22 Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 5(5); and see *Practice Direction about Costs* PD 43-48 para 21.20(1). Accordingly, if the LSC funded client appeals, any earlier order against the Commission can never take effect. If the appeal is unsuccessful, an application may be made to the appeal court for a fresh order: para 21.20(2).

As to the procedure for making a costs order against the Commission see also *R (on the application of Gunn) v Secretary of State for the Home Department* [2001] EWCA Civ 891, [2001] 3 All ER 481, [2001] 1 WLR 1634.

UPDATE

1815 Costs orders against the Legal Services Commission in favour of non-funded parties

NOTE 15--Appointed day is 1 October 2009: SI 2009/1604. Reference to Supreme Court substituted for reference to House of Lords: SI 2000/824 reg 5(3A) (amended by SI 2009/2468).

NOTE 20--A person acting on his own behalf is not acting in an official capacity within the meaning of SI 2000/824 reg 5(8) merely because he is a party to the proceedings by virtue of the office which he holds: *Aehmed v Legal Services Commission; Legal Services Commission v Afzal* [2009] EWCA Civ 572, [2009] All ER (D) 185 (Jul).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(iii) Costs where Parties Funded by the Legal Services Commission/B. ASSESSMENT OF LIABILITY WHERE COST PROTECTION APPLIES/1816. Statements of resources.

B. ASSESSMENT OF LIABILITY WHERE COST PROTECTION APPLIES

1816. Statements of resources.

Where cost protection applies¹, any person who is a party to proceedings in which another party is an LSC funded client (a 'client')² may make a statement of resources, and file it with the court³. A 'statement of resources' means:

- 1509 (1) a statement, verified by a statement of truth⁴, made by a party to proceedings setting out:
- 49
122. (a) his income and capital and financial commitments during the previous year and, if applicable, those of his partner⁵;
123. (b) his estimated future financial resources and expectations and, if applicable, those of his partner; and
124. (c) a declaration that he and, if applicable, his partner, has not deliberately foregone or deprived himself of any resources or expectations, particulars of any application for funding made by him in connection with the proceedings, and any other facts relevant to the determination of his resources; or
- 50
- 1510 (2) a statement, verified by a statement of truth, made by a client receiving funded services, setting out the prescribed information provided by the client⁶, and stating that there has been no significant change in the client's financial circumstances since the date on which the information was provided or, as the case may be, details of any such change⁷.

A person so making and filing a statement of resources must serve a copy of it on the client⁸. Where a copy of a statement of resources has been served not less than seven days before the date fixed for a hearing at which the amount to be paid under a costs order⁹ falls, or may fall, to be decided, the client must also make a statement of resources, and must produce it at that hearing¹⁰.

1 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 5. As to the meaning of 'cost protection' see PARA 1814 note 2.

2 In the Community Legal Service (Costs) Regulations 2000, SI 2000/441, 'client' means an individual who receives funded services; and 'funded services' means services which are provided directly for a client and funded for that client by the Legal Services Commission as part of the Community Legal Service under the Access to Justice Act 1999 ss 4-11 (see generally **LEGAL AID**): Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 2.

3 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 8(1).

4 For these purposes, 'statement of truth' has the same meaning as it has in the Civil Procedure Rules (ie, a statement that the party putting forward the document believes the facts stated in it are true: see CPR 22.1(4); and PARA 613): Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 2.

5 As to the circumstances in which a party's partner's financial resources are to be treated as his own, and as to the meaning of 'partner', see PARA 1814 note 2.

6 le the information prescribed under the Community Legal Service (Financial) Regulations 2000, SI 2000/516, reg 6: see **LEGAL AID** vol 65 (2008) PARA 61.

7 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 2; and see *Practice Direction about Costs* PD 43-48 para 22.1.

8 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 8(2).

9 le a 'section 11(1) costs order': Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 8(3). 'Section 11(1) costs order' means a costs order against a client where cost protection (see PARA 1814 note 2) applies: reg 2. The statutory provision referred to is the Access to Justice Act 1999 s 11(1): see PARA 1814. 'Costs order' means an order that a party pay all or part of the costs of proceedings: Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 2.

10 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 8(3).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(iii) Costs where Parties Funded by the Legal Services Commission/B. ASSESSMENT OF LIABILITY WHERE COST PROTECTION APPLIES/1817. Procedures for ordering costs against client and Commission.

1817. Procedures for ordering costs against client and Commission.

Where cost protection applies¹, then where the court² is considering whether to make a costs order³, it must consider whether, but for cost protection, it would have made a costs order against the LSC funded client (the 'client')⁴ and, if so, whether it would, on making the costs order, have specified the amount to be paid under that order⁵. If the court considers that it would have made a costs order against the client, but that it would not have specified the amount to be paid under it, the court must, when making the costs order, specify the amount (if any) that the client is to pay under that order if, but only if, it considers that it has sufficient information before it to decide what amount is, in that case, a reasonable amount for the client to pay⁶ and it is satisfied that, if it were to determine the full costs⁷ at that time, they would exceed that amount⁸. Otherwise, it must not specify the amount the client is to pay under the costs order⁹.

If the court considers that it would have made a costs order against the client, and that it would have specified the amount to be paid under it, the court must, when making the costs order¹⁰, specify the amount (if any) that the client is to pay under that order if, but only if, it considers that it has sufficient information before it to decide what amount is, in that case, a reasonable amount¹¹ for the client to pay¹². Otherwise, it must not specify the amount the client is to pay under the costs order¹³. Any order made under this provision must state the amount of the full costs¹⁴.

Where the court makes a costs order¹⁵ that does not specify the amount which the client is to pay under it, it may also make findings of fact, as to the parties' conduct in the proceedings or otherwise, relevant to the determination of that amount, and those findings must be taken into consideration in that determination¹⁶. The amount (if any) to be paid by the client under an order made under the provisions set out above¹⁷ and any application for a costs order against the Legal Services Commission (the 'Commission')¹⁸, must be determined in the prescribed manner¹⁹ and at any such determination following an order which does not state the amount of the full costs²⁰, the amount of the full costs must also be assessed²¹.

Where an order specifying the costs payable is made and the LSC funded client does not have cost protection in respect of all of the costs awarded in that order, the order must identify the sum payable (if any) in respect of which the LSC funded client has cost protection and the sum payable (if any) in respect of which he does not have cost protection²².

1 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 5. As to the meaning of 'cost protection' see PARA 1814 note 2.

2 For these purposes, 'court' includes any tribunal having the power to award costs in favour of, or against, a party: Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 2.

3 I.e. a 'section 11(1) costs order': see Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 9(1). As to the meanings of 'section 11(1) costs order' and 'costs order' see PARA 1816 note 9.

4 As to the meaning of 'client' see PARA 1816 note 2. The Community Legal Service (Costs) Regulations 2000, SI 2000/441, regs 9-13 (see the text and notes 1-3, 5-19; and PARAS 1818-1821) also apply to certificates issued under the Legal Aid Act 1988 where costs against the assisted person fall to be assessed under the Civil Legal Aid (General) Regulations 1989, SI 1989/339, reg 124 (lapsed subject to transitional provisions): see *Practice*

Direction about Costs PD 43-48 para 22.3. In *Practice Direction about Costs* PD 43-48 Sections 22-23, the expression 'LSC funded client' includes an assisted person: para 22.3. As to the meaning of 'assisted person' see PARA 241 note 12.

5 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 9(1); and see *Practice Direction about Costs* PD 43-48 para 22.5.

6 Ie in accordance with the Access to Justice Act 1999 s 11(1): see PARA 1814.

7 'Full costs' means, where a section 11(1) costs order (see note 3) is made against a client, the amount of costs which that client would, but for the Access to Justice Act 1999 s 11(1), have been ordered to pay: Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 2.

8 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 9(2)(a); and see *Practice Direction about Costs* PD 43-48 para 22.7.

9 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 9(2)(b).

10 Ie the 'section 11(1) costs order': see note 3.

11 See note 6.

12 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 9(3)(a).

13 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 9(3)(b).

14 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 9(4).

15 See note 9.

16 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 9(6); and see *Practice Direction about Costs* PD 43-48 para 22.6.

17 Ie under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 9(2)(b) or (3)(b): see the text and notes 9, 13.

18 'Costs order against the Commission' means an order, made under the Community Legal Service (Cost Protection) Regulations 2000, SI 2000/824, reg 5 (see PARA 1815) but not one under reg 6 (revoked), that the Commission pay all or part of the costs of a party to proceedings who has not received funded services in relation to those proceedings under a certificate, other than a certificate which has been revoked: Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 2.

19 Ie in accordance with the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10: see PARA 1818.

20 Ie an order under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 9(2)(b): see the text and note 9.

21 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 9(5).

22 *Practice Direction about Costs* PD 43-48 para 22.8.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(iii) Costs where Parties Funded by the Legal Services Commission/B. ASSESSMENT OF LIABILITY WHERE COST PROTECTION APPLIES/1818. Determination proceedings.

1818. Determination proceedings.

Where cost protection applies¹, and the amount to be paid under a costs order², or an application for a costs order against the Legal Services Commission (the 'Commission')³, is to be determined under the following provisions⁴, the receiving party⁵ may, within three months after a costs order⁶ is made, request a hearing to determine the costs payable to him⁷. Such a request must be accompanied by:

- 1511 (1) if the costs order does not state the full costs⁸, the receiving party's bill of costs, which must comply with any requirements of relevant rules of court relating to the form and content of a bill of costs where the court⁹ is assessing a party's costs¹⁰;
- 1512 (2) unless specified conditions are satisfied, a statement of resources¹¹; and
- 1513 (3) if the receiving party is seeking, or, subject to the determination of the amount to be paid under costs order, may seek, a costs order against the Commission, written notice to that effect¹².

The receiving party must file these documents with the court and at the same time serve copies of them on the client¹³, if a determination of costs payable¹⁴ is sought, and on the Director¹⁵, if notice has been given under head (3) above¹⁶. Where documents are served on the client, the client must make a statement of resources¹⁷. He must file the statement of resources with the court, and serve copies of it on the receiving party and, if notice has been given under head (3) above, on the Director, not more than 21 days after the client receives a copy of the receiving party's statement of resources¹⁸. The client may, at the same time as filing and serving a statement of resources, file, and serve on the same persons, a statement setting out any points of dispute in relation to the bill of costs referred to in head (1) above¹⁹.

If the client, without good reason, fails to file a statement of resources, the court must determine²⁰ the amount which the client is to be required to pay under the costs order (and, if relevant, the full costs), having regard to the statement made by the receiving party, and the court need not hold an oral hearing for such determination²¹. If, however, the client files a statement of resources, or the period for filing such notice expires, or if the costs payable by the client have already been determined, the court must set a date for the hearing and, at least 14 days before that date, serve notice of it on the receiving party, the client (unless the costs payable by the client have already been determined) and, if a costs order against the Commission is or may be sought, the Director²². The amount of costs to be determined under these provisions may include the costs incurred in relation to a request made under them²³.

The Director may appear at any hearing in relation to which notice has been given as described above²⁴. Instead of appearing he may give evidence in the form of a written statement to the court, verified by a statement of truth²⁵, which must be filed with the court and a copy of which must be served on the receiving party, not less than seven days before the hearing to which it relates²⁶.

Where the LSC funded client does not have cost protection in respect of all of the costs awarded, the order made by the costs judge or district judge must in addition to specifying the costs payable, identify the full costs in respect of which cost protection applies and the full costs in respect of which cost protection does not apply²⁷.

1 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 5. As to the meaning of 'cost protection' see PARA 1814 note 2. As to the application of reg 10 (see the text and notes 2-23) to certificates issued under the Legal Aid Act 1988 where costs against the assisted person fall to be assessed under the Civil Legal Aid (General) Regulations 1989, SI 1989/339, reg 124 (lapsed subject to transitional provisions) see PARA 1817 note 4.

2 Ie a 'section 11(1) costs order': Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10(1). As to the meaning of such an order, and as to the meaning of 'costs order', see PARA 1816 note 9.

3 As to the meaning of 'costs order against the Commission' see PARA 1817 note 18. As to the Legal Services Commission see generally **LEGAL AID** vol 65 (2008) PARA 38 et seq.

4 Ie is to be determined under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10 by virtue of reg 9(5): see PARA 1817.

5 'Receiving party' means a party in favour of whom a costs order is made: Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 2.

6 See note 2.

7 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10(1), (2). The application must be in Form N244 (see *The Civil Court Practice*) and filed in the appropriate court office, ie the district registry or county court in which the case was being dealt with when the section 11(1) order (see note 2) was made or to which it has subsequently been transferred, or, in all other cases, the Supreme Court Costs Office: *Practice Direction about Costs* PD 43-48 paras 23.2, 23.3(1). Special provisions apply where the appropriate office is any of the following county courts: Barnet, Bow, Brentford, Bromley, Central London, Clerkenwell, Croydon, Edmonton, Ilford, Kingston, Lambeth, Mayors and City of London, Romford, Shoreditch, Uxbridge, Wandsworth, West London, Willesden and Woolwich: see *Practice Direction about Costs* PD 43-48 para 23.2A. If the LSC funded client's liability has already been determined and is less than the full costs, the application will be for costs against the LSC only. If the LSC funded client's liability has not yet been determined, the receiving party must indicate if costs will be sought against the LSC if the funded client's liability is determined as less than the full costs: para 23.3(2). As to the meaning of 'LSC funded client' for these purposes see PARA 1817 note 4. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.

Failure to file a request within the three months' time limit specified in the text is an absolute bar to the making of a costs order against the LSC: *Practice Direction about Costs* PD 43-48 para 23.4.

8 As to the meaning of 'full costs' see PARA 1817 note 7.

9 As to the meaning of 'court' for these purposes see PARA 1817 note 2.

10 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10(3)(a). As to the requirements relating to a bill of costs prescribed by the Civil Procedure Rules see PARA 1783. 'Rules of court', in relation to a tribunal, means rules or regulations made by the authority having power to make rules or regulations regulating the practice and procedure of that tribunal and, in relation to any court, includes practice directions: Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 2.

11 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10(3)(b) (substituted by SI 2003/649). The conditions to be satisfied are that (1) the court is determining an application for a costs order against the Commission; (2) the costs were not incurred in a court of first instance: Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10(3A) (added by SI 2003/649). As to statements of resources see PARA 1816.

12 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10(3)(c). See also *Practice Direction about Costs* PD 43-48 para 23.3(1)(a)-(c).

13 As to the meaning of 'client' see PARA 1816 note 2. See also note 1.

14 Ie under the Access to Justice Act 1999 s 11(1): see PARA 1814.

15 'Director' means any Director appointed by the Commission in accordance with the Funding Code and any other person authorised to act on his behalf, except a supplier; 'Funding Code' means the code approved under the Access to Justice Act 1999 s 9 (see **LEGAL AID** vol 65 (2008) PARA 40); and 'supplier' means any person or body providing funded services to the client, including any authorised advocate (within the meaning of the Courts and Legal Services Act 1990 s 119(1): see **LEGAL PROFESSIONS** vol 65 (2008) PARA 49) engaged by the

client's solicitor to act in proceedings: Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 2 (definition of 'Director' added by SI 2007/2444). A registered European lawyer may provide professional activities by way of legal advice and assistance or legal aid, and the Community Legal Service (Costs) Regulations 2000, SI 2000/441, are to be interpreted accordingly: see the European Communities (Lawyer's Practice) Regulations 2000, SI 2000/1119, reg 14.

16 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10(4) (amended by SI 2007/2444); and see *Practice Direction about Costs* PD 43-48 para 23.4.

17 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10(5).

18 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10(6) (amended by SI 2007/2444); and see *Practice Direction about Costs* PD 43-48 para 23.5. The court may extend or shorten the 21 days' time limit under CPR 3.1 (see PARA 247): *Practice Direction about Costs* PD 43-48 para 23.5.

19 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10(7).

20 The court's functions under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10 may be exercised (1) in relation to proceedings in the House of Lords, by the Clerk to the Parliaments (see **COURTS** vol 10 (Reissue) PARA 371); (2) in relation to proceedings in the Court of Appeal, High Court or a county court, a costs judge or a district judge; (3) in relation to proceedings in a magistrates' court, by a single justice or by the justices' clerk (see **MAGISTRATES**); (4) in relation to proceedings in the Employment Appeal Tribunal, by the registrar of that tribunal (see **EMPLOYMENT**): reg 10(10). 'Costs judge' has the same meaning as in the Civil Procedure Rules (see PARA 1734 note 17): Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 2. As to district judges see **COURTS** vol 10 (Reissue) PARAS 661-662, 728. See also *Practice Direction about Costs* PD 43-48 para 23.8. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

21 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10(8). See also *Practice Direction about Costs* PD 43-48 para 23.6.

22 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10(9) (amended by SI 2007/2444). See also *Practice Direction about Costs* PD 43-48 para 23.7.

23 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10(11).

24 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 13(1)(a) (reg 13(1) amended by SI 2007/2444). He may also appear at the hearing of any appeal under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 11(4) (see PARA 1820) or the hearing of any application under reg 12(8) (see PARA 1821): reg 13(1)(b), (c). See also *Practice Direction about Costs* PD 43-48 para 23.10.

25 As to the meaning of 'statement of truth' see PARA 1816 note 4.

26 See the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 13(2), (3) (amended by SI 2007/2444).

27 *Practice Direction about Costs* PD 43-48 para 23.9.

UPDATE

1818 Determination proceedings

NOTE 7--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 20--Appointed day is 1 October 2009: SI 2009/1604. Reference to Supreme Court substituted for reference to House of Lords: SI 2000/441 reg 10(10) (amended by SI 2009/2468).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(iii) Costs where Parties Funded by the Legal Services Commission/B. ASSESSMENT OF LIABILITY WHERE COST PROTECTION APPLIES/1819. Payment on account of costs.

1819. Payment on account of costs.

Where cost protection applies¹ and the court² makes a costs order³ but does not specify the amount which the client⁴ is to pay under it, the court may order the client to pay an amount on account of the costs which are the subject of the order⁵; but it may do so only if it has sufficient information before it to decide the minimum amount which the client is likely to be ordered to pay⁶ on a determination⁷. The amount of the payment on account of costs must not exceed the minimum amount which the court decides that the client is likely to be ordered to pay on such a determination⁸. Where the court orders a client to make a payment on account of costs it must order the client to make the payment into court⁹ and the payment must remain in court unless and until the court either (1) makes a determination¹⁰ of the amount which the client should pay to the receiving party¹¹ under the costs order, and orders the payment on account or part of it to be paid to the receiving party in satisfaction or part satisfaction of the client's liability under that order; or (2) makes an order¹² that the payment on account or part of it be repaid to the client¹³.

Where a client has made a payment on account of costs pursuant to an order under these provisions, the receiving party must request a hearing¹⁴ to determine the amount of costs payable to him¹⁵. If he fails to request such a hearing within the time permitted¹⁶, the payment on account must be repaid to the client¹⁷. If upon the hearing the amount of costs which it is determined that the client should pay is less than the amount of the payment on account, the difference must be repaid to the client¹⁸.

1 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 5. Regulation 10A (added by SI 2001/822) (see the text and notes 2-18) also applies to certificates issued under the Legal Aid Act 1988 where costs against the assisted person fall to be assessed under the Civil Legal Aid (General) Regulations 1989, SI 1989/339, reg 124 (lapsed subject to transitional provisions): see PARA 1817 note 4.

2 As to the meaning of 'court' for these purposes see PARA 1817 note 2; and as to the exercise of the court's jurisdiction see PARA 1818 note 20.

3 I.e. a 'section 11(1) costs order': see PARA 1816 note 9. As to the meaning of 'costs order' see PARA 1816 note 9.

4 As to the meaning of 'client' see PARA 1816 note 2; but see also PARA 1817 note 4.

5 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10A(1) (as added: see note 1).

6 I.e. on a determination under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10: see PARA 1818.

7 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10A(2) (as added: see note 1).

8 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10A(3) (as added: see note 1).

9 As to payment into court generally see PARAS 742-744.

10 I.e. under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10: see PARA 1818.

11 As to the meaning of 'receiving party' see PARA 1818 note 5.

12 I.e. under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10A(5)(b) or (c) (as added: see the text and notes 16-18).

- 13 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10A(4) (as added: see note 1).
- 14 See note 10.
- 15 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10A(5)(a) (as added: see note 1).
- 16 See note 10.
- 17 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10A(5)(b) (as added: see note 1).
- 18 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10A(5)(c) (as added: see note 1).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(iii) Costs where Parties Funded by the Legal Services Commission/B. ASSESSMENT OF LIABILITY WHERE COST PROTECTION APPLIES/1820. Appeals etc.

1820. Appeals etc.

Subject to the following provisions, and to the provisions relating to the variation and late determination of the amount of costs¹, where cost protection applies² any determination made³ is final⁴.

Any party with a financial interest⁵ in an assessment of the full costs⁶ may appeal against that assessment, if and to the extent that that party would, but for the relevant regulations⁷, be entitled to appeal against an assessment of costs by the court⁸ in which the relevant proceedings are taking place⁹. Further, where the court has specified¹⁰ the amount which a client¹¹ is required to pay under a costs order¹², the client may apply to the court for a determination of the full costs and if, on that determination, the amount of the full costs is less than the amount which the court previously specified, the client must instead be required to pay the amount of the full costs¹³. Finally, the receiving party¹⁴ or the Legal Services Commission¹⁵ may appeal, on a point of law, against the making of a costs order against the Commission¹⁶ (including the amount of costs which the Commission is required to pay under the order), or against the court's refusal to make such an order¹⁷.

1 Ie subject to the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 12: see PARA 1821.

2 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 5. As to the meaning of 'cost protection' see PARA 1814 note 2. Regulation 11 (see the text and notes 2-17) also applies to certificates issued under the Legal Aid Act 1988 where costs against the assisted person fall to be assessed under the Civil Legal Aid (General) Regulations 1989, SI 1989/339, reg 124 (lapsed subject to transitional provisions): see PARA 1817 note 4.

3 Ie under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 9 or reg 10: see PARAS 1817-1819.

4 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 11(1).

5 'Party with a financial interest' is not defined for these purposes; cf *Practice Direction about Costs* PD 43-48 para 44.2(a); and PARA 1795 note 21.

6 As to the meaning of 'full costs' see PARA 1817 note 7.

7 Ie but for the Community Legal Service (Costs) Regulations 2000, SI 2000/441: see PARAS 1814 et seq.

8 As to the meaning of 'court' for these purposes see PARA 1817 note 2; and as to the exercise of the court's jurisdiction see PARA 1818 note 20.

9 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 11(2).

10 Ie under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 9(2)(a): see PARA 1817.

11 As to the meaning of 'client' see PARA 1816 note 2. See also PARA 1817 note 4.

12 Ie under a 'section 11(1) costs order': see PARA 1816 note 9. As to the meaning of 'costs order' see PARA 1816 note 9.

13 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 11(3).

14 As to the meaning of 'receiving party' see PARA 1818 note 5.

- 15 As to the Legal Services Commission see generally **LEGAL AID** vol 65 (2008) PARA 17 et seq.
- 16 As to the meaning of 'costs order against the Commission' see PARA 1817 note 18.
- 17 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 11(4). The Director may appear at the appeal or submit written evidence: see PARA 1818 note 24.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(iii) Costs where Parties Funded by the Legal Services Commission/B. ASSESSMENT OF LIABILITY WHERE COST PROTECTION APPLIES/1821. Variation and late determination of amount of costs.

1821. Variation and late determination of amount of costs.

Where cost protection applies¹ and the court² makes a costs order³, then if the amount (if any) which the client⁴ is required to pay under that costs order, together with the amount which the Legal Services Commission⁵ is required to pay under any costs order against the Commission⁶, is less than the full costs⁷, the receiving party⁸ may apply to the court for an order varying the amount which the client is required to pay under the costs order on the ground that there has been a significant change in the client's circumstances since the date of the order⁹. Where the court has not specified the amount to be paid under the costs order, and the receiving party has not, within the prescribed time limit¹⁰, applied to have that amount determined¹¹, the receiving party may apply for a determination of the amount that the client is required to pay on any of the following grounds¹²:

- 1514 (1) that there has been a significant change in the client's circumstances since the date of the order¹³;
- 1515 (2) that material additional information as to the client's financial resources is available, and that information could not with reasonable diligence have been obtained by the receiving party in time to make an application in accordance with the prescribed procedure¹⁴; or
- 1516 (3) that there were other good reasons justifying the receiving party's failure to make an application within the prescribed time limit¹⁵.

Any such application must be made by the receiving party within six years from the date on which the costs order is first made¹⁶.

On any application for variation of an order specifying the amount of costs payable¹⁷, the order may be varied as the court thinks fit, but the amount of costs ordered, excluding any costs of the application which are ordered to be paid¹⁸, must not exceed the amount of the full costs as stated in any previous order of the court¹⁹. When the amount which the client is required to pay under the costs order has been determined without stating the full costs²⁰ and the receiving party applies²¹ for an order varying that amount, he must file with the application his bill of costs, which must comply with any requirements of relevant rules of court relating to the form and content of a bill of costs where the court is assessing a party's costs²². Copies of these documents must be served²³ with the application²⁴. The LSC funded client²⁵ must respond to the application by making a statement of resources²⁶ which must be filed²⁷ at court and served on the receiving party within 21 days thereafter and the LSC funded client may also file and serve written points disputing the bill within the same time limit²⁸. The court must then, when determining the application, assess the full costs²⁹, identifying any part of them to which cost protection applies and any part of them to which it does not³⁰.

Where the receiving party has received funded services³¹ in relation to the proceedings, the Commission may make an application under the above provisions³². When making the application the Commission must file with the court a statement of the receiving party's costs or, if those costs have not been assessed, the receiving party's bill of costs³³.

The amount of costs to be determined under these provisions may include the costs incurred in relation to an application made under them³⁴.

1 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 5. As to the meaning of 'cost protection' see PARA 1814 note 2. Regulation 12 (see the text and notes 2-34) also applies to certificates issued under the Legal Aid Act 1988 where costs against the assisted person fall to be assessed under the Civil Legal Aid (General) Regulations 1989, SI 1989/339, reg 124 (lapsed subject to transitional provisions): see PARA 1817 note 4.

2 As to the meaning of 'court' for these purposes see PARA 1817 note 2; and as to the exercise of the court's jurisdiction see PARA 1818 note 20.

3 Ie a 'section 11(1) costs order': see PARA 1816 note 9. As to the meaning of 'costs order' see PARA 1816 note 9.

4 As to the meaning of 'client' see PARA 1816 note 2. See also PARA 1817 note 4.

5 As to the Legal Services Commission see generally **LEGAL AID** vol 65 (2008) PARA 17 et seq.

6 As to the meaning of 'costs order against the Commission' see PARA 1817 note 18.

7 As to the meaning of 'full costs' see PARA 1817 note 7.

8 As to the meaning of 'receiving party' see PARA 1818 note 5.

9 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 12(1), (2), (4)(a).

10 Ie the time limit in the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10(2): see PARA 1818.

11 Ie in accordance with the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 10: see PARA 1818.

12 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 12(1), (3); and see *Practice Direction about Costs* PD 43-48 para 23.14(1). An application for costs payable by the Legal Services Commission cannot be made under this provision: para 23.14(2).

13 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 12(4)(a).

14 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 12(4)(b).

15 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 12(4)(c).

16 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 12(5); and see *Practice Direction about Costs* PD 43-48 para 23.16. Applications must be made in the appropriate court office and must be made in Form N244 (see *The Civil Court Practice*) to be listed for a hearing before a costs judge or district judge: *Practice Direction about Costs* PD 43-48 para 23.17. As to the appropriate court office see para 23.2; and PARA 1818 note 7. As to the meaning of 'costs judge' see PARA 1734 note 17; and as to district judges see **COURTS** vol 10 (Reissue) PARAS 661-662, 728.

17 Ie under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 12(2): see the text and notes 1-9.

18 Ie under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 12(9): see the text and note 34.

19 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 12(6); and see *Practice Direction about Costs* PD 43-48 para 23.13.

20 Ie the amount has been determined under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 9(2)(a): see PARA 1817.

21 See note 17.

22 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 12(7)(a). As to the meaning of 'rules of court' see PARA 1818 note 10. As to the requirements relating to the form and content of a bill of costs prescribed by the Civil Procedure Rules see PARA 1783.

23 As to the meaning of 'service' see PARA 138 note 2.

- 24 *Practice Direction about Costs* PD 43-48 para 23.12(1).
- 25 As to the meaning of 'LSC funded client' for these purposes see PARA 1817 note 4.
- 26 As to statements of resources see PARA 1816.
- 27 As to the meaning of 'filing' see PARA 1832 note 8.
- 28 *Practice Direction about Costs* PD 43-48 para 23.12(2).
- 29 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 12(7)(b).
- 30 *Practice Direction about Costs* PD 43-48 para 23.12(3).
- 31 As to the meaning of 'funded services' see PARA 1816 note 2.
- 32 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 12(8); and see *Practice Direction about Costs* PD 43-48 para 23.15(1).
- 33 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 12(8)(a). Regulation 12(4)-(6) applies to that application as if 'the Commission' were substituted for 'the receiving party' therein: reg 12(8)(b); and see *Practice Direction about Costs* PD 43-48 para 23.15(2). As to the form to be used see para 23.17, cited in note 16. The Director may appear at the hearing or may submit written evidence: see PARA 1818 note 24.
- 34 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 12(9).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(iii) Costs where Parties Funded by the Legal Services Commission/C. COSTS UNDER CLIENT'S COSTS ORDER OR CLIENT'S COSTS AGREEMENT/1822. Amount of costs under client's costs order or client's costs agreement.

C. COSTS UNDER CLIENT'S COSTS ORDER OR CLIENT'S COSTS AGREEMENT

1822. Amount of costs under client's costs order or client's costs agreement.

The amount of the costs to be paid under a client's¹ costs order or client's costs agreement² must be determined on the same basis as it would be if the costs were to be paid to a person who had not received funded services³. The amount of the awarded sum⁴ must not be limited to the amount of the funded sum by any rule of law which limits the costs recoverable by a party to proceedings to the amount he is liable to pay to his legal representatives⁵; but this applies only to the extent that the Legal Services Commission⁶ has authorised the supplier⁷ to take payment for the relevant work⁸ other than that funded by the Commission⁹.

The amount of costs to be paid under a client's costs order or client's costs agreement may include costs incurred in filing with the court, or serving on any other party to proceedings, notices or any other documents in accordance with the statutory requirements¹⁰.

1 As to the meaning of 'client' see PARA 1816 note 2.

2 'Client's costs order' and 'client's costs agreement' mean, respectively, an order and an agreement that another party to proceedings or prospective proceedings pay all or part of the costs of a client: Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 14.

3 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 15(1). As to the meaning of 'funded services' see PARA 1816 note 2.

4 'Awarded sum' means the amount of costs to be paid in accordance with a client's costs order or a client's costs agreement: Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 14.

5 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 15(2).

6 As to the Legal Services Commission see generally **LEGAL AID** vol 65 (2008) PARA 17t seq.

7 Ie under the Access to Justice Act 1999 s 22(2)(b): see **LEGAL AID** vol 65 (2008) PARA 230. As to the meaning of 'supplier' see PARA 1818 note 15.

8 'Relevant work' means the funded services provided in relation to the dispute or proceedings to which the client's costs order or client's costs agreement relates: Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 14.

9 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 15(3).

10 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 16. The statutory requirements referred to in the text are the requirements of the Community Legal Service (Costs) Regulations 2000, SI 2000/441; the Community Legal Service (Financial) Regulations 2000, SI 2000/516; or the Funding Code (see PARA 1818 note 15): Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 16. See further **LEGAL AID** vol 65 (2008) PARA 113.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(iii) Costs where Parties Funded by the Legal Services Commission/D. RECOVERY OF COSTS AWARDED TO CLIENT/1823. Recovery of costs where funded services provided under a certificate.

D. RECOVERY OF COSTS AWARDED TO CLIENT

1823. Recovery of costs where funded services provided under a certificate.

Where funded services¹ have been provided under a certificate², and subject to the statutory exceptions³, all money payable to or recovered by a client in connection with a dispute by way of damages, costs or otherwise, whether or not proceedings were begun, and whether under an order of the court⁴ or an agreement or otherwise, must be paid to the client's solicitor⁵, and only the client's solicitor is capable of giving a good discharge for that money⁶. Where the client's solicitor has reason to believe that an attempt may be made to circumvent these provisions, he must inform the Legal Services Commission immediately⁷.

Where money is so payable, and that money is payable by a trustee in bankruptcy, a trustee or assignee of a deed of arrangement, a liquidator of a company in liquidation, a trustee of a pension fund or any other third party (the 'third party') the client's solicitor must send to the third party notice that funded services have been funded for the client by the Commission⁸. Such notice operates as a request by the client that money so payable be paid to his solicitor, and is a sufficient authority for that purpose⁹.

The client's solicitor must forthwith inform the Director¹⁰ of any money or other property recovered or preserved, and send him a copy of the order or agreement by virtue of which the property was recovered or preserved¹¹. Subject to the statutory exceptions¹², he must pay to the Commission all money or other property received by him¹³; and the amount received by way of costs¹⁴ and interest on costs¹⁵ must be separately identified¹⁶.

The Commission must retain:

- 1517 (1) an amount equal to the costs incurred in taking steps to enforce orders in favour of the client¹⁷;
- 1518 (2) an amount equal to that part of the funded sum¹⁸ already paid to the supplier in respect of the relevant work; and
- 1519 (3) where costs are paid to the Commission together with interest, an amount equal to that interest, less the amount of any interest payable to the supplier¹⁹.

The Commission must pay to the supplier:

- 1520 (a) any outstanding amount of the funded sum payable to him in respect of the relevant work;
- 1521 (b) where costs are ordered or agreed to be paid to the client, and those costs are received by the Commission, and those costs (less any amount retained under head (1) above or payable as described below²⁰) exceed the funded sum, an amount equal to the amount of the excess and, where those costs are paid to the Commission together with interest, an amount equal to the interest attributable to that excess²¹.

Where a solicitor has acted on behalf of the client in proceedings before that client receives funded services in respect of the same proceedings, or has a lien on any documents necessary to proceedings to which a client is a party, and has handed them over subject to the lien, then where he gives the Commission written notice that this provision applies, the Commission must pay to that solicitor the costs to which that solicitor would have been entitled if those costs had been assessed on an indemnity basis²². Where the amount of costs so payable has not been assessed by the court, it may instead be assessed by the Commission²³. Where the amount received by the Commission, less any amount retained under head (1) above, is insufficient to meet the funded sum and any sum so payable to the solicitor, the Commission must apportion the amount received proportionately between the two²⁴.

The Commission must pay all the money paid to it under these provisions, which is not paid or retained as described above, to the client²⁵.

1 As to the meaning of 'funded services' see PARA 1816 note 2.

2 'Certificate' means a certificate issued under the Funding Code certifying a decision to fund services for the client: Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 2. As to the meaning of 'Funding Code' see PARA 1818 note 15; and as to the meaning of 'client' see PARA 1816 note 2.

3 See the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 18(2); and **LEGAL AID** vol 65 (2008) PARA 114.

4 As to the meaning of 'court' for these purposes see PARA 1817 note 2.

5 If the client is no longer being represented by a solicitor, all money to which the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 18(1) applies must be paid (or repaid) to the Legal Services Commission, and all references in regs 18(1), 19 to the client's solicitor are to be construed as references to the Commission: reg 17(2). As to the Legal Services Commission see generally **LEGAL AID** vol 65 (2008) PARA 17 et seq.

6 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 18(1).

7 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 18(3).

8 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 19(1).

9 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 19(2).

10 As to the meaning of 'Director' see PARA 1818 note 15.

11 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 20(1)(a) (amended by SI 2007/2444).

12 See the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 20(2)-(4) (reg 20(3), (4) amended by SI 2007/2444); and **LEGAL AID** vol 65 (2008) PARA 115 et seq.

13 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 20(1)(b).

14 See the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 20(5)(a).

15 See the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 20(5)(c). As to interest on costs generally see PARA 1759.

16 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 20(5).

17 Ie under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 23: see **LEGAL AID** vol 65 (2008) PARA 118.

18 'Funded sum' means the amount of remuneration payable by the Commission to a supplier for the relevant work under a contract or any other arrangements that determine that supplier's remuneration, including those that apply by virtue of the Community Legal Service (Funding) Order 2000, SI 2000/627, art 4 (revoked; see now the Community Legal Service (Funding) Order 2007, SI 2007/2441) (application of certain otherwise lapsed provisions relating to civil legal aid: see **LEGAL AID**); and, where funding is provided by the

Commission under a contract which does not differentiate between the remuneration for the client's case and remuneration for other cases, means such part of the remuneration payable under the contract as may be specified in writing by the Commission as being the funded sum: Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 14.

19 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 22(1), (2).

20 le payable under the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 22(5): see the text and note 22.

21 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 22(1), (3).

22 See the Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 22(4), (5). Regulation 22(5) applies only so far as is consistent with the express terms of any contract between the Commission and the solicitor: reg 22(4). As to the indemnity basis see PARA 1747.

23 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 22(6).

24 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 22(7).

25 Community Legal Service (Costs) Regulations 2000, SI 2000/441, reg 22(8).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(iv) Payments in respect of Pro Bono Representation/1824. Orders for payment to prescribed charity.

(iv) Payments in respect of Pro Bono Representation

1824. Orders for payment to prescribed charity.

The following provisions apply to proceedings in a civil court¹ in which a party to the proceedings ('P') is or was represented by a legal representative² ('R') and R's representation of P is or was provided free of charge³, in whole or in part⁴, and they apply even if P is or was also represented by a legal representative not acting free of charge⁵.

The court may order any person to make a payment to the prescribed charity⁶ in respect of R's representation of P (or, if only part of R's representation of P was provided free of charge, in respect of that part)⁷. In considering whether to make such an order and the terms of such an order, the court must have regard to (1) whether, had R's representation of P not been provided free of charge, it would have ordered the person to make a payment to P in respect of the costs payable to R by P in respect of that representation; and (2) if it would, what the terms of the order would have been⁸. The court may not make such an order against a person represented in the proceedings if the person's representation was at all times provided by a legal representative acting free of charge or funded by the Legal Services Commission⁹ as part of the Community Legal Service¹⁰. Rules of court may make further provision as to the making of such orders, and may in particular (a) provide that such orders may not be made in civil proceedings of a description specified in the rules; (b) make provision about the procedure to be followed in relation to such orders; (c) specify matters (in addition to those mentioned above) to which the court must have regard in deciding whether to make such an order, and the terms of any order¹¹.

1 'Civil court' means the civil division of the Court of Appeal, the High Court, or any county court: Legal Services Act 2007 s 194(10).

2 'Legal representative', in relation to a party to proceedings, means a person exercising a right of audience or conducting litigation on the party's behalf: Legal Services Act 2007 s 194(10).

3 'Free of charge' means otherwise than for or in expectation of fee, gain or reward: Legal Services Act 2007 s 194(10).

4 Legal Services Act 2007 s 194(1).

5 Legal Services Act 2007 s 194(2).

6 'Prescribed charity' means the charity prescribed by order made by the Lord Chancellor: Legal Services Act 2007 s 194(8). An order under s 194(8) may only prescribe a charity which (1) is registered in accordance with the Charities Act 1993 s 3A (see **CHARITIES** vol 8 (2010) PARA 304); and (2) provides financial support to persons who provide, or organise or facilitate the provision of, legal advice or assistance (by way of representation or otherwise) which is free of charge: s 194(9). In exercise of this power, the Lord Chancellor has made the Legal Services Act 2007 (Prescribed Charity) Order 2008, SI 2008/2680, prescribing the Access to Justice Foundation (charity registration number 1126147) (see art 2).

7 Legal Services Act 2007 s 194(3). The court may not make an order under s 194(3) in respect of representation if (or to the extent that) it is provided before s 194 comes into force: s 194(11). The relevant provisions of s 194 came into force on 1 October 2008: see the Legal Services Act 2007 (Commencement No 2 and Transitory Provisions) Order 2008, SI 2008/1436, art 3(a).

8 Legal Services Act 2007 s 194(4).

9 As to the Legal Services Commission see **LEGAL AID**.

10 Legal Services Act 2007 s 194(5). As to the Community Legal Service see generally **LEGAL AID** vol 65 (2008) **PARA** 31.

11 Legal Services Act 2007 s 194(7). See CPR 44.3C; and **PARA** 1825.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(6) COSTS IN SPECIAL CASES/(iv) Payments in respect of Pro Bono Representation/1825. Orders in respect of pro bono representation.

1825. Orders in respect of pro bono representation.

Where the court¹ makes an order for the payment of a sum to the prescribed charity², the court may order the payment to the prescribed charity of a sum no greater than the costs specified in Part 45 of the Civil Procedure Rules³ to which the party with pro bono representation⁴ would have been entitled in accordance with that Part and in respect of that representation had it not been provided free of charge or, where Part 45 does not apply, the court may determine the amount of the payment (other than a sum equivalent to fixed costs⁵) to be made by the paying party to the prescribed charity by making a summary assessment⁶ or making an order for detailed assessment⁷, of a sum equivalent to all or part of the costs the paying party would have been ordered to pay to the party with pro bono representation in respect of that representation had it not been provided free of charge⁸.

Where the court makes an order for the payment of a sum to the prescribed charity, the order must specify that the payment by the paying party must be made to the prescribed charity⁹. The receiving party must send a copy of the order to the prescribed charity within seven days of receipt of the order¹⁰. Where the court considers making or makes such an order, Parts 43 to 48 of the Civil Procedure Rules¹¹ apply, where appropriate, with modifications¹².

1 As to the meaning of 'court' see PARA 22.

2 I.e. under the Legal Services Act 2007 s 194(3); see PARA 1824. As to the meaning of 'prescribed charity' see PARAS 611 note 20, 1824 note 6.

3 I.e. specified in CPR Pt 45; see PARA 1760 et seq.

4 As to the meaning of 'pro bono representation' see PARA 611 note 20.

5 As to fixed costs see PARA 1760 et seq.

6 As to summary assessment of costs see PARA 1752.

7 As to detailed assessment of costs see PARA 1779 et seq.

8 CPR 44.3C(1), (2).

9 CPR 44.3C(3).

10 CPR 44.3C(4).

11 As to CPR Pts 43-48 see PARAS 1734, 1737 et seq.

12 CPR 44.3C(5). The modifications are that (1) references to 'costs orders', 'orders about costs' or 'orders for the payment of costs' are to be read, unless otherwise stated, as if they refer to an order under Legal Services Act 2007 s 194(3) (see PARA 1824); (2) references to 'costs' are to be read, as if they referred to a sum equivalent to the costs that would have been claimed by, incurred by or awarded to the party with pro bono representation in respect of that representation had it not been provided free of charge; and (3) references to 'receiving party' are to be read as meaning a party who has pro bono representation and who would have been entitled to be paid costs in respect of that representation had it not been provided free of charge: CPR 44.3C(5) (a)-(c).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(7) FUNDING ARRANGEMENTS/(i) In general/1826. Introduction.

(7) FUNDING ARRANGEMENTS

(i) In general

1826. Introduction.

The legal aid system¹ has been replaced by funding arrangements², and a detailed system is now in place³. Under the new system, lawyers are allowed to represent clients on the basis of a conditional fee agreement⁴ and the client normally takes out after-the-event insurance to cover the risk of having to pay the opponent's costs if the client is unsuccessful, and of liability for costs and expenses of the client's lawyers to the extent that they are not recoverable from the opponent if the client is successful⁵. Where a party has entered into a funding arrangement, it is important that the other parties are notified about the arrangement⁶.

1 See **LEGAL AID**.

2 As to the meaning of 'funding arrangement' see PARA 1830.

3 See further PARAS 23, 1826-1836.

4 As to the meaning of 'conditional fee agreement' see PARA 1830 note 2. Formerly it was considered contrary to public policy that a solicitor's remuneration should depend on the outcome of the case: see *Awwad v Geraghty & Co (a firm)*[2001] QB 570, [2000] 1 All ER 608, CA; *Thai Trading Co (a firm) v Taylor*[1998] QB 781, [1998] 3 All ER 65, CA.

5 See PARA 1830 text and note 5.

6 See PARA 1832.

UPDATE

1826-1836 Funding Arrangements

The Courts and Legal Services Act 1990 s 58AA (added by Coroners and Justice Act 2009 s 154(2)) provides for the regulation of damages-based agreements in respect of claims relating to employment matters.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(7) FUNDING ARRANGEMENTS/(i) In general/1827. Permitted and excluded conditional fee arrangements.

1827. Permitted and excluded conditional fee arrangements.

There are in theory three main types of agreement under which the remuneration of the lawyer may be conditional on the successful outcome of litigation. These are (1) a contingency fee agreement, under which the lawyer will recover some of the money awarded to the claimant; (2) a conditional uplift agreement, under which the lawyer will recover his normal fees plus a success uplift in the event of a win; and (3) a conditional normal fee agreement, under which the lawyer will recover his normal fees, but only in the event of success¹.

However, under the legislation which was introduced to allow conditional fee agreements², only two kinds of conditional fee agreement are permitted: success fee agreements and fee only agreements³. Contingency fee agreements are excluded from the statutory scheme.

1 See *Awwad v Geraghty & Co (a firm)* [2001] QB 570, [2000] 1 All ER 608, CA.

2 See the Courts and Legal Services Act 1990 ss 58, 58A (s 58 substituted, and s 58A added, by the Access to Justice Act 1999 s 27(1)): see PARA 1830 et seq.

3 See the Courts and Legal Services Act 1990 ss 58(1), (2), (4), 58A(6) (as substituted and added: see note 2); and PARA 1830. Where a success fee has been agreed, the percentage uplift may be recovered from the paying party under a costs order: s 58A(6). As to costs orders relating to funding arrangements see PARA 1833. As to factors to be taken into account in assessing an additional liability see PARA 1834; and as to a legal representative's challenge to a disallowance of percentage increase see PARA 1836.

UPDATE

1826-1836 Funding Arrangements

The Courts and Legal Services Act 1990 s 58AA (added by Coroners and Justice Act 2009 s 154(2)) provides for the regulation of damages-based agreements in respect of claims relating to employment matters.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(7) FUNDING ARRANGEMENTS/(i) In general/1828. Other funding arrangements.

1828. Other funding arrangements.

Also permitted under the legislation relating to litigation funding agreements¹ are collective conditional fee agreements², which are made between a membership organisation³ (such as a trade union or a motorists' association) and solicitors, whereby the solicitors agree to provide members of the organisation with representation on a conditional fee basis in accordance with the terms of the collective agreement⁴. Under such an agreement, fees are not specific to proceedings but are to be payable on a common basis in relation to a class of proceedings.

1 See PARA 1831.

2 See PARA 1830 note 3.

3 As to the meaning of 'membership organisation' see PARA 1830 note 6.

4 See PARA 1830.

UPDATE

1826-1836 Funding Arrangements

The Courts and Legal Services Act 1990 s 58AA (added by Coroners and Justice Act 2009 s 154(2)) provides for the regulation of damages-based agreements in respect of claims relating to employment matters.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(7) FUNDING ARRANGEMENTS/(i) In general/1829. Compatibility of legislation with right to fair trial under European Convention on Human Rights.

1829. Compatibility of legislation with right to fair trial under European Convention on Human Rights.

Under the statutory scheme for funding agreements¹, if the claimant is successful, the defendant will have to pay not only the reasonable and proportionate costs of the claimant but also a success fee of up to 100 per cent of those costs plus the cost of after-the-event insurance; and the percentage is in inverse proportion to the claimant's chances of success². Thus, where a claimant is a party to a funding agreement, a defendant may have to pay far more than the reasonable and proportionate costs, which raises the important question of compatibility with the right to a fair trial under the European Convention on Human Rights³. This has been touched on in the House of Lords, which has said that the legislation is not incompatible with the Convention right, at least in relation to personal injury claims arising out of road accidents, and to represent a legitimate way of widening access to justice⁴, but the question has not been definitively resolved⁵.

1 See PARA 1827.

2 See PARA 1834.

3 See the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6, incorporated into domestic law in the Human Rights Act 1998 s 1(3), Sch 1 art 6: see PARA 5. The legislation has been held to be not incompatible with the right to freedom of expression in art 10 of the Convention (Human Rights Act 1998 Sch 1 art 10) in libel cases: see eg *King v Telegraph Group Ltd* [2004] EWCA Civ 613, [2005] 1 WLR 2282; *Campbell v MGN Ltd (No 2)* [2005] UKHL 61, [2005] 4 All ER 793, [2005] 1 WLR 3394.

4 *Campbell v MGN Ltd (No 2)* [2005] UKHL 61 at [17], [2005] 4 All ER 793 at [17], [2005] 1 WLR 3394 at [17] per Lord Hoffmann. As from a day to be appointed the appellate jurisdiction of the House of Lords is abolished and the new Supreme Court of the United Kingdom is established: see the Constitutional Reform Act 2005 Pt 3 (ss 23-60); and **COURTS**. At the date at which this volume states the law, no such day had been appointed.

5 See Zuckerman *Civil Procedure: Principles of Practice* (2nd Edn, 2006) paras 26.153-26.164.

UPDATE

1826-1836 Funding Arrangements

The Courts and Legal Services Act 1990 s 58AA (added by Coroners and Justice Act 2009 s 154(2)) provides for the regulation of damages-based agreements in respect of claims relating to employment matters.

1829 Compatibility of legislation with right to fair trial under European Convention on Human Rights

NOTE 4--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(7) FUNDING ARRANGEMENTS/(ii) General Rules about Funding Arrangements/1830. Meaning of 'funding arrangement'.

(ii) General Rules about Funding Arrangements

1830. Meaning of 'funding arrangement'.

A funding arrangement¹ means an arrangement where a person has:

- 1522 (1) entered into a conditional fee agreement² or a collective conditional fee agreement³ which provides for a success fee⁴; or
- 1523 (2) taken out an insurance policy against the risk of incurring a liability in legal proceedings which may be recovered by way of costs⁵; or
- 1524 (3) made an agreement with a membership organisation⁶ to meet that person's legal costs⁷.

Every conditional fee agreement must be in writing, must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement⁸ and must comply with such requirements (if any) as may be prescribed by the Lord Chancellor⁹. If a conditional fee agreement provides for a success fee it must relate to proceedings of a description specified by order made by the Lord Chancellor and must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased¹⁰. That percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor¹¹.

A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee¹²; and rules of court may make provision with respect to the assessment of any costs which include fees payable under a conditional fee agreement (including one which provides for a success fee)¹³. Similarly, where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy¹⁴.

Where a membership organisation¹⁵ undertakes to meet, in accordance with arrangements satisfying prescribed conditions¹⁶, liabilities which members of the body or other persons who are parties to proceedings may incur to pay the costs of other parties to the proceedings, then if in any of the proceedings a costs order is made in favour of any of the members or other persons, the costs payable to him may¹⁷ include an additional amount in respect of any provision made by or on behalf of the body in connection with the proceedings against the risk of having to meet such liabilities¹⁸. The additional amount must not, however, exceed a sum determined in a prescribed manner; and there may, in particular, be prescribed as a manner of determination one which takes into account the likely cost to the member or other person of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings¹⁹.

The Civil Procedure Rules make special provision with regard to the assessment and recovery of any additional liability²⁰ incurred under a funding arrangement²¹.

1 As to cost protection and the recovery of costs where a party is receiving services funded by the Legal Services Commission see PARA 1814 et seq.

2 A 'conditional fee agreement' is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances: Courts and Legal Services Act 1990 s 58(2) (s 58 substituted, and s 58A added, by the Access to Justice Act 1999 s 27(1)). See *Nizami v Butt*, *Kamaluden v Butt*[2006] EWHC 159 (QB), [2006] 2 All ER 140, [2006] 1 WLR 3307.

3 A 'collective conditional fee agreement' is an agreement which does not refer to specific proceedings, but provides for fees to be payable on a common basis in relation to a class of proceedings, or, if it refers to more than one class of proceedings, on a common basis in relation to each class: see the Collective Conditional Fee Agreements Regulations 2000, SI 2000/2988, reg 3(1) (revoked by SI 2005/2305 as from 1 November 2005 except in relation to a conditional fee agreement entered into before that date; parties may enter into collective conditional fee agreements on or after that date based on the primary legislation). An agreement may be a collective conditional fee agreement whether or not the funder is a client or any clients are named in the agreement: reg 3(2) (revoked).

4 CPR 43.2(1)(k)(i). A conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances: Courts and Legal Services Act 1990 s 58(2)(b) (as substituted: see note 2).

5 CPR 43.2(1)(k)(ii). The insurance policy referred to in the text is a policy to which the Access to Justice Act 1999 s 29 applies: see the text and note 14. A conditional fee agreement with a large mark up and with no after-the-event insurance cover is not enough, by itself, to justify costs-capping; it is necessary to establish the risk of excessive or extravagant expenditure and that such risk of expenditure cannot be controlled by case management techniques or post-trial detailed assessments: *Knight v Beyond Properties PTY Ltd* [2006] EWHC 1242 (Ch), [2007] 1 WLR 625. See also *Tierney v News Group Newspapers Ltd*[2006] EWHC 3275 (QB), [2006] All ER (D) 321 (Dec).

6 'Membership organisation' means a body prescribed for the purposes of the Access to Justice Act 1999 s 30 (see the text and note 19): CPR 43.2(1)(n). The bodies which are prescribed for those purposes are those bodies which are for the time being approved by the Secretary of State for that purpose: see the Access to Justice (Membership Organisations) Regulations 2005, SI 2000/2306, reg 3.

7 CPR 43.2(1)(k)(iii).

8 The proceedings which cannot be the subject of an enforceable conditional fee agreement are (1) criminal proceedings, apart from proceedings under the Environmental Protection Act 1990 s 82 (see **NUISANCE** vol 78 (2010) PARAS 210-212); and (2) family proceedings: see the Courts and Legal Services Act 1990 s 58A(1), (2) (as added (see note 2); s 58A(2) amended by the Adoption and Children Act 2002 s 139(1), Sch 3 para 80; the Civil Partnership Act 2004 s 261(1), (4), Sch 27 para 138, Sch 30; and the Forced Marriage (Civil Protection) Act 2007 s 3(1), Sch 2 Pt 1 para 2). An agreement, in the context of family proceedings, not to bill a client until the conclusion of those proceedings is not a conditional fee agreement: *Denton v Denton*[2004] EWHC 1308 (Fam), [2004] 2 FLR 594, [2005] Fam Law 353.

9 Courts and Legal Services Act 1990 s 58(3) (as substituted (see note 2); amended by SI 2005/3429). The requirements which the Lord Chancellor may so prescribe include requirements for the person providing advocacy or litigation services to have provided prescribed information before the agreement is made; and may be different for different descriptions of conditional fee agreements (and, in particular, may be different for those which provide for a success fee and those which do not): Courts and Legal Services Act 1990 s 58A(3) (as added (see note 2); amended by SI 2005/3429). For these purposes, 'proceedings' includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated: Courts and Legal Services Act 1990 s 58A(4) (as so substituted). A conditional fee agreement is assignable where the events underlying the assignment are the trust and confidence a client has in his solicitor: *Jenkins v Young Brothers Transport Ltd*[2006] EWHC 151 (QB), [2006] 2 All ER 798. See also *Garrett v Halton London Borough Council*, *Myatt v National Coal Board*[2006] EWCA Civ 1017, [2007] 1 All ER 147; and *Jones v Wrexham Borough Council*[2007] EWCA Civ 1356, [2008] 1 WLR 1590.

10 Courts and Legal Services Act 1990 s 58(4)(a), (b) (as substituted: see note 2). Before making an order under the Courts and Legal Services Act 1990 s 58(4), the Lord Chancellor must consult the designated judges, the General Council of the Bar, the Law Society and such other bodies as he considers appropriate: s 58A(5) (as added (see note 2); amended by SI 2005/3429). All proceedings which, under the Courts and Legal Services Act 1990 s 58, can be the subject of an enforceable conditional fee agreement, except proceedings under the Environmental Protection Act 1990 s 82 (see **NUISANCE** vol 78 (2010) PARAS 210-212), are proceedings specified for the purposes of s 58(4)(a): Conditional Fee Agreements Order 2000, SI 2000/823, art 3.

11 Courts and Legal Services Act 1990 s 58(4)(c) (as substituted: see note 2). The specified percentage is 100%: Conditional Fee Agreements Order 2000, SI 2000/823, art 4. Where a conditional fee agreement specifies that the basic fee is to be discounted if the claim fails, the maximum percentage increase for the success fee is calculated by reference to the undiscounted basic fee, as this is the fee that would have been payable if the agreement were not a conditional fee agreement: *Gloucestershire County Council v Evans*[2008] EWCA Civ 21, [2008] 1 WLR 1883, [2008] All ER (D) 284 (Jan). See also *Atack v Lee, Ellerton v Harris* [2004] EWCA Civ 1712, [2005] 1 WLR 2643; and *Begum v Klari*[2005] EWCA Civ 234, (2005) Times, 18 March (100% unacceptable where success on the facts a near certainty; amount reduced to 15%).

12 Courts and Legal Services Act 1990 s 58A(6) (as added: see note 2). See *Campbell v MGN Ltd (No 2)* [2005] UKHL 61, [2005] 4 All ER 793, [2005] 1 WLR 3394; *Sharratt v London Central Bus Co Ltd (The Accident Group Test Cases)*, *Hollins v Russell*[2003] EWCA Civ 718, [2003] 4 All ER 590.

13 Courts and Legal Services Act 1990 s 58A(7) (as added: see note 2).

14 Access to Justice Act 1999 s 29. As to the recovery of insurance premiums see *Callery v Gray* [2001] EWCA Civ 1117, [2001] 3 All ER 833, [2001] 1 WLR 2112; affd [2002] UKHL 28, [2002] All ER (D) 233 (Jun); *Callery v Gray (No 2)*[2001] EWCA Civ 1246, [2001] 4 All ER 1, [2001] 1 WLR 2142; and *Sarwar v Alam*[2001] EWCA Civ 1401, [2001] 4 All ER 541, [2002] 1 WLR 125. A premium payable after the event is recoverable unless payment is deferred beyond the conclusion of the case for a significant period: see *Tilby v Perfect Pizza Ltd*[2002] All ER (D) 72 (Mar), [2002] NLJR 397, SCCO. See also *Inline Logistics Ltd v UCI Logistics Ltd* [2002] EWHC 519 (Ch), [2002] All ER (D) 435 (Mar) (defendant was entitled to recover insurance premium and related tax as part of its costs); *Re Claims Direct Test Cases* [2002] EWCA Civ 428, [2002] PIQR Q152 (not appropriate for the Court of Appeal to decide, or express an opinion, as to any of the substantive issues before the costs judge, such as whether the sums paid for the Claims Direct after-the-event policy constituted premiums within the meaning of the Access to Justice Act 1999 s 29 and how the reasonableness of the premiums was to be determined). See also *Sharratt v London Central Bus Co (No 2)*, *The Accident Group Test Cases*[2004] EWCA Civ 575, [2004] 3 All ER 325 (solicitors of company with whom claimants had taken out after-the-event claims insurance agreed to pay fee to accident investigation company, but in fact fee paid out of client's account; adopting objective test, fee was a referral fee and not recoverable). If the court concludes that it is necessary to incur a staged premium in connection with after the event insurance, it should be judged a proportionate expense: *Rogers v Merthyr Tydfil County Borough Council*[2006] EWCA Civ 1134, [2007] 1 All ER 354.

15 I.e. a body of a description prescribed by regulations made by the Lord Chancellor by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: see the Access to Justice Act 1999 s 30(1), (4) (s 30(4) amended by SI 2005/3429); and note 6. Regulations under the Access to Justice Act 1999 s 30(1) may, in particular, prescribe as a description of body one which is for the time being approved by the Lord Chancellor or by a prescribed person: s 30(6) (amended by SI 2005/3429).

16 The Access to Justice Act 1999 s 30(1) applies to arrangements which satisfy the following conditions: Access to Justice (Membership Organisations) Regulations 2005, SI 2000/2306, reg 4(1). The arrangements must be in writing (reg 4(2)) and must contain a statement specifying the circumstances in which the member may be liable to pay costs of the proceedings (reg 4(2)).

17 I.e. subject to the Access to Justice Act 1999 s 30(3) (see the text and note 19) and (in the case of court proceedings) to rules of court: s 30(2).

18 Access to Justice Act 1999 s 30(1), (2). See *Thornley v Lang*[2003] EWCA Civ 1484, [2004] 1 All ER 886.

19 Access to Justice Act 1999 s 30(3). Where an additional amount is included in costs by virtue of s 30(2), that additional amount must not exceed the following sum, i.e. the likely cost to the member of the body or, as the case may be, the other person who is a party to the proceedings in which the costs order is made of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings: Access to Justice (Membership Organisations) Regulations 2005, SI 2000/2306, reg 5.

20 'Additional liability' means the percentage increase, the insurance premium, or the additional amount in respect of provision made by a membership organisation, as the case may be: CPR 43.2(1)(o). 'Percentage increase' means the percentage by which the amount of a legal representative's fee can be increased in accordance with a conditional fee agreement which provides for a success fee (CPR 43.2(1)(l)); and 'insurance premium' means a sum of money paid or payable for insurance against the risk of incurring a costs liability in the proceedings, taken out after the event that is the subject matter of the claim (CPR 43.2(1)(m)).

21 See PARA 1830 et seq.

UPDATE

1826-1836 Funding Arrangements

The Courts and Legal Services Act 1990 s 58AA (added by Coroners and Justice Act 2009 s 154(2)) provides for the regulation of damages-based agreements in respect of claims relating to employment matters.

1830 Meaning of 'funding arrangement'

NOTE 5--See *Barr v Biffa Waste Services Ltd*[2009] EWHC 2444 (TCC), [2009] All ER (D) 176 (Oct).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(7) FUNDING ARRANGEMENTS/(ii) General Rules about Funding Arrangements/1831. Litigation funding agreements.

1831. Litigation funding agreements.

Provision is prospectively made by amendments to the Courts and Legal Services Act 1990 by the Access to Justice Act 1999¹ for the enforcement of litigation funding agreements². A litigation funding agreement which satisfies all of the statutory conditions will not be unenforceable by reason only of its being a litigation funding agreement³. A litigation funding agreement is described as an agreement under which a person (the 'funder') agrees to fund, in whole or in part, the provision of advocacy or litigation services by someone other than the funder to another person (the 'litigant') and the litigant agrees to pay a sum to the funder in specified circumstances⁴. The following conditions will be applicable to a litigation funding agreement:

- 1525 (1) the funder must be a person, or person of a description, prescribed by the Lord Chancellor⁵;
- 1526 (2) the agreement must be in writing;
- 1527 (3) the agreement must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement⁶ or to proceedings of any such description as may be prescribed by the Lord Chancellor;
- 1528 (4) the agreement must comply with such requirements (if any) as may be so prescribed⁷;
- 1529 (5) the sum to be paid by the litigant must consist of any costs payable to him in respect of the proceedings to which the agreement relates together with an amount calculated by reference to the funder's anticipated expenditure in funding the provision of the services; and
- 1530 (6) that amount must not exceed such percentage of that anticipated expenditure as may be prescribed by the Lord Chancellor in relation to proceedings of the description to which the agreement relates⁸.

Before making regulations under these provisions, the Lord Chancellor will be required to consult the designated judges, the General Council of the Bar, the Law Society and such other bodies as he considers appropriate⁹.

Once these provisions are in force a costs order made in any proceedings will, subject in the case of court proceedings to rules of court, be able to include provision requiring the payment of any amount payable under a litigation funding agreement¹⁰; and rules of court will be able to make provision with respect to the assessment of any costs which include fees payable under a litigation funding agreement¹¹.

1 See the Courts and Legal Services Act 1990 s 58B (added by the Access to Justice Act 1999 s 28 (amended by SI 2005/3429) as from a day to be appointed; at the date at which this title states the law, no such day had been appointed).

2 Litigation funding agreements will enable third parties such as insurance companies to fund litigation on a no-win, no-fee basis. As the necessity for this statutory provision see 604 HL Official Report (5th series), 14 July 1999, col 439.

3 See the Courts and Legal Services Act 1990 s 58B(1) (as prospectively added: see note 1).

- 4 See the Courts and Legal Services Act 1990 s 58B(2) (as prospectively added: see note 1).
- 5 Regulations under the Courts and Legal Services Act 1990 s 58B(3)(a) may require a person to be approved by the Lord Chancellor or by a prescribed person: s 58B(4) (as prospectively added: see note 1). As to the Lord Chancellor see **COURTS** PARA 501; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 477 et seq.
- 6 Ie by virtue of the Courts and Legal Services Act 1990 s 58A(1), (2): see PARA 1830 note 8. 'Proceedings' includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated: s 58B(6) (as prospectively added: see note 1).
- 7 The requirements which the Lord Chancellor may prescribe under the Courts and Legal Services Act 1990 s 58B(3)(d) include requirements for the funder to have provided prescribed information to the litigant before the agreement is made and may be different for different descriptions of litigation funding agreements: s 58B(5) (as prospectively added: see note 1).
- 8 Courts and Legal Services Act 1990 s 58B(3) (as prospectively added: see note 1).
- 9 Courts and Legal Services Act 1990 s 58B(7) (as prospectively added: see note 1).
- 10 Courts and Legal Services Act 1990 s 58B(8) (as prospectively added: see note 1).
- 11 Courts and Legal Services Act 1990 s 58B(9) (as prospectively added: see note 1).

UPDATE

1826-1836 Funding Arrangements

The Courts and Legal Services Act 1990 s 58AA (added by Coroners and Justice Act 2009 s 154(2)) provides for the regulation of damages-based agreements in respect of claims relating to employment matters.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(7) FUNDING ARRANGEMENTS/(ii) General Rules about Funding Arrangements/1832. Providing information about funding arrangements.

1832. Providing information about funding arrangements.

A party who seeks to recover an additional liability¹ must provide information about the funding arrangement² to the court³ and to other parties as required by a rule, practice direction⁴ or court order⁵. There is no requirement to specify the amount of the additional liability separately nor to state how it is calculated until it falls to be assessed⁶.

A claimant⁷ who has entered into a funding arrangement before starting the proceedings to which it relates must provide information to the court by filing the required notice⁸ when he issues the claim form⁹. He must provide information to every other party by serving¹⁰ the notice. If he serves the claim form himself he must serve the notice with the claim form; and if the court is to serve the claim form, the court will also serve the notice if the claimant provides it with sufficient copies for service¹¹.

A defendant¹² who has entered into a funding arrangement before filing any document must provide information to the court by filing notice with his first document, which may be an acknowledgment of service, a defence, or any other document, such as an application to set aside a default judgment¹³. He must provide information to every party by serving notice. If he serves his first document himself he must serve the notice with that document; and if the court is to serve his first document the court will also serve the notice if the defendant provides it with sufficient copies for service¹⁴.

In all other circumstances a party must file and serve notice within seven days of entering into the funding arrangement concerned¹⁵. There is no requirement in the costs practice direction for the provision of information about funding arrangements before the commencement of proceedings, but such provision is recommended and may be required by a pre-action protocol¹⁶.

Unless the court otherwise orders, a party who is required to supply information about a funding arrangement must state whether he has entered into a conditional fee agreement which provides for a success fee¹⁷, taken out an insurance policy¹⁸ or made an arrangement with a prescribed body¹⁹, or more than one of these²⁰. Where the funding arrangement is a conditional fee agreement, the party must state the date of the agreement and identify the claim or claims to which it relates, including Part 20 claims²¹ if any²². Where the funding arrangement is an insurance policy the party must state the name of the insurer and the date of the policy and must identify the claim or claims to which it relates, including Part 20 claims if any²³. Finally, where the funding arrangement is by way of an arrangement with a relevant body the party must state the name of the body and set out the date and terms of the undertaking it has given and must identify the claim or claims to which it relates, including Part 20 claims if any²⁴. Where a party has entered into more than one funding arrangement in respect of a claim, for example a conditional fee agreement and an insurance policy, a single notice²⁵ may contain the required information about both or all of them²⁶.

Where the court makes a group litigation order ('GLO')²⁷, the court may give directions as to the extent to which individual parties should provide information in accordance with the above provisions²⁸.

Where the funding arrangement has changed, and the information a party has previously provided is no longer accurate, that party must file notice of the change and serve it on all other parties within seven days²⁹. Where such a party has already filed an allocation

questionnaire³⁰ or a pre-trial check list (listing questionnaire)³¹, he must file and serve a new estimate of costs with the notice³². Further notification need not, however, be provided where a party has already given notice (1) that he has entered into a conditional fee agreement with a legal representative and during the currency of that agreement either of them enters into another such agreement with an additional legal representative; or (2) of some insurance cover, unless that cover is cancelled or unless new cover is taken out with a different insurer³³.

- 1 As to the meaning of 'additional liability' see PARA 1830 note 20.
- 2 As to the meaning of 'funding arrangement' see PARA 1830.
- 3 As to the meaning of 'court' see PARA 22.
- 4 See eg *Practice Direction about Costs* PD 43-48 Section 19; and the text and notes 6-33.
- 5 CPR 44.15(1).
- 6 See *Practice Direction about Costs* PD 43-48 para 19.1(1).
- 7 As to the meaning of 'claimant' see PARA 18.
- 8 The notice must contain the information set out in Form N251 (see *The Civil Court Practice*): *Practice Direction about Costs* PD 43-48 para 19.2(1). 'Filing', in relation to a document, means delivering it, by or otherwise, to the court office: CPR 2.3(1). The mere delivery of a document to a court office constitutes filing within the definition in CPR 2.3(1) without any requirement for there to be any person at the office to receive or authenticate that document: *Van Aken v Camden London Borough Council* [2002] EWCA Civ 1724, [2003] 1 All ER 552.
- 9 *Practice Direction about Costs* PD 43-48 para 19.2(2)(a). For these purposes, 'claim form' includes petition and application notice: para 19.2(1).
- 10 As to the meaning of 'service' see PARA 138 note 2.
- 11 *Practice Direction about Costs* PD 43-48 para 19.2(2)(b). As to service of the claim form see PARA 139 et seq.
- 12 As to the meaning of 'defendant' see PARA 18.
- 13 *Practice Direction about Costs* PD 43-48 para 19.2(3)(a). As to acknowledgment of service see PARAS 184-186; as to filing a defence see PARAS 199-205; and as to application to set aside a default judgment see PARAS 516-519. As to the meaning of 'set aside' see PARA 197 note 6.
- 14 *Practice Direction about Costs* PD 43-48 para 19.2(3)(b).
- 15 *Practice Direction about Costs* PD 43-48 para 19.2(4).
- 16 See *Practice Direction about Costs* PD 43-48 para 19.2(5). As to pre-action protocols see PARAS 107-110.
- 17 Ie within the meaning of the Courts and Legal Services Act 1990 s 58(2): see PARA 1830.
- 18 Ie to which the Access to Justice Act 1999 s 29 applies: see PARA 1830.
- 19 Ie a body which is prescribed for the purposes of the Access to Justice Act 1999 s 30: see PARA 1830.
- 20 *Practice Direction about Costs* PD 43-48 para 19.4(1).
- 21 As to Part 20 claims (counterclaims etc) see PARA 618 et seq.
- 22 *Practice Direction about Costs* PD 43-48 para 19.4(2).
- 23 *Practice Direction about Costs* PD 43-48 para 19.4(3).
- 24 *Practice Direction about Costs* PD 43-48 para 19.4(4).
- 25 Ie containing the information set out in Form N251: see note 8.

26 *Practice Direction about Costs* PD 43-48 para 19.4(5).

27 As to GLOs see PARAS 233--235, 1810.

28 *Practice Direction about Costs* PD 43-48 para 19.5.

29 CPR 44.15(2). The notice must be signed by the party or his legal representative: *Practice Direction about Costs* PD 43-48 para 19.3(4). As to signature of documents and notices see PARA 1752 note 23. As to service of notices see CPR Pt 6; and PARA 138 et seq. A solicitor is not bound by the terms of an estimate of costs: *Leigh v Michelin Tyre plc* [2003] EWCA Civ 1766, [2004] 2 All ER 175; *Mastercigars Direct Ltd v Withers LLP* [2007] EWHC 2733 (Ch), [2008] 3 All ER 417. See also *Reynolds v Stone Rowe Brewer (a firm)* [2008] EWHC 497 (QB), [2008] All ER (D) 250 (Mar).

30 As to allocation questionnaires see PARA 263.

31 As to pre-trial check lists see PARAS 290, 299.

32 CPR 44.15(3). As to estimates of costs see PARA 1740.

33 *Practice Direction about Costs* PD 43-48 para 19.3(2).

UPDATE

1826-1836 Funding Arrangements

The Courts and Legal Services Act 1990 s 58AA (added by Coroners and Justice Act 2009 s 154(2)) provides for the regulation of damages-based agreements in respect of claims relating to employment matters.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(7) FUNDING ARRANGEMENTS/(ii) General Rules about Funding Arrangements/1833. Costs orders relating to funding arrangements; in general.

1833. Costs orders relating to funding arrangements; in general.

The court¹ will not assess any additional liability² until the conclusion of the proceedings³, or part of the proceedings, to which the funding arrangement⁴ relates⁵. The court should nevertheless make a summary assessment⁶ of the base costs⁷ of the hearing or application unless there is a good reason not to do so⁸; and the existence of a conditional fee agreement⁹ or other funding arrangement is not by itself a sufficient reason for not carrying out a summary assessment¹⁰. If before the conclusion of the proceedings the court carries out a summary assessment of the base costs it may identify separately the amount allowed in respect of solicitors' charges, counsel's fees, other disbursements and any VAT¹¹. If an order for the base costs of a previous application or hearing did not identify separately those amounts, a court which later makes an assessment of an additional liability may apportion the base costs previously ordered¹².

Where a legal representative¹³ acting for the receiving party¹⁴ has entered into a conditional fee agreement the court may summarily assess all the costs other than any additional liability¹⁵ but an order for payment will not be made unless the court has been satisfied that in respect of the costs claimed, the receiving party is at the time liable to pay to his legal representative an amount equal to or greater than the costs claimed¹⁶. The court may direct that any costs, for which the receiving party may not in the event be liable, are to be paid into court to await the outcome of the case, or are not to be enforceable until further order, or it may postpone the receiving party's right to receive payment in some other way¹⁷.

Where the court makes a summary assessment of the base costs, all statements of costs¹⁸ and costs estimates¹⁹ put before the judge²⁰ will be retained on the court file²¹.

Where there has been a trial of one or more issues separately from other issues, the court will not normally order detailed assessment²² of the additional liability until all the issues have been tried unless the parties agree²³.

At the conclusion of the proceedings, or the part of the proceedings, to which the funding arrangement relates the court may:

- 1531 (1) make a summary assessment of all the costs²⁴, including the additional liability²⁵;
- 1532 (2) make an order for detailed assessment of the additional liability but make a summary assessment of the other costs²⁶; or
- 1533 (3) make an order for detailed assessment of all the costs²⁷.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'additional liability' see PARA 1830 note 20.

3 As to the conclusion of proceedings see PARA 1752 note 28.

4 As to the meaning of 'funding arrangement' see PARA 1830.

5 CPR 44.3A(1). See *Arkin v Borchard Lines* [2005] EWCA Civ 655, [2005] 3 All ER 613.

6 As to the meaning of 'summary assessment' see PARA 1734; and as to summary assessment see PARA 1752.

- 7 As to the meaning of 'base costs' see PARA 1740 note 3.
- 8 *Practice Direction about Costs* PD 43-48 para 13.12(1).
- 9 As to the meaning of 'conditional fee agreement' see PARA 1830 note 2.
- 10 *Practice Direction about Costs* PD 43-48 para 14.1.
- 11 *Practice Direction about Costs* PD 43-48 para 9.2(1).
- 12 *Practice Direction about Costs* PD 43-48 para 9.2(2).
- 13 'Legal representative' means a barrister or a solicitor, solicitor's employee or other authorised litigator (as defined in the Courts and Legal Services Act 1990: see s 119(1); and **LEGAL PROFESSIONS** vol 65 (2008) PARA 497 note 7): CPR 2.3(1).
- 14 Unless the context otherwise requires, 'receiving party' means a party entitled to be paid costs: CPR 43.2(1)(f).
- 15 *Practice Direction about Costs* PD 43-48 para 14.2.
- 16 *Practice Direction about Costs* PD 43-48 para 14.3. A statement in the form of the certificate appended at the end of Form N260 (see *The Civil Court Practice*) may be sufficient proof of liability but the giving of information under CPR 44.15 (where that rule applies) (see PARA 1832) is not sufficient: *Practice Direction about Costs* PD 43-48 para 14.3.
- 17 *Practice Direction about Costs* PD 43-48 para 14.4.
- 18 As to statements of costs see PARA 1752.
- 19 As to costs estimates see PARA 1740.
- 20 As to the meaning of 'judge' see PARA 49.
- 21 *Practice Direction about Costs* PD 43-48 para 13.12(2).
- 22 As to the meaning of 'detailed assessment' see PARA 1734; and as to such assessment see PARA 1779 et seq.
- 23 *Practice Direction about Costs* PD 43-48 para 14.5.
- 24 As to the meaning of 'costs' see PARA 1730. Under an order for payment of 'costs' the costs payable will include an additional liability incurred under a funding arrangement: *Practice Direction about Costs* PD 43-48 para 9.1.
- 25 CPR 44.3A(2)(a). Where the court makes a summary assessment of an additional liability at the conclusion of proceedings, that assessment must relate to the whole of the proceedings; this will include any additional liability relating to base costs allowed by the court when making a summary assessment on a previous application or hearing: *Practice Direction about Costs* PD 43-48 para 14.7. Paragraph 13.13 (see PARA 1752) applies where the parties are agreed about the total amount to be paid by way of costs, or are agreed about the amount of the base costs that will be paid. Where they disagree about the additional liability the court may summarily assess that liability or make an order for a detailed assessment: para 14.8. In order to facilitate the court in making a summary assessment of any additional liability at the conclusion of the proceedings the party seeking such costs must prepare and have available for the court a bundle of documents which must include (1) a copy of every notice of funding arrangement (Form N251) which has been filed by him; (2) a copy of every estimate and statement of costs filed by him; (3) a copy of the risk assessment prepared at the time any relevant funding arrangement was entered into and on the basis of which the amount of the additional liability was fixed: para 14.9.
- 26 CPR 44.3A(2)(b). Where the court makes a summary assessment of the base costs, the order may state separately the base costs allowed as solicitor's charges, counsel's fees, any other disbursements and any VAT; and the statements of costs upon which the judge based his summary assessment will be retained on the court file: *Practice Direction about Costs* PD 43-48 para 14.6. As to VAT on costs see PARA 1749.
- 27 CPR 44.3A(2)(c).

UPDATE

1826-1836 Funding Arrangements

The Courts and Legal Services Act 1990 s 58AA (added by Coroners and Justice Act 2009 s 154(2)) provides for the regulation of damages-based agreements in respect of claims relating to employment matters.

1833 Costs orders relating to funding arrangements; in general

NOTE 13--'Legal representative' now means a barrister, solicitor, solicitor's employee, manager of a body recognised under the Administration of Justice Act 1985 s 9 (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 687 et seq), or person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the conduct of litigation (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 515), who has been instructed to act for a party in relation to proceedings: CPR 2.3(1) (definition substituted by SI 2009/3390).

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(7) FUNDING ARRANGEMENTS/(ii) General Rules about Funding Arrangements/1834. Factors to be taken into account in assessing an additional liability.

1834. Factors to be taken into account in assessing an additional liability.

Where a party has entered into a funding arrangement¹ the costs² claimed may³ include an additional liability⁴. In deciding whether the costs claimed are reasonable and, on a standard basis assessment⁵, proportionate, the court⁶ will consider the amount of any additional liability separately from the base costs⁷ and will, in deciding whether the base costs are reasonable and, if relevant, proportionate, consider the factors⁸ which are discussed elsewhere in this title⁹.

When the court is considering the factors to be taken into account in assessing an additional liability, it will have regard to the facts and circumstances as they reasonably appeared to the solicitor¹⁰ or counsel¹¹ when the funding arrangement was entered into and at the time of any variation of the arrangement¹².

In deciding whether a percentage increase¹³ is reasonable relevant factors to be taken into account may include:

- 1534 (1) the risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur;
- 1535 (2) the legal representative's¹⁴ liability for any disbursements;
- 1536 (3) what other methods of financing the costs were available to the receiving party¹⁵.

The court has the power, when considering whether a percentage increase is reasonable, to allow different percentages for different items of costs or for different periods during which costs were incurred¹⁶. A percentage increase will not be reduced simply on the ground that, when added to base costs which are reasonable and, where relevant, proportionate, the total appears disproportionate¹⁷.

In deciding whether the cost of insurance cover is reasonable, relevant factors to be taken into account include:

- 1537 (a) where the insurance cover is not purchased in support of a conditional fee agreement with a success fee¹⁸, how its cost compares with the likely cost of funding the case with a conditional fee agreement with a success fee and supporting insurance cover;
- 1538 (b) the level and extent of the cover provided;
- 1539 (c) the availability of any pre-existing insurance cover;
- 1540 (d) whether any part of the premium would be rebated in the event of early settlement;
- 1541 (e) the amount of commission payable to the receiving party or his legal representatives or other agents¹⁹.

Where the court is considering a provision made by a membership organisation²⁰, the relevant rule²¹ provides that any such provision which exceeds the likely cost to the receiving party of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings is not recoverable. In such circumstances the court will, when assessing the additional liability, have regard²² to the factors set out in heads (a) to (e) above²³.

- 1 As to the meaning of 'funding arrangement' see PARA 1830.
- 2 As to the meaning of 'costs' see PARA 1730.
- 3 Ie subject to CPR 44.3B: see PARA 1835.
- 4 *Practice Direction about Costs* PD 43-48 para 11.4. As to the meaning of 'additional liability' see PARA 1830 note 20.
- 5 As to assessment on the standard basis see PARA 1747.
- 6 As to the meaning of 'court' see PARA 22.
- 7 *Practice Direction about Costs* PD 43-48 para 11.5. As to the meaning of 'base costs' see PARA 1740 note 3.
- 8 Ie the factors set out in CPR 44.5: see PARA 1748.
- 9 *Practice Direction about Costs* PD 43-48 para 11.6.
- 10 In the *Practice Direction about Costs* PD 43-48, 'solicitor' means a solicitor of the Supreme Court or other person with a right of audience in relation to proceedings, who is conducting the claim or defence as the case may be on behalf of a party to the proceedings and, where the context admits, includes a patent agent: para 1.4. As to rights of audience see **COURTS** vol 10 (Reissue) PARAS 331, 706; and **LEGAL PROFESSIONS**. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales: see the Constitutional Reform Act 2005 s 59(1). At the date at which this title states the law, no day had been appointed for these purposes.
- 11 In the *Practice Direction about Costs* PD 43-48, 'counsel' means a barrister or other person with a right of audience in relation to proceedings in the High Court or in the county courts in which he is instructed to act: para 1.4. As to rights of audience see **COURTS** vol 10 (Reissue) PARAS 331, 706; and **LEGAL PROFESSIONS**.
- 12 *Practice Direction about Costs* PD 43-48 para 11.7. This is subject to para 17.8(2) (costs-only proceedings: see PARA 1755): para 11.7. See *Halloran v Delaney* [2002] EWCA Civ 1258, [2003] 1 All ER 775 (additional costs in costs-only proceedings could be recovered as falling within terms of original funding arrangement), applied in *Crane v Canons Leisure Centre* [2007] EWCA Civ 1352, [2008] 2 All ER 931 (where the issue was whether the satellite costs of conducting the detailed costs assessment were to be regarded as base costs on which a percentage success fee would be payable or disbursements on which a success fee would not be payable).
- 13 As to the meaning of 'percentage increase' see PARA 1830 note 20.
- 14 As to the meaning of 'legal representative' see PARA 1833 note 13.
- 15 *Practice Direction about Costs* PD 43-48 para 11.8(1). As to the meaning of 'receiving party' see PARA 1833 note 14.
- 16 *Practice Direction about Costs* PD 43-48 para 11.8(2). The court has no power to direct that a success fee is recoverable at a different rate for different periods during the same proceedings; in so far as para 11.8(2) suggests otherwise, it is wrong: *U v Liverpool City Council* [2005] EWCA Civ 475, [2005] 1 WLR 2657.
- 17 *Practice Direction about Costs* PD 43-48 para 11.9.
- 18 As to the meaning of 'conditional fee agreement with a success fee' see PARA 1830.
- 19 *Practice Direction about Costs* PD 43-48 para 11.10. See generally *Callery v Gray* [2001] EWCA Civ 1117, [2001] 3 All ER 833, [2001] 1 WLR 2112; affd [2002] UKHL 28, [2002] All ER (D) 233 (Jun); *Callery v Gray (No 2)* [2001] EWCA Civ 1246, [2001] 4 All ER 1, [2001] 1 WLR 2142; and *Sarwar v Alam* [2001] EWCA Civ 1401, [2001] 4 All ER 541, [2002] 1 WLR 125.
- 20 As to the meaning of 'membership organisation' see PARA 1830 note 6.
- 21 Ie CPR 44.3B(1)(b): see PARA 1835.
- 22 Ie in addition to the factors set out in CPR 44.5: see PARA 1748.
- 23 *Practice Direction about Costs* PD 43-48 para 11.11.

UPDATE

1826-1836 Funding Arrangements

The Courts and Legal Services Act 1990 s 58AA (added by Coroners and Justice Act 2009 s 154(2)) provides for the regulation of damages-based agreements in respect of claims relating to employment matters.

1834 Factors to be taken into account in assessing an additional liability

NOTE 10--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(7) FUNDING ARRANGEMENTS/(ii) General Rules about Funding Arrangements/1835. Limits on recovery under funding arrangements.

1835. Limits on recovery under funding arrangements.

A party may not recover as an additional liability¹:

- 1542 (1) any proportion of the percentage increase² relating to the cost to the legal representative³ of the postponement of the payment of his fees and expenses⁴;
- 1543 (2) any provision made by a membership organisation⁵ which exceeds the likely cost to that party of the premium of an insurance policy against the risk of incurring a liability to pay the costs⁶ of other parties to the proceedings⁷;
- 1544 (3) any additional liability for any period in the proceedings during which he failed to provide information about a funding arrangement⁸ in accordance with a rule, practice direction⁹ or court order¹⁰;
- 1545 (4) any percentage increase where a party has failed to comply with a requirement in the costs practice direction¹¹ or a court order to disclose in any assessment proceedings the reasons for setting the percentage increase at the level stated in the conditional fee agreement¹².

These provisions do not, however, apply in an assessment¹³ of a solicitor's bill to his client on an order under the Solicitors Act 1974¹⁴.

In a case to which head (3) or head (4) above applies the party in default may apply for relief from the sanction¹⁵. Where the amount of any percentage increase recoverable by counsel¹⁶ may be affected by the outcome of the application, the solicitor¹⁷ issuing the application must serve¹⁸ on counsel a copy of the application notice and notice of the hearing as soon as practicable and in any event at least two days before the hearing. Counsel may make written submissions or may attend and make oral submissions at the hearing¹⁹.

1 As to the meaning of 'additional liability' see PARA 1830 note 20.

2 As to the meaning of 'percentage increase' see PARA 1830 note 20.

3 As to the meaning of 'legal representative' see PARA 1833 note 13.

4 CPR 44.3B(1)(a).

5 As to the meaning of 'membership organisation' see PARA 1830 note 6.

6 As to the meaning of 'costs' see PARA 1730.

7 CPR 44.3B(1)(b).

8 As to the meaning of 'funding arrangement' see PARA 1830.

9 See eg CPR 44.15; *Practice Direction about Costs* PD 43-48 s 19; and PARA 1832.

10 CPR 44.3B(1)(c).

11 See eg *Practice Direction about Costs* PD 43-48 para 32.5; and PARA 1784.

12 CPR 44.3B(1)(d).

13 le under CPR 48.9: see PARA 1813.

14 CPR 44.3B(2).

15 *Practice Direction about Costs* PD 43-48 para 10.1. He should do so as quickly as possible after he becomes aware of the default, making an application supported by evidence to a costs judge or district judge of the court dealing with the case: see para 10.1. As to sanctions and relief from sanctions see generally CPR 3.9, 3.10; and PARAS 256-257. As to making applications see CPR Pt 23; and PARA 303 et seq.

16 As to the meaning of 'counsel' see PARA 1834 note 11.

17 As to the meaning of 'solicitor' see PARA 1834 note 10.

18 As to the meaning of 'service' see PARA 138 note 2.

19 *Practice Direction about Costs* PD 43-48 para 10.2. As to adjournment of the hearing to allow for such a challenge see PARA 1836.

UPDATE

1826-1836 Funding Arrangements

The Courts and Legal Services Act 1990 s 58AA (added by Coroners and Justice Act 2009 s 154(2)) provides for the regulation of damages-based agreements in respect of claims relating to employment matters.

1835 Limits on recovery under funding arrangements

TEXT AND NOTES 1-12--CPR 44.3B(1) amended: SI 2009/2092.

Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(7) FUNDING ARRANGEMENTS/(ii) General Rules about Funding Arrangements/1836. Legal representative's challenge to a disallowance of percentage increase.

1836. Legal representative's challenge to a disallowance of percentage increase.

In certain cases where an agreement provides for a success fee and the court¹ disallows any amount of a legal representative's² percentage increase³ in summary⁴ or detailed assessment⁵ proceedings and the legal representative applies for an order that the disallowed amount should continue to be payable by his client⁶, the court may adjourn the hearing to allow the client to be notified of the order sought and to be separately represented⁷.

If any amount of the increase is disallowed under summary assessment, the court will give directions to enable an application to be made by the legal representative for the disallowed amount to be payable by his client, including, if appropriate, a direction that the application will be determined by a costs judge⁸ or district judge⁹ of the court dealing with the case¹⁰, unless it there and then decides the issue¹¹. The court that has made the summary assessment may then and there decide the issue whether the disallowed amount should continue to be payable if the receiving party¹² and all parties to the relevant agreement consent to the court doing so, the receiving party (or, if corporate, an officer) is present in court and the court is satisfied that the issue can be fairly decided then and there¹³.

Where detailed assessment proceedings have been commenced, and the paying party¹⁴ serves points of dispute¹⁵ which show that he is seeking a reduction in any percentage increase charged by counsel¹⁶ on his fees, the solicitor¹⁷ acting for the receiving party must within three days of service deliver to counsel a copy of the relevant points of dispute and the bill of costs or the relevant parts of the bill¹⁸. Counsel must within ten days thereafter inform the solicitor in writing whether or not he will accept the reduction sought or some other reduction. Counsel may state any points he wishes to have made in a reply to the points of dispute, and the solicitor must serve them on the paying party as or as part of a reply¹⁹. Counsel who fails to inform the solicitor within the time limits set out above will be taken to accept the reduction unless the court otherwise orders²⁰.

Where the paying party serves points of dispute seeking a reduction in any percentage increase charged by a legal representative acting for the receiving party, and that legal representative intends, if necessary, to apply for an order that any amount of the percentage disallowed as against the paying party shall continue to be payable by his client, the solicitor acting for the receiving party must, within 14 days of service of the points of dispute, give to his client a clear written explanation of the nature of the relevant point of dispute and the effect it will have if it is upheld in whole or in part by the court, and of the client's right to attend any subsequent hearings at court when the matter is raised²¹. Where the solicitor acting for a receiving party files²² a request for a detailed assessment hearing it must, if appropriate, be accompanied by a certificate signed by him²³ stating:

- 1546 (1) that the amount of the percentage increase in respect of counsel's fees or solicitor's charges is disputed;
- 1547 (2) whether an application will be made for an order that any amount of that increase which is disallowed should continue to be payable by his client;
- 1548 (3) that he has given his client an explanation²⁴; and
- 1549 (4) whether his client wishes to attend court when the amount of any relevant percentage increase may be decided²⁵.

The solicitor acting for the receiving party must, within seven days of receiving from the court notice of the date of the assessment hearing, notify his client, and if appropriate counsel, in writing of the date, time and place of the hearing²⁶. Counsel may attend or be represented at the detailed assessment hearing and may make oral or written submissions²⁷. At the detailed assessment hearing, the court will deal with the assessment of the costs payable by one party to another, including the amount of the percentage increase, and give a certificate accordingly²⁸. The court may decide the issue whether the disallowed amount should continue to be payable under the relevant conditional fee agreement without an adjournment if:

- 1550 (a) the receiving party and all parties to the relevant agreement consent to the court deciding the issue without an adjournment;
- 1551 (b) the receiving party (or, if corporate, an officer or employee who has authority to consent on behalf of the receiving party) is present in court; and
- 1552 (c) the court is satisfied that the issue can be fairly decided without an adjournment²⁹.

In any other case the court will give directions and fix a date for the hearing of the application³⁰.

1 As to the meaning of 'court' see PARA 22.

2 As to the meaning of 'legal representative' see PARA 1833 note 13.

3 As to the meaning of 'percentage increase' see PARA 1830 note 20.

4 As to the meaning of 'summary assessment' see PARA 1734; as to such assessment generally see PARA 1747; and as to such assessment of an additional liability see PARA 1833.

5 As to the meaning of 'detailed assessment' see PARA 1734; and as to such assessment see PARA 1779 et seq.

6 A conditional fee agreement subject to a success fee which relates to court proceedings must provide that where the percentage increase becomes payable as a result of those proceedings, then if fees subject to the agreement are assessed, and any amount in respect of the percentage increase is disallowed on the assessment on the ground that the level at which the increase was set was unreasonable in view of facts which were or should have been known to the legal representative at the time it was set, that amount ceases to be payable under the agreement, unless the court is satisfied that it should continue to be so payable: see the Conditional Fee Agreements Regulations 2000, SI 2000/692, reg 3(2)(b) (revoked; but see note 7). There is a similar requirement with regard to collective conditional fee agreements: see the Collective Conditional Fee Agreements Regulations 2000, SI 2000/2988, reg 5(2)(b) (revoked; but see note 7).

7 CPR 44.16(2). CPR 44.16 applies where the Conditional Fee Agreements Regulations 2000, SI 2000/692, or the Collective Conditional Fee Agreements Regulations 2000, SI 2000/2988, continue to apply to an agreement which provides for a success fee: CPR 44.16(1). Those regulations were revoked by the Conditional Fee Agreements (Revocation) Regulations 2005, SI 2005/2305, reg 2, but still apply for the purposes of a conditional fee agreement entered into before 1 November 2005: see reg 3.

8 As to the meaning of 'costs judge' see PARA 1734 note 17.

9 As to district judges see **COURTS** vol 10 (Reissue) PARAS 661-662, 728.

10 *Practice Direction about Costs* PD 43-48 para 20.3(1).

11 See the text and notes 12-13.

12 As to the meaning of 'receiving party' see PARA 1833 note 14.

13 *Practice Direction about Costs* PD 43-48 para 20.3(2).

14 Unless the context otherwise requires, 'paying party' means a party liable to pay costs: CPR 43.2(1)(g).

15 As to points of dispute see PARA 1787.

16 For these purposes, 'counsel' means counsel who has acted in the case under a conditional fee agreement which provides for a success fee. A reference to counsel includes a reference to any person who appeared as an advocate in the case and who is not a partner or employee of the solicitor or firm which is conducting the claim or defence (as the case may be) on behalf of the receiving party: *Practice Direction about Costs* PD 43-48 para 20.2.

17 As to the meaning of 'solicitor' see PARA 1834 note 10.

18 *Practice Direction about Costs* PD 43-48 para 20.4(1). As to bills of costs see PARA 1783.

19 *Practice Direction about Costs* PD 43-48 para 20.4(2).

20 *Practice Direction about Costs* PD 43-48 para 20.4(3).

21 *Practice Direction about Costs* PD 43-48 para 20.5.

22 As to the meaning of 'filing' see PARA 1832 note 8.

23 As to the signature of documents see PARA 1752 note 23.

24 In accordance with *Practice Direction about Costs* PD 43-48 para 20.5: see the text and note 21.

25 *Practice Direction about Costs* PD 43-48 para 20.6.

26 *Practice Direction about Costs* PD 43-48 para 20.7(1).

27 *Practice Direction about Costs* PD 43-48 para 20.7(2).

28 *Practice Direction about Costs* PD 43-48 para 20.8(1).

29 *Practice Direction about Costs* PD 43-48 para 20.8(2).

30 *Practice Direction about Costs* PD 43-48 para 20.8(3).

UPDATE

1826-1836 Funding Arrangements

The Courts and Legal Services Act 1990 s 58AA (added by Coroners and Justice Act 2009 s 154(2)) provides for the regulation of damages-based agreements in respect of claims relating to employment matters.

